



Alphabet Soup: The International Tribunals?

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Summary Overview

- I. Learning Objectives: Understanding the range of international and regional courts and differences in their design, function, and implications for U.S. law.^{† ‡}
- II. An Introduction to International Courts

There exist a wide range of international courts, whose jurisdictions run the gamut from general questions of international law (the International Court of Justice) to specific subject areas (the Tribunal for the Law of the Sea). International courts are created pursuant to international treaties and, generally speaking, have jurisdiction only over nation-states that have consented to participate in the institution. While there are some courts that can hear disputes arising around the globe, most international courts have a regional focus. We provide below a brief description of the major global and regional courts.¹ In the interest of space, we did not discuss any arbitral tribunals other than the NAFTA dispute settlement system.

Following the list of international and regional courts, we provide a short history of international criminal courts and discuss some implications these courts may have on U.S. law and jurisprudence.

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¹ This information is gathered from a variety of sources. We have tried to be as accurate as possible but have not independently verified all information provided.

GLOBAL COURTS

International Court of Justice (ICJ)

Year of Establishment: 1946	Location: The Hague, Netherlands	Number of Judges: 15
Standing to Bring Claims: Nation-states may commence proceedings in the ICJ, although international agencies may request non-binding advisory opinions		
Foundational Treaty: The Statute of the International Court of Justice/The UN Charter		
Number of Member States: Same as the Member States of The United Nations (presently 191)		
US a party? Yes (although only with regard to particular international treaties)		
Number of Cases by 2003 ² : 104 contentious cases filed; 80 judgments issued; 23 advisory opinions issued		
Jurisdiction: The ICJ's function is twofold: to settle in accordance with international law the legal disputes submitted to it by States, and to give non-binding, advisory opinions on legal questions submitted by duly authorized international organs and agencies. The ICJ may hear any legal dispute over international law, no matter whether it arises out of the alleged violation of an international agreement or out of customary international law. The ICJ has jurisdiction only over disputes between states, and only if they have accepted the court's jurisdiction by at least one of three ways: 1) ad hoc agreement by parties to submit dispute to Court; 2) part of a jurisdictional clause to a treaty; 3) reciprocal effect of optional declarations by which states accept the jurisdiction of the ICJ to settle disputes arising with another state making a similar declaration.		

International Tribunal for the Law of the Sea (ITLOS)

Year of Establishment: 1982 (began operations in 1996)	Location: Hamburg, Germany	Number of Judges: 21
Standing to Bring Claims: Nation-states (except for the Seabed Disputes Chamber)		
Foundational Treaty: United Nations Convention on the Law of the Sea (UNCLOS)		
Number of Member States: 149		
US a party? No		
Number of Cases by 2004: 13 judgments issued		
Jurisdiction: ITLOS settles disputes over the implementation and interpretation of the Law of the Sea Treaty. However, it is only one (and not the default) of four dispute resolution mechanisms		

² Unless otherwise indicated, data on total cases from each court taken from Karen Alter, *Private Litigants and the New International Courts*, 39 *COMPARATIVE POLITICAL STUDIES* 22, Table 1 (2006).

available under this treaty, including arbitration, special arbitration, and the ICJ.
 The ITLOS does not have jurisdiction over disputes unless the parties have agreed to it by ad hoc declaration, agreement, or prior optional declaration.

Special Features: the Tribunal has a special 11-member chamber (Seabed Disputes Chamber) with compulsory jurisdiction over disputes concerning activities in the seabed. This special chamber can apply not only the UNCLOS and principles of international law, but also the rules and regulations of the International Sea-bed Authority and the terms of contracts concerning seabed activities. In addition, individuals and companies have standing to bring actions before the special chamber.

Appellate Body of the World Trade Organization (WTO)

Year of Establishment: 1994	Location: Geneva, Switzerland	Number of Judges: 7
Standing to Bring Claims: Nation-states may commence proceedings at the WTO		
Foundational Treaty: Dispute Settlement Understanding of the WTO		
Number of Member States: 149		
US a party? Yes		
Number of Cases by 2003: 304 disputes formally initiated; 59 decisions issued		
Jurisdiction: The Appellate Body hears appeals arising from arbitral panels convened to hear disputes between members of the World Trade Organization over the interpretation and application of the treaties that set out the law of the World Trade Organization and its predecessor institution, the General Agreement on Tariffs and Trade.		

