



The **JUSTICE** *Project*

*International Tribunals and Procedures
to end impunity for
Genocide, War Crimes, and Crimes Against Humanity*

**The Justice Project:
International Tribunals and Procedures to end Impunity for Genocide, War
Crimes, and Crimes Against Humanity**

The International Court of Justice
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Universal Jurisdiction
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International Criminal Court
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United Nations Tribunals for Genocide, War Crimes and Crimes Against Humanity
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*Law and Protection During Conflict:
Introduction to International Humanitarian Law*
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U.S. Ratification of International Human Rights Treaties
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Preface

At World Without Genocide, one of our major areas of emphasis is to educate about genocides and other mass atrocities that have occurred in the past and those that are taking place today. People often know about the crises, but are less familiar with how these heinous crimes can be addressed through international law.

Although trials and punishment for the crimes can never truly create justice after massive social destruction and upheaval, retributive justice provides irrefutable documentation of the truth; opportunities for survivor victims and witnesses to tell their stories with dignity and credibility; strong deterrence for committing the crimes; and a path for a community's healing and reconstruction. Of great significance is the effort to end impunity for terrible crimes perpetrated against innocent people based solely on who they are.

This volume highlights five ways that international law and retributive justice attempt to end impunity for the world's worst crimes: prosecutions at the United Nations International Court of Justice, the International Criminal Court, United Nations *ad hoc* tribunals, the use of universal jurisdiction, and the evolving body of International Humanitarian Law. Each chapter provides information about landmark trials and the contributions to international law.

We begin this volume with the texts of the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide, two foundational documents that shape international law and the aspirations for peace and dignity for all.

I hope that this material will be interesting, insightful, and useful to scholars and others committed to justice.

A handwritten signature in black ink that reads "Elmyr Kennedy". The signature is written in a cursive, flowing style.

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The Universal Declaration of Human Rights
Passed by the United Nations on December 10, 1948



Article 1.

All human beings are born free and equal in dignity and rights.

Article 2.

Everyone can claim the following rights, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

Article 3.

Everyone has the right to life, liberty and security of person.

Article 4.

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5.

No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.

Article 6.

Everyone has the right to recognition everywhere as a person before the law.

Article 7.

All are equal before the law and are entitled to equal protection of the law.

Article 8.

Everyone has the right to legal remedy when the rights in one's own country are not respected.

Article 9.

No one shall be subjected to arbitrary arrest, detention, or exile.

Article 10.

Everyone is entitled to a fair and public hearing by an independent and impartial tribunal.

Article 11.

Everyone charged with an offense is presumed innocent until proved guilty and has the right to a defense.

Article 12.

Everyone has the right to the protection of the law against such interference or attacks.

Article 13.

Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including one's own, and to return to one's country.

Article 14.

Everyone has the right to seek and to enjoy in other countries asylum from persecution.

Article 15.

Everyone has the right to a nationality, cannot be arbitrarily deprived of nationality, and cannot be denied the right to change nationality.

Article 16.

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to establish a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses.

Article 17.

Everyone has the right to own property alone and with others. No one shall be arbitrarily deprived of their property.

Article 18.

Everyone has the right to freedom of thought, conscience, and religion, and to manifest this in teaching, practice, worship, and observance.

Article 19.

Everyone has the right to freedom of opinion and expression.

Article 20.

Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.

Article 21.

Everyone has the right to take part in their country's government. Elections shall be by universal and equal suffrage and by secret vote or by free voting procedures.

Article 22.

Everyone has the right to social security and is entitled to economic, social, and cultural rights indispensable for dignity and personal development.

Article 23.

Everyone has the right to work, to free choice of employment, to favorable work conditions, to protection against unemployment, and to equal pay for equal work. Everyone has the right to form and to join trade unions.

Article 24.

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic paid holidays.

Article 25.

Everyone has the right to a standard of living adequate for health and well-being, including food, clothing, housing and medical care, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood.

Article 26.

Everyone has the right to education. Education in the elementary stages shall be free and compulsory. Higher education shall be equally accessible to all on the basis of merit.

Article 27.

Everyone has the right freely to participate in the cultural life of the community.

Article 28.

Everyone is entitled to a social and international order in which the rights in this Declaration can be fully realized.

Article 29.

In the exercise of rights and freedoms, everyone shall be subject only to limitations determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others. These rights and freedoms may not be exercised contrary to the purposes and principles of the United Nations.

Article 30.

Nothing in this Declaration may be interpreted as implying for any State, group, or person any right to engage in any activity or to perform any act aimed at the destruction of any rights and freedoms set forth herein.

Convention on the Prevention and Punishment of the Crime of Genocide
Passed by the United Nations on December 9, 1948



The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

Article 1. The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article 2. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 3. The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article 4. Persons committing genocide or any of the other acts enumerated in **Article 3** shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article 5. The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in **Article 3**.

Article 6. Persons charged with genocide or any of the other acts enumerated in **Article 3** shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article 7. Genocide and the other acts enumerated in **Article 3** shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article 8. Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in **Article 3**.

Article 9. Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in **Article 3**, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article 10. The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article 11. The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly. The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations. After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 12. Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article 13. On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a procès-verbal and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article 11. The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession. Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article 14. The present Convention shall remain in effect for a period of ten years as from the date of its coming into force. It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period. Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article 15. If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article 16. A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General. The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article 17. The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following: (a) Signatures, ratifications and accessions received in accordance with article 11; (b) Notifications received in accordance with article 12; (c) The date upon which the present Convention comes into force in accordance with article 13; (d) Denunciations received in accordance with article 14; (e) The abrogation of the Convention in accordance with article 15; (f) Notifications received in accordance with article 16.

Article 18. The original of the present Convention shall be deposited in the archives of the United Nations. A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article 11.

Article 19. The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

The International Court of Justice

Jacob Simpson, Research and Advocacy Associate

The International Court of Justice (ICJ, the Court, or the World Court) is one of the oldest venues of international justice operating in the world today. The ICJ is housed at the Peace Palace in The Hague, Netherlands. The Hague is also the home city to the International Criminal Court, and because of this, people often confuse these two distinct courts. In this essay, we look at the history of the ICJ; its mechanisms, the structures through which it operates, and the Court's jurisdiction. By understanding how the Court operates within the field of international justice, we then look at how it has (and has not) applied justice to one of the most widely condemned international crimes: *genocide*.

The Peace Palace



The Hague, Netherlands



Origins

The ICJ was officially established after World War II, yet its origins trace back to the start of the 20th century. In 1899, at an international peace conference, global powers began calling for a permanent court to settle non-violent disputes between states.¹ This meeting resulted in the establishment of the *Permanent Court of Arbitration*, which was based in The Hague. There was much disagreement over how the Permanent Court of Arbitration would select judges or find cases, and after a second meeting in 1907, global powers were still unable to come to an agreement to enable the Court's effective continuation.² Although the *idea* of an international court was widely supported, there was no agreement on the *mechanisms* of its operation.

After global powers failed to reach an agreement in 1907, further decisions about an international court of arbitration took a back seat to the two world wars, which halted the negotiation process surrounding the court's functioning. Despite this delay, the global conflicts that dominated the early 20th century further cemented the need for international justice, both in terms of criminal prosecution for violations of international law and for non-violent and unbiased dispute resolution between conflicting states. After the end of World War II these needs resulted in the establishment of the Nuremberg trials, which were *ad hoc* courts established only to adjudicate crimes perpetrated during World War II, and in the evolution of the Permanent Court of Arbitration into the International Court of Justice.

¹ <https://www.icj-cij.org/en/history>

² *Ibid.*

In April 1945, representatives from 44 countries gathered in Washington, D.C. to draft a proposal for a new international court. The proposal was submitted to the San Francisco conference, a two-month-long process that resulted in the United Nations Charter. With the help of the postwar demand for international justice, the proposal for the court was codified in the United Nations Charter, and in April 1946 the International Court of Justice was officially established, hearing its first case a year later.³

There are two important conclusions from the origin of the ICJ that shine a light on how the court has evolved in relation to the crime of genocide:

(1) The development of international justice is slow. States almost universally recognized the need for an international court, yet it took nearly fifty years for the court's mechanisms to become codified.

(2) The ICJ was created by the UN Charter, meaning that it is subject to the laws and practices of the United Nations. The connection with the United Nations is clear within the court's jurisdiction as well as within the cases of genocide that have been brought before the court.

Jurisdiction and Court Mechanisms

The ICJ is a court of arbitration. This means that the court exists to decide which side the law falls on in a dispute. The ICJ **does not** exist to impose international law upon the world, it does not have any enforcement mechanisms, and unlike the International Criminal Court, the ICJ cannot open a case without first being asked to do so. Simply put, the ICJ is a body to settle a dispute over international law between two states.

There are two ways that the ICJ gains jurisdiction over a dispute pertaining to international law. First, the Court can pass judgments on the implications of international law for disputes that are "submitted by states against another state." These cases are known as *contentious proceedings*.⁴ This means that states are not able to bring legal complaints against individuals who have violated international law, and the court can only rule on the legality of a state's actions if a second state submits a case to the court. These types of cases make up the majority of the ICJ's caseload. Secondly, the court "can give advisory opinions on legal questions at the request of the organs of the United Nations." These cases are known as *advisory proceedings*.⁵ This means that the court must interpret the implications of international law at the request of a predesignated international body. One key take-away from the court's two-fold jurisdiction is that, in order for any case to come before the court, an appeal for judgment must first be submitted, meaning that the court cannot address an issue of international law without first being asked to do so.

For example, an advisory proceeding could be initiated by the UN General Assembly if needed to resolve a question of international law. The court would review international law and apply relevant law to the situation in question. For contentious proceedings, a state would ask the court to settle a dispute over international law with another state. Several examples of contentious cases are given below.

In either case, once the appeal is submitted, the court must determine if it does, in fact, have jurisdiction. The court must determine if (1) The parties to the dispute mutually agree to submit their dispute to the court, (2) Both the parties to the dispute are signatories to a treaty which details the ICJ as the venue of dispute resolution, and (3) Both states are party to the UN convention being cited in the

³ <https://www.icj-cij.org/en/history>

⁴ <https://www.icj-cij.org/en/jurisdiction>

⁵ Ibid.

claim, and have thus agreed to ICJ jurisdiction for all conventions and international treaties ratified by both states.⁶ Essentially there has to be an issue of international law that is being disputed, and both parties must consent to ICJ jurisdiction to resolve the dispute in relation to the specific law invoked in the appeal to the court.

Once the court determines that it holds jurisdiction, the case proceeds to trial, where 15 judges selected by the UN General Assembly will hear arguments from both sides before issuing a ruling. The judges each serve 9-year terms, and they are nominated by countries that are party to the ICJ statute.

The ruling is often thought of as a recommendation based in international law because there is no mechanism to enforce the court's decision.

The best way to understand the processes of the ICJ is to look at a case.

The Corfu Channel Case

The Corfu Channel case was the first case brought to the ICJ. In 1946, British ships received fire from the Albanian shore for passing through Albanian territorial waters in the Corfu Channel. A month later, two British ships were struck by Albanian mines placed throughout the Corfu Channel. The mines killed 46 British soldiers and destroyed one of the British ships. In May 1947, the United Kingdom submitted an application to the ICJ demanding reparations for the destroyed ship and loss of life, arguing that British passage through the Corfu channel was protected by international law and that the Albanian attacks constituted an excessive use of force.⁷

The Corfu Strait



The court determined that it had jurisdiction over the dispute based on Article 36, Paragraph 1 of the ICJ statute. The judges determined that Albania had informally submitted to the Court's jurisdiction by (1) participating in written proceedings in response to Britain's claim on the court, and (2) by being party to the ICJ statute.⁸

⁶ <https://www.icj-cij.org/en/how-the-court-works>

⁷ <https://www.icj-cij.org/files/case-related/1/001-19490409-JUD-01-00-EN.pdf>

⁸ <https://www.icj-cij.org/files/case-related/1/001-19490409-JUD-01-00-EN.pdf>

Once it was determined that the court had jurisdiction, Albania and the United Kingdom agreed that the court must answer these two questions: (1) Did the United Kingdom violate Albanian sovereignty? and if not, (2) was Albania responsible for the damages to British ships?⁹

The court ruled that because the Corfu Channel was an international strait, the United Kingdom did not violate Albania's sovereignty by passing through their territorial waters. Additionally, since the incident occurred during a time of peace, the United Kingdom further maintained the right of innocent passage, meaning that they did not have to be authorized by Albania to pass through the strait. The court also found that, based on the mines' location in heavily-monitored Albanian territorial waters, Albania must have had knowledge of the mines' existence. This meant that the court found Albania responsible for the damages done to British ships.

Albania refused to participate in the compensation proceedings. The Court ruled that Albania must pay £843,000 to the United Kingdom, today's equivalent of roughly 22.5 million euros. The judgment remained unpaid for decades until the two countries settled for a smaller amount in 1996.

Cases like the Corfu Channel case exemplify the vast majority of disputes brought before the ICJ. But how can the court address instances of genocide, where international law is abundantly clear?

Genocide at the ICJ

For most of its history, the ICJ has only dealt with disputes like the one presented in the Corfu Strait case. However, in 1996 the court addressed the crime of genocide for the first time when the country of Bosnia and Herzegovina brought a case against Serbia and Montenegro.

Bosnia and Herzegovina v Serbia and Montenegro

In 1996, the Republic of Bosnia and Herzegovina ('Bosnia') filed a case against Serbia and Montenegro ('Serbia'; at the time a single republic, subsequently dissolved in 2006 into two separate states) alleging that Serbia had violated Article IX of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'). Bosnia alleged that the Srebrenica massacre, among other historical acts, was orchestrated and perpetrated by the Serbian state.

The ICJ found that the court had jurisdiction over the case, as both states were party to the Genocide Convention. Neither state had opted out of Article IX of the Convention which states that "disputes between the contracting parties relating to the interpretation, application, or fulfilment of the present Convention, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."¹⁰ It thus fell upon the court to determine two points: (1) Do the alleged events constitute genocide as codified in the Convention, and if so, (2) to what extent is Serbia responsible for genocidal acts perpetrated against Bosnian populations?

Balkans Regional Map



⁹<https://heinonline.org/HOL/Welcome?message=Please%20log%20in&url=%2FHOL%2FPage%3Fhandle%3Dhein.journals%2Fstflr1%26id%3D676>

¹⁰ https://www.matrixlaw.co.uk/wp-content/uploads/2016/03/22_04_2015_09_30_13_Article-IX-matrix.pdf

After several years of arguments regarding a host of violent offenses, the court concluded in 2007 that the Srebrenica massacre was, indeed, genocide, and that the acts “were committed with the specific intent to destroy, in part, the group of the Muslims of Bosnia and Herzegovina as such.”¹¹ Now the court had to determine Serbia’s culpability and if reparations were legally justified.

The court found, by a vote of 13-2, the following:

- Serbia had not committed genocide or conspired to commit or incite genocide.
- Serbia had not been complicit in genocide.
- Serbia had violated its obligation to prevent genocide as mandated by the Genocide Convention.
- Finally, Serbia’s failure to comply with the International Criminal Tribunal for the former Yugoslavia (ICTY) also constituted a violation of the Genocide Convention.

