CONFERENCE REPORT
Dr Christine Schwöbel (Lecturer in Law, University of Liverpool), Laura Dawson (PhD Candidate, University of Liverpool), Joycelin Okubuiro (PhD Candidate, University of Liverpool)

Introduction
The Critical Approaches to International Criminal Law (CAICL) Conference took place from 6-8 December 2012 in Liverpool. On the first day of the conference, all participants gathered in the International Slavery Museum; the second and third days were held at the Jurys Inn. The conference was co-sponsored by the University of Liverpool and a generous research grant by the Institute for Global Law and Policy (IGLP) at Harvard Law School. Academics, practitioners and members of civil society organisations attended from around the world. Over 80 participants were present.

The overarching concern in the discussions was the question of what ‘critical’ means, both in regard to law in general and in regard to international criminal law in particular. In the call for papers, scholars were invited to submit abstracts (and later papers) which offered a critique going beyond an effectiveness critique of international criminal law (ICL). This was an invitation to discuss some of the assumptions on which the field rests – there were suggestions for exploring issues of the politics of ICL, ideology, gender, violence, and the field’s privileging of individualism. While some scholars understood this as drawing from a critical legal tradition, others felt that this was not the appropriate means of critique for international criminal law. The disparity between criticism and critique emerged. Is it ‘useful’ to speak about historical, ideological, or political-economic narratives which underlie the field? Or should we be strengthening a professionalism of those participating in ICL?
Thursday 6\textsuperscript{th} December

I. Welcome

Christine Schwöbel, Lecturer in Law at the University of Liverpool, welcomed the conference participants. These are excerpts from her welcome:

‘It is wonderful to see everyone here today, such excellent scholars from across the world, all come together in anticipation of the coming discussions on what CAICL means and entails.

Very briefly to when this idea for CAICL came about: I feel that, in a way, this project has been a long time coming, both for me and for some of the speakers at this conference. However, it became a collaborative project idea in Harvard in May this year where a number of today’s CAICL participants attended the Institute for Global Law and Policy Workshop. At the workshop we shared some of the concerns and frustrations with the emerging and increasingly popular field of ICL. Following this, we (Michelle Burgis-Kasthala, Paul Clark, Tor Krever, Heidi Matthews, John Reynolds and I) applied for a collaborative research grant, which has, in part, allowed us to come together today.

I believe one of the central questions for the coming days will be: ‘What does it mean to be critical?’ Does this relate to a certain tradition of thought (critical legal studies, a Marxist tradition, for example?), Does this relate to suggestions for abandonment or reengagement with international criminal justice? If we talk about reengagement, then which of the present features of ICL are worth retaining? Does this relate to principles within ICL or does this relate to the field as a whole? Certainly, what we know, from the call for papers, is that CAICL will hopefully be a means to get beyond a mere effectiveness critique. An effectiveness critique in this sense means the type of critique which is about strengthening the existing structures, language, institutions. We aim to get beyond this and engage in a deeper conversation. In thinking about CAICL, I found it difficult to articulate what ‘critique’ could mean. When in doubt – use someone else’s words, and Foucault is usually a good bet. Michel Foucault said:

\begin{quote}
A critique is not a matter of saying that things are not right as they are. It is a matter of pointing out on what kinds of assumptions, what kinds of familiar, unchallenged, unconsidered modes of thought the practices that we accept rest…
\end{quote}

I believe that this is the type of critique we are engaging with in the following days. It is however important to note a number of possible tensions, dangers and pitfalls which indicate that being critical is not so straightforward. Such tensions, dangers and pitfalls may include the following:

- OVERSTATING THE GAP: There is a clear tension between the desire to describe the necessity and timeliness of this area of research (the gap, its ‘newness’), and the danger of over-stating this very gap. Most research begins
with a proclaimed gap, and for the CAICL project this gap appears particularly pronounced. However, we should be aware that we are not beginning our research from a clean slate; we draw on already existing work in- and outside the field of ICL. Moreover, it is the awareness of the existing work and its own preferences or biases which informs a nuanced understanding of our own positions.

- **INTROSPECTION:** The sense of forming a new approach to an existing field brings with it the danger of introspection. Trying to come to grips with what critique means, working on an identity, maybe even wanting to establish a movement from within ICL, could lead to a detachment from the contexts within which we are working. At worst, such introspection could lead to the furthering and establishment of a separate discipline within the discipline of ICL. This would make us blind to the context and engagement which critique necessitates.

- **COMPLICITY:** Engagement however also brings with it the danger of complicity. In how far does an engaged critique (a dialectic between practice and theory if you like) strengthen precisely those structures which we are hoping to address? Indeed, Gerry Simpson has previously commented (maybe half in jest) that the most radical approach to a CAICL project would be to stop the project immediately. In how far then do we need to find a way of navigating both complicity and the temptation of outdoing each other’s radicalism?

- **ALIENATION:** Introspection and the fear of complicity could lead to an alienation from the field of ICL. Again, distancing and alienation would mean that critique would become disengaged and, possibly, not believable.

- **INSTRUMENTALISING:** A further danger in critique is the possible instrumentalising of those ‘we’ want to speak for. If academics, practitioners, and civil society members speak for ‘the other’, be that in our case victims of international crimes, women who are disadvantaged by the gendered language of ICL, or the accused, it is worth being wary of such instrumentalising. There is a temptation to overstate, to essentialise, to provoke, or to shock in order to make a point, but we need to be aware of whose identities we are essentialising in this endeavour.

All in all, these dangers highlight that being on the side of the critics is not necessarily about being on the side of the angels... These are all (open) questions which I look forward to discussing with you in the coming days here in Liverpool.

It is a great pleasure that we are in the International Slavery Museum for our first day – and indeed it is meaningful that we are in this location. Rights, law, repression, complicity, power imbalances, are all issues which are relevant to the concerns of the museum and its visitors. And on that note, it is a great pleasure to introduce you to Dr Richard Benjamin, the director of the Slavery Museum and co-Director of the Centre for the Study of International Slavery at the University of Liverpool.

**Richard Benjamin**, *Director of the International Slavery Museum team at National Museums Liverpool.*

Dr. Benjamin welcomed the conference participants to the Slavery Museum. He spoke briefly of the history of the museum and its plans for the future. He also
explained that the Slavery Museum not only concerns the transatlantic slave trade; it is also concerned with contemporary forms of slavery as the enduring impact of the transatlantic slave trade. The museum is not only educational in its exhibits and the story it tells, but is also a learning and teaching hub, hosting numerous talks and conferences on themes relating freedom and enslavement.

II. Panel I - ICL & The Political

Chair – Rob Cryer, Professor of International and Criminal Law

Heidi Matthews, SJD candidate at Harvard Law School and a Graduate Fellow at the Edmund J. Safra Center for Ethics, Harvard University, and the Film Studies Center-Harvard.

Democratization as Politicization in International Criminal Law

This paper uses the lens of international criminal law to contribute to the debate about the alleged “democratic deficit” in international legal normativity. The legitimacy of international law cannot be settled by resort to variations of the state consent theory, but must be continually reassessed as a political question. The most pressing issue for international law today is how to politicize the international legal sphere. This reverses the age-old question of how to get law from politics by suggesting that we can – and should - get politics out of law. Viewed in this light, the challenge becomes how to describe the shape of the new political relationship created between the bare individual and institutions of global governance. However, international criminal tribunals almost always eschew the responsibility to adjudicate “political” claims on the theory that this would be ultra vires the purely juridical function. Using the recent Appeals Chamber decision of the Special Tribunal for Lebanon on jurisdiction and the legality of the Tribunal, I show that it is precisely this good faith effort to engage meaningfully with the claims of its subjects that international law can achieve its most direct form of democratic legitimacy.

Paul Clark, Barrister, currently undertaking pupillage at Garden Court Chambers, London.

Contesting the Constituency: Embracing the Politics of International Criminal Law

In what space does international criminal law (ICL) operate? What, or where, is its constituency? The answer to such questions might seem so obvious as to empty the inquiry of any interest at all. I will argue, however, that the institutions applying “international criminal law” have never been international, and should not become so. I will first explain this assertion through brief consideration of the ‘spaces’ in which tribunals purporting to carry out international criminal law have operated since the end of the Second World War. I will then consider the essentially “political” nature of the ideas and institutional features that underpin the institutional features to which I
refer. I make this argument without substantive reference to vested interests per se or to bare realpolitik.