International Criminal Court (ICC)

Year of Establishment: 1998 (began operations in 2002)	Location: The Hague, Netherlands	Number of Judges: 18
Standing to Bring Claims: Only the prosecutor can commence cases and only against individual defendants.		
Foundational Treaty: The Rome Statute of the International Criminal Court		
Number of Member States: 102		
US a party? No		
Number of Cases by 2006: The prosecutor has active investigations into crimes committed in Uganda, the Democratic Republic of Congo, and Sudan.		

Jurisdiction: The Court has subject matter jurisdiction over the international crimes of genocide, crimes against humanity, and war crimes that have taken place since July 1, 2002. The Court may only exercise jurisdiction if: 1) the accused is a national of a State Party to the Rome Statute or a State otherwise accepting the jurisdiction of the Court; 2) the crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or 3) the UN Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime. In addition, The Court abides by the principle of “ complementarity” – the court will refrain from prosecuting a case if the case has been or is being investigated or prosecuted by a State with jurisdiction, provided that the prosecuting State is willing and able to investigate and prosecute. State Parties or the UN Security Council may refer situations to the Prosecutor, who will evaluate and commence an investigation unless there is no reasonable basis to proceed. The Prosecutor may also begin an investigation on his own initiative.

REGIONAL COURTS

Europe

European Court of Justice and the Court of First Instance (ECJ/CFI)

Year of Establishment: 1952	Location: Luxembourg	Number of Judges: 25
Standing to Bring Claims: The European Commission or a Member State can bring actions in the Court of Justice. Natural and legal persons, as well as Member States, can bring actions against the European Commission or Community institutions in the Court of First Instance.		
Foundational Treaty: Convention on Certain Institutions Common to the European Communities		
Number of Member States: 25		
Number of Cases by 2004: 2,497 infringement cases by Commission; 5,293 cases referred by national courts; 7,528 direct actions		
Jurisdiction: The interpretation and application of European Community law. The Court of Justice is the judicial arm of the European Community.		

European Court of Human Rights (ECHR)

Year of Establishment: 1959	Location: Strasbourg, France	Number of Judges: 45
Standing to Bring Claims: Nation-states and individuals can bring claims against a Contracting State		

Foundational Treaty: European Convention on Human Rights
Number of Member States: 45
Number of Cases by 2003: 8,810 cases deemed admissible; 4,145 judgements issued
Jurisdiction: The court hears alleged breaches of the civil and political rights contained in the Convention for the Protection of Human Rights and Fundamental Freedoms by one of the states that is a party to this treaty.

Court of Justice of the European Free Trade Agreement (EFTAC)

Year of Establishment: 1992 (when countries of the European Community entered into and agreement with the countries of the European Free Trade Agreement to integrate the two areas into the European Economic Area (EEA)	Location: Luxembourg	Number of Judges: 3
Standing to Bring Claims: Member States and EFTA bodies		
Foundational Treaty: European Economic Area Agreement		
Number of Member States: 3		
Number of Cases by 2003: 59 opinions issued		
Jurisdiction: Infringement actions brought by the EFTA Surveillance Authority against an EFTA State with regard to the implementation, application or interpretation of an EEA rule; disputes between two or more EFTA States; appeals concerning decisions made by EFTA' s Surveillance Authority; and advisory opinions to courts in EFTA States on the interpretation of EEA rules.		
Special Features: Since the EFTAC' s jurisdiction corresponds to the ECJ' s jurisdiction over the European Community, the two courts closely coordinate their efforts. Both consider each other' s jurisprudence, and all Member states of the EEA can be represented before both courts.		

Court of Justice of the Benelux Economic Union (Benelux CJ)

Year of Establishment: 1974	Location: Brussels, Belgium	Number of Judges: 9
Standing to Bring Claims: Benelux member states		
Foundational Treaty: Benelux Treaty		
Number of Member States: 3		
Number of Cases by 2003: Unknown		

Jurisdiction: The Court promotes the uniform interpretation of common legal rules for which it has become competent (e.g. concerning trademarks, penalty, motor vehicle insurance, movement of persons, protection of birds). When a national judge determines that a Benelux rule is unclear in a case, the court and (and sometimes must) request a ruling by the Benelux CJ. This process produces a binding interpretation of law. The Benelux CJ can also issue a non-binding advisory opinion on an interpretation of a common legal rule at the request of the three Member States. Finally, the Benelux CJ has appellate jurisdiction over decisions on the legal status of Benelux officials.