Ultimately, this decision means that even though there was insufficient evidence that the Serbian government acted as perpetrators of genocide in Srebrenica, they also did nothing to prevent genocide or to aid in the pursuit of justice after the fact.¹²

The court ordered Serbia’s increased compliance with the ICTY and determined that Serbia’s violations of the Genocide Convention did not warrant payment of compensation to Bosnia.¹³

Even though Serbia was not found to have committed genocide, this case presents a key historical moment for the court in having jurisdiction over cases of genocide - establishing a precedent for the evolution of the ICJ’s role in relation to crimes of genocide.

The court’s evolution also be tracked by looking at the second genocide case submitted to the court: *The Gambia v. Myanmar*.

The Gambia v. Myanmar

The case between Myanmar and Gambia marks a significant evolution for adjudicating the crime of genocide at the ICJ. Gambia filed a case against Myanmar in 2019 alleging that Myanmar was violating their obligations under the Genocide Convention by committing genocide against the Muslim Rohingya population living in western Myanmar. The case is ongoing (as of Winter 2021) and it will most likely take years to resolve.

However, there have been several important developments within the initial proceedings.

In 2019, Gambia requested **provisional measures** to be enacted against Myanmar, which means that the court has found “an ongoing legal violation” that will create increased harm to the Rohingya during the court proceedings. Provisional measures in this case would require Myanmar to stop all acts that could be seen as violations of the Genocide Convention and to work actively to stop all militias and paramilitary groups from enacting further violence in western Myanmar. In January 2020, the court found that there was sufficient evidence to justify provisional measures against Myanmar. This does not

¹¹ <https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>

¹² <https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>

¹³ Ibid.

mean that Myanmar's leaders are guilty of committing genocide, but it does place significant legal pressure on the country to cease legal violations during the development of court proceedings.¹⁴

This case is important for two additional reasons.

First, Gambia is not directly impacted by the genocide of the Rohingya. In the Bosnian case, the country filing the appeal was representative of the victimized population. The Rohingya do not hold statehood, and thus would not be able to bring the case against Myanmar to the ICJ. *The Gambia chose to pursue justice on behalf of the Rohingya, but why?*

Gambia is supported by the Organization of Islamic Cooperation, who are mobilized by the systematic destruction of a Muslim population due in part to their religious identity. Additionally, Gambia's prosecution is being led by Minister of Justice Abubacarr M. Tambadou, who visited a Rohingya refugee camp in Bangladesh. What he witnessed recalled similar testimonies he had heard during his decade-long experience prosecuting perpetrators of the Rwandan genocide as a member of the United Nations International Criminal Tribunal for Rwanda.

Abubacarr M. Tambadou

Lead Prosecutor in Gambia v. Myanmar



Fatou Bensouda

Former Chief Prosecutor at the ICC



However, there is a state-based reason as well for Gambia's move to stand up against genocide. Gambia suffered under a 22- year brutal military dictatorship that finally ended in 2016. Since then, the country has been at the forefront of international justice throughout the world, motivated by the inaction of others during their long struggle. Coincidentally, the lead prosecutor for the International Criminal Court at this time, Ms. Fatou Bensouda, is also from Gambia, and the state demonstrates an empowering approach to international justice by advocating on behalf of others.¹⁵

The second reason that this case is important is through the precedent set by the provisional measures. By ordering Myanmar to actively pursue the standards set by the Genocide Convention before the trial began, the court is proactively impacting the persecution of the Rohingya. This step shows how the

¹⁴ <https://www.asil.org/insights/volume/24/issue/2/what-does-icj-decision-gambia-v-myanmar-mean>

¹⁵ <http://www.ipsnews.net/2019/12/story-behind-gambias-lawsuit-myanmar-rohingya-genocide/>

court is evolving in relation to the sometimes frustratingly- long duration of international trials, protecting impacted populations without sacrificing the needed due diligence of the court.

The case between Bosnia and Serbia, and Gambia's lawsuit against Myanmar, illustrate that the practices of trying genocide at the ICJ have changed. A precedent of protecting vulnerable populations on behalf of international justice has been established, and the court is becoming a venue that may increasingly address instances of genocide and mass violence.

Why haven't more cases of genocide been brought to the ICJ?

As one of the oldest venues of international justice, it appears surprising that only two cases of genocide have been brought before the court. This may be because the victims of genocides are almost never states. It is people, not states, who are typically the victims of state-sponsored violence. This means that the victims do not have the capacity to bring a case forward to the ICJ against a state. In order for the ICJ to pass judgment on a state's culpability in genocide, a third-party state has to bring the case to the ICJ. This had never happened until Gambia filed suit against Myanmar at the end of 2019. Justice evolves slowly, and Gambia's groundbreaking position in relation to the genocide of the Rohingya may change the way that states around the world approach genocide at the ICJ, breaking a trend of bystander states that dominated much of the ICJ history.

The ICJ is an important mechanism of international justice that works in conjunction with the International Criminal Court, other international tribunals, and cases using universal jurisdiction to address the crime of genocide.

Universal Jurisdiction

Kathryn Ust, Research and Legislative Associate

Overview

For a court to hear a legal case, it must have **jurisdiction**. In broad terms, this means that the crime must have occurred in its territory or have been committed by or against one of its citizens.

For the crime of genocide, establishing jurisdiction can be tricky. The perpetrators of genocide are often government officials who will not investigate and prosecute their own actions. Because of the potential for perpetrators to go unpunished, international law has developed mechanisms to hold perpetrators of the world's most heinous crimes accountable.

After the Holocaust, the Allied forces (the US, UK, France, and the Soviet Union) established the International Military Tribunal, the first international criminal court to prosecute war crimes.¹⁶ Since then, the United Nations has formed several *ad hoc* tribunals to prosecute perpetrators of genocides and mass atrocities that occurred in former Yugoslavia, Rwanda, Cambodia, and several other places.¹⁷ However, these tribunals were temporary and were under the administrative control of the UN.

In 2002, the International Criminal Court (ICC) was established. The ICC is the world's only permanent independent court empowered to investigate and prosecute genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁸ The Rome Statute, the ICC's founding document, grants the court jurisdiction over the 123 states that have ratified the Statute to date (2021).¹⁹ The United Nations Security Council can also grant the Court jurisdiction over a non-member state through a resolution.²⁰

The International Criminal Court



The ICC and various UN tribunals have greatly advanced efforts towards justice, but their jurisdictional limits prevent the courts from prosecuting perpetrators to the fullest extent of the law. Under the

¹⁶ <https://www.ushmm.org/learn/timeline-of-events/1942-1945/international-military-tribunal>

¹⁷ <https://research.un.org/en/docs/law/courts>

¹⁸ <https://www.icc-cpi.int/about/how-the-court-works>

¹⁹ *Ibid.*

²⁰ *Ibid.*

concept of universal jurisdiction, however, the ability to investigate a crime does not depend on where the crimes were committed or on the nationality of the perpetrator or the victim.²¹ National courts can prosecute perpetrators of grave crimes, including genocide, crimes against humanity, and war crimes.²² Universal jurisdiction recognizes the collective need to end impunity for perpetrators of the world's worst crimes.

The Founding

Universal jurisdiction arises from two primary sources in international law: customary law and international agreements or treaties. Universal jurisdiction first emerged as part of customary law in the 18th century to try pirates.²³ Customary law evolves when nations exercise universal jurisdiction over new crimes, and other nations consistently accept the exercise of jurisdiction.²⁴ Universal jurisdiction has expanded under customary law to include the crimes of slave trading, war crimes, and genocide, in addition to piracy.²⁵

Universal jurisdiction is also established through international treaties. This is the predominant means through which universal jurisdiction is exercised today. Most treaties codify the universal jurisdiction principles developed through customary law.²⁶ But unlike customary law, which binds all nations, international agreements only bind the parties to the treaty.²⁷

The 1949 Geneva Conventions were the first international treaties to codify universal jurisdiction into international law.²⁸ The Geneva Conventions consist of four treaties that regulate armed conflict and seek to protect wounded and sick soldiers, prisoners of war, and civilians.²⁹ The 196 signatories to the Geneva Conventions are obligated under the treaty to use universal jurisdiction to prosecute grave breaches.³⁰ These include willful killing, torture or inhuman treatment, including biological experiments, and willfully causing great suffering or serious injury to body or health, among others.³¹

Other treaties that obligate state parties to use universal jurisdiction include the 1954 Hague Convention, the 1984 Convention Against Torture, and the 2006 Convention Against Enforced Disappearance, which is not yet in force.³²

In the last 15 years, the nations of Australia, Austria, Belgium, Canada, Denmark, France, Finland, Germany, Norway, The Netherlands, Spain, Senegal, Sweden, Switzerland, the United Kingdom, and the United States have enacted their own universal jurisdiction legislation.³³

²¹ <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction#>

²² Ibid.

²³ Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, MSU-DCL J. Int'l L. (2000).

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction#>

²⁹ <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>

³⁰ Ibid.

³¹ <https://www.icrc.org/en/doc/resources/documents/faq/5zmgf9.htm>

³² <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction#>

³³ Ibid.

International invocation of universal jurisdiction is on the rise. From 2008 to 2017 the world saw 815 cases of universal jurisdiction, twice as many as in the previous twenty years.³⁴ Of those 815 cases, 72 of them have been completed to date, with the majority resulting in convictions.³⁵

Universal jurisdiction does not rival international courts. Rather, it helps to fill in the holes of existing international justice mechanisms. Many human rights scholars see the increasing use of universal jurisdiction as an indicator of a heightened global commitment to pursue international justice, as opposed to a symbol of failing international courts.³⁶

The Jurisdiction

Generally, universal jurisdiction allows states to investigate and prosecute perpetrators of grave crimes regardless of where the crime was committed or the nationality of the perpetrator or the victim. However, jurisdiction varies depending on whether universal jurisdiction is exercised through customary law, international treaty, or state legislation.

Courts rely on customary law the least, but it arguably provides the most expansive jurisdiction. Courts are not limited to prosecuting perpetrators from treaty signatory states. Anyone can be investigated and prosecuted. Customary law covers the crimes of genocide, war crimes, slave trading, and piracy.³⁷ But because the crimes are not codified in international law, courts often prefer to rely on international agreements or state legislation to prosecute perpetrators.

Universal jurisdiction is most-commonly applied through treaties or, most recently, state (i.e., national government) legislation. These statutes define the crimes that can be prosecuted and the limits, if any, to universal jurisdiction. When a nation relies on an international treaty providing universal jurisdiction, the court only has jurisdiction over the signatories to the treaty and the crimes covered by the treaty.³⁸

Because of the jurisdictional limits associated with international treaties, many states have enacted their own legislation to give expanded jurisdiction to their national courts. State legislation most commonly provides universal jurisdiction over genocide, crimes against humanity, and war crimes.

In 2002, Germany enacted the Code of Crimes against International Law (CCAIL), the most expansive universal jurisdiction laws in Europe.³⁹ Unlike many national statutes, the CCAIL does not require a German connection to the international crime.⁴⁰ Germany's broad interpretation of universal jurisdiction under the CCAIL has "revolutionized war crimes prosecution" and made the country a world leader in ending impunity.⁴¹ As of winter 2021, Germany is pursuing 110 cases under universal jurisdiction – the most in the world.⁴²

³⁴ <https://www.economist.com/international/2021/01/02/laws-to-catch-human-rights-abusers-are-growing-teeth>

³⁵ Ibid.

³⁶ Ibid.

³⁷ Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, MSU-DCL J. Int'l L. (2000).

³⁸ Ibid.

³⁹ <https://www.ijmonitor.org/2019/04/how-germany-is-leading-the-way-for-accountability-for-crimes-in-syria/>

⁴⁰ https://www.hrw.org/sites/default/files/related_material/IJ0914German_0.pdf

⁴¹ <https://www.npr.org/2019/09/24/754863320/how-europe-has-become-the-epicenter-for-syrian-war-crimes-cases>

⁴² <https://www.economist.com/international/2021/01/02/laws-to-catch-human-rights-abusers-are-growing-teeth>

Major Cases

The Holocaust

The prosecution and conviction of Adolf Eichmann, a senior Nazi official, was one of the first cases to rely on universal jurisdiction to prosecute crimes against humanity. Eichmann was responsible for carrying out Hitler's Final Solution, the murder of Europe's Jews. He identified millions of Jews across occupied Europe and arranged their deportation to Auschwitz and other extermination camps.⁴³ Some six million Jews and members of other minority groups were murdered because of Eichmann's actions.⁴⁴ He fled to Argentina and was never tried at Nuremberg. In 1960, Israeli secret service agents arrested Eichmann and took him to Israel to stand trial.⁴⁵

Israeli Supreme Court during the Trial of Adolf Eichmann



The Israeli court indicted Eichmann for crimes against the Jewish people, crimes against humanity, war crimes, and belonging to a hostile organization.⁴⁶ Eichmann's defense rested on jurisdiction. He argued that the Israeli court did not have jurisdiction to try the case because the crimes were committed in Germany, Eichmann was Austrian, and he was arrested in Argentina.⁴⁷

The Israeli Supreme Court rejected this argument, citing the strong foundation in international law granting national courts universal jurisdiction over crimes against humanity and war crimes.⁴⁸ The Court explained that universal jurisdiction authorizes national courts to act as agents of the international community by enforcing international law.⁴⁹ After finding jurisdiction, the Israeli Supreme Court convicted Eichmann on all counts.

The Eichmann case was seminal in many respects. Not only did the Court's decision affirm the legitimacy of universal jurisdiction; it also established the legal procedure required in such cases. The Israeli Supreme Court rejected arguments that a national court exercising universal jurisdiction must offer to

⁴³ <https://www.amnesty.org/download/Documents/24000/ior530132012en.pdf>

⁴⁴ Ibid.

⁴⁵ <https://www.britannica.com/biography/Adolf-Eichmann>

⁴⁶ <https://trialinternational.org/latest-post/adolf-eichmann/>

⁴⁷ Ibid.

⁴⁸ <https://www.amnesty.org/download/Documents/24000/ior530132012en.pdf>

⁴⁹ <https://www.amnesty.org/download/Documents/24000/ior530132012en.pdf>

extradite the suspect to his home country before proceeding.⁵⁰ It also rejected claims that the state where the crime occurred had legal priority over other states.⁵¹ These principles are followed by courts applying universal jurisdiction today.

Chile

On October 16, 1998, the former President of Chile, Augusto Pinochet, was detained in London.⁵² It was the first time a former head of state was arrested based on universal jurisdiction, and it set a precedent that advanced international justice efforts around the world.⁵³ Pinochet was a brutal dictator responsible for torturing, murdering, and forcibly disappearing Chilean citizens.⁵⁴

In 1996, lawyers relying on universal jurisdiction filed complaints in Spain against the military leaders of Chile, including Pinochet. Two years later, after learning of Pinochet's arrival in the UK, the Spanish court issued a warrant for Pinochet's arrest and extradition to Spain to stand trial.⁵⁵ The next day, Pinochet was arrested. Pinochet challenged the arrest, claiming that he was immune from arrest and extradition as a former head of state.⁵⁶

The House of Lords, Britain's highest court, rejected Pinochet's immunity argument.⁵⁷ In its initial opinion, which was later annulled, the court ruled that head of state immunity only applies to functions of a head of state, and international crimes like torture are not a "function" of a head of state.⁵⁸ The Lords' second judgment was more limited, holding that Pinochet could not claim immunity from torture because Britain and Chile had ratified the UN Convention against Torture.⁵⁹ A British magistrate judge ruled that Pinochet could be extradited to Spain.⁶⁰ However, Pinochet was deemed unfit to stand trial and was never extradited.⁶¹ Although Pinochet was never tried in Spain, his case was historic. It proved that a former head of state can be arrested and tried for crimes against humanity committed in an official capacity. The case led to prosecutions of other heads of state, including former Guatemalan dictator Efraín Ríos Montt.

