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Fall 2019

## DIPL 4198 International Criminal Law

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### Recommended Citation

Miller, Zinaida PhD, "DIPL 4198 International Criminal Law" (2019). *Diplomacy Syllabi*. 430.  
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# INTERNATIONAL CRIMINAL LAW

DIPL 4198

Professor Zinaida Miller

Fall 2019

## COURSE DESCRIPTION

Since the end of the Cold War, there has been a rapid and unprecedented expansion in law, institutions, and policy regarding atrocity crimes such as genocide and crimes against humanity as well as abuses committed during war. International criminal law (ICL) has become a well-known, well-funded, and controversial enterprise of its own, along with the related field of transitional justice. ICL appears in both domestic and international courts and comes up frequently in the news, whether in relation to unresolved conflicts such as Syria, open cases like the indictment of Sudanese ex-President Bashir, or as a factor in national politics. The growth and prominence of the field has also provoked questions, including whether international criminal law can deliver on the promises it makes for justice, progress, reconciliation, peace, and reparation.

This course will examine the history, theory, and practice of international criminal law. Much of what we do will involve studying the doctrines of international criminal law: who can be held accountable for what actions and under which circumstances? In addition to these types of questions, we will be delving into the politics and policy of international criminal law. Is more international criminal law always a good thing? Is the International Criminal Court a neutral institution or is it irreparably biased? How effective and legitimate is international criminal law? How does international criminal law fit into the global legal order?

By reading and discussing case law and scholarly commentary as well as engaging in debates in class, students will also develop familiarity with legal reasoning and analysis. Law is, centrally, about making arguments; in reading and analyzing a wide variety of international legal cases, issues, and doctrines, students will become skilled at identifying, critiquing, and developing legal arguments. The course will also help students to develop critical reading and writing faculties that extend beyond the legal field. We will pay special attention to the intersections between international law and politics and to the relationship between law and justice.

## COURSE REQUIREMENTS

This course has several components, more fully described below. **Class participation will be 20% of your grade, response papers and legal arguments will be worth 40% and the final take-home exam will comprise 40% of your grade.**

Readings and Participation. Class attendance and participation are a required part of the course, and will be constitute a quarter of your semester's grade. I expect you to read all of the assigned readings before class and to be prepared to discuss them in class. We will incorporate some in-class exercises as we go; your grade will be judged in part on your **active participation** in those debates as well as in regular class discussion.

Response Papers. I will give you prompts for five response papers of 500-750 words. I will hand out guidelines for these papers separately. These papers are meant to help you think through some of the important issues being raised by the readings.

Legal Arguments. Over the course of the semester, I will occasionally assign you a problem or case from the casebook and ask you to prepare arguments or summarize a case based on what you have read. These will count towards your writing grade.

Take-Home Exam. There will be a final, cumulative take-home exam.

## ACADEMIC INTEGRITY

Plagiarism and other forms of academic dishonesty will be reported to the administration, and may result in a lowered or failing grade for the course and up to possible dismissal from the School of Diplomacy. See University and School standards for academic conduct here: <https://www.shu.edu/student-life/upload/Student-Code-of-Conduct.pdf> and <http://www.shu.edu/academics/diplomacy/academic-conduct.cfm>

In a paper, where you quote language word for word from a source, you must place it in quotation marks or in a block quote and **give the exact source** for each quoted passage. Where you paraphrase something, you must **cite the source**. Where you refer to or use an author's insight or idea, you must **cite the source**. Lifting or paraphrasing language from a web site without indication and citation is plagiarism.

***Any indication of plagiarism on a case brief or response paper will result in a failing grade for the assignment and a reduction in the participation grade for the class.*** A repeated incident of plagiarism (i.e., more than one) is likely to result in a failing grade for the class and will be reported to the administration. All materials will be turned in through Safe Assign.

## INCLUSIVE LEARNING

It is the policy and practice of Seton Hall University to promote inclusive learning environments. If you have a documented disability you may be eligible for reasonable accommodations in compliance with University policy, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and/or the New Jersey Law against Discrimination. Please note, students are

not permitted to negotiate accommodations directly with professors. To request accommodations or assistance, please self-identify with the Office for Disability Support Services (DSS), Duffy Hall, Room 67 at the beginning of the semester. For more information or to register for services, contact DSS at (973) 313-6003 or by e-mail at [DSS@shu.edu](mailto:DSS@shu.edu).

