
Review of Conference: “International Criminal Tribunals in the 21st Century”

by *Tim Curry*

THE WAR CRIMES RESEARCH OFFICE,¹ an organization that provides confidential legal research and technical assistance to international criminal tribunals around the world, celebrated its 10th anniversary this year. To honor this special milestone, the American University Washington College of Law hosted a conference on September 30, 2005, entitled “International Criminal Tribunals in the 21st Century.”² Scholars, judges, practitioners, and luminaries in international criminal law from around the world converged in Washington, D.C., for a day of discussions with some of the brightest minds in the field.

Discussing issues such as standards of justice, developing jurisprudence, court funding, and apprehension of fugitives, the conference was an important dialogue focusing on how to envision the next generation of international criminal justice.³

APPROACHING THE NEXT ERA OF WAR CRIMES TRIBUNALS

TO OPEN THE CONFERENCE, ARYEH NEIER, President of the Open Society Institute and former Executive Director of Human Rights Watch, discussed pressing issues facing international criminal tribunals in the new century. Acknowledging criticisms that justice has been slow at many of today’s tribunals and that many perpetrators have yet to be held accountable, he stated it was important to remember that the last 12 years of international criminal prosecutions have seen great advancements in the development of international criminal law when compared to the half-century since the first international criminal tribunals were established at Nuremberg. Despite great pressure for the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR) and the Special Court for Sierra Leone to finish prosecutions by the end of their mandates, he warned the international community not to leave work undone. According to Neier, when many of these courts were created, those who created them did not think them through thoroughly enough. Today, the realities of closing them have become complicated. Many issues still need resolution, such as what to do with the evidence accumulated in the courts, with the victims and witnesses who have yet to find justice, with detainees who have yet to be tried, and with fugitives who remain at large.

Neier found a need for more hybrid tribunals and regional courts, saying that the International Criminal Court (ICC) cannot be seen as a panacea for all international crimes. The ICC’s temporal jurisdiction limits it to cases that occurred after July 1, 2002, and it lacks access to certain regions of the world. Neier believed that there might be a need to create more hybrid ad hoc courts to deal with specific conflict situations and a need to strengthen existing regional court systems. He saw the lack of regional human rights mechanisms in Asia and the Middle East as especially problematic, and worried that atrocities in those regions could go unpunished. Neier also suggested that if a functioning African Court were established within the African Union, it could give the ICC more leeway to examine issues in other regions of the world.

ESTABLISHING A GLOBAL FUND FOR INTERNATIONAL JUSTICE

Increased funding is necessary for the success of any future international criminal tribunals. At the time the major international criminal tribunals were established, the international community did not adequately focus on funding. To prevent this in the future, Neier envisioned a global fund to ensure sufficient resources for these courts. The money would be donated by various governments, but administered by a technical review panel of international experts in much the same way The Global Fund to Fight AIDS, Tuberculosis and Malaria currently functions. As such, the donor governments would not be the decisionmakers and the system would be less political. Using this model, the funding problems that have plagued so many of the tribunals would be eased. Neier estimated that about \$1 billion would be adequate to administer international criminal justice. Unfortunately, he doubted that there is political will to set up such a fund.

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VICTIM ENGAGEMENT IS ALSO KEY TO ENSURE THAT JUSTICE IS SERVED

Following Neier’s remarks, Diane Orentlicher, an internationally renowned legal scholar and former UN Independent Expert on the Action to Combat Impunity, discussed the impact of these justice systems on the victims. She urged future tribunals to focus significant resources on community outreach that is aimed at engaging victimized communities in the process of justice. Although some outreach has been conducted by these tribunals, there has been more of a focus on informing the population about the tribunal and its work. According to Orentlicher, consulting with people

is key. She emphasized that those who have been victimized need to be involved in both the design and implementation of future courts. If the tribunals do not craft justice that answers to the needs of the community, they will fail to “create a legacy of enhanced justice at home” and will fail to help those communities heal. Orentlicher was struck by how little research has been done on the effects international tribunals have had on the victims of these atrocities. She urged scholars and non-governmental organizations (NGOs) to engage in this kind of study, deeming it essential to the development of more effective international justice mechanisms.