Special Features: Members of the Benelux CJ continue to serve on their national supreme courts while in office.

Economic Court of the Commonwealth of Independent States (ECCIS)

Year of Establishment: 1993	Location: Minsk, Belarus	Number of Judges: Up to 24 (2 from each member state)
Standing to Bring Claims: Member States of the CIS and CIS institutions		
Foundational Treaty: Charter of the Commonwealth of Independent States		
Number of Member States: 12		
Number of Cases by 2000: 47 cases (not clear if they were completed or not)		
Jurisdiction: Interstate disputes concerning the implementation of economic obligations under the agreements, decisions, and regulations of the Commonwealth. Jurisdiction may also be granted as part of a jurisdictional clause of a treaty. Other matters may be referred to the court by CIS states by special agreement.		

International Criminal Tribunal for the former Yugoslavia (ICTY)

Year of Establishment: 1993	Location: The Hague, Netherlands	Number of Judges: Up to 28 (16 permanent and up to 12 ad litem)
Standing to Bring Claims: Only the prosecutor can commence cases, and then only against individual defendants.		
Foundational Treaty: ICTY Statute (adopted pursuant to UN Security Council Resolution 827)		
Number of Member States: N/A		
Number of Cases by 2003: 75 public indictments, 18 completed cases		

Jurisdiction: Grave breaches of the 1949 Geneva Conventions, violations of the law or customs of war, genocide, and crimes against humanity. The Tribunal's jurisdiction is limited to crimes committed in the territory of the former Yugoslavia since 1991. Investigations are initiated at the discretion of the Prosecutor.

Special Features: The Tribunal has concurrent jurisdiction with national courts, however it can claim primacy over a national prosecution if such action is in the interest of international justice. The Tribunal was established by the UN Security Council, acting under Chapter VII of the UN Charter. Because it was created under Security Council authority, all UN Member States are bound to comply with the decisions and requests of the Tribunal.

The Americas

Inter-American Court of Human Rights (IACHR)

Year of Establishment: 1969	Location: San Jose, Costa Rica	Number of Judges: 7
Standing to Bring Claims: State Parties to the Convention and the Inter-American Commission of Human Rights, another treaty body tasked with monitoring the state of rights enforcement and investigating individual petitions.		
Foundational Treaty: American Convention of Human Rights		
Number of Member States: 35		
US a party? No		
Number of Cases by 2003: 104 judgements, 18 advisory opinions, 148 provisional measures ordered		
Jurisdiction: Interpretation and Application of the American Convention on Human Rights. States must consent to the exercise of jurisdiction either unconditionally or by condition of reciprocity for a specific period or case.		

NAFTA Dispute Resolution Procedures

Year of Establishment: 1992	Number of Judges: Ad hoc panels are comprised of 5 independent experts
Standing to Bring Claims: Member States	
Foundational Treaty: North American Free Trade Agreement	
Number of Member States: 3	

US a party? Yes
<p>Chapter 20 – General Dispute Settlement Procedure</p> <p>Jurisdiction: Disputes between Members concerning the interpretation and application of NAFTA.</p> <p>Number of Cases by 2006: 3³</p> <p>Special Features: Disputes arising under the following chapters may be referred to the dispute settlement procedures of Chapter 20: Chapter 7 (Agriculture and Sanitary and Phytosanitary Measures), Chapter 10 (Government Procurement), Chapter 11 (Non-compliance of a Party with a final award), and Chapter 14 (Financial Services).</p>
<p>Chapter 19 – Anti-Dumping and Countervailing Duties</p> <p>Jurisdiction: Review of decisions by a Member State authority on anti-dumping and countervailing duty matters.</p> <p>Number of Cases Completed by 2006: 141⁴</p> <p>Special Features: In cases of alleged conflict of interest or other extraordinary circumstances, a panel's decision can be appealed to a three-member Extraordinary Challenge Committee comprised of judges or former judges.</p>

Court of Justice of the Andean Community (TJAC)