The label “political” has become a dirty word in ICL. This, I will argue, is profoundly regrettable. Not only does it entail a concerted effort by international criminal lawyers and institutions to bury their heads in the sand, it stifles the imagination as to potential future of ICL on numerous levels, from broad institutional design to particular decisions in real cases in the present day. This paper is part of a broader project which takes issue with the vague maligning of the word “political” in ICL. I argue that, ironically, the real concern, is insufficient politics. The paper will conclude by raising some tentative questions as to the ramifications of embracing this notion.

Roberto Yamato, PhD Candidate, School of Law, Birkbeck, University of London

The Constitution of the Outlaw of Humanity: Reading the “origin” of international criminal law at the limits of Carl Schmitt’s political world

During the 1990’s, a certain discourse of “the end of history” was accompanied by a certain sense that, finally, human rights were going to be inter-nationally protected, and enforced. After the end of the Cold War, a certain discourse would advertise, we were all – as one, as humanity – moving towards the global. The UN International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Pinochet Case, and the Rome Treaty establishing the first permanent International Criminal Court were read, at least by some, as some kind of institutional proof of the realization of a universal, self-fulfilling prophecy, or enlightenment.

In such story, the “new” international criminal law was celebrated as the final, natural next step within the universal progression of human rights towards the global. What’s more, the universal, the global and the international could be understood, or simply confused, as synonyms, and the so-called universal jurisdiction could be celebrated as the enforcement paradigm of humanity’s sovereign law and order. According, for instance, to the so-called Princeton Principles on Universal Jurisdiction, this progression towards humanity’s universal law and enforcement had its origins in the criminalization of the pirate, the first international outlaw – and also constructed as the enemy of human race (hostis humani generis).

The general aim of this paper is to offer a rereading of international criminal law and its mutual constitutive relation with the political. More specifically, it is to offer a reading of the “origin” of international criminal law at the limits of Carl Schmitt’s “political world”; that is, at the limits of the “pluriverse” that seems to be the condition of possibility of Schmitt’s conceptualization of the “political”.

In this regard, this paper develops a tentative reading of the category of the pirate within the international political thought of Schmitt. And thus, by rereading this “original” enemy of humankind within Schmitt, it seeks to reengage the problem of the criminalization – or absolutization – of the enemy (a problem that was vehemently denounced by Schmitt since the end of the First World War).

This paper suggests that reading the pirate – that is, the “origin” of international criminal law – at the limits of Carl Schmitt’s political world seems to offer another way of (re)imagining the mutual constitutive relation between international criminal law and the international political world, and thus of (re)engaging the problem of the constitution of the “absolute enemy” or “outlaw of humanity”, and its legitimation of violence.
Key issues and discussion points:
In the discussion, the question of legitimacy was raised – what does it mean for ICL to be independently legitimated? Is legitimacy a useful measure – is it simply subjective? Thomas Frank’s work on legitimacy was raised as a more ‘usable’ conceptual framework. There were competing sentiments as to whether legitimacy could be achieved (or even was achievable) through attempting to separate the political from trials or by acknowledging the inherent politicisation of ICL. The discussion then focussed on whether consent of States would provide legitimacy at the ICC and in the wider ICL forum. The issue that consent would not necessarily lead to legitimacy was raised. Also ‘legitimacy’ was taken to mean ‘fairness’ rather than a democratic legitimacy. Furthermore, it was asserted that an ICL trial serves a number of purposes, and discontinuing practices due to illegitimacy might be a greater wrong.

Panel II - ICL & Its (Accepted) History

Chair: Joseph Powderly, Assistant Professor Grotius Centre for International Legal Studies, Leiden University

Thomas Skouteris, Associate Professor in the Department of Law at The American University in Cairo and director of AUC’s Ibrahim Shihata Memorial LLM Program in International and Comparative Law.

Historical Discourse and International Criminal Justice
The purchase of ICL relies on the acceptance as axiomatic of several assumptions concerning the discipline's social, political and legal outcomes. Deterrence, reconciliation, creating the conditions for lasting peace (no peace without justice), closing the books, and the creation of an objective historical record are some of the most often repeated goals of ICL. Recent work has demonstrated that the capacity of ICL to contribute to such goals is, at best, questionable, thus paving the way for more careful analysis. My paper will turn to the capacity of international criminal law trials in particular to tell the story of what happened. Some recent critical work (e.g. Koskenniemi) have described the discursive limits of the history telling functions of international tribunals, namely the inevitable oscillation between impunity and show trials. Others have copiously explained how the structural/procedural/oppositional make up of international criminal trials may only tell partial stories. The paper intends to do three things: a) to distill the findings of recent literature with a view to identifying the style of historical narratives produced by international criminal law; b) to argue that even the most radical of critical histories actually replicate traditional Cartesian epistemology by insisting on privileging historical consciousness over spatiality, i.e. continue to treat "space" as the undialectical, the fixed, the dead (as Foucault would say) container where legal relations take place. c) While this is not a bad thing in itself, the paper seeks to explore whether critical space theory (starting from Boyarin's and Benjamin's "space-time of memory" to Foucault's/Lefebvre's/Soja's Third spaces) can transform our form of engagement with atrocity.

Dov Jacobs, Assistant Professor in International Law at the Grotius Centre.
International Criminal Law and the Bermuda Triangle of Nuremberg.

It is a rather unoriginal to point out that the Nuremberg Trial is seen as the foundational moment of International Criminal Law. Indeed, while some scholars will attempt to trace back the its origins further, to the failed attempt after World War I to prosecute the German Emperor for his role in the initiation of the war and the Ottoman leaders for the Armenian genocide, or even earlier, for example, to the trial of Peter von Hagenbach in the 15th Century, most narratives of ICL start in Nuremberg, to take us by the hand to the Hague. Not only is this event considered as the ‘big bang’ moment of ICL, it remains a point of reference to most of its mainstream academics and the institutions that apply it. This paper will aim at analyzing the effects of such a continued hegemonic presence of Nuremberg in ICL discourse and how it conditions its current application and understanding of both itself and the situations it aims at addressing. In effect, ICL carries a history that, it is argued, cannot be ignored. As a result, any serious critique of ICL today, needs to start with a rethinking of Nuremberg. In order to do that, it is required to do a deconstruction of Nuremberg into three of its dimensions, the combined effects of which affect ICL today.

Gerry Simpson, Kenneth Bailey Chair of Law at Melbourne Law School, the University of Melbourne, Director of the Asia Pacific Centre for Military Law.

International Criminal Law and the Past

“Often people said, ‘You must have seen some very interesting sights when you went to the Nuremberg Trial’. Yes, indeed. There had been a man with one leg and a child of twelve, growing enormous cyclamens in a greenhouse” (Rebecca West).[1] In this presentation, I will try to work out why I find this passage so appealing, and what it might help me say – by way of a series of hastily confected impressions – about the possibilities of a critical international criminal justice and, in particular, about what a history of international criminal justice might look like from this vantage point.

Wui Ling Cheah, Assistant Professor at the Faculty of Law of the National University of Singapore (NUS), Research Fellow at the NUS Centre of International Law.

The British Military’s Prosecution of Japanese War Crimes in Colonial Singapore: A Socio-legal and Historical Study

This paper forms part of a larger project that examines the significance and meaning of British-organised military trials held in Singapore after WWII (the Singapore Trials). The Singapore Trials were among hundreds of post-WWII trials individually conducted by Allied Forces pursuant to the 1943 Moscow Declaration, alongside the Tokyo and Nuremberg Trials. In Asia, the British tried 920 accused before British military courts. As Singapore then served as the British military’s base for Southeast Asian war crimes investigations, the Singapore Trials dealt with diverse war crimes and reflected British regional policy. However, there has yet to be any comprehensive study of these trials.

A cursory examination of these trials raises a number of puzzling questions, particularly when they are compared to contemporary war crimes trials, or even the Nuremberg and Tokyo Trials. Why were the judgments and findings of these trials so

brief, comprising one or two pages in length? How was it possible that each trial lasted only for a few days, given the complex or systematic nature of the crimes? Why was there little reference to applicable laws, and what norms, if any, regulated these trials? Were these trials a form of vengeful “justice” dealt out by victors in the aftermath of WWII? Or were they based on ideas that, even if different from present-day standards, were nevertheless reasonable and comprehensible in their historical context? Indeed, it would be easy to dismiss the Singapore Trials as a form of “victors’ justice” due to the brevity of their judgements, their short duration, and their failure to discuss legal norms. In contrast, modern-day war crimes trials are regulated by substantive and procedural legal rules, and characterised by lengthy decisions and proceedings. Even the Tokyo Trial, which ran alongside the Singapore Trials, had proceedings that lasted for over a year and issued a decision that ran for hundreds of pages. When compared against these trials, the Singapore Trials indeed appear discretionary and vengeful. And yet, a closer examination of these trials reveals a not insubstantial number of acquittals, sentence reductions upon petition, and a gradation of sentences.