THE FUTURE OF INTERNATIONAL INCITEMENT LAW

JUDGE NAVANETHEM PILLAY, a former ICTR judge who is now a judge in the Appeals Division of ICC, addressed the controversial decision in *Prosecutor v. Nahimana, et al.* (the *Media Case*) and its effects on international incitement law during the conference. In the *Media Case*, two owners of the radio station *Radio-Television Libre des Mille Collines* (RTLM) and the editor-in-chief of the newspaper *Kangura* were found guilty of direct and public incitement to commit genocide for their role in the 1994 Rwandan Genocide.

RTLM was instrumental in stoking the fires of hatred against



The Incitement Panel: Joel Simon, Diane Orentlicher, Judge Navanethem Pillay, and moderator Eric Blinderman.

the Tutsi before and during the 1994 Rwandan Genocide. Outlining the case against the defendants during her remarks in Washington, Judge Pillay cited instances in which RTLM broadcasters called for the killing of specific individuals. Although the radio station owners were not the individuals who made these broadcasts, the trial chamber concluded they were nonetheless guilty of inciting genocide.

The *Kangura* newspaper has also been held out as a major instigator of the genocide in Rwanda. An article in issue No. 9 of the paper called for the Hutu to “wake up, be firm, and be vigilant” against the Tutsi threat. The article, which singled out Tutsi women as spies bent on seducing Hutu men, created “10 Commandments” for dealing with Tutsis. Moreover, the cover of issue No. 26 carried the picture of a machete under the headline, “What weapons should we use to answer the *Inyenzi*⁴ once and for all?”

Commenting on how she and the other judges came to their decision in the case, Pillay said, “We did not invent this jurisprudence.” In holding that hate speech constituted incitement, they cited decisions and reports from European human rights mechanisms, the U.S. Supreme Court, and various international conventions.

EFFECTS ON FREEDOM OF EXPRESSION AND FREEDOM OF THE PRESS

Joel Simon, Deputy Director of the Committee to Protect Journalists (CPJ), joined Orentlicher and Judge Pillay on the panel discussing developments in incitement law. (For Orentlicher’s views on the *Media Case*, see page 1). Simon warned that repressive governments are already using the *Media* judgment to justify infringements on freedom of speech and freedom of the press. He stated that governments are suppressing broadcasts merely by labeling them dangerous. He pointed to an incident in the Democratic Republic of Congo, where the government shut down a local radio station that reported a mine strike. Striking workers were protesting a lack of drinking water and the postponement of national elections. The government claimed that media coverage of the strike highlighted political shortcomings and could incite political violence in other areas.

In Rwanda, the government has been accused of using the *Media* judgment to suppress free speech and to ban journalists. Laws introduced after the release of the *Media* judgment make it a crime to promote “ethnic division” in Rwanda.⁵ Simon said such allegations were used against Rwanda’s only independent newspaper, *Umuseso*.

Simon cautioned that “the suppression of so-called hate speech has become more damaging than the hate speech itself.” Simon feared that the *Media* judgment has blurred the definition of incitement. “Instead of focusing on the suppression of hate speech and incitement to hatred — concepts that are hard to define — it might be more effective to focus on speech intended to incite violence.” Simon pointed out that incitement to violence is clearly defined in the Johannesburg Principles of 1995 as “speech intended to provoke imminent violence and likely to result in such violence.”⁶ He went on to insist that “there must also be a direct and immediate relationship between the expression and the likelihood or occurrence of violence.”

THE ICC WILL TACKLE ONLY THE MOST GRAVE CRIMES UNDER INTERNATIONAL LAW

LUIS MORENO-OCAMPO, CHIEF PROSECUTOR of the ICC, gave the conference’s keynote address. Ocampo explained that one of the greatest challenges facing him as Prosecutor was the lofty and often contradictory set of expectations he faces. Ocampo repeatedly pointed to the limited capacity of the ICC and the Office of the Prosecutor (OTP) as a major constraint on fulfilling these expectations. Size constraints limit the OTP’s ability to investigate every case over which the ICC may have jurisdiction. Ocampo insisted that the largest part of the work in international justice should not be done in The Hague, but on a national level in individual states. He hoped that the ICC investigations and prosecutions would provide guidance to national initiatives.