Year of Establishment: 1979	Location: Quito, Ecuador	Number of Judges: 5
<p>Standing to Bring Claims: Petitions for the annulment of decisions of other Community bodies can be filed by Member States, the Council of Ministers of Foreign Affairs, the Commission of the Andean Community, the General Secretariat of the Andean Community, or private parties. For matters concerning compliance from Member States, the General Secretariat or Member States can file petitions, and private entities may file petitions through the General Secretariat. Domestic courts are required to request Court opinions on the interpretation of Community law.</p>		
Foundational Treaty: Treaty Creating the Court of Justice of the Cartagena Agreement		
Number of Member States: 5		
Number of Cases by 2004: 31 nullifications, 108 infringement measures, 711 preliminary rulings		
<p>Jurisdiction: The interpretation and application of the law of the Andean Community. The Court is the judicial branch of the Andean Community legal system. It can thus nullify the decisions of other Community bodies, determine whether Member States are complying with Community law, and issue binding interpretations of Community law.</p>		

³ According to information on Completed Panel Reviews, NAFTA Secretariat, <http://www.nafta-sec-alena.org>.

⁴ According to information on Completed Panel Reviews, NAFTA Secretariat, <http://www.nafta-sec-alena.org>.

Central American Court of Justice (CACJ)

Year of Establishment: 1962	Location: Managua, Nicaragua	Number of Judges: 5
Standing to Bring Claims: States, SICA organ, and private entities		
Foundational Treaty: Charter of the Organization of Central American States		
Number of Member States: 5		
Number of Cases by 2004: 65 cases, 21 advisory opinions, 30 rulings, 7 cases in progress		
Jurisdiction: The CACJ is the judicial arm of the Central American Integration System (SICA), and shares its mission to realize a closer integration between its members and thereby establish a free, democratic, and peaceful region. As such, it hears disputes between member States or between a member State and a State which is not a member but agrees to the Court's jurisdiction; between States and any natural or legal person who is a resident of any Member State; and about the integration process arising between SICA organs and Member States or natural or legal persons. The CACJ also acts as a permanent consultative organ for domestic courts of the region and can, upon request of a party, hear disputes between constitutional organs of Member States.		

Caribbean Court of Justice (CCJ)

Year of Establishment: 2001 (began operating in April 2005)	Location: Port of Spain, Trinidad & Tobago	Number of Judges: 7
Standing to Bring Claims: Member States		
Foundational Treaty: Agreement Establishing the Caribbean Court of Justice		
Number of Member States: 12		
Number of Cases by 2006: 2 judgements issued		
Jurisdiction: The interpretation and application of the Revised Treaty of Chaguaramas in preserving the CARICOM Single Market and Economy. The CCJ also acts as the final court of appeal for the domestic legal systems of Member States of the Caribbean Community. When domestic courts are called on to interpret the Revised Treaty of Chaguaramas, they must first seek a binding interpretation from the CCJ.		

Africa

Court of Justice of the Common Market for Eastern and Southern Africa (COMESA Court)

Year of Establishment: 1994	Location: Khartoum, Sudan	Number of Judges: 7
Standing to Bring Claims: Member States, COMESA institutions, and third parties with cases against COMESA institutions		
Foundational Treaty: Treaty Establishing the Common Market for Eastern and Southern Africa		
Number of Member States: 19		
Number of Cases by 2003: 3 judgements, 1 order		
Jurisdiction: As the judicial body of the Common Market for Eastern and Southern Africa, the COMESA Court oversees the implementation of the COMESA Agreement. The COMESA Court adjudicates disputes between member States against one another, references by the COMESA Council or the Secretary General against a member State for infringement of or failure to fulfill a Treaty provision, and references from a Member State or any legal and natural person resident in a member State concerning the legality of any act, regulation, directive, or decision of the COMESA Council. The COMESA Court also has jurisdiction over COMESA employees and third parties in cases against COMESA or its institutions.		

African Court on Human and Peoples' Rights (ACHPR)

Year of Establishment: 1998 (began operating in 2006)	Location: Arusha, Tanzania	Number of Judges: 11
Standing to Bring Claims: State Parties and the African Commission on Human and Peoples' Rights. NGOs recognized by the Organization of African Unity (OAU) and individuals can also bring cases if the State at issue has consented to this exercise of jurisdiction. In addition, Member States, OAU organs, and recognized NGOs can ask for advisory opinions.		
Foundational Treaty: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights		
Number of Member States: 53		
Number of Cases: Unknown		

Jurisdiction: The interpretation and application of the African Charter on Human and Peoples' Rights and any other human rights agreement that the States concerned in the case or dispute have ratified.

Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (OHADA)

Year of Establishment: 1997	Location: Abidjan, Côte d'Ivoire	Number of Judges: 7
Standing to Bring Claims: Member States, OHADA bodies.		
Foundational Treaty: Treaty on the Harmonisation of Business Law in Africa		
Number of Member States: 16		
Number of Cases: 4 opinions, 27 rulings		
Jurisdiction: The Common Court's primary role is to provide advice to the Council of Justice and Financial Ministers of the Organization for the Harmonization of Corporate Law in Africa (OHADA) on proposed uniform laws for corporate and trade law in Member States. When a case concerning a uniform law is pending before a national court, the case can be referred to the Common Court by the judge or either party. The court also facilitates arbitrations in the settlement of business disputes by monitoring proceedings to ensure impartiality and reviewing arbitral awards.		

International Criminal Tribunal for Rwanda (ICTR)

Year of Establishment: 1994	Location: Arusha, Tanzania (Appeals Chamber located in The Hague, Netherlands)	Number of Judges: 16 permanent and up to 4 ad litem judges
Standing to Bring Claims: Only the prosecutor can commence cases, and then only against individual defendants.		
Foundational Treaty: ICTY Statute (adopted pursuant to UN Security Council Resolution 955)		
Number of Member States: N/A		
Number of Cases: 17 completed cases; 38 cases in progress		
Jurisdiction: Genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. It may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighboring States during the same period.		

Special Features: The Tribunal has concurrent jurisdiction with national courts, however it can claim primacy over a national prosecution if such action is in the interest of international justice. The Tribunal was established by the UN Security Council, acting under Chapter VII of the UN Charter. Because it was created under Security Council authority, all UN Member States are bound to comply with the decisions and requests of the Tribunal.

Court of Justice of the African Union (CJAU)

Year of Establishment: 2003 (not yet in force)	Location: To Be Determined	Number of Judges: 11
Standing to Bring Claims: Organs of the African Union, Member States, and third parties given permission by the African Union Assembly.		
Foundational Treaty: Protocol of the Court of Justice of the African Union		
Number of Member States: 53		
Number of Cases: 17 completed cases; 38 cases in progress		
Jurisdiction: All disputes and applications referred to it concerning the interpretation and application of the Constitutive Act of the African Union and all decisions, regulations, and directives of the organs of the African Union. The CJAU may also exercise jurisdiction when such jurisdiction is specifically provided for in an agreement concluded among Member States or with the African Union. Organs of the African Union may also request Advisory Opinions.		
Note: The CJAU, not currently in operation, will be merged with the ACHPR in the future.		

The Middle East

Court of Justice for the Arab Maghreb Union

Year of Establishment: 1999 (began operating in 2001)	Location: Nouakchott, Mauritania	Number of Judges: 10
Standing to Bring Claims: Member States and Arab Maghreb Union bodies		
Foundational Treaty: Treaty of Marrakech		
Number of Member States: 5		
Number of Cases: Unknown		
Jurisdiction: Interpretation and application of the Treaty of Marrakech and other documents adopted by the Union. The Court also has jurisdiction to issue advisory opinions requested by the Presidential Council of the Union.		

Judicial Tribunal for the Organization of Arab Petroleum Exporting Countries

Year of Establishment: 1968	Location: Kuwait	Number of Judges: Unknown
Standing to Bring Claims: Member States and OAPEC bodies		
Foundational Treaty: 1967 Agreement between Saudi Arabia, Kuwait, and Libya		
Number of Member States: 11		
Number of Cases by 1999: 2		
Jurisdiction: Disputes relating to the interpretation and application of the Organization of Arab Petroleum Exporting Countries (OAPEC) Agreement and disputes arising between Member State concerning petroleum operations, and disputes referred to it by the Ministerial Council. Upon consent of the parties, the Tribunal may also adjudicate disputes arising between a Member State and a petroleum company operating in its territory or the territory of another Member State, or other disputes arising between Member States.		

Asia

At present, there are no regional courts in Asia.