My project aims to achieve an empirically informed, in-depth understanding of what the Singapore Trials meant from the perspective of military personnel charged with their organisation and day-to-day implementation. By examining trial-related archival records using a mix of interpretive and reading methods from the disciplines of sociology and history, my project addresses the following research questions: (1) How did those involved make sense of, or interpret, these war crimes trials? (2) What meanings emerged from the interpretative work of the relevant actors? (3) How does this meaning-making activity enhance our understanding of these trials? Among other findings, I highlight how accusations of “victor’s justice” do not adequately explain these trials. Instead, the influence of politics was more nuanced and complicated. Against a changing post-WWII political landscape, these trials were intended to facilitate the British authorities’ reassertion of colonial authority in Singapore.

Key issues and discussion points:
This was the first session in which the question of critique first surfaced. In the questions session, the challenge was posed whether a historical perspective, particularly one which focuses on theory, is ‘useful’ when it comes to critical approaches to ICL. Here, the speakers replied that theory has value for its own end and should not merely be viewed as a means with which to improve the professionalism of practitioners. The distinction was made between history as a function of a trial and history as the consequence of the trial. History as a consequence was determined to be the ‘better’ option i.e. the trial and its purpose would remain ‘pure’. The issue of the type of history which these trials create was raised and seemed to be a topic which excited the room. There was seemingly consensus that trials result in a fragmented history, often conflicting between actors in the conflict. Such a historical narrative can only be biased.

ICL & Violence

Chair: Fiona Beveridge, Professor, Head of the School of Law and Social Justice at the University of Liverpool.
Niamh Hayes, Head of Office for the Institute for International Criminal Investigations. Ph.D. candidate at the Irish Centre for Human Rights, National University of Ireland, Galway.

*Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court*

The proposed paper will examine the investigation and prosecution of sexual violence by international criminal tribunals, with a particular focus on the first ten years of practice of the International Criminal Court. Sexual violence has traditionally been overlooked as an international crime, not prosecuted at Nuremberg and controversially absent from many of the initial indictments issued by the ad hoc international criminal tribunals. However, thanks to the efforts of international practitioners and the sustained advocacy of international women’s groups, rape and sexual violence now receive significantly more emphasis in the rhetoric of international criminal law and institutions. Unfortunately, that rhetoric has not always been supported by a corresponding improvement in the rate of inclusion of sexual violence crimes within indictments and prosecutions. Experience has shown that it is not enough merely to talk a good game about sexual violence; it is far more challenging but ultimately far more significant to competently and consistently investigate and prosecute such crimes where there is evidence of their commission. Of course, just as in any domestic criminal jurisdiction, certain myths and received wisdoms attach themselves to crimes of sexual violence in the international sphere: that they are uniquely difficult to prove; that victims and witnesses will be unwilling to discuss their experiences; or that sexual violence is an issue which affects only women in conflict. In practice, however, these assumptions are frequently disproven, and a closer examination of the record of international criminal tribunals in prosecuting these crimes reveals that sexual violence charges are most at risk from ineffective investigations, poor pleading of facts or modes of liability, or a degree of resistance from the bench. Efforts to investigate and prosecute sexual violence, when analysed closely, reveal themselves as a microcosm of any strategic and systemic weaknesses within the Office of the Prosecutor or indeed the international criminal institution as a whole. It also offers a pronounced example of the gulf which frequently arises between the self-proclaimed goals and ideals of the international criminal enterprise and its ability to realise those ambitions in practice.

Fletch Williams, MPhil student in International Peace Studies at Trinity College Dublin

*The Prosecution of Wartime Sexual Torture: Are War Crimes for Men and Crimes Against Humanity for Women?*

The current level of prosecutions for sex crimes committed in war is unprecedented. As well as these prosecutions brought before international tribunals such as the ICTR, ICTY and ICC, there has been the rapid development of international law in relation to sex crimes. The Akayesu judgment is celebrated by many for being the first case to implement a liberal and progressive legal understanding of rape that does not refer to physical body parts or genders. Praise for the rapid acceleration in international legal understandings of rape and sexual assault, specifically within conflict situations, is deserved. Many modern prosecutions of sexual assault and rape in wartime have occurred under the seemingly gender-neutral law of ‘torture’ but, the preconceptions of judges, and prosecuting and defending lawyers hold a significant sway in the interpretation of international statutes.
This can lead to significant disparities in how the sexual abuse of men and the sexual abuse of women are understood in international criminal law. Examining relevant jurisprudence on an international level reveals an interesting trend; female victims of wartime sexual torture have their cases prosecuted under the Crimes Against Humanity provisions of international statutes and male victims under the War Crimes provisions of international statutes. This is the case even though there is often the capacity for prosecutors to prosecute sexual torture as a War Crime or as a Crime against Humanity. Significantly, this still happens both when victims are civilians and combatants.

This paper proposes that there is an assumption that when women are sexually tortured, they are primarily treated as being victims of sexual assault and there is distinction made between the victims of sexual torture on gender lines. Female victims are often treated as victims of Crimes Against Humanity, and their torture is explained as consequence of sexual abuse, however in near identical circumstances male victims are treated as the victims of war crimes and their sexual torture is seen as a component of their torture, and not as a discrete entity. This positioning of torture and sex is not something that is explicitly acknowledged within international criminal law but appears to be an assumption running some of the leading cases.

This paper examines the ICTY’s judgments which provide the majority of the jurisprudence on prosecuting sexual torture committed against men. Particular attention will be given to the Čelebići judgment because male and female victims of torture in the same camp were treated as being different categories victim. This is having a negative jurisprudential, procedural and policy impact, to the detriment of both female and male victims of wartime sexual assault, as a norm is being entrenched about what crimes can happen to men and what crimes can happen to women. This paper argues that these cases are at the heart of the debate over feminist understandings of rape and whether rape is something that can be ‘owned’ by feminism, as some theorists have claimed.

**Emily Haslam,** Lecturer in International Law at the University of Kent and a member of the Kent Centre for Critical International Law.

**Remembering and Forgetting: The Nineteenth Century Slave Trading Trial of Joseph Peters and the Victim Subject of International Criminal Law**

This paper critiques the dominant focus of international criminal law histories which take post World War II trials as foundational because they exclude European colonial violence and questions of African agency from international criminal law’s originary narratives. Its focus is on a series of early nineteenth century prosecutions for slave trading under the British Slave Trade Felony Act. Reading this litigation alongside contemporary international criminal law demonstrates the extent to which techniques and tropes of early international criminal law were implicated in a colonial project. In that respect, silence about abolition litigation in traditional international criminal histories has exerted a profound legacy on the contemporary framing of international criminal law. This paper is part of a broader ongoing project which asks what international criminal law looks like when abolition litigation is brought more systematically into the picture.

**Key issues and discussion points:**
This session returned to a more positivist note – it was argued that critique should be regarded as specific criticism to specific practices. In this view, the law has an important role to play to improve the current situation. Questions asked included: Do the approaches to violence differ in that one view claims law is a remedy to violence and the other view claims that law is equated with violence? How should law deal with those who are charged with sexual crimes given the perpetrators will go into ‘regular’ prisons? Do we need a separate crime of ‘sexual violence’? Could ‘violence’ be sufficient? Feminist critique was a part of the discussion at this point; it was raised that there were international crimes traditionally viewed as male (e.g. war crimes) vs. crimes ‘more fitting’ to women (e.g. crimes against humanity). The potential that there is a level of unfairness in labelling someone guilty of sexually violent crimes which they personally did not commit, was raised. It was a very emotive and lively discussion. A particular talking point of the panel was an issue raised by the floor questioning whether perhaps too much focus was put on the ‘sexual’ element and not on the ‘violence’ element; simply, what was specifically so much worse about sexual violence than violence itself? This led to discussion as to what the focus of a trial at the ICC and in ICL should be: closure, justice, recognition of a personal wrong etc.