One of Ocampo’s primary concerns since taking office has been the selection of cases to prosecute. Based on international law and the Rome Statute, Ocampo determined that the decisive factor of a claim is its “gravity.” He said that, thus far, he has measured gravity by calculating the number of deaths in a given situation, but admits that there may be other indicators. He used rape as an example of a crime that might also be useful in assessing the gravity of a situation, but pointed out that it is a crime that is traditionally under-reported and difficult to quantify. Therefore, the number of deaths remains his primary indicator of gravity and was the main factor he used in selecting Northern Uganda, the

Democratic Republic of Congo, and the Darfur region of Sudan as the three cases the OTP is currently investigating.

Ocampo proposed several issues that he hopes the international scholarly community will examine in the near future, including the standards for evaluating justice, the goals of prosecution, and the delicate balance between prosecutions and the peace process. The possibility that war crimes investigations may threaten the peace process in a given area has been particularly difficult for Ocampo, especially due to a lack of consensus among

offered suggestions for future courts.

SECURING THE COOPERATION OF THE INTERNATIONAL COMMUNITY IS ESSENTIAL

Officials from each of the tribunals agreed that the cooperation of the international community is instrumental to apprehending indictees and fugitives. Without the cooperation of states where indictees seek refuge, capture is nearly impossible. None of these tribunals has its own police force and therefore none has the authority to arrest or capture indictees. Each tribunal must rely on officials of the state in which the indictee is located to apprehend them.

The ICTR has taken a three-pronged approach to finding and apprehending fugitives. Mohammed Ayat, the Senior Legal advisor to ICTR Prosecutor Hassan Jallow, explained that the ICTR created a “tracking team,” which was responsible for locating and investigating the indictees. At the same time, the ICTR has been trying to improve relationships with other states. This involves selling the international community on the successes of the court and showing how international “buy-in” will be beneficial for that state. Ayat also highlighted that strong U.S. cooperation and support had led to the third-prong of their apprehension strategy, the Reward for Justice Program. This program, funded by the United States government, offers large monetary rewards for information leading to the capture of the ICTR’s most sought-after fugitives. Since the ICTR was created, over 70 indictees have been captured.

David Tolbert, the Deputy Prosecutor at the ICTY, agreed that the apprehension of fugitives has been a major challenge. He acknowledged a “major sea change” in the past two years, due in large part to greater cooperation from the international community. At present, of the 161 individuals indicted by the ICTY only seven remain at large. Tolbert agreed with Ayat that gaining the cooperation of national governments was one of the greatest challenges in the hunt for fugitives. He cited Serbia and Croatia as particularly difficult, with Serbia having been openly hostile and Croatia, while appearing to be cooperative, having actively led a campaign to block certain prosecutions. In both cases, the pressure of some of the international community’s heaviest hitters was essential to securing the cooperation of these two states. The European Union (EU) threatened to refuse discussions on Croatia and Serbia’s admittance to the Union to ensure compliance. The U.S. has continually tied any hope of each country receiving loans and other financial aid to the respective government’s cooperation with the tribunal.

For the Special Panels for Serious Crimes in East Timor, this kind of international cooperation was glaringly deficient. Siri Frigaard, the Norwegian prosecutor who served as the Deputy General Prosecutor at the Special Panels, spoke to conference attendees about how politics complicated the apprehension of indictees. The Special Panels were created to try Indonesians and East Timorese believed to be responsible for atrocities committed in East Timor in 1999. Indonesia, however, refused to turn any of its citizens over to the Panels for trial and East Timor and the UN seemed unwilling to push the issue. As an example, Frigaard pointed to their attempts to distance themselves from the indictment against the former head of the Indonesian military, General Wiranto. The UN publicly stated that the Panels were part of the East Timorese judicial system and that the UN took no responsi-



Courtesy of the War Crimes Research Office

Keynote speaker Luis Moreno-Ocampo.

legal experts and peace brokers. Many legal scholars regularly insist that the international community should never recognize amnesties because they lead to impunity, maintaining that justice requires that perpetrators be prosecuted. Despite these warnings, diplomats, negotiators, and domestic legislations often include amnesties in peace treaties as a device to coax war criminals to the bargaining table. Even with these concerns, Ocampo remained hopeful that the search for justice and the search for peace were not mutually exclusive.