International Criminal Courts

A. A History of International Criminal Courts

The Nuremberg Tribunal (International Military Tribunal of IMT) which prosecuted and tried 21 top Nazi military and civic leaders in 1945 was the first time that individuals were held criminally liable in an international court for violations of international humanitarian law or the law of war. The Nuremberg Tribunal was composed of four judges from the United States, the United Kingdom, France, and the Soviet Union. The crimes charged were waging aggressive war, crimes against the law of war based primarily on the Hague and Geneva Conventions, and crimes against humanity, a separate category for crimes committed by a government against its own citizens including in this case the Holocaust against the Jews. The Nuremberg trial took the better part of a year and at the end, eighteen defendants were convicted, three acquitted, eleven executed by hanging, and seven imprisoned. The Nuremberg Tribunal used an ad hoc combination of common law and civil law procedure. Incriminating documents were plentiful, and hearsay evidence was used. One defendant was tried in absentia. Despite much criticism that Nuremberg represented “victors’ justice,” most commentators give the IMT good marks for basic fairness including defendants’ rights to counsel and to cross-examine evidence against them as well as a lengthy and well-reasoned opinion, unanimous in most basic respects. In 1950 the United Nations adopted the Nuremberg Principles of International Law which recognized and defined war crimes, crimes against humanity, and crimes against peace and the principle of individual criminal liability for their commission.

Except for a few national prosecutions such as Jules Eichmann in Israel and Klaus Barbie in France, there were no individuals put on trial for international crimes of war or crimes against humanity for nearly fifty years. In 1993, in the midst of the Balkan Wars and in response to horrifying accounts coming out of

the war zone involving prison camps compared to Nazi concentration camps, executions of civilians and prisoners of war, widespread rapes and other atrocities, the International Tribunal for the Former Yugoslavia (ICTY) was established by a U.N. Security Council Resolution under its Chapter VII peacekeeping authority to facilitate ending the conflict and to punish those on both sides committing war crimes. The United States was a leader in supporting the initiative and lent considerable manpower and financial resources to the endeavor. Under the ICTY Charter, eleven (later increased to 16) permanent judges were chosen by the General Assembly from nominations by member UN States. The jurisdiction of the ICTY, located in The Hague, Netherlands, covered the same international crimes as Nuremberg with two exceptions. No crimes against peace would be charged and a new crime, genocide, was added to accommodate the Genocide Convention which had been adopted by a majority of countries, including the U.S. The ICTY's jurisdiction was also limited temporally to crimes committed on the territory of the former Yugoslavia after January 1, 1991. The ICTY operates through trial chambers of 3 judges each and an appellate chamber of 5. There has to date been an American judge on the ICTY at all times and two of its Presidents have been American. The judges elected for four year terms have come from both common and civil law backgrounds, some with extensive courtroom experience, other from academic or diplomatic backgrounds. Over 100 rules of procedure and evidence have been adopted and revised by the judges over a 13 year period combining elements of the common law adversarial process and features of civil law. The basic protections for a defendant required by the International Compact of Civil and Political Rights (ICCPR), i.e. notice of charges, rights to counsel, right to answer evidence against him, rights to pretrial release, were guaranteed in the ICTY Charter. Rules of evidence at the ICTY however are more tolerant of hearsay than the Anglo-Saxon model; relevant and probative evidence is admissible unless its admission would be prejudicial to the integrity of the

tribunal; the judges can give it the weights they think it deserves. Acquittals may be appealed and defendants may make unsworn and uncrossexamined statements to the court. Although the ICTY did not hold its first trial for three years after its establishment due to inability to apprehend suspects, it has now indicted 161 and completed trials of 95; 49 are serving or have served prison terms. The ICTY can impose sentences up to life imprisonment but not capital punishment.

In 1994 the Security Council established the International Criminal Tribunal for Rwanda in Arusha, Tanzania to try the same kind of crimes as the ICTY arising from the horrendous atrocities committed by the Hutus against the Tutsis in that year. The ICTR operates under the same basic rules as the ICTY; until recently both Tribunals had the same chief prosecutor and the same Appeals Chamber. To date, the ICTR has completed proceedings for 21 defendants, and 7 additional convictions are on appeal. Both the ICTY and the ICTR are now in the exit mode, expected to finish up trials and appeals within the next 3 -4 years. Unfinished cases will be devolved onto national courts.