ICL & Critique

Chair: Michelle Farrell, Lecturer in Law at the University of Liverpool

Immi Tallgren, Post-doctoral research fellow at the Erik Castrén Institute for International Law and Human Rights, University of Helsinki, and chercheuse associée, Facultés universitaires Saint-Louis, Brussels.

What do we talk about when we talk about ‘we’ in international criminal law?

We are the ones to make a better day by international criminal law, but who is speaking? Is the ‘we’ talking on behalf of a particular moral or political entity of particular adepts, currently vested in social engineering by criminal law? Or does the ‘we’ stand for the representatives of a metaphysical ‘international community’, a universal “conscience collective” (Durkheim), animated by a religious type of experience of unity and telos in creating a brighter future, carried by an “oceanic feeling” (Freud, Koskenniemi)? Is there a ‘we’ of ‘humanity’ that can hold criminals accountable, and if yes, what language does it speak?

Is the ‘we’ of international criminal law referring to a union based on equality, reciprocity and mutual respect? Or is the ‘we’ rather talking with the patronizing intonations of a superior, in the uniform of a manager, showing ‘you’ or ‘them’ the way, and holding the keys of the prison? Who is the ‘you’, ‘them’ that the ‘we’ is charitably but forcibly baptizing in the faith of humanity – and its progress - by the instruments of criminal law?

And who is the ‘we’ of the critical approaches in this conference: is it a separate ‘we’, and if yes, what does it want? Does it have aspirations of the “part-time men on learning” (Laursen) that Kant entrusts the oversight of his ultimate political end, perpetual peace? Or is the ‘critical we’ rather producing advice that ultimately leads only to “annihilation, the peace of the graveyard” (Kant)? How is the relationship between the ‘we’ of the international criminal law project and the ‘we’ of the critical approaches to it: antagonistic, parasitic or symbiotic?
As these questions indicate, my paper somewhat clumsily aims at moving in two directions: the linguistic or phenomenological questioning of the use of ‘we-talk’ in international criminal law and some observations on the presumed identities of the ‘subjects’, both in international criminal law and in the critical approaches to it. These questions form a (work-in-progress, immature) part of my on-going research project where I am trying to make visible the cultural and religious frameworks and references of international criminal law. I will here mainly focus on a preliminary exercise of reading Herbert Spiegelberg’s pioneering article on ‘we-talk’.

Diane Bernard, «chargéederecherches» by the Belgian National Fund for Research and «professeurinvitée» at Facultés Universitaires Saint-Louis (Brussels, Belgium)

Rituals and symbols in international criminal law
This paper aims at demonstrating that judgements for international crimes do mainly exercise a symbolic function or, in other words, that trials for international crimes have a ritual nature. The underling idea of this proposition is that the international trials play as a catharsis, repeating the social disapproval of genocide, crime against humanity, war crimes or aggression. At least four aspects of international criminal law seem to confirm this hypothesis.

First, there seems to be an asymmetry between the actors in these trials: unique and named accused is confronted to a multitude of anonymous victims, by prosecutor scrutinized by the media, before almost unknown judges. This reveals the importance of the accusation, the action to be taken in reaction to the ‘worst’ crimes. This could refer to a ritualised lynching, or to the theory of the scapegoat (see R. Girard 1973). Moreover, another actor intervenes in the trials: the ‘international community’ or even the ‘humanity’ appears to call for their establishment of ‘universal values’. This cannot be anything else than symbolic.

Concrete conditions and structure of the trials may also be commented in this sense (hierarchized space, robes,): it allows to ‘re-tell’ the chaos and to re-create the illusion of a legal order. Media do play a role here (see the arrests of Mladic or Karadzic, or actions in Libya).

Issues of responsibility indicate the same way. Psychological circumstances are never recognised as excluding responsibility, despite the traumatic events during which genocide, war crimes and crimes against humanity are committed. Strictly individual and potentially hierarchical, the responsibility as defined in international law goes against all the psychological theories according to which ‘ordinary people’ may commit terrible crimes. Trials reveal (require?) a culprit, personally and fully guilty.

Penalties also show the symbolic nature of trials. Neither prevention nor reparation may be obtained by imposing penalties. Retribution does theoretically require (an impossible) proportionality and should also be considered as impossible in trials for international crimes (and in general). In consequence, the utilitarian conception of penalties as expressing reprobation and strengthening an undermined legal order (see Durkheim or van de Kerchove) can be considered. These trials are about ‘telling’ the crime at least as much as ‘punishing’ the criminals. Building a truth and a memory.

Would the symbolic nature of international trials be proven, some practical propositions could be addressed to judges and actors in international criminal law. Selection of accused and victims could for instance be consequently oriented, in order to denounce the whole drama more than to guarantee the last word to the prosecution
in certain cases. Penalties could change of nature, taking distance from the retributive ideals and utilitarian targets while shouldering their symbolic impact and limits. Finally, the whole relevancy of the ‘criminal’ or ‘penal ‘trials’ could be discussed, joining some abolitionist arguments (see Hulsman or recently Rugiero): can penal law answer to atrocity?

**Sara Kendall,** Researcher at Leiden University’s Grotius Centre for International Legal Studies

**Critical Orientations: On Critique, Practice and Ethics at the ICC**

Critical (political) theorists have noted the etymological link between ‘critique’ and ‘crisis’, suggesting that the subjective and evaluative work of critique may be tied to a broader context of conflict or controversy, which in turn calls for reaching a decision or rendering judgment. This link between critique and crisis offers a point of departure for reflecting on the practice of the International Criminal Court, the field of international criminal law’s first permanent institutional form. We might argue that ICC is currently in a state of crisis, beset by challenges to its geographical focus on African conflicts and to its inherently political dimensions, such as its ability to exercise jurisdiction over non-state parties through UN Security Council referrals.

After considering what critical resources we might draw upon to orient our approaches to international criminal law, the second part of this paper addresses the work of the ICC in practice based upon research in states where it has intervened. Focusing on processes of identity formation and on the broader political economy that the court both produces and operates within, I argue that international criminal law scholarship should pay greater attention to institutional discourses, conflations between law and justice, and the limits and exclusions of this legal frame. To conclude, I raise some ethical implications of ICC interventions that may be obscured by its normative focus on ‘ending impunity’.

**Joseph Powderly,** Assistant Professor of Public International Law, Grotius Centre for International Legal Studies, University of Leiden

**Confronting Decisional Legitimacy in International Criminal Law**

Is it possible to speak of a practically identifiable theory of adjudication for international criminal law, one which conceptualizes, in a relatively coherent manner, the criteria upon which the interpretive community may evaluate the decisional legitimacy of “creative” judicial development of substantive international criminal law? Indeed, is it even possible to identify a set of objective criteria by which to measure the notoriously subjective notion of legitimacy, and is such an inquiry likely to be intellectually persuasive? Put simply, what criteria can be identified that might allow us to test the legitimacy of judicial “law-making” in the context of international criminal law?

At the root of this issue lies an enduring conceptual impasse which has dogged international criminal law since its inception and is in dire need of resolution, namely, what understanding is to be attached to the nature of the judicial function in the context of international criminal proceedings? In the context of contemporary international criminal law scholarship, it is considered trite to remark that the primary impetus for the “evolution” of international criminal law rests with the individual and collective crusades of interpretatively creative members of the bench; however, there is nevertheless a dearth of scholarship addressing why it is that this has been so
readily accepted as a feature of the international criminal legal order (in so far as one may be considered to currently exist). The relatively limited scholarship which does address these issues, in at least a tangential way, tends to emphasize the adolescence of the international criminal legal order, notions pertaining to judicial responsibility and the prioritization of effet utile. However, at no point does the scholarship seek to theoretically differentiate instances of creative or “dynamic” interpretation of positive rules from unabashed judicial activism, which lacks even a tentative foundation in applicable law. In this sense, the scholarship is not blind to the reality of judge-made law, but rather has adopted a rather entrenched position whereby this reality is accepted without any meaningful inquiry into the manner in which we might measure the decisional legitimacy of such an enterprise. This, on one level, might be rather simplistically explained as resulting from the failings of the interpretive community. However, on another level it points in the direction of a much greater failing, namely, the absence of a coherent theoretical tradition attaching to international criminal law by which the bench might steer its interpretational course.

Naturally, no one paper is capable of addressing all of these issues with any degree of satisfaction. Instead, this paper sets itself the comparatively modest objective of sketching the contours of some of these issues, while honing in on the issue of determination of decisional legitimacy in international criminal law.