### INCOMPLETES

Incompletes will be given only in exceptional cases for emergencies. Students wishing to request a grade of Incomplete must provide documentation to support the request accompanied by a Course Adjustment Form (available from the Diplomacy Main Office) to the professor *before* the date of the final examination. If the incomplete request is approved, the professor reserves the right to specify the new submission date for all missing coursework. Students who fail to submit the missing course work within this time period will receive a failing grade for all missing coursework and a final grade based on all coursework assigned. Any Incomplete not resolved within one calendar year of receiving the Incomplete or by the time of graduation (whichever comes first) automatically becomes an “FI” (which is equivalent to an F). It is the responsibility of the student to make sure they have completed all course requirements within the timeframe allotted. Please be aware that Incompletes on your transcript will impact financial aid and academic standing.

### ELECTRONICS

**I cannot encourage you enough to take notes with pen and paper.** More than one study has concluded that taking notes by hand rather than by typing improves learning; when you cannot transcribe but rather have to translate class discussion and lecture into hand-written notes, you are far more likely to retain the information in more detail and for longer.<sup>1</sup> The temptation to multitask while you are on a computer will not only reduce your participation but will negatively affect those around you.<sup>2</sup> While I do not prohibit the use of laptops for notetaking in this class, I encourage you to consider taking notes by hand and either not using your computer or using it only to refer to readings. **All use of electronics for any purpose other than notetaking or referencing readings is prohibited.** If you use your laptop for anything else, you will be subject to discipline, including reduction in grades. If I find laptops to be a consistent distraction in class, I will ban them. Please know that I have absolutely no tolerance for the use (or sight) of mobile phones in the classroom. **If I see your cell phone on your desk or in your hand during class, I will confiscate it for the remainder of class.** If you have an emergency situation that requires you to check your phone or email during class, please let me know before class.

### OFFICE HOURS AND CONTACT INFORMATION.

My office is McQuaid 101-B and my office hours are Mondays 12:30-3:00pm and by appointment. I will leave a sign-up sheet on my door each week. Please do not hesitate to come talk to me. My extension is x2461 and my e-mail address is [Zinaida.Miller@shu.edu](mailto:Zinaida.Miller@shu.edu). I do make an effort to respond promptly to all email questions and concerns but I will not respond to emails received after 9:00PM until the next day.

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<sup>1</sup> <http://www.newyorker.com/tech/elements/the-case-for-banning-laptops-in-the-classroom>.

<sup>2</sup> <http://www.sciencedirect.com/science/article/pii/S0360131512002254#>.

## COURSE MATERIALS

The required casebook is Beth van Schaack and Ronald Slye, *International Criminal Law and Its Enforcement* (3d ed.) Additional readings will be placed the course Blackboard site and other readings are available online. The reading assignments listed below are subject to modification, so please **check your email regularly**, as I will notify you through email with changes as well as posting on Blackboard.

If you have not taken Public International Law (or are eager for a helpful refresher!), you may find it useful to look over the treatise, *International Law* (7<sup>th</sup> ed.) by Mark W. Janis or *International Law Frameworks* by David Bederman and Chimène Keitner (4<sup>th</sup> ed.). You should be familiar with basic nuts and bolts of international law, most importantly with what the sources of international law are and how they work – treaties, customary international law, etc.

If you'd like to keep up with current issues in the fields of international law and international criminal law, some useful websites to consult are

Opinio Juris [www.opiniojuris.org](http://www.opiniojuris.org)

Justice In Conflict <https://justiceinconflict.org/>

IntLawGrrls <https://ilg2.org/>

European Journal of International Law <https://www.ejiltalk.org/>

American Society of International Law <https://www.asil.org/insights/insigh10.htm>

**\*\*CB= van Schaack and Slye Casebook**

Any additional materials are listed as Blackboard.