Ocampo was conservative in his estimates of what the ICC will be able to achieve in the six years that remain in his term as Prosecutor. He anticipated that his office would investigate an additional 6-8 cases at most. Unless he is persuaded otherwise by the writings of legal scholars, he intends to focus on the gravest crimes within the jurisdiction of the Court. He admitted, however, that he could not predict what attitudes might change before then, necessitating a broader focus.

LESSONS LEARNED ON THE EFFECTIVE APPREHENSION OF INDICTEES

REGARDLESS OF THE SIZE, COMPOSITION, OR LOCATION of the court, any future international criminal tribunal will have the difficult task of apprehending indictees. Officials from the Office of the Prosecutor at the ICTY, the ICTR, the Special Court for Sierra Leone, and the Special Panels for Serious Crimes in East Timor shared some lessons they learned in their tenure at their respective courts and

bility for the indictment. At the same time, the Timorese government, which was trying to rebuild relations with Indonesia, pointed out that the Panels were a UN-conceived court and disavowed any connection to the indictment. Without government or UN support, those most responsible for the crimes might never be turned over to the Special Panels. Indeed, to date, none of the Indonesians indicted by the Special Panels have been tried in East Timor and the question of whether the Timorese people will ever receive justice remains in doubt. Frigaard did say that despite the inability to try Indonesian leaders, many of the families of the victims had expressed some satisfaction that by indicting these men the Special Panels had apportioned some blame.

SEALED INDICTMENTS CAN BE AN EFFECTIVE TOOL

Some feel that the use of sealed indictments — indictments that are not made public until moments before an indictee is taken into custody — is unfair. David Crane, the former Chief Prosecutor at the Special Court for Sierra Leone, countered that sealed indictments were instrumental in shattering a suspect's sense of security. Crane used a sealed indictment against former Liberian President Charles Taylor, who stands accused for his part in sponsoring the civil war in Sierra Leone. Crane blamed the international community's apathy for what happens in Africa as significantly contributing to the failure to apprehend Taylor. He called on the international community to pressure Nigeria, which has given Taylor refuge, to turn the indictee over to the Special Court for trial. Crane asserted that by "allowing for an African exception to the Nuremberg principles" of international criminal justice, the world has sent a negative message to Africans. Despite overwhelming votes in the EU Parliament, the U.S. Congress, and the UN Security Council, no state has been willing to expend the political capital necessary to see Taylor brought to justice.

HYBRID COURTS, DOMESTIC WAR CRIMES CHAMBERS, AND REGIONAL CRIMINAL COURTS: ALTERNATIVE MODELS OF ACCOUNTABILITY

The conference concluded with a discussion on the viability of hybrid courts, domestic war crimes chambers, and regional criminal courts. Judge Phillip Rapoza, a former judge with the Special Panels for Serious Crimes in East Timor and a current judge on the Massachusetts Court of Appeals, shared his experiences on the world's first "hybrid" court. Rapoza was on the bench at the end of the Special Panels' mandate and echoed some of Frigaard's observations from earlier in the day. For Rapoza, the Special Panels' greatest obstacles were the failure of the local population, the East Timorese government, and the UN to "take ownership" of the judicial process, as well as the failure of the international community to "buy-in" to the court.

Rapoza believed that many of the Special Panels' problems stemmed from it being the first court of its kind. For Rapoza, four questions remain unanswered with the end of the Panels' mandate. First was the question of who is responsible for the nuts and bolts of the process. When the UN established the United Nations Transitional Authority for East Timor (UNTAET) to manage the territory's transition to statehood, there were no funds set aside specifically for the Panels. Competition for money was fierce amongst the various UNTAET sectors. Because the Panels were within a national court system, East Timor was ultimately responsible for security once it became a sovereign state. The court, however, only obtained one security guard from the government and

he was under-trained, unarmed, and often asleep. There was absolutely no security for victims or witnesses. Despite these major concerns the UN provided no additional security.