**Key issues and discussion points:**
This session centralised the question of ‘critique’ versus ‘criticism’. Are ‘we’ able to step ‘outside’ of a certain field? Or are we members of an interpretive community? And who is the ‘we’ of critique?

**Keynote Address**

**Frédéric Mégret**, Associate-Professor at the Faculty of Law, McGill University and the holder of the Canada Research Chair in the Law of Human Rights and Legal Pluralism, affiliated with the McGill Centre of the same name.

**Key issues and discussion points:**
The keynote began with some provocative statements with Fred asking, what is it that ‘turns us on’ about ICL? What is the libidinal effect of this discipline?
He then set out to sketch a CAICL research agenda on how critical energies directed at international criminal justice have or could unfold. He did this in ten points, as he said, à la David Kennedy.

(1) international criminal justice is hyperbolic and misleading;
(2) international criminal justice is deeply selective;
(3) international criminal justice presents as objective that which is deeply political;
(4) international criminal justice is a manifestation of Western imperialism;
(5) international criminal justice is unaccountable and illegitimate;
(6) international criminal justice is excessively centralized and oblivious to pluralism;
(7) international criminal justice reinforces racialized and gendered stereotypes;
(8) international criminal justice reduces complex political questions to simple moral formulas;
(9) international criminal justice is a form of power that does not say its name;
(10) international criminal justice is a dismal ambition for the international community.

Reception

**Johannes CS Frank**, Writer, translator and publisher, programme director for the Ernst Ludwig Ehrlich Scholarship Fund.

**Key issues:**
At the reception, Johannes Frank, presented his poem, titled ‘Bella. A Love Song for War’. The poem explores themes of violence, gender bias, hegemony, and exclusions.

*Bella. A Love Song for War*

Friday 6th December

**Panel I: ICL & Hegemony**
Chair: Gerry Simpson, Kenneth Bailey Chair of Law at Melbourne Law School, the University of Melbourne, Director of the Asia Pacific Centre for Military Law (Australia)

Michelle Burgis-Kasthala, Lecturer in the School of International Relations, University of St Andrews (UK)

Foregrounding Justice in Times of Regional Transition? The Hegemonic Gaze of International Criminal Law in Lebanon and Beyond

This paper takes the Special Tribunal in Lebanon as its case study to explore the ways in which International Criminal Law has been deployed in the Middle East as a Transitional Justice tool. It deploys the metaphor of the hegemonic gaze to depict a process where local and particular practices are recalibrated into seemingly international and general claims that can be represented within the court room. The paper demonstrates that ICL’s hegemonic pull has been powerful, even regarding domestic debate within Lebanon, yet it also points to the destabilising tendencies inherent in such internationalising practices.

Asad Kiyani, PhD Candidate at the University of British Columbia, and a Liu Scholar at the Liu Institute of Global Issues (Canada)

Al-Bashir, the ICC and the Counterproductivity of Effectiveness

This paper argues that the ICC’s indictment and legal pursuit of Sudanese President Omar al-Bashir threatens its future effectiveness. Al-Bashir was first indicted in 2009, but has travelled throughout Africa and even as far as China without being arrested and transferred to the Hague. This relative freedom results from a combination of two factors: Sudan’s position as a non-State Party to the Rome Statute, and al-Bashir’s personal immunity as the Head of State of Sudan. The ICC’s rebuttals to these points are problematic on two fronts. First, the ICC position can only be sustained by relying on controversial restatements of international law. Many of its arguments are either of dubious quality. Secondly, the ICC’s arguments threaten to be counterproductive in three ways. They alienate States Parties to the Rome Statute, upend basic principles of international law, and create a disincentive for states to ratify the Rome Statute in the future. This is particularly true for P-5 members who have not yet done joined the Court.

While the ICC relies on both Security Council authority and a customary law exception to justify its jurisdictional claims, this paper focuses on the former. While both arguments are flawed, it is the Security Council argument that threatens to have the greatest repercussions for the Court’s future effectiveness. The paper outlines and critically evaluates that argument, situates it in its political context, and explains the potential consequences of relying upon that flawed position.

Aisling O’Sullivan, PhD Candidate at Irish Centre for Human Rights (ICHR), NUI Galway (Ireland)

Hegemonic and Counter-Hegemonic Positions in the discourse on the doctrine of Universal jurisdiction

Within the dominant legal paradigm, the competing narratives on the doctrine of universal jurisdiction tend to distort the representation of international legal practice.
This dominant approach focuses exclusive attention on particular legal ideas according with a particular concept of social justice. Underpinning this approach is an intuitive acceptance by the international legal profession of certain legal outcomes, conceived of as natural and inevitable, particularly the acceptance of immunity of incumbent senior state officials and the limitation of or reversal on universal jurisdiction in absentia. The approach underpinning this presentation is to disrupt this notion of international law as located within a fixed political culture. It will argue that the competing narratives are an attempt ‘to accommodate moral intuitions with professional competence’ (Koskenniemi, ‘Turn to Ethics’, 159).

Using the lens of indeterminacy, it will argue that the arguments on the justification for and content of universal jurisdiction invariably fall into oppositions, oscillating between descending or ascending patterns (Koskenniemi, From Apology to Utopia, 61-64). There, arguments justify or criticize the doctrine of universal jurisdiction, depending on competing perceptions of the social world (Koskenniemi, ‘Hegemony’, 199). International lawyers frame their competing arguments in terms of Justice or Order, emphasizing either the international social condemnation of state criminality (‘accountability’/ending impunity’) or the social desirability of stability and order within the legal system (preventing ‘abuse’ or ‘chaos’). Therefore, this presentation seeks to unpack the discourse by exploring the hegemonic and counter-hegemonic moves. The initial moralist move by civil society, emphasizing social condemnation, led to accusations by its opponents of “idealism” and the formalist counter-move by the accused, emphasizing the dignity of the State, led to accusations by its opponents of “formalism”.

This presentation will discuss the series of hegemonic and counter-hegemonic moves by exploring the battle between a Moralist project and its Formalist counter-project in the Case of the Arrest Warrant. The moralist project is a descending pattern of argument, emphasizing the normative ideal of criminal accountability in the advancement of the rule of law. It challenges what it perceives as the inequity of the status-quo perpetuating impunity, ‘the antithesis of accountability’ (Bassiouni, ‘Searching for Peace’, 9). However, the initial Moralist project focused the debate on universal jurisdiction, placing the doctrine of sovereign immunity and other potential limitations into the periphery. But the formalist critique resurrected the doctrine of sovereign immunity from the shadows and represented the doctrine as an immoveable, unless an explicit exception exists in regards to crimes under international law. It is an ascending pattern of argument, emphasizing the historical fact of sovereign immunity and the perceived limited application of universal jurisdiction. It challenges what it perceives as the probability of politically motivated trials, undermining the rule of law, and arbitrarily interfering in conflict reconciliation. It sought to change the bias in its favour and had its early success with the Arrest Warrant judgment. Finally, this presentation will conclude with a brief outline of what appears to be an attempt to accommodate the “valid” criticisms by each project.

Frederick Cowell, doctoral student in law at Birkbeck College, University of London.

Anti-Imperialist politics and the ICC: The context of the opposition to the Omar al-Bashir arrest warrant

In 2009 when the International Criminal Court (ICC) issued an arrest warrant for Omar al- Bashir, the President of Sudan, for war crimes and crimes against humanity
in Darfur, the action was condemned by the Sudanese ambassador to the UN as being a “tool of imperialism.” Other politicians in Africa have made comments in a similar vein; Rwandan President Paul Kagame has condemned the ICC stating that it was created to perpetuate “colonialism, slavery and imperialism” and the African Union’s assembly has issued a declaration of non-cooperation with the ICC’s arrest warrant. Behind these criticisms is the idea that the ICC is ‘imperialist’, either with reference to the current neo-imperialism of western powers or the historic imperialism of international law.

Anti-imperialist critiques of the ICC prior to the indictment of al-Bashir were on the margins of discourse about the court, and where they were discussed it was in the context of legal debates about its jurisdiction. These criticisms initially could be counterbalanced with reference to the more optimistic politics of the ICC’s founding which were born out of a desire to atone for international inaction during the tragedies of the 1990's in Bosnia and Rwanda. However, by the time the ICC issued al-Bashir’s arrest warrant in 2009 there was a growing anti-imperialist opposition to the ICC. Genealogically the ICC derives its juridical authority from the imperialist legal tradition of international law and the near exclusive focus of the prosecutor on cases in sub-Saharan Africa has contributed to the perception that the court is engaged in some form of neo-imperialist practice.