Guatemala

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² <https://www.amnesty.org/en/latest/news/2013/10/how-general-pinochets-detention-changed-meaning-justice/>

⁵³ Ibid.

⁵⁴ <https://www.hrw.org/report/1998/11/01/pinochet-precedent/how-victims-can-pursue-human-rights-criminals-abroad>

⁵⁵ <https://www.amnesty.org/en/latest/news/2013/10/how-general-pinochets-detention-changed-meaning-justice/>

⁵⁶ <https://www.hrw.org/report/1998/11/01/pinochet-precedent/how-victims-can-pursue-human-rights-criminals-abroad>

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

Rios Montt on Trial



In 1982, in the midst of the Guatemalan Civil War, General Efraín Ríos Montt took power following a coup d'état.⁶² The new dictator initiated a scorched-earth policy. His army moved through rural villages, torturing and slaughtering civilians, predominately indigenous Mayans, and burning villages, crops, sacred places, and cultural symbols.⁶³ Montt was only in power for one year,⁶⁴ but in that year, 200,000 Mayan people were killed or forcibly disappeared and 440 Mayan villages were destroyed, marking the most violent period of the conflict.⁶⁵

In 1999, survivors who were frustrated by the delays, obstruction, and harassment occurring in Guatemalan courts filed a complaint in Spain charging Ríos Montt and other military and government officials with genocide, torture, and crimes against humanity.⁶⁶ After a lower court determined it did not have jurisdiction, the Spanish Constitutional Court reversed that decision, holding that universal jurisdiction allowed Spanish courts to hear the case.⁶⁷ In 2006, an arrest warrant was issued for Ríos Montt and the other co-defendants, but Guatemala refused to extradite the accused.⁶⁸ A Spanish trial never occurred because under Spanish law, a defendant must be present for court proceedings.⁶⁹

But the Spanish proceedings were not in vain. They helped form a case in Guatemala. In 2012, Ríos Montt was indicted in his home country for genocide and crimes against humanity.⁷⁰ He was convicted on both charges and sentenced to 80 years in prison.⁷¹ The ruling was historic. It was the first conviction of genocide handed down by a national court against a former head of state.⁷² It was also Guatemala's first acknowledgement that genocide occurred.⁷³

⁶² <https://trialinternational.org/latest-post/efrain-rios-montt/>

⁶³ <https://hnh.org/library/research/genocide-in-guatemala-guide/#>

⁶⁴ <https://trialinternational.org/latest-post/efrain-rios-montt/>

⁶⁵ Ibid.

⁶⁶ <https://www.amnestyusa.org/pdfs/websec6july2008.pdf>

⁶⁷ <https://trialinternational.org/latest-post/efrain-rios-montt/>

⁶⁸ Ibid.

⁶⁹ <https://www.amnestyusa.org/pdfs/websec6july2008.pdf>

⁷⁰ <https://trialinternational.org/latest-post/efrain-rios-montt/>

⁷¹ Ibid.

⁷² <https://cja.org/what-we-do/litigation/the-guatemala-genocide-case/?list-type&type=83>

⁷³ Ibid.

However, the conviction was overturned just weeks later.⁷⁴ In 2017, a Guatemalan court ordered a new trial against Rios Montt for genocide and crimes against humanity.⁷⁵ Rios Montt died the next year without a final verdict being reached.⁷⁶

Rwanda

In 1994, 800,000 ethnic Tutsis and moderate Hutus were killed in just 100 days. The Hutu-led government and military of Rwanda incited militias and civilians alike to take to the streets and murder their Tutsi neighbors.⁷⁷ After the genocide, the UN established the International Criminal Tribunal for Rwanda (ICTR) to prosecute high-ranking military and government leaders, politicians, businessmen, and religious, militia, and media leaders.⁷⁸ Of the 93 individuals indicted, 62 were convicted and sentenced.⁷⁹ The Rwandan government also initiated proceedings against lower-level perpetrators. Because so many Rwandans were involved in the genocide, over 100,000 genocide suspects were awaiting trial by the year 2000.⁸⁰

Universal jurisdiction has been employed to supplement the ICTR and national proceedings, allowing courts in Belgium, France, Netherlands, Germany, Finland, Sweden, and Canada to hold perpetrators accountable.

In 2016, a French court relying on universal jurisdiction convicted Octavien Ngenzi and Tito Barahira, former Rwandan mayors, of genocide and crimes against humanity.⁸¹ The two mayors carried out “massive and systematic summary executions,” including the violent murders of 2,000 people seeking refuge in a church.⁸² The men were sentenced to life in prison—the harshest genocide sentence delivered by a French court.⁸³ Ngenzi and Barahira appealed the verdict, but the French Supreme Court upheld the ruling in 2019.⁸⁴

In December 2019, a Belgian court exercised universal jurisdiction to hand out its first genocide conviction.⁸⁵ The court found Fabien Neretse, an influential businessman who founded and financed a pro-Hutu militia in his village, guilty of genocide and war crimes.⁸⁶ Neretse was found guilty of war crimes for ordering the murder of eleven civilians and countless other unidentifiable victims and for sending the militia and government to execute his Tutsi neighbors, who planned to flee Rwanda.⁸⁷ Neretse was well-known and often appeared at rallies, urging Hutus to slaughter their Tutsi neighbors.⁸⁸

⁷⁴ Ibid.

⁷⁵ <https://trialinternational.org/latest-post/efrain-rios-montt/>

⁷⁶ <https://www.nytimes.com/2018/04/01/obituaries/efrain-rios-montt-guatemala-dead.html>

⁷⁷ <https://www.hrw.org/reports/1999/rwanda/Geno4-7-03.htm>

⁷⁸ <https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml>

⁷⁹ <https://unictr.irmct.org/en/tribunal>

⁸⁰ <https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml>

⁸¹ <https://www.theguardian.com/world/2016/jul/06/two-rwandan-mayors-jailed-for-life-over-1994-massacre>

⁸² Ibid.

⁸³ Ibid.

⁸⁴ https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf

⁸⁵ <https://www.france24.com/en/20191220-rwanda-belgium-france-genocide-1994-hutu-tutsi-fabien-neretse-war-crimes>

⁸⁶ <https://www.justiceinfo.net/en/tribunals/national-tribunals/43372-fabien-neretse-found-guilty-genocide.html>

⁸⁷ <https://www.justiceinfo.net/en/tribunals/national-tribunals/43372-fabien-neretse-found-guilty-genocide.html>

⁸⁸ <https://www.france24.com/en/20191220-rwanda-belgium-france-genocide-1994-hutu-tutsi-fabien-neretse-war-crimes>

Based on evidence from these appearances, the Belgian jury found Neretse guilty of genocide. He was sentenced to 25 years in prison.⁸⁹

Liberia

In 1994, the U.S. Torture Victim Protection Act was enacted. The law authorizes federal courts to exercise universal jurisdiction over persons on U.S. territory who are suspected of torture, regardless of where the torture was committed.⁹⁰ In December 2006, the first prosecution under the statute was initiated against Charles “Chuckie” Taylor, the son of former Liberian president Charles Taylor.⁹¹

The charges against Chuckie Taylor stemmed from his role as head of the Anti-Terrorist Unit (ATU) for his father’s administration.⁹² The ATU was initially formed to protect government buildings but was soon employed to quell a growing rebellion.⁹³ Under Chuckie Taylor’s leadership, the ATU carried out extrajudicial killings of civilians and prisoners, rape, abduction, child soldier recruitment, and extensive torture.⁹⁴ Common torture methods included electric shocks to the genitals, burning victims alive, and violent beatings.⁹⁵

On October 30, 2008, Chuckie Taylor was found guilty of six counts of torture⁹⁶ and was sentenced to 97 years in prison.⁹⁷ Taylor appealed his convictions on the ground that the Torture Act impermissibly exceeds the bounds of authority.⁹⁸ On July 15, 2010, the conviction was upheld.⁹⁹ The court concluded that Congress had the authority to criminalize torture and that the Torture Act was enacted constitutionally.¹⁰⁰

Myanmar

In November of 2019, the Burmese Rohingya Organization UK (BROUK) relied on universal jurisdiction to petition an Argentinian court to open an investigation into genocide and crimes against humanity being perpetrated against the Rohingya Muslim minority in Myanmar.¹⁰¹ The complaint names Aung San Suu Kyi and other top military officials for their role in the August 2017 military campaign where at least 10,000 Rohingya were killed and 730,000 fled their homes for safety in Bangladesh.¹⁰²

In the same month that charges were brought in Argentina, The Gambia filed a case before the International Court of Justice (ICJ, also known as the World Court) alleging that Myanmar committed genocide against the Rohingya in violation of the Genocide Convention. The ICJ is the principal court of the UN and has jurisdiction over disputes between states regarding UN treaties.¹⁰³ The Gambia’s case is

⁸⁹ <https://www.justiceinfo.net/en/tribunals/national-tribunals/43372-fabien-neretse-found-guilty-genocide.html>

⁹⁰ <https://www.amnesty.org/en/latest/news/2008/10/chuckie-taylor-convicted-torture-20081031/>

⁹¹ https://www.hrw.org/sites/default/files/related_material/HRB_Chuckie_Taylor.pdf

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ <https://trialinternational.org/latest-post/chuckie-taylor/>

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ <https://www.theguardian.com/world/2019/nov/14/myanmars-aung-san-suu-kyi-faces-first-legal-action-over-rohingya-crisis>

¹⁰² <https://www.npr.org/2020/01/23/798821883/myanmar-must-prevent-genocide-of-rohingya-u-n-court-rules>

¹⁰³ <http://coalitionfortheicc.org/news/20200213/justice-rohingya-what-has-happened-and-what-comes-next>

the first genocide case before the ICJ where the charging party was not directly involved in the genocide.¹⁰⁴ In January 2020, the ICJ ordered Myanmar to prevent genocide against the Rohingya while the court considers the case, which could take years.¹⁰⁵

International Court of Justice in The Hague, Netherlands



Also in November of 2019, the International Criminal Court authorized Prosecutor Fatou Bensouda to open an investigation into the crimes committed against the Rohingya. However, Myanmar is not a party to the Rome Statute, so the ICC's jurisdiction is limited to crimes that occurred in neighboring Bangladesh.¹⁰⁶ The court's investigation will likely focus largely on the crime against humanity of Rohingyas' mass deportation to Bangladesh.

The concurrent cases are unique but not unheard of. Multiple cases were also brought for the atrocities committed in Rwanda and the former Yugoslavia.¹⁰⁷ Initiating separate cases has both advantages and disadvantages. According to a commissioner at the International Commission of Jurists, "Bringing four separate procedures to bear can help ensure that no stone will be left unturned."¹⁰⁸ However, problems can arise if the proceedings involve the same defendants or the same conduct. Courts may compete over access to witnesses and evidentiary records, and due process becomes a concern.¹⁰⁹

Yazidis

A German court brought the first charge of genocide against members of the Islamic State in Iraq and Syria (ISIS) for crimes committed against the Yazidis, a religious minority who have been persecuted by ISIS.¹¹⁰ In 2014, ISIS invaded the Yazidi peoples' homeland, slaughtering upwards of 5,000 Yazidis, mostly men and elderly women, and enslaving 6,000 Yazidis, primarily young women and children.¹¹¹ ISIS members forced Yazidi women and girls into sexual enslavement where they were repeatedly raped and

¹⁰⁴ Ibid.

¹⁰⁵ <https://www.npr.org/2020/01/23/798821883/myanmar-must-prevent-genocide-of-rohingya-u-n-court-rules>

¹⁰⁶ <http://coalitionfortheicc.org/news/20200213/justice-rohingya-what-has-happened-and-what-comes-next>

¹⁰⁷ <https://www.aljazeera.com/news/2019/11/cases-brought-myanmar-deliver-justice-rohingya-191117174800430.html>

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ <https://www.nytimes.com/2020/04/25/world/europe/germany-genocide-trial-iraq-yazidi.html>

¹¹¹ <https://macmillan.yale.edu/news/report-documents-ongoing-persecution-yazidi-community-iraq>

beaten.¹¹² Yazidi boys were indoctrinated and forced to fight for ISIS.¹¹³ The crimes have been deemed one of the 21st century's clearest cases of genocide.¹¹⁴

Female Yazidi Resistance Fighters



Despite the overwhelming evidence of genocide, the ICC has not been able to prosecute the crimes because its two mechanisms for establishing jurisdiction have not been met. First, the ICC cannot base jurisdiction on the crimes being committed by a national of a member state or in the territory of a member state because neither Iraq nor Syria are member states to the ICC. Second, the United Nations Security Council has not adopted a resolution conferring jurisdiction. Additionally, a future UN resolution is unlikely because Russia, one of Syria's closest allies and a permanent member of the Security Council, has vetoed every previous effort for resolutions to grant the ICC jurisdiction over Syria and likely will continue to do so.¹¹⁵

Because the ICC lacks jurisdiction, Yazidi survivors are largely relying on universal jurisdiction to bring their perpetrators to justice. In Germany, universal jurisdiction was employed to bring the first charge of genocide for crimes committed against the Yazidis. The defendant, known only as Taha Al-J., and his wife, Jennifer W., bought a Yazidi mother and her five-year-old daughter as slaves.¹¹⁶ They were subjected to inhumane conditions, including food and water deprivation, humiliation, and torture.¹¹⁷ In 2015, Taha Al-J. chained the five-year-old girl outdoors in heat reaching 122 degrees Fahrenheit and left her to die.¹¹⁸

Taha Al-J has been charged with genocide, crimes against humanity, war crimes, and membership in a terrorist organization.¹¹⁹ His trial began in April of 2020.¹²⁰ His wife was tried on similar charges a year earlier.¹²¹ A decision has not yet been issued.¹²²

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ <https://muse.jhu.edu/article/747390>

¹¹⁶ <https://www.justsecurity.org/69833/first-yazidi-genocide-trial-commences-in-germany/>

¹¹⁷ <https://www.nytimes.com/2020/04/25/world/europe/germany-genocide-trial-iraq-yazidi.html>

¹¹⁸ Ibid.

¹¹⁹ https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf

¹²⁰ <https://www.nytimes.com/2020/04/25/world/europe/germany-genocide-trial-iraq-yazidi.html>

¹²¹ https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf

¹²² Ibid.