A second unanswered question revolved around who was responsible for the results of the Panels. As Frigaard discussed earlier in the day, when the UN or East Timor did not like a decision the Panels made, they distanced themselves from the court, as exemplified in the aftermath of the Wiranto indictment. Rapoza believed that these actions left the Panels isolated and unsupported.

Rapoza's remaining questions involved the closely related issues of who is responsible for the legacy of the Special Panels and who should continue the unfinished process. When the UN Security Council voted to end the mandate of the Special Panels in May 2005, prior to the completion of its work, the question of what happened to the untried cases was left in limbo. Consequently, those responsible for the crimes in East Timor may never be held accountable.

Similar questions of ownership have also been a major stumbling block for the Khmer Rouge Tribunal (KRT) that is being established in Cambodia. As David Scheffer, the former U.S. Ambassador-at-Large for War Crimes, explained, it has taken decades for the international community to agree how the court should be structured and funded. Staffing and funding for the court, which is located within the domestic Cambodian judicial system and uses both Cambodian and international law and employs both domestic and international judges is voluntarily provided by a group of governments. At the time of the conference, however, the KRT was still clarifying issues of judicial training and acceptable standards of due process.

One alternative judicial model that seems to be working well is the War Crimes Chamber of the Court of Bosnia-Herzegovina. Michael Johnson, the Registrar at the Court, thought that Bosnia proved that post-conflict countries can try international war crimes themselves. The ICTY affirmed in the Radovan Stankovic case that Bosnia's War Crimes Chamber was fully qualified to take over such cases and prosecute them under international standards of due process.⁷ The Chamber, which is within the Bosnian judicial system, employs a mix of international staff and Bosnian Serbs, Croats, and Muslims. It is also able to mete out justice at six percent of the annual budget of the ICTY.

CONCLUSION

IN SPITE OF DECADES OF INACTION in the development of international criminal law due to the stalemate of the Cold War, the past 12 years have seen an explosion of international criminal and humanitarian jurisprudence and the variety of venues in which it is prosecuted. The 21st century thus far appears as if it will be even more brutal and bloody than the past century. The international community has a responsibility to challenge these crimes and hold the perpetrators accountable for their actions. As this conference demonstrated, there are still many unanswered questions facing those who are working toward effective international justice. Those in attendance, along with their colleagues around the world, are better prepared to tackle these challenges than they were a dozen years ago. As we look to the next era of international criminal tribunals, there is hope that the wheels of justice will have a positive effect for the victims of the next century's international crimes.

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organizations, models of social change, the role of organizers, leadership development, grassroots fundraising, challenging “isms” (racism, sexism, classism, and heterosexism), accountability, and strategy. Fundraising training topics include: appropriate methods in different approaches to social change; who gives money and why; the role of the organizer and the fundraiser; developing a donor base; and elements of successful fundraising programs.

The SEP is providing organizational support to community organizations and social justice groups involved in rebuilding neighborhoods, towns, and cities along the Gulf Coast of the United States that were severely hit by hurricanes this fall. A list of the organizations that SEP is associated with is available on the organization’s website.

THE MISSISSIPPI WORKERS’ CENTER FOR HUMAN RIGHTS

www.msworkerscenter.org

The Mississippi Workers’ Center for Human Rights was founded in 1996 in Oxford, Mississippi, by human rights activist and attorney Jaribu Hill. The Center’s concept grew out of the Southern Human Rights Organizers’ Conference in September 1996, where activists recognized the need for a new approach to solving the pressing problems facing Mississippi’s low-

wage workers, most of whom are not unionized. The workers had no recourse and needed programs that spoke to the quality of their lives both inside and outside of the workplace. The Center began providing organizing support, legal representation, and training for low-wage, non-union workers in the state of Mississippi shortly thereafter. As an advocacy organization that links legal strategies with organizing strategies, the Center represents an alternative to traditional labor organizations. The Center now has a membership of over 600 workers and supporters.

The Center’s work focuses on two primary campaign areas: “Terror on the Plant Floor,” which assists workers in challenging hate crimes in the workplace (e.g., hanging nooses in public places, Ku Klux Klan terror, and racist graffiti on bathroom walls), and “Dying to Make a Living,” which focuses on environmental justice in the workplace and provides workers with information about chemical poisons and toxic substances. In response to the devastation by the hurricanes this fall, the Center has also established the Mississippi Workers’ Center Southern Relief Fund for Hurricane Katrina Victims. This is a separate fund that is used to provide relief to hurricane victims.