This paper argues that the historical legacy of colonial imperialism in international law and the neo-imperialism of western powers towards African conflicts does not necessarily compromise the operational efficacy or desirability of the ICC as an institution but, it is important to understand why these anti-imperialist arguments are being made. Whilst some anti-imperialist criticism of the ICC has been made by defenders of al-Bashir, much of it has originated from individuals, states or organisations that have been critical of al-Bashir’s government and have supported the African Union’s peacekeeping mission in Darfur. The al-Bashir case marks a turning point precisely because the Sudanese indictments are a manifestation both of the ICC’s power to intervene in recalcitrant states, and of its weakness, as to date it has been unable to enforce its arrest warrants. This has provided a specific focal point for technical and ideological critiques of the ICC that have influenced the debate about its future.

This paper analyses the theoretical basis for the ‘ICC as imperialism’ thesis by deconstructing the anti-imperialist critique of the ICC, following the al-Bashir indictment, into four discrete arguments. These arguments will then be assessed in turn and used to analyse the immediate future of the ICC in the context of its growing membership, new chief prosecutor and future indictments.

**Key issues and discussion points:**
The discussion focussed on the (possible) difference between viewing ICL as (a) imperialist itself or (b) an imperialist tool.
Panel II: ICL & Neo-Liberalism

Chair: Gabe Mythen, Reader in Sociology, University of Liverpool

Tor Krever, PhD Candidate in Law at the London School of Economics and Political Science (UK).

What does it mean to say international criminal law is political? Heated debates centre on the political or apolitical nature of international criminal law and its institutions. Advocates of international criminal law insist the field is quintessentially apolitical, indeed that it is an answer to, and check upon, the tempestuous logic of international politics. Critics, by way of contrast, dismiss international courts as inherently political and their prosecutors as necessarily political animals or even simply political tools of geopolitical powers. A further set of debates centres on political trials, extending an already voluminous literature to the international trial: to what extent do the international trials of alleged war criminals resemble or depart from their legalistic, supposedly apolitical municipal avatars? Again, sharply divided positions are stacked with international proceedings attacked as political show trials or defended as shining exemplars of liberal legalism. The maps these various debates on the political in international criminal law. By way of this cartography, the article argues that, if varied, these positions all reveal a narrow, limited understanding of politics. That is, contemporary debates tend to locate politics in, say, the motivation behind a particular prosecution, or in the one-sidedness of prosecutions (i.e., in so-called victors’ justice), or in the absence of legalistic process and protections for defendants (as in so-called political show trials). While commentators disagree, often fiercely, whether a given trial or court should be characterised as political, they share a faith that international criminal law can and even should be made apolitical. The article will argue that, in contrast with this position implicit in contemporary debates, our understanding of politics in international criminal law should be broadened. Even the seemingly neutral, legalistic international criminal trial may be understood to function politically. Moreover, a narrow focus on legalistic procedure or geopolitical calculi in fact serves to distract from and blind us to this larger political role of trials. A broader understanding of politics in international criminal trials may, by way of contrast, allow us to better recognise the role of international criminal law in the political legitimation and reproduction of neo-liberalism.

Grietje Baars, Lecturer City Law School (UK)
Liverpool critical perspectives on International criminal law
Since Schwarzenberger’s provocative statement in 1950 that there is “no such thing as an international criminal law” … international criminal law (“ICL”) has had a relatively easy ride. The ontological question is no longer asked (quite the reverse) and critiques (if any) are constructively limited to how we can make ICL work better. In this paper I investigate how ICL was constructed and why it is seemingly so critique-proof. This entails a complete re-conceptualisation of what ICL actually is and how it was made. In a typology of mainstream scholarship I distinguish four main strands that together form the mutually reinforcing building blocks of ICL. Then, while engaging such rare critical voices as Tallgren, Pahkavan and Mégret, I proceed to propose an alternative, Marxist understanding of ICL. I do so by focusing on two key themes: firstly: an alternative history of the concept of “accountability” which draws on Weber’s economic historiography and the (as I shall argue) related concept of the cash nexus. With accountability used in this sense, we can interpret criminal law as transforming an issue of society at large (certain problems caused by the prevailing mode of production) to an issue (deviancy) of an individual, for which the individual may expect to ‘pay’ in time or money. Secondly, I introduce the concept of “commodified morality” in explaining the success of ICL and discussing its ICL ideological use. I will illustrate the two key themes by drawing on my work on the use of ICL in post-war Germany and Japan. There, on both sides, ICL was employed by the Allies/US Occupation to at once optimize, and ‘spirit away’ the economics of conflict. As it was then, one of the key functions of ICL now is to provide a spectacle distracting our attention from the material causes of conflict and the wholesale (‘shock doctrine’) economic reforms that often occur behind the scenes of post-conflict situations: this is ICL’s role as part of international law’s ‘capitalizing mission’. I will finish by posing the equally provocative question, whether ICL’s highly emotive support, including on the street, functions as a ‘black hole’ into which real revolutionary energy risks seeping.

Akbar Rasulov, Lecturer in Public International Law at the University of Glasgow (UK)

ICL and the Neopragmatic Turn in the Law of War (Crimes)

Key issues and discussion points:
The discussion raised the question whether ICL can itself be a sight for revolutionary energies, or whether it is a black hole for revolutionary energy. Is it an area which is ‘critique-proof’?

Panel III: ICL & Individualism

Chair: Gaetano Pentassuglia, Reader in International Law and Human Rights
University of Liverpool

Charalambos Papacharalambous, Vis. Asst. Professor in Criminal Law (Law Dept,
University of Cyprus

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From the individual to the associations: a challenge for the ICL

Collective agency is gaining ground since the end of last century in the framework of criminal law discourse. ICL seems very prone to follow these developments. We can trace the modern origins of the latter in: (a) systemic theories of liability; especially concerning criminal law, discussions turn from classical personal culpability towards failures or wrongs in accomplishing social roles (penalization as counterfactual securing of societal normative expectations: e.g. G. Jakobs); (b) enterprises’ or companies’ liability: instead of traditionally punishing the ‘heads’, now is the legal entity which commits the crime (e.g.: ‘corporate killings’); there is an urge for getting rid of evidential difficulties when the perplexity as to questions of the causal chain escalates (cf. environmental criminality); (c) torts (!): utter “proximity” and you are done! (Civil law wrongfulness expands according to the moralization of the interpersonal contact; e.g. ‘Levinasan Manderson’, on the occasion of some Australian case-law); (d) emphasizing victimization in new criminal law contexts, like organized crime, money laundering, terrorism; personal guilt and guilt by association get obfuscated; this turns to be accurate in certain criminal fields like trafficking insofar as it is revealed as ‘state crime’ (but whereby simultaneously this critical voice is silenced!); (e) criminal policy models: where no normal criminals are to be punished but rather societal systems to be dealt with, the deviants become enemies, insofar also non-persons to be confronted through ‘combat norms’ (: Jakobs [again!]). ICL, forced through its very meaning of dealing with systemic macro-criminality, absorbs the notion of collectivity without having digested it sufficiently. Key words: Joint Criminal Enterprise and qualified participations concepts (emblematically: Olásolo 2010 on senior leaders’ responsibility). Beyond accessorial liability, collective wrong notions span from members’ responsibility as of them having being cogs in the machinery (JCE II type/ ‘institutionalized’ responsibility form) to members’ responsibility as of the fact that they should have known the possibility of the excesses of others (JCE III/ ‘collateral’ responsibility form, e.g.: gray zone between reckless and negligent conduct/ boundaries between actus reus and ‘crimes of ideas’ blurred/ approximation to strict liability despite the grievous nature of international crimes demanding mens rea par excellence); Is this a kind of ‘Jamashita’-syndrom revival (overflowing participation beyond the confinements of ‘command responsibility’)? More generally: doesn’t a normative model overturn here fully any notion of naturalistic ‘commission’? What does the acceptance (in Lubanga and Katanga et al. ICC’s decisions) of Roxins theory on ‘control of crime’? It seems that by making perpetration all the more indirect, ICL tends to generalize ‘perpetration through another’, who is nonetheless fully responsible (and thus less fungible and in no way ‘innocent agent’); this construct overwhelms everything, imposing inaccurate Eurocentric vagueness on ecumenical and multifaceted events.