Syria

The Syrian Civil War created one of the largest refugee crises of our time. Since the war started in 2011, 12.2 million Syrians have been forced from their homes; 5.6 million Syrians have sought refuge abroad, and 6.6 million Syrians are internally displaced (as of 2020).¹²³ Over half a million people have been killed.¹²⁴ The vast majority of casualties and displacements are attributed to the Syrian government, led by Bashar al-Assad, and Russia, its closest ally.¹²⁵ The Assad regime has used chemical weapons and barrel bombs against its own civilians and has detained, tortured, and murdered thousands of political prisoners.¹²⁶

Syrian Refugees in Hungary



The Commission for International Justice and Accountability (CIJA), an independent non-profit organization funded by Western governments, has amassed significant evidence of the crimes committed by the Syrian government for use at future trials. CIJA has roughly 800,000 pages of political, military, and intelligence documents linking the torture and killing of civilians to the Assad regime.¹²⁷ In addition, CIJA has some 55,000 photos from a military defector who was tasked with photographing the corpses of those tortured and killed in detention.¹²⁸

Even though there is extensive evidence implicating the Syrian government, holding high-ranking officials accountable has proven nearly impossible. Because Syria is not a member state to the ICC, the only way for the court to obtain jurisdiction is by referral from the UN. However, Russia has thwarted UN efforts to refer the case to the ICC.¹²⁹ European courts have had some success in bringing cases against low-level Syrian soldiers and against members of ISIS, but until recently, high-ranking members of the Assad regime have enjoyed impunity.

On April 23, 2020, however, a German court indicted Anwar Raslan, the head of investigations at a branch of Syria's General Intelligence Directorate, for crimes against humanity, murder, rape, and sexual assault.¹³⁰ Raslan was the commander of one of Syria's most notorious detention centers.¹³¹ He oversaw the torture of at least 4,000 detainees by means of brutal beatings, electric shocks, rape, and sexual assault.¹³² At least 58 people died because of the abuses carried out under Raslan's direction.¹³³

¹²³ <https://www.hrw.org/world-report/2019/country-chapters/syria>

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ <https://www.pbs.org/wgbh/frontline/article/how-syrian-war-crimes-are-being-investigated-in-europe/>

¹²⁷ <https://www.npr.org/2019/09/24/754863320/how-europe-has-become-the-epicenter-for-syrian-war-crimes-cases>

¹²⁸ <https://www.hrw.org/report/2015/12/16/if-dead-could-speak/mass-deaths-and-torture-syrias-detention-facilities>

¹²⁹ <https://www.pbs.org/wgbh/frontline/article/how-syrian-war-crimes-are-being-investigated-in-europe/>

¹³⁰ https://www.washingtonpost.com/world/europe/syrian-war-crimes-germany-trial/2020/04/23/9384d1ae-832a-11ea-81a3-9690c9881111_story.html

¹³¹ <https://www.nytimes.com/2020/04/23/world/middleeast/syria-germany-war-crimes-trial.html>

¹³² *Ibid.*

¹³³ *Ibid.*

Raslan is the first high-ranking Syrian official to be tried, and the landmark case against him is the first in the world to address state-sponsored torture in Syria.¹³⁴ The case is monumental not only for these reasons, but also for the German court's reliance on their national universal jurisdiction laws, the CCAIL. The CCAIL interprets universal jurisdiction very broadly and has allowed German courts to prosecute major offenders, including Raslan and Taha Al-J.¹³⁵ Courts relying on treaties or customary law for universal jurisdiction would not have pursued these cases.

According to Stephen Rapp, the former war crimes ambassador-at-large for the U.S. State Department, "Germany is the capital of accountability in the case of Syria and [has] shown . . . it's possible to arrest people and bring them to court."¹³⁶ Germany's case against Raslan may be a turning point in international human rights law, encouraging a broad application of universal jurisdiction and holding perpetrators accountable.

Significant Contributions

Universal jurisdiction has been instrumental in ending impunity for the world's most heinous crimes. And by ensuring that perpetrators will never escape justice, universal jurisdiction is also a tool for preventing atrocities.

The importance of universal jurisdiction is especially apparent for the crime of genocide, where perpetrators are often government officials who clearly will not prosecute themselves. Although the International Criminal Court has greatly facilitated prosecutions of human rights abusers, the Court's limited jurisdiction highlights the need for a broader legal mechanism to guarantee justice.

Universal jurisdiction has enabled German courts to prosecute members of ISIS and the Assad regime, who would otherwise go unpunished for committing genocide and war crimes. These cases, along with the others presented here from countries throughout the world, show the value of expansive national legislation granting courts universal jurisdiction. Every nation should follow Germany's lead: adopt legislation granting courts broad universal jurisdiction to prosecute genocide, crimes against humanity, and war crimes and exercise that jurisdiction tirelessly. Legal justice offers an end to impunity.

¹³⁴ Ibid.

¹³⁵ <https://www.npr.org/2019/09/24/754863320/how-europe-has-become-the-epicenter-for-syrian-war-crimes-cases>

¹³⁶ Ibid.

International Criminal Court

Zofsha Merchant, Research Intern

Overview

The International Criminal Court (ICC, or the Court) is a permanent international tribunal located at The Hague in the Netherlands. It was created by a multilateral treaty known as the Rome Statute that was adopted on July 17, 1998 and came into effect on July 1, 2002, after domestic ratification by sixty State Parties.

The ICC was created to prosecute the most serious international crimes. Its mandate includes genocide, crimes against humanity, and war crimes. The crime of aggression was added by a subsequent review conference in Kampala, Uganda, in 20.¹³⁷

The Court has opened investigations into crimes in thirteen situations: The Democratic Republic of the Congo, Uganda, the Central African Republic, Darfur (Sudan), Kenya, the Central African Republic II, Libya, Côte d'Ivoire (Ivory Coast), Mali, Georgia, Burundi, Myanmar/Bangladesh, and Afghanistan. As of winter 2021, the Court is conducting preliminary investigations in nine situations: Columbia, Guinea, Iraq/UK, Nigeria, Palestine, The Philippines, Ukraine, and Venezuela.¹³⁸

Currently there are 137 signatories, but only 123 states are considered parties to the treaty (meaning the ICC has official jurisdiction within them as a State Party). As of winter 2021, the United States is not a State Party.¹³⁹ The State Parties fund the ICC by making annual contributions, along with having the option to make donations for special funds. All State Parties are members of the Assembly of States Parties, which meets annually to approve the ICC budget and elect the judges and the chief prosecutor.¹⁴⁰ The current ICC Prosecutor is Karim Asad Ahmad Khan, whose term began in 2021 and concludes in 2030.¹⁴¹

Karim Asad Ahmad Khan



The Founding

The ICC was founded in 1998 through a treaty negotiated in Rome by 160 states. It was created primarily following the spirit of the Nuremberg International Military Tribunal, which brought together the four major Allied powers to prosecute people accused of the worst crimes during World War II. The ICC shares many core principles with the Nuremberg court, both focusing on the importance of fair trials and the necessity for accountability of crimes. In addition, both the ICC and Nuremberg Tribunal have jurisdiction over crimes against humanity, war crimes, and crimes against peace or crimes of aggression. The essential principles of fairness, impartiality, holding all officials--regardless of their position--accountable, etc. that the ICC was built upon have been directly translated from Nuremberg. Yet the ICC also shows progress from the Nuremberg's 1946 international humanitarian law standards, as seen with

¹³⁷ <http://worldwithoutgenocide.org/genocides-and-conflicts/darfur-genocide/icc>

¹³⁸ <https://www.icc-cpi.int/Pages/Main.aspx>

¹³⁹ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en

¹⁴⁰ https://www.icc-cpi.int/iccdocs/PIDS/publications/Universality_Eng.pdf

¹⁴¹ <https://news.un.org/en/story/2021/02/1084582>

the ICC's jurisdiction over the crime of genocide.¹⁴² At the time of the Nuremberg tribunal, the crime of genocide had not yet been codified by the United Nations.

The ICC was also created in the spirit of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda, which were established in 1993 and 1994 respectively, focusing on achieving justice for war crimes and crimes of genocide.¹⁴³

The ICC was officially approved and established on July 17, 1998. It took three years of intense discussions and negotiations during a diplomatic conference held in Rome to achieve a statute that the international community overwhelmingly approved, with ratification by 120 of 148 states. Within the Rome Statute, the ICC is defined as being a body meant to investigate the 'most serious of crimes in the international community. It would prosecute the individuals responsible for crimes against humanity, genocide, war crimes, and the crime of aggression.' The Rome Statute also detailed the jurisdiction and technicalities of the ICC.¹⁴⁴

Although it was established in 1998, the ICC did not actually begin proceedings until it was approved in domestic proceedings by 60 states. This approval was received on July 1, 2002 which is when the court began its proceedings. Over time, more countries have joined, with the current total up to 123 states.

The International Criminal Court



Jurisdiction

While the ICC has the power to hear cases within its mandate, it operates on the principle of complementarity. It will only exercise its jurisdiction if national courts with jurisdiction either cannot or will not prosecute perpetrators of international crimes. It is therefore often referred to as a court of last resort.¹⁴⁵

The ICC may exercise jurisdiction if an accused is a national of a State Party (or if the State otherwise accepts jurisdiction), if a relevant crime occurs in the territory of a State Party, or if a situation giving rise

¹⁴² https://www.icc-cpi.int/NR/rdonlyres/ED2F5177-9F9B-4D66-9386-5C5BF45D052C/146323/PK_20060930_English.pdf

¹⁴³ <https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/17/the-international-criminal-court-turns-20-heres-a-look-at-how-it-got-here/>

¹⁴⁴ <https://www.hrw.org/news/1998/12/01/summary-key-provisions-icc-statute>

¹⁴⁵ <http://worldwithoutgenocide.org/genocides-and-conflicts/darfur-genocide/icc>

to crimes within the Court's purview is referred by the UN Security Council pursuant to its Chapter VII authority under the UN Charter, even if the situation occurs in a state which is not a party to the Rome Statute. The Prosecutor also has the power to initiate investigations *proprio motu*, or on their own initiative without referral, if information credibly alleging the commission of crimes within the Court's jurisdiction is received from individuals or organizations.¹⁴⁶ A state that is not a State Party of the ICC can also accept the court's jurisdiction for an investigation on an *ad hoc* basis.¹⁴⁷

The ICC's jurisdiction is also limited to crimes occurring after July 1, 2002, or after the relevant state ratifies the Rome Statute, whichever is later. This means that any crimes that occurred before 2002 are not subject to investigation by the ICC.¹⁴⁸

Major Cases

As mentioned above, the ICC has opened investigations into twelve situations and is currently conducting preliminary investigations into nine situations. Preliminary investigations determine whether there is sufficient legal basis regarding the violation of the Rome Statute to conduct an official investigation. Below are key points from the twelve ICC investigations:

Democratic Republic of Congo

This situation was referred to the ICC in April 2004 and opened in June of that year. The investigation involved cases and charges regarding war crimes and crimes against humanity. What is notable about this investigation is that this was the Office of the Prosecutor's first investigation and led to the ICC's first two convictions. The trial of Thomas Lubanga Dyilo was the very first to be completed before the ICC. Lubanga, who had been in custody in Kinshasa for murdering UN peacekeepers, was surrendered to the ICC on March 17, 2006, after an arrest warrant was issued in February 2006. Following a tumultuous trial, Lubanga was convicted on March 14, 2012, of conscripting and using child soldiers in the hostilities for the Patriotic Force for the Liberation of Congo. He was sentenced to fourteen years in prison on July 10, 2012.¹⁴⁹

In jurisprudence, *Lubanga* is notable for its expansion of the law pertaining to child soldiers in armed conflict. Rulings confirm the longstanding doctrine of international human rights law regarding children that consent (i.e. enlistment versus compulsion) is irrelevant, and there is no need to show compulsion of the victim to prove the crime of conscripting or using child soldiers.¹⁵⁰

Uganda

This situation was referred to the ICC by the Government of Uganda in January 2004 and an investigation was opened in July of that year. The investigation focused on the conflict between the national authorities and the Lord's Resistance Army (LRA) in Northern Uganda. It involved charges regarding alleged war crimes and crimes against humanity.

What is notable about this investigation is that, in 2005, it was the first time the Court issued a warrant of arrest against high-ranking LRA members.¹⁵¹

¹⁴⁶ <http://worldwithoutgenocide.org/genocides-and-conflicts/darfur-genocide/icc>

¹⁴⁷ <https://www.icc-cpi.int/about/how-the-court-works>

¹⁴⁸ *Ibid.*

¹⁴⁹ <https://www.icc-cpi.int/drc>

¹⁵⁰ *Ibid.*

¹⁵¹ <https://www.icc-cpi.int/uganda>

Central African Republic

The investigation into this situation has been twofold. Specifically, the first investigation (labeled Central African Republic I) was referred by the CAR government in 2004 and officially opened in 2007. It mainly followed one case, *The Prosecutor v Jean-Pierre Bemba*, for war crimes and crimes against humanity. Bemba was acquitted of both counts in 2018.¹⁵²

A second investigation into this situation was referred, again by the CAR government, in May 2014. It was officially opened in September 2014 and focused on investigating the renewed violence in the CAR since 2012.¹⁵³ Two cases will be heard beginning in February 2021 for war crimes and crimes against humanity.

Darfur (Sudan)

This investigation was referred to the ICC by the UN Security Council in March of 2005 and was opened by June, looking at genocide, war crimes, and crimes against humanity. This was the first time that the ICC investigated a non-State Party, which is still under the ICC's jurisdiction because it was referred by the UN Security Council. This is also the first time that the ICC investigated claims of genocide.

Another important element from this investigation is that this was the first time that a warrant was issued for a sitting president, President Omar Al-Bashir. This warrant has been outstanding since 2009 and it is for all three crimes described above.

Omar al-Bashir



Al-Bashir was ousted from his position on April 11, 2019.¹⁵⁴ He is currently serving a two-year prison sentence in Sudan on charges of money-laundering and corruption. The Sudanese government has pledged to turn him over to the ICC following the completion of this prison term.

Kenya

This investigation was opened in 2010 and was the first time the ICC conducted a *proprio motu* investigation. The investigation examined charges of crimes against humanity during the 2007 post-election violence in Kenya. During this case, there were attempts at influencing and corrupting witnesses, thereby creating charges for 'offenses against the administration of justice' for some of the suspects.¹⁵⁵

Libya

This situation was referred to the ICC by the UN Security Council in February 2011 and an investigation was opened by March of that year. Again, although Libya was not a State Party, the ICC had jurisdiction due to the UN referral. The investigation focused on charges of crimes against humanity and war crimes.¹⁵⁶

¹⁵² <https://www.icc-cpi.int/car>

¹⁵³ <https://www.icc-cpi.int/carII>

¹⁵⁴ <https://www.icc-cpi.int/darfur>

¹⁵⁵ <https://www.icc-cpi.int/kenya>

¹⁵⁶ <https://www.icc-cpi.int/libya>

Côte d'Ivoire (Ivory Coast)

This investigation was the first time a state accepted the ICC's jurisdiction on an *ad hoc* basis, as the Ivory Coast was not yet a Rome Statute State Party when the investigation first opened. In 2003, the Côte d'Ivoire accepted the ICC's jurisdiction, and this acceptance was renewed in both 2010 and 2011. In 2013, the Ivory Coast ratified the Rome Statute and officially became a State Party. The investigation was for charges of crimes against humanity, specifically regarding 2010 post-election violence in the state.¹⁵⁷

In 2016, Laurent Gbagbo and Charles Blé Goudé's trial began in the ICC on charges of crimes against humanity. In 2019, both were acquitted of all charges and the Prosecutor then filed an appeal for this decision. In June of 2020, the ICC held a hearing for the appeal of the acquittal—which is notable and unique. The ICC has yet to make its judgment.¹⁵⁸

Mali

This situation was referred to the ICC by the Government of Mali in 2012 and was officially opened in 2013. It focused on charges of alleged war crimes.¹⁵⁹ In September 2015 the court issued an arrest warrant for Ahmad al-Faqi al-Mahdi on charges of the war crime of intentionally directing attacks against buildings dedicated to religion, specifically the mausoleums and mosques located in Timbuktu. They were destroyed by members of Ansar Dine and other Islamist groups in 2012.