The Human Rights Brief is accepting submissions for the next edition of “NGO Update.” If your organization has an event or situation it

would like to publicize, please send a short description to hrbrief@wcl.american.edu and include “NGO Update” in the subject heading of the message. Please limit your submission to two paragraphs. The Human Rights Brief reserves the right to edit for content and space limitations. **HRB**

Lauren Bartlett, a J.D. candidate at the Washington College of Law, covers NGOs for the Human Rights Brief.

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The bill also amends the Microenterprise for Self-Reliance Act of 2000 to extend availability of the microcredit program to vulnerable populations. It amends the Foreign Assistance Act of 1961 to include military education and training on the protection of vulnerable populations and authorizes the President to provide assistance to programs that protect vulnerable populations during humanitarian emergencies. Finally, the bill expresses Congress’ view that the UN should strengthen the ability of its Department of Peacekeeping Operations to protect civilians, especially women and children, from sexual exploitation by peacekeeping personnel. **HRB**

Ryan Vogel, a J.D. candidate at the Washington College of Law, covers Legislative Watch for the Human Rights Brief.

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ENDNOTES: Curry

¹ The American University Washington College of Law created the War Crimes Research Office (WCRO) in 1995 with funding from the Open Society Institute following a request for research assistance from the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY). In the 10 years since its creation, the WCRO has provided confidential research on discrete issues of international criminal and humanitarian law to the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone, and the Special Panels on Serious Crimes in East Timor, and has provided technical assistance to those working to establish the Khmer Rouge Tribunal in Cambodia.

² Some notable conference participants include Luis Moreno-Ocampo, Prosecutor, ICC; Judge Navanethem Pillay, Appeal Judge, ICC, and former Judge, ICTR; Judge Patricia Wald, former Judge, ICTY; David Scheffer, former U.S. Ambassador-at-large for War Crimes; Judge Phillip Rapoza, former Judge, Special Panels for Serious Crimes in East Timor, and Judge, Massachusetts Court of Appeals; Aryeh Neier, President, Open Society Institute; David Tolbert, Deputy Prosecutor, ICTY; David Crane, former Prosecutor, Special Court for Sierra Leone; Siri Frigaard, former Deputy Prosecutor for Serious Crimes in East Timor and Chief Public Prosecutor for Organized and other Serious Crimes, Norway; Mohammed Ayat, Senior Legal Adviser, ICTR; Michael Th. Johnson, Registrar, War Crimes Chamber, Court of Bosnia and Herzegovina; Robert Pulver, Acting Chief, Criminal Law and Judicial Advisory Unit, UN Department of Peacekeeping Operations; Robert Goldman, for-

mer President, Inter-American Commission on Human Rights; Diane Orentlicher, former UN Independent Expert on Update of the UN Set of Principles for the Protection of Human Rights through Action to Combat Impunity; Susana SáCouto, Executive Director, WCRO.

³ In addition to the topics covered in this article, the conference included panel discussions on “The Relationship between Human Rights and Humanitarian Law and its Impact on the Promotion of International Criminal Justice” and “The Impact of International Criminal Justice Mechanisms on Peace Initiatives,” which are not specifically addressed in this piece due to editorial constraints.

⁴ *Inyenzi*, which means “cockroaches,” was widely understood to mean Tutsis. See Bill Berkley, *The Graves Are Not Yet Full 2* (Basic Books 2001).

⁵ In 2004 Human Rights Watch accused the Rwandan Government of interpreting the law too broadly, enabling officials to label any opposition to the government as inciting “ethnic division.” *Rwanda: Kigali Directs Attorney General to Probe ‘Genocidal’ Groups*, UN IRIN News Agency (Sept. 24, 2004).

⁶ *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, principle 2*, U.N. Doc. E/CN.4/1996/39 (1996).

⁷ See *Prosecutor v. Gotjko Jankovic*, Case No. IT-96-23/2-PT, Judgment (Apr. 19, 2004). Stankovic was a co-defendant in the case.