Athanasios Chouliaras, Attorney at law in Greece (Greece)

International Criminal Law and Individualism: a critical view from the margin

It is now well settled in the academic debate that international criminality subsumes to the broader category of macro-criminality. The provision of contextual elements in each international criminal type as well as the development of a ‘normative model’ of responsibility as opposed to a ‘naturalistic’ one, of an ‘organizational model’ as opposed to an ‘individualistic’ one and generally the emergence of a new ‘imputation model’ based on the notions of ‘control’, ‘supervision’, ‘conspiracy’, ‘collective
responsibility’, etc. are clear signs of the fact that (international) criminal law theory seeks to provide apposite solutions to the specific problems that arise in the sphere of international macro-criminality. Nevertheless, it will be argued that the official discourse on international criminality, shaped by the institutions of international criminal law and corroborated through the case law of international criminal tribunals, falls short of dealing genuinely with the systemic nature of international criminality by eschewing to address the central role of the state as such. The said position presupposes the thesis that international macro-criminality constitutes chiefly, although not exclusively, a form of state crime. In this context, the paper summarizes the epistemological premises and the basic points of the criminological theories on state crime, which offer an alternative discourse on international criminality, potentially complementary to the one of ICL. Despite the unanimity among criminologists that the idea-matrix of abuse of power and the category of ‘crimes of the powerful’ offer the broader conceptual framework of the criminology of state crime, there is an open debate on the criterion employed for the definition of the latter concept (harm, deviance, law). Notwithstanding the variety of approaches, one could assert that they all converge on the conclusion that the most important traits of state crime are its political nature (macro-level) and organizational dimension (meso-level). These elements on the one hand are corroborated by while on the other hand explain the eruption of collective violence at societal level, which results in the production of massive crimes, analyzed as instances of conformity instead of deviancy, i.e. as crimes of obedience (micro-level). The fact that the official version on international macro-criminality equates international core crimes to instances of individual or interpersonal criminality and not to instances of state criminality can be explained mainly on the basis that ICL is anchored to the principles of individualism, as much in ontological as in methodological basis. What is more, ontological and methodological individualism lead both to normative individualism. However, international community is not composed exclusively of individuals, but of states, corporations and international organizations as well. Seen trough this prism, overcoming the confines of individualism seems to be a prerequisite for the development of a new sense of penalty at the international plane, within which the state can be portrayed as the principal actor of core international crimes.

Christopher Gevers, Lecturer in the School of Law, University of KwaZulu-Natal (South Africa)

Africa, International Criminal Law and the Politics of Individualism

This paper argues that there is a ‘bias’ within the international criminal law project towards an individualist concept of ‘politics’. The starting point is to recognize that international criminal law is a political project, in both its conceptualization and operation. While it speaks the language of law it is, in the words of Gerry Simpson, ‘legalized politics’. This raises the question as to whether there is a ‘meta’ political theory or ideology that we might ascribe to the field? While liberalism of some variant (i.e. liberal-legalism, or liberal-cosmopolitanism) is the generally accepted front-runner, it is possible to give liberalism too much credit for the project. There is in fact much about the field that is not liberal. In the final analysis, the ‘field’ is made up of a number of different political projects - it is a broad church.

That being said, liberalism – and more specifically its ‘methodological individualism’ – has had a marked effect on constituting the field, and continues to
influence how it operates (and it is represented). It is that ‘individualism’ that I want to explore further in this paper, both in terms of agency – in the words of Druml, the “construction of the individual as the central unit of action” – as well as representation. This exploration takes place through three sub-themes: history, purpose and performance.

First, when one considers ICL’s relationship with history – both in terms of its own ‘history’ and the history it ‘delivers’ – the individual is at the center. When courts ‘deliver’ history – a role for which they are criticized on both principled (Arendt) and methodological (Evans) grounds – it is often reductionist, linear and individualistic. Similarly, the history of the field – as told in mainstream international law – is very much the history of the individual: the rise of the individual in international law, a moment of redemption or even completion and triumph (law over politics, human rights over sovereignty, reason over power).

Second, individualism and agency are also at the center of the dominant discourses on why we punish international crimes. Remarkably, for all our sophistication, international lawyers have spent comparatively little time on this ‘quest for purpose’ (Druml). Perhaps because it seems so ‘self-evident’, a sensibility even (Tallgren). However, within the two main schools of thought with regard to purpose – retributivist and consequentialist – there is focus on the individual as both the autonomous moral agent, despite ample evidence that atrocities might require a more complex conception of agency.

Third, given this focus on the individual in the field’s history and design, it is not surprising that when it comes to measuring ‘performance’ there is an overemphasis individual gains – even when those gains come at the expense of ‘liberal’ principles (Robinson).

In the final part of the paper, I will apply this critique – of excessive individualism in the field’s history, purpose and performance – to the relationship between ICL and African states. Briefly, African states have been accused of adopting positions antagonistic to ICL – and the ICC specifically – that are ‘political’. Having argued that ICL is not only political, it also favours a certain form of politics, I will aim to show how this bias results in the distortion (and then dismissal) of African positions on ICL.

Stefan Mandelbaum, PhD researcher in law at King’s College London,

*The State’s Two Bodies: A Dialectical Critique of Political Terror and International Criminal Prosecution*

In his account of the Jacobin regime following the 1789 French revolution, G.W.F. Hegel draws the conclusion that the modern principle of ‘individual autonomy’ is hardly reconcilable with the sphere of ‘the political.’ In fact, an absolute “right of the subject’s particularity,” when applied to political decision-making, leads necessarily to terror on a state level and by means of public resources.

In tracing back critical elements constituting state terror, this talk is concerned precisely with this psychological dialectic governing ‘individuality’ (rational spontaneity) and ‘absolute political will’ (terror). The central aim is to illuminate how, logically, terror necessitates politico-ontologically wrong thinking as the impossibility of uttering a particular interest: the very way actual individuals organise their enjoyment is hemmed in by an anticipated historic common sense. This has an immediate effect on criminal prosecution, as in a political environment of terror the very fact of being under suspicion equals being guilty.
On a state level, certain wrong-doing equals crime and requires to be punished according to criminal laws. However, as already Sigmund Freud remarked in 1918, at least in times of war and publicly accepted war crimes, the citizen is aware without any doubts “that the state forbids him to do wrong not because it wishes to do away with wrongdoing but because it wishes to monopolize it.” Accordingly, in times when rhetoric of a war on terror is commonly used as a political tool, the crucial distinction between the body politic and the body of law, between partisan will and the rule of law gradually vanishes. Against the background of this structure of state terror ‘at home’ this talk shall demonstrate that today’s threat of international terrorism is the very particular interest, dressed as the general interest, invading the discourse on Criminal Law as such.

It will be concluded, on the one hand, that the structure of political terror is essentially a mass-psychological repression of actual non-participation in domestic political processes, leading to a “redirection activity” (Freud) of simply overemphasising the individuality of international actors. Hence, it is an elaborated transgression of the very same logic of individuality and political will ‘at home’. On the other hand, a close analysis of the given options of international criminal prosecution shall illustrate that the apparent and persistent prerogative of states, i.e. the primacy of an individual entity in International Criminal Law, is essentially nothing but the inversion of state interest to a pure interest on a global stage: What is elevated in criminal theory is the individual state identity as actual and random particularity, what prevails historically and reigns ideologically is the ‘principle of individualism’.

Key issues and discussion points:
The discussion brought questions of State Crime and international criminal law to the fore. It was discussed in how far ICL should be learning from the field of State Crimes, a specialised field of criminology.
It was also raised whether ICL should expand to deal with state crimes, given that in a sense it is the society/government who create the circumstances in which the individual goes on to commit the crime. The Peace vs. Justice debate also featured heavily; the distinction was made that peace was concerned with the political whereas justice was concerned with the legal.

IV. ICL & Performance

Chair: Robert Murtfeld, PhD candidate at the School of Oriental and African Studies (SOAS) (UK)

Edwin Bikundo, Lecturer at the School of Criminology and Criminal Justice at Griffith University in Brisbane (Australia).

The International Criminal Court and Africa: Exemplary Justice
This is a theoretical and empirical investigation into the causal link (if any) between international criminal trials and preventing violence through exemplary prosecutions. Specifically how do representative trials of persons accused of having the greatest responsibility for the most serious crimes of concern to the international community as a whole, supposedly bind recurrent violence? The argument pursued is that by
using an accused as an example, a court engages in an indirect and uncertain substitution of personal rights for social harmony and order.