On September 27, 2016, al-Mahdi was sentenced to nine years in prison for the destruction of cultural world heritage in the Malian city of Timbuktu.

Georgia

The Prosecutor opened a *proprio motu* investigation into Georgia in January of 2016. The charges focus on crimes against humanity and war crimes. Since the ICC is a court of last resort, it could not proceed while Georgian and Russian authorities were investigating the same cases on a domestic level. However, in March of 2015 it appeared that the Georgian investigation had been indefinitely stalled, thereby allowing the ICC to open an investigation while still monitoring relevant Russian proceedings.¹⁶⁰

Burundi

The Prosecutor opened a *proprio motu* investigation of alleged crimes against humanity in October 2017. While Burundi had ratified the Rome Statute and become an official State Party in 2004, they withdrew in October of 2017. Thus, the ICC only has the jurisdiction to investigate crimes committed in Burundi between 2004 and 2017.¹⁶¹

Myanmar/Bangladesh

The Prosecutor opened a *proprio motu* investigation in November of 2019. Although the exact crimes have not been specified yet, the investigation will focus on crimes committed against the Rohingya people and violence committed against them in Bangladesh, which is a state party.¹⁶²

¹⁵⁷ <https://www.icc-cpi.int/cdi>

¹⁵⁸ <https://www.icc-cpi.int/cdi/gbagbo-goude>

¹⁵⁹ <https://www.icc-cpi.int/mali>

¹⁶⁰ <https://www.icc-cpi.int/georgia>

¹⁶¹ <https://www.icc-cpi.int/burundi>

¹⁶² <https://www.icc-cpi.int/bangladesh-myanmar>

Afghanistan

The Prosecutor was able to open a *proprio motu* investigation in March of 2020. The Prosecutor had originally requested the investigation in 2017, but it was rejected by the Pre-Trial Chamber II on the basis that “the commencement of an investigation would not be in the interest of justice.” However, the Prosecutor then filed an appeal which led to the Appeals Chamber reviewing and then amending the Pre-Trial Chamber’s rejection. In its preliminary investigation, charges included crimes against humanity and war crimes.¹⁶³ The United States is likely to be investigated in these proceedings.

Impact

The ICC has had a tremendous impact on prosecuting and bringing to justice many leaders who have committed the most heinous crimes throughout the world. Although the process may be slow with various barriers, the creation of the ICC has allowed for the prosecution of crimes that otherwise may have gone unpunished. These trials, and the subsequent convictions, have created a precedent that ensures more accountability for crimes against humanity, war crimes, crimes of aggression, and genocide. It is hoped that the ICC may actually deter future crimes through the threat of prosecution for abusive leaders.¹⁶⁴

However, there is speculation about what deterrent power the ICC actually has. Specifically, some believe that in situations where existing rulers are violating rights, the threat of ICC action may actually seek leaders to further entrench themselves and escalate crimes to maintain power and prevent prosecution. This was seen specifically in Sudan, where the ICC’s arrest warrant did nothing to deter President Omar al-Bashir from perpetrating crimes, nor did the warrant deter other countries from allowing him to travel within their borders without arrest.

In addition, because State Parties can refer themselves to the ICC for investigation, there is a higher chance for asymmetrical accountability. This is less likely to happen when the ICC issues a *proprio motu* investigation or has a referral from the UN Security Council, as in these cases the investigations will most likely look at both government officials and rebel groups. However, when a State Party refers itself, the government may be less likely to be targeted for prosecution, since they are the ones who did the referring, instead expecting that the ICC will focus on rebels or other groups opposing the established government.¹⁶⁵

Another concern raised by some critics is an alleged anti-African bias of the ICC. Specifically, nine of the twelve investigations that have been conducted by the ICC have been on the African continent. This is not to say that atrocities haven’t been committed there, but rather that the ICC may have a Eurocentric and colonialist perspective of justice, with a greater likelihood of prosecuting crimes in African nations while ignoring atrocities that are occurring elsewhere.¹⁶⁶ However, as noted in the summary of the investigations, the majority of cases have been brought by the states themselves, including by African states; this accusation of an anti-African bias is without foundation.

Regardless of the flaws of the institution, it is indisputable that as a court of last resort, the ICC fills a gap in the justice system. It provides a place where survivors and witnesses can provide testimony in safety

¹⁶³ <https://www.icc-cpi.int/afghanistan>

¹⁶⁴ <https://www.crisisgroup.org/global/deterrent-effect-icc-commission-international-crimes-government-leaders>

¹⁶⁵ Ibid.

¹⁶⁶ <https://www.aljazeera.com/indepth/opinion/icc-problem-simple-racism-eurocentricism-180725111213623.html>

and dignity; it creates historical records of the events, eliminating the likelihood of charges of denial in the future; and it enhances and supports the power of law and justice more broadly.

Recent Updates

One of the most recent investigations that the ICC opened is in Afghanistan. The investigation focuses on charges of war crimes for both Afghanistan National Security Forces and U.S. troops. The Trump Administration worked from 2017 to block this investigation, claiming that the ICC was infringing on U.S. national sovereignty and that prosecution of U.S. soldiers could be done in domestic courts.

Secretary of State Pompeo also expressed concern regarding the Prosecutor’s preliminary examination into Palestine.¹⁶⁷



In 2017, after Prosecutor Fatou Bensouda first attempted to open an investigation into Afghanistan, the US revoked her entry visa, thus preventing her from entering the country and giving briefings before the UN Security Council.¹⁶⁸ In June of 2020, former President Trump authorized sanctions and visa restrictions on ICC members, including freezing assets. He also signed an executive order stating that anyone who “directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute any US personnel” would also be subject to the sanctions.¹⁶⁹ This attempt to threaten and bully the ICC was denounced around the world by the EU, France, Germany, the American Bar Association, and various human rights organizations—including World Without Genocide.¹⁷⁰

In January 2021, a federal judge ruled that the sanctions put in place by the Trump administration were unconstitutional. This decision will not mark the end of hostilities between the US and the ICC. However, it does offer a rebuke to the Trump administration's attacks on the court and its supporters.

¹⁶⁷ <https://www.cnn.com/2020/06/11/politics/icc-executive-order/index.html>

¹⁶⁸ <https://www.cnn.com/2019/04/05/politics/icc-prosecutor-visa-revoked/index.html>

¹⁶⁹ <https://www.cnn.com/2020/06/11/politics/icc-executive-order/index.html>

¹⁷⁰ <https://www.hrw.org/news/2020/06/11/oppose-trump-administration-measures-against-international-criminal-court>

United Nations Tribunals for Genocide, War Crimes and Crimes Against Humanity

By Ellen J. Kennedy, Ph.D., Executive Director

Introduction – The Nuremberg Trials

Even before the end of World War II, the governments of the Allied powers of England, France, the US, and the USSR fighting against the Axis powers of Germany, Japan, and Italy announced their intention to punish Nazi war criminals. Discussions began in 1942 among leaders of nine European countries occupied by Germany. Subsequently, in 1943, the *Moscow Declaration of German Atrocities* was signed by the US, Great Britain, and the USSR. This declaration stated that when the war ended, major war criminals would be prosecuted and punished jointly by the four Allied nations. The result was the establishment of the International Military Tribunal, or IMT, a court convened by the four victorious Allies and held in Nuremberg, Germany from 1945-1946.¹⁷¹

International Military Tribunal at Nuremberg, Germany



This was the first international effort to hold individuals accountable for the most heinous of the world's crimes. It also served as the model for the trial of Adolf Eichmann (see page 15) and for present-day courts at The Hague, Netherlands, including the International Criminal Court and the International Court of Justice (or World Court) and for subsequent UN-administered *ad hoc* tribunals.

The United Nations Charter, Article 41

When the United Nations Charter was created in 1945, an important section was Chapter VII, *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*. Article 41 in this Chapter gives the Security Council the authority to use "measures not involving the use of armed force ... to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures."¹⁷²

¹⁷¹ <https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg>

¹⁷² <https://www.un.org/en/sections/un-charter/chapter-vii/index.html>

The Security Council has used this authority to create international tribunals to adjudicate people accused of violations of international humanitarian and human rights law or to create a tribunal when a state has requested such a tribunal.

However, this opportunity was not used from the conclusion of the Nuremberg trials until the end of the Cold War, roughly for half a century. There were political disagreements among the Security Council members that prevented consensus on measures to address the genocides and other mass atrocities that occurred from 1946-1991.

When the global geopolitical situation shifted, the Security Council created courts that were established to end individuals' impunity for genocide, war crimes, crimes against humanity, and grave breaches of the Geneva Conventions. These courts also allowed survivors and witnesses to speak with dignity and to receive official acknowledgment and recognition of their suffering. In addition, the courts provide historically accurate accounts and irrefutable documentation of the events that transpired.

International Criminal Tribunal for former Yugoslavia

Beginning in the late 1980s and early 1990s, reports about massacres of thousands of civilians, rape and torture in detention camps, cities under siege, and hundreds of thousands expelled from their homes in former Yugoslavia led the UN in late 1992 to establish a Commission of Experts to examine the situation.

The Commission documented horrific crimes and provided the UN Secretary-General with evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law. The Security Council established an international tribunal to adjudicate persons responsible for these crimes and to deter further violence.

On May 25, 1993, the UN Security Council passed Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia, known as the ICTY. This was the first war crimes court established by the UN and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals.¹⁷³ It was also the first tribunal ever mandated to prosecute the crime of genocide.¹⁷⁴

International Criminal Tribunal for former Yugoslavia in The Hague, Netherlands



¹⁷³ <https://www.icty.org/en/about/tribunal/establishment>

¹⁷⁴ <https://www.ushmm.org/learn/timeline-of-events/after-1945/un-security-council-creates-icty>

For details about ICTY proceedings and prosecutions, the ICTY website offers significant resources.¹⁷⁵

International Criminal Tribunal for Rwanda

A year after ICTY was established, genocide erupted in Rwanda, and at least 800,000 people perished in violence committed in a hundred-day period, April – July 1994. The UN Security Council created a second tribunal, the International Criminal Tribunal for Rwanda, ICTR, to prosecute persons responsible for serious violations of humanitarian and human rights law committed in Rwanda and neighboring states. For the first time in history, an international tribunal, the ICTR, delivered verdicts against persons responsible for committing genocide. The ICTR was also the first institution to recognize rape as a means of perpetrating genocide.¹⁷⁶

For more information about ICTR proceedings and prosecutions, see the ICTR website.¹⁷⁷

Banner for the ICTR in Kigali



International Residual Mechanism for the Criminal Tribunals

The International Residual Mechanism for the Criminal Tribunals was established by the Security Council through Resolution 1966, December 22, 2010, to finish the work begun by ICTY and ICTR. It consists of two branches corresponding to the two tribunals. The ICTR branch, located in Arusha, Tanzania, commenced functioning on July 1, 2012. The ICTY branch is in The Hague, Netherlands and began work on July 1, 2013. These branches address ongoing appeals or other issues that remain with the tribunals.¹⁷⁸

The Security Council has created several other tribunals. Brief descriptions appear below.

The Extraordinary Chambers in the Courts of Cambodia

This special Cambodian court receives international assistance through the United Nations Assistance to the Khmer Rouge Trials (UNAKRT). The court is also informally known as the Khmer Rouge Tribunal, the ECCC, or the Cambodia Tribunal. It is a *hybrid court*, a blend of the international and the domestic in the laws that govern its proceedings, the crimes that are adjudicated, and the staff serving on the Court.

¹⁷⁵ <https://www.icty.org/>

¹⁷⁶ <https://unictr.irmct.org/en/tribunal>

¹⁷⁷ <https://unictr.irmct.org/>

¹⁷⁸ *Ibid.*

Cambodia's Hybrid Court



At least 1.7 million people died from starvation, torture, execution, and forced labor from 1975-1979 under the Khmer Rouge regime, headed by Pol Pot. The end of the Khmer Rouge period was followed by a civil war that ended in 1998.

In 1997, the Cambodian government requested the United Nations to assist in establishing a court to prosecute the senior leaders of the Khmer Rouge. The government insisted that the court should be held in Cambodia using Cambodian staff and judges together with foreign personnel. International participation was invited due to the weakness of the Cambodian legal system and the international nature of the crimes, as well as for assistance in meeting international standards of justice.¹⁷⁹

To date, only a small number of accused have been prosecuted. Many of the presumed perpetrators, including Pol Pot, were deceased and were never brought to trial or they have been determined to be unfit to stand trial due to advanced age and ill health.

Additional information about ECCC proceedings and prosecutions is at the ECCC website.¹⁸⁰

The Special Tribunal for Lebanon

This tribunal, the STL, is the first of its kind to deal with terrorism as a discrete crime. The primary mandate of this court is to hold trials for the people accused of carrying out the attack of February 14, 2005 that killed 22 people, including the former prime minister of Lebanon, Rafik Hariri, and injured many others. The tribunal also has jurisdiction over other attacks in Lebanon between October 1, 2004 and December 12, 2005 if they are connected to the events of February 14, 2005 and are of similar nature and gravity. The mandate also allows the tribunal to have jurisdiction over crimes carried out on any later date, decided by the parties and with the consent of the UN Security Council, if they are connected to the February 14, 2005 attack.

¹⁷⁹ <https://www.eccc.gov.kh/en/introduction-eccc>

¹⁸⁰ <https://www.eccc.gov.kh/en/case-load>

There have been nine indictments; of the nine accused, two were acquitted, one died before the completion of the trial, two have served or are serving sentences, and four remain as fugitives. Several cases are under investigation and no further indictments have been made.

The STL is unique among the international tribunals in that it may hold trials *in absentia*.

The tribunal was established following a request by the government of Lebanon to the United Nations. The UN brought its provisions into force through UN Security Council Resolution 1757.¹⁸¹ It is an independent, judicial organization composed of Lebanese and international judges, a hybrid court like the Extraordinary Chambers in the Courts of Cambodia. It does, however, try people under Lebanese criminal law.

The STL's headquarters are in the outskirts of The Hague, the Netherlands, and the tribunal also has an office in Beirut, Lebanon.