The “ ad hoc” tribunals of the 1990s evidenced a continuing confidence on the part of the United States in the Nuremberg principles of the primacy of international humanitarian law and the moral imperative of punishing violators. Though technically even U.S. citizen might have been brought before these tribunals – none were – we did not seek any specific exemptions from their reach. And we contributed not just dollars but seasoned legal talent to their prosecutors’ offices and vital evidence to the trials themselves. In turn the tribunals produced volumes of important and noteworthy decisions fleshing out the contours of international criminal law and the law of war. Many of these decisions have drawn upon American precedents in their reasoning. Tribunal jurisprudence is of course based on customary law – that law which a majority of civilized nations feel obliged to obey – but determining what is customary law

in new situations often requires a search of different countries' law and practice and U.S. law has been prominently influential in this endeavor.

But the UN created tribunals have been expensive and in their early days slow, the average ICTY proceeding taking more than a year now reduced by several months. The UN has made it clear that it would not create any more of their genre. Yet the total breakdown of national judicial systems in war-torn countries and their judges' lack of knowledge or experience with international law have rendered the alternative of letting countries do their own war crimes trials unrealistic. For instance in Indonesia the country's insistence to go it alone produced war crime trials that the rest of the world, including the United States, labeled as "seriously flawed and lack(ing in) credibility." (12 acquittals of 18 paramilitaries accused of massacring East Timor civilians in the wake of the UN referendum on independence; only one defendant served time.)

A middle way between UN based tribunals and national courts had to be found. The small impoverished war-ravaged nation of Sierra Leone provided an opportunity to experiment with a different model. A decade-long civil war had left 200,000 dead, others brutally mutilated, thousands of child soldiers preying on child victims, 90% of the country devastated; no legal infrastructure left. The U.N. and the Sierra Leone government in 2002 signed an agreement to create a Special Court for Sierra Leone operating alongside but not inside the regular judiciary. The Sierra Leone model differed from the "ad hoc" tribunals in that it would employ a mixture of national and international judges, most importantly it would only seek to try those "bearing the greatest responsibility" for the atrocities and conclude within a 3 year period. The first prosecutor was an American former Defense Department lawyer; the bench was headed by an Australian Chief Judge; the financial support came from a group of voluntary donors including the United States who stood for one third of the costs. Though it has passed the three year mark, the Sierra Leone Tribunal is regarded as efficient and is finishing the last three of its fourteen trials now. Its most

prominent defendant Charles Taylor, the former President of Liberia, indicted for providing arms to rebels in the civil war in exchange for “ blood diamonds” mined by slave labor, is awaited trial in the Hague by a panel of the Sierra Leone court. The Sierra Leone court is now scheduled to finish its other proceedings within a year or so. The temporary “ hybrid court” is more likely the wave of future international courts than the original U.N. model.

In a similar mode, Cambodia after many years of negotiations with the UN finally signed an agreement in 2002 to establish the Extraordinary Chambers to try the dozen or so still-surviving leaders the notorious Khmer Rouge regime of 1975 – 80 that killed 2 million Cambodians. This hybrid court will be unique in that it will be staffed by a majority of Cambodian judges supplemented by a cohort of UN-appointed international judges, will have co-prosecutors and co-investigating judges, one Cambodian and one international, will employ a civil law form of procedure, and use Cambodian law, with resort to international law where Cambodian law does not provide guidance. Again voluntary donors will support the tribunal. Despite some apprehension about the reputation of a few Cambodian judges for integrity, the Extraordinary Chambers represents the last chance to bring the now aged Khmer Rouge leaders to account for their disastrous atrocities three decades ago.

Finally and perhaps most significantly, we have the International Criminal Court (ICC) which began operations in 2002. This is the only permanent international criminal court on the scene. It is a treaty-based court backed by the 102 member nations who have ratified the Rome Treaty, and is the product of nearly a decade of international negotiations in which the US participated up to the last minute when it declined to vote for the Treaty or to ratify it due to differences about the manner in which cases could be brought to the court (the US wanted Security Council assignments rather than independent choices by the prosecutor). Most experts suggest the real reason for US reticence was fear that US leaders or servicemen might be brought before the court on trumped up