**Note:** I strongly recommend that you do each reading for an assignment in the order listed on the syllabus.

**Part I. Introductions**

**Class 1 (August 28)**

**Introduction to the Course**

**Class 2 (Sept 4)**

**The History and Theory of International Criminal Law**

**What is criminal law and what is it for?**

- CB 17-25 through Note 3 (“The Purposes of Criminal Law”)

**What is transitional justice?**

- <https://www.ictj.org/about/transitional-justice>
- Roht-Arriaza and Mariezcurrena, *Transitional Justice in the Twenty-First Century*, pp 1-14 (“The New Landscape of Transitional Justice”)

**What is international criminal law and what is it for?**

- CB 1-12
- Cryer et al, An Introduction to International Criminal Law and Procedure, pp 28-37 (“Aims, Objectives, and Justifications”)
- Stahn, A Critical Introduction to International Criminal Law, pp 166-182 (“Critiques”)

**How did we get here? The International Military Tribunals at Nuremberg and Tokyo**

- Cryer et al, An Introduction to International Criminal and Procedure, pp 115-125 (“Nuremberg and Tokyo”)
- CB 100-114

**Part II. Law, Politics, Institutions: International Criminal Tribunals and Jurisdiction**

**Class 3 (September 11)**

**Battles over Jurisdiction: Who can be tried where, for what, and when?**

**Introducing the Ad hoc Tribunals for the former Yugoslavia and Rwanda**

Blackboard

- Des Forges, “Leave None to Tell the Story” 8-18 (Introduction to the Rwandan Genocide)
- ICTY, “The Conflicts” <http://www.icty.org/en/about/what-former-yugoslavia/conflicts> (Introduction to the Balkans crisis)
- Cryer et al, 122-143 (the Tribunals for Yugoslavia and Rwanda)

## Introduction to Jurisdiction

- CB 31-39

## Challenging Security Council Jurisdiction at the ICTY

- CB 114-128, through Note 2 (ICTY and *Tadić*)

## Challenging International Criminal Law Jurisdiction at the Special Court for Sierra Leone *Nullem Crimen Sine Lege* (no crime without law)

- CB 991-1006, through Note 6 (SCSL, *Hinga*)

## Another Option? Universal Jurisdiction

- CB 53-56 (Introduction to Universal Jurisdiction)
- CB 70-73 (Notes on Universal Jurisdiction)

### Blackboard

- Aljazeera, German Lawyers Seek Criminal Case Against Syria's Assad, <http://www.aljazeera.com/news/2016/11/german-lawyers-seek-criminal-case-syria-assad-161128141943783.html>

## Class 4 (September 18)

### The Law and Politics of the International Criminal Court

#### How does the ICC work?

- CB 139-156 (Triggers and Situations)
- CB 175-83 (Complementarity and Admissibility)
- Be prepared to discuss the questions on CB 198-200 Notes 2, 6-7.

### Blackboard

- Skim: Cryer et al, 144-163 (ICC Jurisdiction and Admissibility). **Note**: The Cryer reading here is really meant to be a supplement to the Casebook. If you are unclear on the jurisdiction of the ICC or its rules for admissibility and complementarity, the Cryer reading should help. I do recommend that you read over it, because it offers a more direct summary of many of these concepts, but it's meant as a secondary source.
- Be familiar with Rome Statute Parts I, II, and V

### The Legitimacy of the ICC

- CB 164-175 (The U.S. and the ICC)

### Blackboard

- Kamari Clarke and Abdul Tejan-Cole on ICC Forum: "Is the ICC Targeting Africa Inappropriately?" (March 2013-January 2014)
- Tor Krever, "Africa in the Dock: On ICC Bias" (Critical Legal Thinking, 2016)
- Al Jazeera, "The ICC: A Common Cause Between John Bolton and Africa?"
- Washington Post, "Trump Administration Applauds International Court's Decision to Abandon Afghan War Crimes Probe" (April 12, 2019)

## Part III: Substantive International Criminal Law

### Class 5 (Sept. 25)

#### Introduction to International Humanitarian and Criminal Law

##### Some Criminal Law Basics

- CB 205-11 (You don't need to spend a lot of time on this – the idea is just to familiarize yourself with the meanings of *actus reus* and *mens rea*)