The Special Court and the Residual Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) was set up in 2002 as the result of a request to the United Nations in 2000 by the Government of Sierra Leone for "a special court" to address serious crimes against civilians and UN peacekeepers committed during the country's decade-long (1991-2002) civil war. SCSL became the world's first "hybrid" international criminal tribunal, mandated to try those "bearing the greatest responsibility" for crimes committed in Sierra Leone after November 30, 1996, the date of the failed Abidjan Peace Accord. It was the first modern international tribunal to sit in the country where the crimes took place, and the first to have an effective outreach program on the ground.

The SCSL jurisdiction allowed for charges for war crimes, crimes against humanity, other serious violations of international humanitarian law, and certain serious violations of Sierra Leonean law.

In March 2003 the Prosecutor brought the first of 13 indictments against leaders of the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the Civil Defense Forces (CDF), and then-Liberian President Charles Taylor.

Ten persons were brought to trial. Two others died, one before proceedings could commence (RUF Leader Foday Sankoh) and one outside the jurisdiction of the Court (RUF Battlefield Commander Sam Bockarie). A third (AFRC Chairman Johnny Paul Koroma), fled Sierra Leone shortly before he was indicted and is considered to be at large. One person (Samuel Hinga Norman) died during the course of his trial, and proceedings were terminated.

Nine persons were convicted and sentenced to terms of imprisonment ranging from 15 to 52 years. The eight RUF, CDF and AFRC prisoners convicted in Freetown are held at Rwanda's Mpanga Prison due to security concerns.

The Special Court also conducted contempt trials in 2005 (relating to threats against a protected witness) and three trials in 2011-2013 (for tampering with prosecution witnesses who testified in the AFRC and Taylor trials, respectively).¹⁸²

The Special Court for Sierra Leone was the first international tribunal to try and convict persons for the use of child soldiers (AFRC trial), for forced marriage (and other inhumane acts) as a crime against humanity (RUF trial), and for attacks directed against United Nations peacekeepers (RUF trial).

¹⁸¹ <https://www.stl-tsl.org/en/about-the-stl>

¹⁸² <http://www.rscsl.org/>

The Special Court was the first modern international tribunal (and the first court since Nuremberg) to indict, try and convict a sitting head of state (Taylor trial).¹⁸³ Because of security issues, Taylor's trial was moved from Freetown to The Hague, Netherlands, where it was held at the International Criminal Court but fully under the jurisdiction of the SCSL.¹⁸⁴

In 2013 the Special Court for Sierra Leone became the first court to complete its mandate and transition to a residual mechanism. The Residual Special Court was signed into law on February 1, 2012. The RSCSL principal seat is in Freetown, Sierra Leone with an interim seat in The Netherlands and a sub-office in Freetown for witness and victim protection and support. Its role is ongoing witness protection and support, supervision of prison sentences, and handling of claims for compensation.¹⁸⁵

Conclusion

These *ad hoc* tribunals have contributed immeasurably to the march of justice and to ending impunity for the world's most horrific crimes. Individuals are held to account; potential crimes may be deterred; victims are memorialized; survivors and witnesses give testimony and provide documentation and history; and brutal atrocities are forever recorded to stand up against denial.

The men and women who have worked at these courts, the courageous people who have come forward despite the most difficult and dangerous of circumstances to themselves and their loved ones, and all those who provide support and encouragement deserve the greatest of praise. Their work is perilous – but they help to create the possibility, someday, for a world without genocide and other acts of atrocity perpetrated against our fellow human beings.

¹⁸³ Ibid.

¹⁸⁴ https://en.wikipedia.org/wiki/Special_Court_for_Sierra_Leone#Charles_Taylor

¹⁸⁵ https://en.wikipedia.org/wiki/Special_Court_for_Sierra_Leone

Law and Protection During Conflict: Introduction to International Humanitarian Law

By Jacob Simpson, Research and Advocacy Associate

International law is composed of several interconnected bodies of law. **International Criminal Law** “regulates the commission of grave crimes occurring on the territory of sovereign states where those crimes constitute genocide, crimes against humanity, piracy, terrorism, or other violations of *jus cogens* norms.”¹⁸⁶ The second area is **international Human Rights Law**, which “governs the obligations of States towards citizens and other individuals within their jurisdiction.”¹⁸⁷ These obligations arise from treaties to prevent torture, discrimination, to safeguard migrants, refugees, and the disabled, in addition to preventing genocide and other mass atrocities. The third area is **International Humanitarian Law (IHL)**, which regulates the conduct of warfare.

These three bodies of law each have distinct goals, jurisdictions, and histories. However, their enforcement overlaps, since crimes such as genocide often include violations of human rights law and IHL in the lead-up to mass killings.

In this essay, we examine the mechanisms of international justice and the intersection between the different bodies of law, beginning with IHL.

Introduction

International Humanitarian Law (IHL) refers to the general body of law that regulates the conduct of war. Enforcing law and protecting human rights during times of war and conflict may appear to be impossible or even unthinkable, as warfare is inherently violent and often lawless. However, IHL has played a crucial role in the prevention and punishment of atrocities during times of war, and it has a long history of providing for the protection of those impacted by conflict. An additional goal of IHL is to serve as a deterrent to the prohibited atrocities.

According to IHL scholar Amanda Alexander, IHL “aims to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.”¹⁸⁸ This definition highlights the two main objectives of IHL: (1) to regulate what combatants can and cannot do during warfare, and (2) to protect individuals made vulnerable by war.

To understand these broad legal obligations in the context of contemporary conflict, it is important to understand how this body of law came to be internationally recognized.

Origins

The two objectives of IHL are codified within documents known as the four Geneva Conventions and additional protocols. However, each objective originated from a unique set of circumstances.

¹⁸⁶ https://www.law.cornell.edu/wex/international_criminal_law

¹⁸⁷ https://phap.org/PHAP/Themes/Law_and_protection/PHAP/Themes/IHRL.aspx?hkey=77d82908-6db9-4c1f-86a7-686757e05564

¹⁸⁸ <https://academic.oup.com/ejil/article/26/1/109/497489>

Laws of Individual Protection

The history of IHL began with Henry Dunant, who founded the Red Cross movement and pushed for laws to protect people injured or threatened by warfare.

Dunant, a Swiss citizen, was present at the battle of Solferino in northern Italy in 1859. At this battle, the French, led by Napoleon, squared off against the Austrian army in a decisive clash over the unification of Italy. The battle left 40,000 soldiers wounded by the time the sun set on the first day. Dunant was appalled by the suffering he witnessed, and he was deeply upset by the inadequate care and resources for the thousands of wounded soldiers on the battlefield.¹⁸⁹



After the battle, Dunant's experience led him to establish the Red Cross in Geneva, Switzerland, with a mission to send independent and well-resourced medics to battlefields to provide care for soldiers and civilians injured by conflict.

Dunant's Red Cross has evolved since its inception. It is now known as the "International Committee of the Red Cross and Red Crescent (ICRC)" - the Red Crescent designation used in Muslim Majority countries. Medical aid facilities marked with either the Red Cross, the Red Crescent, or similar symbols exist in warzones throughout the world to signify a protected zone where individuals can receive aid regardless of their involvement in the conflict.

Dunant also advocated strongly for an international agreement to protect the work and the workers of the Red Cross from parties engaged in conflict. In 1864, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field was adopted. This Convention established the body of law protecting wounded and sick soldiers. Over time, it also came to protect civilians and humanitarian workers.¹⁹⁰

Dunant and the Swiss Red Cross constitute the origins of IHL that established and protected the rights of individuals during conflict. Interestingly, Dunant was a co-recipient of the first-ever Nobel Peace Prize in 1901, shared with Frédéric Passy of the European peace movement.

But what about the second element of IHL that dictates the responsibilities of states during times of war? For that we look at the American Civil War.

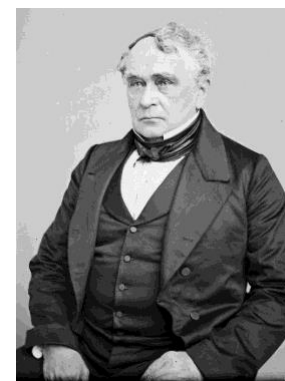
¹⁸⁹ <https://www.icrc.org/en/doc/resources/documents/misc/57jnvr.htm>

¹⁹⁰ <https://academic.oup.com/ejil/article/26/1/109/497489>

Law of War

In April 1863, at the height of America's Civil War, President Abraham Lincoln issued "General Order No. 100: Instructions for the Government of the Armies of the United States in the Field."¹⁹¹ This decree set forth basic regulations for actions that the armies of the United States could and could not pursue during the Civil War.

The decree is known as the "Lieber Code" after Francis Lieber, who authored most of General Order No. 100. The legal order sets forth 157 provisions ranging from general principles governing warfare to details about how combatants may act in relation to enemy forces. The Lieber Code was one of the first documents codifying the laws of the conduct of war.



Perhaps the most significant element of the Lieber Code is the provision on military necessity. This provision states that it is only acceptable to use military force out of military necessity. In other words, *military force is only justified if it clearly leads towards the conclusion of armed hostilities.*

Article 16 of the Lieber Code explains the principle of military necessity: "Military necessity does not admit of cruelty- that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight"... "in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult."¹⁹²

Once the Lieber Code was published and codified by the United States, countries throughout the world adopted and developed its principles, especially that of military necessity. The Lieber Code became a template for the international laws that govern the boundaries for parties engaged in warfare.

The Lieber Code represents the origins of the laws that regulate what combatants can do during warfare. Henry Dunant and the Red Cross represent the origins of laws that protect individuals who are made vulnerable during times of war. But the Geneva Conventions and subsequent additional protocols brought these two bodies of international law together into what we know as IHL.

Geneva Conventions

There are four Geneva Conventions and two additional protocols that together form the body of IHL. Within these six legal instruments, the influence of both Dunant and Lieber is clear.

The First Geneva Convention protects wounded and sick soldiers on land during war. This Convention is the direct decedent of Dunant's Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. The Convention gives legal protection to wounded and sick soldiers as well as religious and medical personnel who are assisting wounded and sick soldiers.¹⁹³ This protection also upholds Lieber's laws of war, as the protection of wounded soldiers reinforces the rationale of military necessity.

The Second Geneva Convention protects wounded, sick, and shipwrecked military personnel at sea. It closely follows the articles of the First Geneva Convention, and it creates legal protection for neutral hospital ships that provide care for wounded and sick soldiers at sea.¹⁹⁴

¹⁹¹ <https://blogs.loc.gov/law/2018/04/the-lieber-code-the-first-modern-codification-of-the-laws-of-war/>

¹⁹² Ibid.

¹⁹³ <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>

¹⁹⁴ <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>

The Third Geneva Convention protects prisoners of war. This Convention defines who is considered a prisoner of war and the legal protections to which they are entitled. The Convention also mandates that after the cessation of active hostilities, all prisoners of war shall be released and repatriated. This Convention provides clear legal rules for the treatment of those they have captured, and the regulations are fairly consistent with the regulations set forth in the Lieber Code.¹⁹⁵

The Fourth Geneva Convention protects civilians, including those in occupied territory. Created directly in response to the atrocities of World War II, the Fourth Geneva Convention largely deals with the rules of civilian distinction – these rules providing an obligation on both parties in a conflict to protect and remain distinct from civilians, so that conflict does not result in unnecessary suffering for civilian populations.¹⁹⁶

The Ottoman Red Crescent in Jerusalem



World War I Hospital Ship Flying the Red Cross



Two additional protocols were adopted in 1977. These protocols served two key purposes: (1) They further codified the limits placed on parties engaged in armed conflict. (2) They applied the four Geneva Conventions to conflicts that included non-state actors. This meant that the Geneva Conventions could protect individuals and dictate the laws of warfare in conflicts that were not just between two state parties but that occurred between warring groups within a single state.¹⁹⁷

A third additional protocol was added in 2005. This protocol recognized the new insignia of the Red Crystal as having equal meaning as the already established Red Cross and Red Crescent.

The Geneva Conventions could only become established international law if countries throughout the world first signed onto them and then ratified them through their own legislative process. In the US, the Senate has to vote by a two-thirds majority (67 votes) in order for ratification to occur.

As of Winter 2021, the four original Geneva Conventions have been signed and ratified by 196 states, including every UN member state. No international treaty has been ratified by more countries.¹⁹⁸ Every state that has ratified the Geneva Conventions is also entitled to use universal jurisdiction and bring non-citizens to trial for the world's worst crimes.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ <https://www.bbc.com/news/world-europe-35023029#:~:text=196%20countries%20have%20ratified%20them,it%20was%20an%20exciting%20time.>

The additional protocols do not have the same broad support as the four original conventions: the first protocol has been ratified by 174 states, the second by 169 states, and the third by only 77 states.¹⁹⁹

The United States ratified the four Geneva Conventions and the first additional protocol. The US signed the second protocol but has not ratified it in the Senate. The Second Protocol outlines specific provisions to protect victims of internal armed conflict, meaning conflict that takes place within the borders of a single country. Other countries that did not ratify the second protocol include India, Pakistan, Turkey, Iran, Iraq, Syria, and Israel.²⁰⁰

With broad international ratification the international body of law known as IHL came into being.

But enforcing IHL is another challenge altogether.

Enforcement Mechanisms

There are many different venues where perpetrators can be prosecuted for violations of IHL. Below are some of the venues charged with upholding IHL and prosecuting those who violate the Geneva Conventions and their corresponding protocols.

Military Tribunals and National Courts

Military tribunals and national courts have a mandate to prosecute violations of IHL perpetrated by their own citizens. For example, United States military tribunals investigate violations of IHL committed by U.S. soldiers and mercenaries.

“All nations that are parties to the Geneva Conventions are required to pass domestic legislation that provides penalties for IHL violations.”²⁰¹ This requirement means that most violations of IHL are prosecuted domestically, in either national courts or established military tribunals.

International Criminal Tribunals

International criminal tribunals prosecute grave violations of IHL. These tribunals step in where the national or military tribunals either cannot or will not prosecute individuals of IHL violations because the entire government/ruling body is culpable in serious crimes or because there are no domestic or military courts capable of handling these violations.

¹⁹⁹ Ibid.

²⁰⁰ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475>

²⁰¹ https://www.redcross.org/content/dam/redcross/atg/PDF_s/Family___Holocaust_Tracing/IHL_ProsecutionofViolations.pdf

International Criminal Tribunal for the Former Yugoslavia



International criminal tribunals were established by the United Nations in the 1990s to address the crimes committed during the war in the former Yugoslavia (International Criminal Tribunal for former Yugoslavia) and the genocide in Rwanda (International Criminal Tribunal for Rwanda), both aiming to pursue justice in response to grave breaches of the Geneva Conventions, violations of laws and customs of war, and genocide.²⁰²

These criminal tribunals, among other UN-established courts, are temporary, and are only set up to deal with particular and serious violations of IHL and international human rights law in specific instances and with limited geographic and temporal jurisdiction.

International Criminal Court

The International Criminal Court (ICC) is a permanent court established in 1998 by a treaty known as the Rome Statute. The Court prosecutes individuals for grave breaches of IHL as well as genocide, crimes against humanity, and the crime of aggression.²⁰³

The ICC is a unique international venue with the jurisdiction to hold individuals accountable for violating IHL and other serious crimes occurring from the year 2002 forward. The case of Dominic Ongwen illustrates an ICC prosecution of war crimes.