These prosecutions combine a peculiar rhetoric, logic and aesthetic all which substitute the responsibilities for a society in general to a particular individual in order to redeem that society by transferring its communal responsibility onto the individual punished as a form of atonement or expiation. International and domestic trials as well as truth and reconciliation commissions are part of a suite of options addressing communal mass violence that can work in tandem. However, because those convicted do not have a monopoly on criminality nor do those merely reconciled have a monopoly on virtue, exemplification through punishment only targets a few on behalf of the many. Indeed such a redemptively sacrificial economy distinguishes legal justice from mere vengeance.

**Christian de Vos**, PhD Researcher for the 'Post-Conflict Justice and Local Ownership' project at Leiden University’s Grotius Centre for International Legal Studies

**The Road from Rome: Domestic Implementation and the (A)Political**

The adoption of the Rome Statute in 1998 marked the start of a vigorous campaign by international civil society to have states not only ratify but implement the Statute within their domestic legal orders. While implementation is frequently invoked as a duty of states under the ICC’s complementarity principle, it also reflects traditional rule of law agendas amongst civil society actors (and their donors) in which the “gap” between international standards and domestic practice can purportedly be bridged. This paper examines debates around the implementation of the Rome Statute in three domestic jurisdictions – Kenya, Uganda, and the Democratic Republic of Congo – and argues that, rather than a site of necessary political deliberation, implementation in Kenya and Uganda was a largely performative act pushed along by external actors and enacted for their approval. The ramifications of this diminished process can be seen in recent controversies over the place of amnesties in Uganda’s transitional justice landscape and the aborted establishment of a Kenyan Special Tribunal, both of which have tested in a more profound way the consequences of implementation. Paradoxically, the DRC, which is often seen as a “failure” state for having not yet enacted ICC legislation, has been the site of greater political contestation and judicial activity, bringing international criminal justice more deeply (if imperfectly) to the political fore. These developments suggest that implementation, though commonly understood as a technocratic legal exercise and an indicator of obedient statehood is, in fact, a politically fraught and dynamic process.

**Marieke de Hoon**, holds a research and teaching position at the Vrije Universiteit (Amsterdam), where she is working on her PhD

**The Politics of International Criminal Law in a Trial of Rupture**

This paper addresses the implications of adjudicating on the crime of aggression given its indeterminate nature. The indeterminacy of aggression stems from the differing conceptual frameworks stakeholders have regarding the function of war, the nature of international relations, and the source and binding nature of international law, as well as, more fundamentally, differing perspectives on reality as such. There are three main problems of adjudicating aggression that are discussed in the paper. The first concerns the role of the adjudicator. By creating the crime of aggression and
opening the jurisdiction of the ICC for cases of aggression, the notion of aggression is
treated as an underdetermined notion rather than indeterminate. This means that the
notion is to be developed by judges into concrete criteria, leaving judges with a task
ill-suited to adjudication. Indeed, by the ignoring of this indeterminacy, adjudicators
will be put in the position to make choices between fundamentally opposed
conceptual frameworks that have been subject to fierce disagreement by legal,
philosophical and political scholars and practitioners, ever since legal thinking about
war started many centuries ago. Second, due to the indeterminacy of aggression and
following the logic developed by Vergès, the more successful judicial strategy for
trials on aggression may well be that of rupture rather than connivance, creating
difficulties for the effectiveness and credibility of an adjudication. In an aggression
trial, not only the facts of the case and the interpretation of the law will be questioned
but, as in a trial of rupture, the whole framework and idea of applying law to the
inherently political decision of the legitimacy of a particular use of force will be
challenged. Third, due to the indeterminacy of aggression and the abovementioned
problems with adjudicating aggression, the more fundamental problem lies in the
limitations of the abilities of law, and criminal law in particular, as a solution-bringing
instrument on the issue of the legitimacy or aggressiveness of war for the purpose of
preventing and suppressing war.

Sarah Nouwen, University Lecturer in Law, University of Cambridge, Fellow of the
Lauterpacht Centre for International Law and Pembroke College.

The Tribunalization of Global Justice Ending Impunity as Hegemonic Politics
What happens when ideals of global justice are translated into legal institutions? As
Jack Balkin observed some twenty years ago, our longing for justice stands in a
complex and paradoxical relation to the institutional practices designed to satisfy our
desire for a more just world. While the ideals of justice need institutional and
conventional translation in order to be effective, the very same institutionalization
may corrupt the ideals that we hold dear:

Human law, culture, and convention are never perfectly just, but justice needs
human law, culture, and convention to be articulated and enforced. There is a
fundamental inadequation between our sense of justice and the products of culture,
but we can only express this inadequation through the cultural means at our
disposal…Hence, our laws are imperfect not because they are bad copies of a
determinate Form of justice, but because we must articulate our insatiable longing for
justice in concrete institutions, and our constructions can never be identical with the
longings which inspire them.

In terms of aspirations for justice, by monopolising the term global justice for
the enforcement of international criminal law, international criminal justice
marginalises other conceptions of justice, conceptions of justice that may be more
meaningful to many people other than international criminal law experts. We give
four examples of possible alternative conceptions.

In response to these alternative conceptions of justice, international criminal
lawyers often argue that these could be ‘complementary’ to international criminal
justice (thus invoking a term derived from the ICC’s complementarity principle even
though it is unrelated to the principle’s legal meaning). In practice, however, the rise
of international criminal justice sometimes suppresses other conceptions of justice.
This is particularly so where these other conceptions of justice lack international
institutionalisation: no institution, no ‘expertise’ and no legal-expert politicians fighting the cause.

Key issues and discussion points:
The various forms of ICL & performance were discussed: The sacrificial nature and scapegoating in ICL, which is always a performative exercise; implementation of ICC principles as a performative act; the show trial as well as the trial of rupture as forms of performance; and the performance of complementarity as a disciplinary struggle undermining diversity.
The question of what the performance is for was raised: was it a political move or an obligation? Again the question of legitimacy was a talking point.

Closing Panel

Christine Schwöbel (University of Liverpool), Michelle Farrell (University of Liverpool), Niamh Hayes (NUI Galway), Yvonne McDermott (Bangor University)

Key issues and discussion points:
Christine Schwöbel provided a short summary of some of the themes of the conference (with a little help from some Beatles song titles). A few words were said about future CAICL events and projects, and the intention to publish an edited collection of some of the papers from the conference was noted. Finally, the co-sponsors, particularly the IGLP at Harvard Law School (which provided a research grant), were thanked.

On a more substantive note, the sliding scale of what ‘critical’ means was once more highlighted by Michelle Farrell. She considered whether she or others may in fact ‘want out’ after the conference, finding that they are unable to place themselves anywhere on the noted scale or traditions. It was commented how those on the international legal left, while possibly becoming complicit in those structures which they seek to critique, may find it tempting to draw stark distinctions. This was echoed by Niamh Hayes and Yvonne McDermott, who commented that the binary between critique and criticism may be mapped onto the binaries of theory and practice, or indeed on the binary of researchers and teachers – on a provocative note: can anyone criticise while it takes an intellectual to critique?
I. Writing Workshop

On the third day of the conference, a smaller group of participants met for a writing workshop. The writing workshop was coordinated by Michelle Burgis-Kasthala and followed the IGLP writing workshop guidelines. While engaging with our peers’ work through conference presentations is invaluable, we also felt that there was a need to engage more closely in the scholarship.

Previous to meeting in Liverpool, papers were written and distributed to one of two groups. In addition, scholars were paired up. The idea behind the IGLP method is that authors do not present their own work – their workshop partner presents the work. The author has two minutes to make some remarks on which type of feedback they would like to receive. The partner then summarises the key points and then provides constructive feedback.

The writing workshop was regarded as an extremely valuable addition to the open conference.

II. Teaching Workshop

We then met for a teaching workshop with the idea of exchanging thoughts and materials on teaching ICL from a critical perspective. This was coordinated by Christine Schwöbel, who shared her LLM module outline for the course Critical Approaches to International Criminal Law at the University of Liverpool.

There was a vibrant discussion on institutional restrictions and personal preferences in regard to critique and teaching. What is our role as educators? Do we have an obligation to teach students the core cases and statutes before we introduce them to critique? Do we label our courses ‘critical’? Can we discuss issues of revolution in class? And, if so, at which stage in the students’ studies?
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