#### Introduction to International Humanitarian Law (IHL) and War Crimes

##### Blackboard

- Cryer et al pp 268-73 (“War Crimes”)
- Sriram et al, pp 54-57 (“Substantive international humanitarian law obligations”)

#### IHL applies in armed conflict. So what is an “armed conflict” in international law?

- CB 215-38 (*Boškoski* and Notes) [I am not expecting you to have every fact straight – this is a long excerpt. The important things to focus on are **what the law is and what kind of evidence the Court uses** to determine whether or not there is an armed conflict here.]

### Class 6 (October 2)

#### War Crimes

##### Nexus to Armed Conflict

- CB 262-274 (*Kayishema* and Notes)

##### Hague Law: Means and Methods of Warfare

- CB 304-312 (NATO Responsibility)
- CB 315, Note 9

##### Geneva Law: Protected Persons and Things

- CB 316-18, 327-334 (Civilians as Protected Persons: *Kordić*)
- CB 334-340 (Combatants as Protected Persons)

### Class 7 (Oct. 9)

**\*\* CLASS DOES NOT MEET \*\***

Assignment TBA.

### Class 8 (Oct. 16)

#### Crimes Against Humanity

##### Definitions and Elements

- CB 419-42, through Note 4 (Elements, *Kupreškić* ICTY 2000)

##### Constitutive Acts: Sexual Violence



- CB 459-475 (Sexual Violence and Forced Marriage)

Blackboard:

- Karen Engle, "Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina," *American Journal of International Law* 99(4): 778-788 (2005)

**Class 9 (October 23)**

**Genocide**

**What is Genocide?**

Blackboard

- Raphael Lemkin, "Genocide," *American Scholar*, 15(2): 227-230 (April 1946)
- *Vanity Fair* Interview with Philippe Sands, author of *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (2016)

**Genocide and Judgment in Rwanda**

- CB 495-511 (*Akayesu* and Notes)

Blackboard

- Lars Waldorf, "Mass Justice for Mass Atrocity," *Temple Law Review* 79(1): 26-34 (2006)
- Peter Uvin, "Reading the Rwandan Genocide," *International Studies Review*, 3(3): 79-87 (Autumn, 2001)
- Mark Drumbl, "Law and Atrocity: Settling Accounts in Rwanda," *Ohio Northern University Law Review* 31(1): 44-52 (2005)
- Victor Peskin, "Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda," *Journal of Human Rights* 4(2): 213-17, 222-229 (2005)

**Rwanda to Darfur**

Blackboard

- David Luban, "Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report," *Chicago Journal of International Law* 7(1): 307-320 (2006)
- Mahmood Mamdani, "The Politics of Naming: Genocide, Civil War, Insurgency" *London Review of Books* (2007) [Optional: Letters in response]

**Class 10 (October 30)**

**ICL in Action: Case Study on the Special Court of Sierra Leone**

Blackboard

- Chandra Sriram et al., *War, Conflict, and Human Rights*, **Ch. 6** (Sierra Leone) and **Ch 12, pp 206-212** (Hybrid Tribunals)
- David M. Crane, "Dancing with the Devil: Prosecuting West Africa's Warlords", *Case Western Reserve International Law Journal* (2005)

- Chandra Sriram, “Wrong-Sizing International Justice?”, *Fordham International Law Journal* (2006)
- Charles Jalloh, “Special Court for Sierra Leone: Achieving Justice?”, *Michigan Journal of International Law* (2011)

## Part IV: Special Issues in International Criminal Law

### Class 11 (Nov. 6)

#### Incitement to Genocide

##### The Media Cases at the ICTR

- CB 959-973 (The Media Case)
- CB 973-975, 979-983 (Notes 1-4, 11-15)
- CB 984-87 (Problem)

#### Music and Genocide

##### Blackboard

- Donald G. McNeil, “Killer Songs,” *The New York Times Magazine*, March 17, 2002
- James Parker, “The Musciology of Justice: Simon Bikindi and Incitement to Genocide at the International Criminal Tribunal of Rwanda,” 211-214