Ongwen was a commander of the Lord's Resistance Army (LRA) operating in Northern Uganda. The LRA is notorious for using child soldiers and for the mass killing and abduction of civilian populations. Ongwen was accused of organizing an LRA attack in 2004 against a camp for internally displaced people who are protected by the Fourth Geneva Convention.

In 2005, the ICC issued a warrant for Ongwen's arrest, and in 2013 he was captured and brought before the Court to stand trial for war crimes including: "murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, and pillaging," as well as additional charges of crimes against humanity. Ongwen was accused of 70 total counts of war crimes and crimes against humanity.

On February 4th, 2021, the ICC found Ongwen guilty of 61 counts of war crimes and crimes against humanity. He was also convicted of forced pregnancy, a conviction marking a legal first in the Court's history.²⁰⁴ His case illustrates that the ICC can and does prosecute individuals for grave violations of IHL while also focusing on other crimes.²⁰⁵

²⁰² https://www.redcross.org/content/dam/redcross/atg/PDF_s/Family___Holocaust_Tracing/IHL_ProsecutionofViolations.pdf

²⁰³ Ibid.

²⁰⁴ <https://www.bbc.com/news/world-africa-55921421#:~:text=Ex%2DUgandan%20rebel%20commander%20Dominic,first%20in%20an%20international%20court.&text=He%20was%20convicted%20on%2061,and%20war%20crimes%20he%20faced.>

²⁰⁵ <https://www.icc-cpi.int/uganda/ongwen>

In the case of Ongwen and the Lord's Resistance Army, the violations of IHL are clear and well-documented. However, the letter of the law is not always as clear, and there are many challenges for the enforcement of IHL.

Contemporary Challenges to IHL

The Geneva Conventions and their additional protocols have not been updated since 1977, and the world has changed drastically since then. Two new elements of warfare have important implications for the application of IHL: the prevalence of non-state combatants, and the growing use of drone warfare.

Non-State Combatants

Since the passage of the Geneva Conventions the nature of warfare has changed dramatically. Leading up to World War II, conflict largely existed between established states. This "international armed conflict" typically had two warring parties that were on a level playing field in the eyes of international law.

Today, the International Committee for the Red Cross and Red Crescent has noted an increasing trend where "non-State armed groups" operate within densely-populated areas when fighting against one or more government forces with far superior military means. This type of warfare has become known as "internationalized armed conflict," and it poses many challenges to the enforcement of IHL. For example, non-state militias often disguise their presence by hiding within a civilian population - in violation of the Fourth Geneva Convention. How do you enforce IHL in response to this violation by a warring entity that is not a state?

Many state armies have responded to this violation by targeting the non-state groups despite the high chance of civilian casualties. The International Commission of the Red Cross writes that some states use the violation of IHL by non-state actors "as a justification to bypass the taking of all possible precautions to minimize risks to civilians, as required by IHL."²⁰⁶

When one party in a conflict is not subject to the restrictions of IHL, how, then, should IHL be enforced? Scholars and lawyers are grappling with this problem in a context where most conflicts are no longer between two states but are, instead, between a state and a non-state armed group or between two or more non-state parties. One solution has been for the ICC to prosecute individuals from non-state armed groups retroactively, like Dominic Ongwen from the Lord's Resistance Army.

Drone Warfare

Unmanned aircraft used in military attacks are not explicitly outlawed under IHL. However, the use of drones is subject to IHL restrictions. When using drones, "parties to a conflict must always distinguish between combatants and civilians and between military objectives and civilian objects."²⁰⁷ These parameters are consistent with the restrictions that IHL places on other forms of warfare.

The absence of specific laws in relation to drones poses a problem for IHL, as drone strikes create a unique and non-reciprocal psychological impact for parties without drone capabilities. In a recent ICRC

²⁰⁶ <https://www.icrc.org/en/document/contemporary-challenges-ihl>

²⁰⁷ <https://www.icrc.org/en/doc/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>

report, this concern for the level of stress induced by drones was raised: “What are the consequences of their constant presence in the skies on the mental health of the people living in areas below? Unfortunately, first-hand information is not always available, especially when drones are used in areas where security constraints make it difficult to evaluate their impact.”²⁰⁸

The lack of information on drone strikes and their impacts makes it difficult to create specific IHL responses to this new form of warfare. However, the ICRC has begun to evaluate how the body of IHL law can best regulate the impact of drone strikes to uphold the laws of war and not cause undo suffering for individuals.

Whether in response to drone warfare, increasing non-state combatants, or the continuing evolution of techniques of warfare, IHL supporters will continue to develop the law to protect noncombatants and to minimize the suffering resulting from warfare.

SCRABB II Target Drone



²⁰⁸ Ibid.

U.S Ratification of International Human Rights Treaties

Amalie Wilkinson, Research Intern

Human rights are the universal rights that we assume are inherent to all human beings, without distinction. To define and protect these rights, the United Nations has established a system of international human rights treaties. These are multilateral agreements –agreements between three or more state parties— that outline basic human rights in a variety of contexts. States that are parties to a treaty are bound by international law to respect and provide its rights to all their inhabitants. Certain international treaties are also referred to as ‘conventions’ and ‘covenants.’²⁰⁹

Treaties constitute the basis for international human rights law. They lay out obligations for states and guide subsequent state legislation to meet these obligations.²¹⁰ Human rights treaties can strengthen domestic laws or facilitate the prosecution of perpetrators who violate human rights. When domestic law fails to protect human rights, treaties provide mechanisms to hold state parties accountable. Treaty bodies can suggest ways states can improve human rights and can undertake inquiries into potential treaty violations.²¹¹

Treaty Creation

The process of creating international treaties begins when states draft an agreement, usually at an international conference. Once the document is finalized, it can be adopted as international law in two ways. First, a treaty can be adopted with the consent of all states that participated in drafting it. Second, if the text is drafted at an international conference, it must win a two-thirds vote of all states that are present.²¹²

After a treaty is adopted, the text is placed with its ‘depository,’ the organization or government to which the treaty’s administration is entrusted. In most cases, it is the UN Secretary-General. Treaties adopted within the framework of other international organizations can be deposited with that organization. All international treaties must be filed with the UN Secretariat after entering into force.²¹³

Treaty Ratification

After adoption, multilateral treaties open for signature by heads of state or their representatives. A signature indicates support, but it does not constitute consent to be bound by the treaty. To become the law of the land in a signatory state, a treaty must be ratified. ‘Ratification’ means that a state consents to being bound by a treaty under international law. Once a state ratifies a treaty, it becomes a party to that treaty.²¹⁴

²⁰⁹ https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml

²¹⁰ <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law#:~:text=Through%20ratification%20of%20international%20human,rights%20guaranteed%20under%20international%20law>

²¹¹ <https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>

²¹² https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

²¹³ Ibid.

²¹⁴ <https://www.unhcr.org/4d09dbe69.pdf>

For certain treaties, the signatory period has an end date after which states can no longer sign unless they follow a special process known as ‘accession.’²¹⁵

U.S. Treaty Ratification

Before a state can ratify a treaty, it must seek domestic approval. This process has several steps in the United States.

If a treaty is being drafted, the Secretary of State must authorize the U.S. government to be part of negotiations. An authorized representative can sign the treaty after its terms are settled. Once a treaty is signed, the President submits it to the U.S. Senate Foreign Relations Committee.²¹⁶ The Committee either reports back to the Senate with a majority vote or declines to act on the treaty. If the committee declines to act, the treaty will remain available to the Senate for future consideration. Alternatively, the committee can report to the Senate favorably, unfavorably, or without recommendation.²¹⁷



After receiving a report, the Senate can make amendments to the text unless the treaty indicates otherwise. These amendments are known as RUDs: Reservations, Understandings, and Declarations. RUDs serve to limit and interpret the treaty’s application within U.S. law.²¹⁸ Finally, the Senate votes on a resolution to ratify with any necessary RUDs. If the treaty is approved by 67 votes, the President can ratify the treaty, indicating that the US commits to the treaty on a national level.²¹⁹

Local, state, and federal law is expected to comply with ratified treaties. However, to officially override pre-existing legislation that is inconsistent with a ratified international treaty, the treaty must become official U.S. domestic law, which happens in one of two ways. First, treaty provisions that are considered ‘self-executing’ automatically become domestic law. Courts generally consider provisions ‘self-executing’ when they are specific and enforceable without additional legislation. Second, if a provision is not ‘self-executing’ it can take official legal effect only through an act of Congress.²²⁰

The U.S. Role in International Human Rights Treaties

The United States has ratified only 14 of 53 international human rights-related treaties and optional protocols.²²¹ In contrast, Canada has ratified 36 of these treaties and protocols.

The US has ratified only three of the nine UN core international human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the International Covenant on Civil and Political Rights (ICCPR); and the Convention against Torture and Other Cruel, Inhuman or

²¹⁵ *Ibid.*

²¹⁶ https://law.duke.edu/ilrt/treaties_3.htm

²¹⁷ <https://crsreports.congress.gov/product/pdf/RS/98-384>

²¹⁸ <https://treaties.un.org/doc/source/publications/THB/English.pdf>

²¹⁹ <https://crsreports.congress.gov/product/pdf/RS/98-384>

²²⁰ <https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law>

²²¹ See table below, “US Ratification of Major International Human Rights Treaties”.

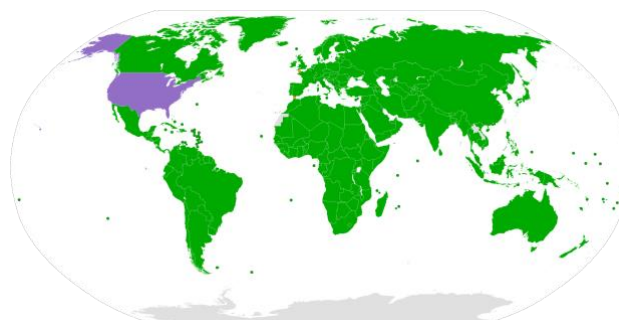
Degrading Treatment or Punishment.²²² There are 26 countries that have ratified all nine, including Argentina, Ecuador, Mexico, and Uruguay.

The Convention on the Rights of the Child (CRC) is one of the core treaties that the US has not ratified, the only country in the world that has not done so.²²³

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, pronounced SEE-daw) is also among the six core treaties that the US has not ratified. CEDAW is viewed internationally as a Bill of Rights for women. Six UN member states have not ratified the convention: Iran, Palau, Somalia, Sudan, Tonga, and the US.²²⁴

Convention on the Rights of the Child

Green: States have ratified the CRC.



Additionally, the US has only ratified two of the International Labor Organization's eight fundamental conventions.²²⁵ It has ratified none of the three international conventions to protect refugees and stateless persons.²²⁶

In cases where the US has ratified international human rights treaties, RUDs have often been added to limit treaty power.²²⁷ For example, the US attached two Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. The first reservation asserts that disputes between the US and another state party about the Convention can only be submitted to the International Court of Justice with the consent of the U.S. government. The second reservation exempts U.S. compliance if the Convention requires legislation or action that is prohibited by its Constitution.²²⁸ These reservations weaken the power of the Convention to prosecute genocide perpetrated or aided by the US.

²²² <https://indicators.ohchr.org/>

²²³ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4&clang=_en

²²⁴ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-8&chapter=4&clang=_en

²²⁵ https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F

²²⁶ https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=V-4&chapter=5&clang=_en

; https://treaties.un.org/pages/ViewDetailsII.aspx?src=IND&mtmsg_no=V-2&chapter=5&Temp=mtmsg2&clang=_en ;

https://treaties.un.org/pages/ViewDetailsII.aspx?src=IND&mtmsg_no=V-3&chapter=5&Temp=mtmsg2&clang=_en

https://treaties.un.org/pages/ViewDetailsII.aspx?src=IND&mtmsg_no=V-3&chapter=5&Temp=mtmsg2&clang=_en

²²⁷ <https://globaljusticecenter.net/blog/773-u-s-aversion-to-international-human-rights-treaties>

²²⁸ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-1&chapter=4#EndDec

U.S. Ratification of Major International Human Rights Treaties

A list of international human rights treaties appears below, indicating U.S. ratification status of each treaty.

Human Rights Treaty	Ratification	# of Parties
Civil Rights and Freedoms		
Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, 1962.	Not Ratified	56 states
International Covenant on Civil and Political Rights (ICCPR), 1966.	Ratified	173 states
International Covenant on Economic, Social, and Cultural Rights (ICESCR), 1966.	Not Ratified	171 states
Optional Protocol to the International Covenant on Civil and Political Rights, 1989.	Not Ratified	116 states
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1989.	Not Ratified	89 states
Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, 2008.	Not Ratified	26 states
International Law and the Administration of Justice		
Convention on the Prevention and Punishment of the Crime of Genocide, 1948.	Ratified	152 states
Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949.	Ratified	196 states
Geneva Convention relative to the Treatment of Prisoners of War, 1949.	Ratified	196 states
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968.	Not Ratified	56 states
Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977.	Not Ratified	174 states
Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977.	Not Ratified	169 states
Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984.	Ratified	171 states
International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, 1989.	Not Ratified	37 states
Rome Statute of the International Criminal Court, 1998.	Not Ratified	123 states

Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000.	Ratified	150 states
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 2002.	Not Ratified	90 states
International Convention for the Protection of All Persons from Enforced Disappearance (CPED), 2006.	Not Ratified	63 states
Labor Rights, Forced Labor, and Slavery		
Forced Labor Convention, 1930.	Not Ratified	179 states
Freedom of Association and Protection of the Right to Organize Convention, 1948.	Not Ratified	157 states
Right to Organize and Collective Bargaining Convention, 1949.	Not Ratified	168 states
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950.	Not Ratified	82 states
Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950.	Not Ratified	41 states
Equal Remuneration Convention, 1951.	Not Ratified	173 states
Slavery Convention, signed at Geneva on 5 September 25, 1926, and amended by the Protocol, 1953.	Not Ratified	99 states
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956.	Ratified	124 states
Abolition of Forced Labor Convention, 1957.	Ratified	176 states
Discrimination (Employment and Occupation) Convention, 1958.	Not Ratified	175 states
Employment Policy Convention, 1964.	Not Ratified	115 states
Minimum Age Convention, 1973.	Not Ratified	173 states
Worst Forms of Child Labor Convention, 1999.	Ratified	187 states
Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000.	Ratified	178 states
Protocol of 2014 to the Forced Labor Convention, 2014.	Not Ratified	51 states
Statelessness and Refugees		
Convention relating to the Status of Refugees, 1951.	Not Ratified	146 states
Convention relating to the Status of Stateless Persons, 1954.	Not Ratified	95 states
Convention on the Reduction of Statelessness, 1961.	Not Ratified	76 states
Protocol relating to the Status of Refugees, 1967.	Ratified	147 states
The Prevention of Discrimination		