#### Incitement vs. Hate Speech: Does Context Matter?

##### Blackboard

- Richard A. Wilson, “Inciting Genocide with Words,” *Michigan Journal of International Law* 36(2) (2015): 278-286
- Kevin Boyle, “Hate Speech—The United States versus the Rest of the World,” *Maine Law Review* 53(2) (2001): 489-91, 497-500
- Jennifer Allen & George Norris, “Is Genocide Different? Dealing with Hate Speech in a Post-Genocide Society,” *Journal of International Law and International Relations*, 7(1)(2011): 156-161, 165-68

#### Free Speech After Charlottesville

##### Blackboard

- K-Sue Park, “The ACLU Needs to Rethink Free Speech,” *The New York Times*, August 17, 2017
- Suzanne Nossel, “The Problem of Making Hate Speech Illegal,” *Foreign Policy*, August 14, 2017

### Class 12 (November 13)

#### History and Genocide on Trial

##### Telling History at the *Eichmann* Trial

### **Blackboard**

- Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963)(Excerpts)
- Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001)(Excerpts)
- Gerry Simpson, *Law, War, and Crime: War Crimes Trials and the Reinvention of International Law* (2007)(Excerpts)
- Richard Ashby Wilson, *Writing History in International Criminal Law* (2011) (Excerpts)

### **Telling History at the ICTR and After**

#### **Blackboard**

- Nigel Eltringham, “‘The Judgement Is Not Made Now; The Judgement Will Be Made in the Future’: ‘Politically Motivated’ Defence Lawyers and the International Criminal Tribunal for Rwanda’s ‘Historical Record’,” *Humanity* (2017)
- Susanne Buckley-Zistel, “Nation, narration, unification? The politics of history teaching after the Rwandan genocide,” *Journal of Genocide Research* 11(1) (2009)

### **Class 13 (November 20)**

#### **Responsibility, Complicity, and “Grey Zones”**

#### **Legal Doctrines about Responsibility**

- CB 785-95, 805 (Superior Responsibility: *Delalić*)
- CB 1011-23 (Superior Orders as a Defense: *Erdemović*)
- CB 1094-1100 (Duress as Mitigation in Sentencing: *Erdemović*)

#### **“Grey Zones”**

##### **Blackboard**

- Hannah Arendt, *Eichmann in Jerusalem*, Postscript
- Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Violence* 3-8, 147-156
- Lawrence Douglas, *The Memory of Judgment* 152-157, 173-182
- Gerry Simpson, *Law, War & Crime* 71-78
- Mark Drumbl, “Victimizers as Victims,” *London Review of International Law*, 217-223, 227-246

**\*\* NO CLASSES NOVEMBER 27\*\***

### **Class 14 (December 4)**

#### **Amnesties, Critiques, and Alternatives**

#### **A duty to prosecute? A duty not to prosecute? Criminal Law and Amnesties**

##### **Blackboard**

- Diane Orentlicher, “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency.” *The International Journal of Transitional Justice*. 1(1): 10–22 (2007).

- Lisa Laplante, “Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes.” *Virginia Journal of International Law* 49(4): 916-934 (2009).
- Louise Mallinder and Kieran McEvoy, “Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies.” *Contemporary Social Science* 6(1): 107-113, bottom of 119-124 (2011)
- CB 199, Note 5: How should we think about amnesties in relation to ICC jurisdiction?
- CB 1066-1078, 1081 (*Kallon* and Notes on RSA, Cambodia, IACHR)

#### **A Broader Picture?**

- Kamari Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009), 54-59
- John Reynolds and Sujith Xavier, “‘The Dark Corners of the World’: TWAIL and International Criminal Justice,” *Journal of International Criminal Justice* 14(4) (2015), 980-983
- Ismael Muvingi, “Sitting on Power Kegs: Socioeconomic Rights in Transitional Societies”, *International Journal of Transitional Justice* 3(1) (2009) 163-177, 180-82
- Rosemary Nagy, “Transitional Justice as Global Project: Critical Reflections,” *Third World Quarterly*, 29(2) (2008), 284-87