Convention against Discrimination in Education, 1960.	Not Ratified	106 states
Protocol Instituting a Conciliation and Good Offices Commission to be responsible for seeking a settlement of any disputes which may arise between States Parties to the Convention against Discrimination in Education, 1962.	Not Ratified	36 states
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1966.	Ratified	182 states
International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973.	Not Ratified	109 states
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979.	Not Ratified	189 states
International Convention against Apartheid in Sports, 1985.	Not Ratified	62 states
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999.	Not Ratified	114 states
The Rights of Indigenous People		
Indigenous and Tribal Peoples Convention, 1989.	Not Ratified	23 states
Agreement Establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean (FILAC), 1992.	Not Ratified	23 states
The Rights of Migrant Workers		
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), 1990.	Not Ratified	56 states
The Rights of Persons with Disabilities		
Convention on the Rights of Persons with Disabilities (CRPD), 2006.	Not Ratified	182 states
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006.	Not Ratified	98 states
The Rights of the Child		
Convention on the Rights of the Child (CRC), 1989.	Not Ratified	196 states
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000.	Ratified	171 states
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography, 2000.	Ratified	177 states
Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2011.	Not Ratified	47 states
Total # of Treaties: 53	Ratified: 14	Not Ratified: 39

229

²²⁹ <https://indicators.ohchr.org/> ;

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:102871 ;

Conclusion

The ratification of these treaties develops universal standards of human rights and customary international law. Since the end of World War II and the founding of the United Nations, great advances have been made to reach the aspirational goal of 'universal human rights.'

https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 ;
<https://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx> ;
<https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> ;
https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=US ;
<https://en.unesco.org/node/297949> ;
<http://portal.unesco.org/la/convention.asp?KO=12949&language=E&order=alpha>

Regional Human Rights Systems and Courts

Amalie Wilkinson, Research Intern

The United Nations has an international system to monitor, promote, and protect human rights. This includes a variety of international human rights treaties and the Human Rights Council. However, there is no international human rights court where people can seek remedy when their rights have been violated.²³⁰

Human rights systems that cover wide regions have emerged to fill gaps in the UN's work. They protect human rights in ways designed for the culture and politics of their region. There are three regional systems, one each in Africa, the Americas, and Europe. Each system has three interconnected parts:²³¹

- 1) One or multiple **regional treaties** to define the rights protected under the system.
- 2) One or multiple bodies –**committees, commissions, or offices**— to research, monitor, and promote human rights in the region.
- 3) A **court** to enforce the rights set out by the system's treaties.²³²

Individual human rights bodies have also emerged in Southeast Asia and the Middle East, but they are not part of a broader regional system.²³³

These regional systems exist to hold **states** accountable for human rights violations, as they do not have jurisdiction to prosecute individuals. They do not replace national courts, so all complainants must first try to remedy their issue at a local or state level.²³⁴

Each regional human rights system or body was established by its respective intergovernmental organization: the Council of Europe (CoE), the Organization of American States (OAS), the African Union (AU), the League of Arab States, and the Association of Southeast Asian Nations (ASEAN).²³⁵ There are benefits to protecting human rights systems under these regional bodies. For example, countries in the same region often share security interests and can use the regional structure to compel one another to respect multilateral treaties. They also often have similar cultural values.²³⁶

The European System

The **European Human Rights System, created in 1949**, is the most effective and comprehensive regional system to date. It operates under the **Council of Europe (CoE)**, an intergovernmental organization with

²³⁰ <https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>

²³¹ <https://guides.ll.georgetown.edu/c.php?g=273364&p=6025368>

²³² *ibid.*

²³³ <https://ijrcenter.org/regional/>

²³⁴ *ibid.*

²³⁵ *ibid.*

²³⁶ <https://sur.conectas.org/wp-content/uploads/2017/11/sur4-eng-christof-heyms.pdf>

47 member states.²³⁷ The CoE is different from, and includes more countries than, the European Union; almost every state on the European continent, even Russia and Turkey.²³⁸

Council of Europe Members

The Council of Europe established a regional human rights system in 1950 by ratifying the **European Convention for the Protection of Human Rights and Fundamental Freedoms**. This treaty defined the human rights that should be enjoyed by everyone in Europe. Since 1950, there have been several amendments, including the abolition of the death penalty, the right to free elections, and more.²³⁹



Commissioner for Human Rights

The **Commissioner for Human Rights** promotes awareness and respect for the human rights defined in the European Convention. Commissioners are elected for six-year terms. Their office is an independent institution that was set up by the Council of Europe in 1999. They visit countries, research human rights topics, identify potential issues, and provide advice on how to protect human rights.²⁴⁰

European Committee on Social Rights

The **European Committee on Social Rights** is also a monitoring body for human rights under the Council of Europe. However, it focuses on social rights set by the **European Social Charter (1961)**. The Committee is composed of 15 independent members, elected for a period of six years.²⁴¹

There are 43 European states party to the European Social Charter. The states submit periodic reports, and the Committee decides whether they have complied with the Charter. It can give recommendations about how to better protect social rights.²⁴²

European Court of Human Rights

The **European Court of Human Rights (ECtHR)**, established in 1959, is a permanent court located in Strasbourg, France. It has jurisdiction over human rights cases in all 47 member states of the Council of Europe. Its judgments are binding, and they are routinely implemented by national courts and governments, often leading to changes in national laws. It is the most highly regarded human rights court on the planet.²⁴³

European Court of Human Rights



²³⁷ <https://www.coe.int/en/web/portal/47-members-states>

²³⁸ <https://guides.ll.georgetown.edu/c.php?g=273364&p=602536>

²³⁹ https://www.echr.coe.int/Documents/Convention_Instrument_ENG.pdf

²⁴⁰ <https://www.coe.int/en/web/commissioner/mandate>

²⁴¹ <https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights>

²⁴² <https://ijrcenter.org/regional/>

²⁴³ https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf;

<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/evolving-international-human-rights-system/2740F0E3C03C28FD4C76A9DAE14E9CCD>

Individuals can accuse states of violating their rights, or states can accuse other states. The Court can also give non-binding advisory opinions in which they interpret human rights topics or treaties upon the request of the Council of Europe.

Issues

Unfortunately, the ECtHR has become a ‘victim of its own success.’ Due to its high popularity and credibility, it has received an overwhelming number of cases and has become less efficient.²⁴⁴

The Inter-American System

The inter-American human rights system operates under the **Organization of American States (OAS)**, an intergovernmental organization of which all 35 states in the western hemisphere are members. The OAS was established in 1948. This regional human rights system upholds the rights that are guaranteed in regional treaties including:²⁴⁵

- **The Charter of the Organization of American States (1948)**
- **The American Declaration of the Rights and Duties of Man (1948)**
- **The American Convention on Human Rights (1969)**

Inter-American Commission on Human Rights

The **Inter-American Commission on Human Rights** monitors the compliance of states with their human rights obligations. The 7 members, elected for 4-year terms, visit countries, publish reports, and monitor human rights in the Americas.²⁴⁶

The Commission is also a gatekeeper for the Inter-American Court of Human Rights. It can accept complaints, which are known as ‘petitions,’ from individuals, organizations, and states against any member of the OAS. The Commission reviews each petition and can refer cases to the Court.²⁴⁷

Inter-American Court of Human Rights

The Inter-American Court of Human Rights was established in 1979 and is based in San José, Costa Rica. It has 7 judges elected for 6-year terms. Decisions made by the Court are binding and are not subject to appeal. However, states must consent to be bound Court’s jurisdiction. There are only 20 states that have done so. The US has not.²⁴⁸

Organization of American States Members



²⁴⁴ [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET\(2010\)410206_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf)

²⁴⁵ <https://guides.ll.georgetown.edu/c.php?g=273364&p=6025373>

²⁴⁶ https://ijrcenter.org/regional/inter-american-system/#Inter-American_Commission_on_Human_Rights

²⁴⁷ <https://guides.ll.georgetown.edu/c.php?g=273364&p=6025373>; <https://ijrcenter.org/regional/>

²⁴⁸ https://ijrcenter.org/regional/inter-american-system/#Inter-American_Court_of_Human_Rights ; https://www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH_2019_eng.pdf

The Court can institute interim measures while it decides a case. It can demand that a state take or refrain from specific actions to prevent human rights violations. Additionally, the Court can give advisory opinions upon request from any OAS organ or member state.²⁴⁹

Issues

The inter-American human rights system is recognized as the second most developed, after the European system. Nonetheless, countries in the region lag behind Europe in terms of human rights due to the prevalence of poverty, discrimination, corruption, illiteracy, and flawed judicial systems within many of the member states.²⁵⁰

Moreover, the Court's voluntary jurisdiction inhibits it from hearing cases against the US, Canada, and other states that have not given their consent, undermining the Court's power.²⁵¹

The African System

The African human rights system operates under the **African Union (AU)**, an intergovernmental organization founded in 2002 with 55 members states—all the independent states on the African continent.²⁵²

The African human rights system protects the rights defined in **the African Charter on Human and Peoples' Rights (1981)**. It has been ratified by 54 out of the AU's 55 members, the exception being Morocco. The Charter safeguards the civil, political, economic, and social rights of individuals and recognizes the rights of groups.²⁵³ There is an emphasis on Indigenous rights and self-determination, predicated upon Africa's history of apartheid and colonial abuse. Cultural values are reflected in provisions about individual and family rights.²⁵⁴

African Union Members



African Commission on Human and Peoples' Rights

The **African Commission on Human and Peoples' Rights** promotes and investigated violations of the African Charter rights. It is composed of 11 independent commissioners, elected for 6-year terms.²⁵⁵

Individuals, NGOs, and states can submit complaints against any member of the AU for human rights abuses. The commission can make recommendations or request provisional measures to protect victims while an issue is under investigation. However, it does not have binding legal authority.²⁵⁶

²⁴⁹ <https://ijrcenter.org/regional/>

²⁵⁰ <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/evolving-international-human-rights-system/2740F0E3C03C28FD4C76A9DAE14E9CCD>

²⁵¹ [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET\(2010\)410206_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf)

²⁵² <https://guides.ll.georgetown.edu/c.php?g=273364&p=6025371>

²⁵³ Ibid.

²⁵⁴ https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf

²⁵⁵ <https://ijrcenter.org/wp-content/uploads/2020/07/ACHPR-EC-Mini-Guide-clean-1.pdf>

²⁵⁶ <https://guides.ll.georgetown.edu/c.php?g=273364&p=6025371>; <https://www.somo.nl/wp-content/uploads/2018/07/ACHPR-brochure-final.pdf>

The African Court on Human and Peoples' Rights

The **African Court on Human and Peoples' Rights** is in Arusha, Tanzania and is composed of 11 independent judges, elected for 6-year terms. It has binding legal authority over states that have accepted its jurisdiction. The court holds three types of jurisdictions.²⁵⁷

First, there is a Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. There are 31 states that have ratified this protocol. The Court has jurisdiction to decide complaints against these states. Complaints can be submitted by an AU state, a recognized intergovernmental organization, or the African Commission on Human and Peoples' Rights.²⁵⁸

Second, states can opt-in to more extensive jurisdiction. A state can give the Court power to decide complaints brought against it by individuals or certain NGOs. Only eight states have opted-in to this jurisdiction.²⁵⁹

Third, the Court can also give advisory opinions at the request of any AU organ, member state, or recognized organization.²⁶⁰

Issues

The African human rights system is structurally complete, but a lack of political will to enforce human rights among AU member states limits the system's impact. The Commission and Court are severely underfunded, lowering their capacity to produce comprehensive assessments, make timely decisions, and attract qualified candidates to serve as commissioners and judges. Many cases of human rights abuses are not referred to the Court due to a lack of faith in the institution's integrity.²⁶¹

The Emerging Arab States System

The Arab states are split between Africa and Asia. They are connected by a strong link to Islam, as well as similar political traditions, ideals, and laws. Their human rights system remains in its early stages of development.²⁶²

The emerging Arab human right system exists under the **League of Arab States**, an intergovernmental organization similar in structure to the EU, OAC, and AU. The League of Arab States adopted the **Arab Charter of Human Rights** in 2004, which outlines human rights as they interact with the ideals of Islam. In 2009, the League established the **Arab Committee of Human Rights** to promote and protect rights laid out in the Charter.²⁶³

League of Arab States Members



While these are important steps towards a regional human rights system, the Charter includes provisions that may be incompatible with international human rights standards. For example, the Charter condones the death penalty for serious crimes, a penalty that is outlawed by other regional

²⁵⁷ https://ijrcenter.org/regional/african/#African_Court_on_Human_and_Peoples8217_Rights

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET\(2010\)410206_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf)

²⁶² Ibid.

²⁶³ Ibid.

systems. It also defines marriage as a union between a man and a woman, which denies protections for the LGBTQ+ community.²⁶⁴ Additionally, the emerging system suffers from weak institutional capacity and low political cooperation.²⁶⁵

The Emerging Sub-Regional Southeast Asian System

The Asia-Pacific region has no human rights system. Cultural and political diversity, as well as a lack of political will, have inhibited the creation of a regional intergovernmental organization. The politically diverse region includes Australia's western democracy, China's communist regime, and Saudi Arabia's Islamic theocracy. It is unlikely that a human rights system akin to that of Europe, the Americas, or Africa will emerge.²⁶⁶

Association of Southeast Asian Nations Members



Nevertheless, one sub-regional human rights system has begun to emerge in Southeast Asia. The system exists under the 10-member **Association of Southeast Asian Nations (ASEAN)**.²⁶⁷ ASEAN was established in 1967 to promote economic, political, and security cooperation in the Asian South Pacific.²⁶⁸

The organization established the **ASEAN Intergovernmental Commission on Human Rights** in 2009 to raise awareness and educate about human rights. The Commission was also tasked with developing a regional human rights instrument, such as a convention or declaration on human rights, which has yet to be developed.²⁶⁹

The Commission also lacks judicial power to hold governments accountable for human rights violations. ASEAN's emphasis on non-interference in international affairs has been a major barrier. The sub-regional system requires more power and political will to take shape.²⁷⁰

²⁶⁴ <https://digitallibrary.un.org/record/551368?ln=en#record-files-collapse-header>

²⁶⁵ [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET\(2010\)410206_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf)

²⁶⁶ Ibid.

²⁶⁷ [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET\(2010\)410206_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf)

²⁶⁸ <https://www.cfr.org/background/what-asean>

²⁶⁹ [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET\(2010\)410206_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf)

²⁷⁰ Ibid.

Systems Summary

Intergovernmental Organizations	Council of Europe	Organization of American States	African Union	League of Arab States	Association of Southeast Asian Nations
Human Rights Instruments	Convention for the Protection of Human Rights and Fundamental Freedoms. European Social Charter.	Charter of the OAS. American Declaration on the Rights and Duties of Man. American Convention on Human Rights.	African Charter on Human and Peoples' Rights.	Arab Charter of Human Rights.	None.
Monitoring/ Enforcing Bodies	European Court of Human Rights. Commissioner for Human Rights. European Committee on Social Rights.	Inter-American Commission on Human Rights. Inter-American Court of Human Rights.	The African Commission on Human and Peoples' Rights. The African Court on Human and Peoples' Rights.	Arab Committee of Human Rights.	ASEAN Intergovernmental Commission on Human Rights.
Level of development	Highly developed, issues with efficiency.	Well developed, several notable flaws.	Developed, but in need of further consolidation.	Emerging, concerning human rights standards.	Emerging, lack of enforcement and underlying treaty.

Conclusion

Existing regional human rights systems vary widely, from the well-developed European system to the emerging sub-regional system in Southeast Asia. They all require further work to ensure the protection and promotion of human rights in their respective regions.

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