charges motivated by resentment against the US for unpopular foreign policies. The ICC is however an active entity now possessed of four referrals, three from African states and one from the Security Council (Darfur). Its Annex on Elements of Crimes is the most up to date and sophisticated written articulation of war crimes, crimes against humanity and genocide, drawing upon the experience of the ad hoc courts in elaborating on the original Nuremberg definitions. It has jurisdiction only over crimes committed after July 2002 when it came into existence and referred to it by a State Party to the Rome Statute or one who accedes to its jurisdiction. It also has a principle of complimentary – that is if a state who is involved in a case referred to it maintains that it will investigate and or prosecute the case in its own justice system, the ICC must let it do so unless the prosecutor can show that the state is unable or unwilling to do so in a genuinely impartial manner. In addition to the over 100 bilateral agreements the US has negotiated with countries not to turn over any US-affiliated person to the ICC, the Congress has passed a Servicepersons Protection Act which prohibits any US agency, including courts, from cooperating in any way in permitting the ICC to take jurisdiction over an American. Still more recently the US has abstained in the Security Council from vetoing the Councils recent referral of the Darfur situation to the ICC. As the ad hoc courts come to an end and the hybrid courts finish their limited lifetimes, the ICC will be the flagship on the development of international law, and the absence of the US from any part of the process is discouraging to many, given our past primary role in bringing international humanitarian law to the forefront.

B. Issues with International and Hybrid Courts

International and hybrid courts operate in a different milieu from national courts. They are usually not an intrinsic part of a national government; compared to our own system, for example, there is no legislative body to enact or revise the international law they administer; no executive body to enforce their judgments.

The courts themselves do not work within a judicial hierarchy; no one international court has jurisdiction to overrule another. Many commentators have worried that this may result in a cacophony of different “ voices” about what international humanitarian law does mean, although to date the courts have been remarkably consistent in their rulings about the fundamental tenets of international criminal law. There is too the absence of stare decisis as a governing principle; current international and hybrid tribunals have an appellate chamber which reviews the rulings of trial chambers but among the courts and even from one appellate ruling to another there is no hard and fast requirement of adherence to prior rulings. In practice, however the courts have adhered to a practice of consistency in their own jurisprudence with careful thought before changing course.

International and hybrid courts since Nuremberg have faced the problem of blending common law and civil law modes of trial – none so far have embraced jury trials. Usually 3 or 5 judges sit on the trial bench with a majority required for a conviction. Nuremberg played a mix and match game with common and civil law practice; ad hoc courts began with a predominantly common law orientation but have increasingly introduced features of the civil law mode; the Sierra Leone tribunal employs a common law procedure; the ICC will use a mostly common law system of procedure as well. But the nationally based tribunals like Iraq and Cambodia take a basic civil investigative format approach in their trials. All of them however accept the fairness rules laid out in the ICCPR and required by the UN for its imprimatur. One problem they all wrestle with is the misuse of the courtroom as a bully pulpit by Heads of State to advance their own peculiar nationalist breed of propaganda. Justice Jackson worried about this phenomenon with Herman Goering back in Nuremberg but no uncontrollable outbursts ever came; the German defendants were by comparison with later performances extremely well behaved. Slobodan Milosevic, some feel, over-dominated the courtroom until his death mid-trial; Saddam Hussein has tried

some of the same tactics in his trial; some fear a copycat scenario when Charles Taylor comes to trial in the Hague.

One of the most troublesome problems international courts face is that they have no enforcement mechanisms for their orders and judgments. This has affected not only the slowness with which indicted suspects have been apprehended but the ability to compel witnesses to attend and documents to be handed over by national authorities. The UN courts were obliged by the Security Council Resolution creating the courts to cooperate with the tribunal in these respects but that did not always happen. The two most notorious indictees of ICTY, Mladic and Karadzic are still at large after almost a decade and a half. Hybrid courts located within a country have a better chance at getting national authorities to enforce their orders; hopefully the ICC can use its State Party participants to do the same.

Outreach to the victims and to the citizenry of the countries in which the war crimes have occurred is another problem which the newer breed of hybrid court located in that same country strives to solve. But additionally, the Sierra Leone court and the Cambodian court have made a priority, with the aid of NGOs, of going out into the country and speaking at villages and townships about how the court will operate and what are its aims. The ad hoc courts found, as Nuremberg did before it, that too often the most important constituency for their efforts, the survivors and victims, knew or understood little of what they was accomplishing.

Finally because they are add-ons to the regular operations of nations or the UN, the issue of adequate resources to do their job properly is an issue for everyone of these courts. Individual countries whether they are the hosts of the hybrid courts or voluntary donors to their operations do not always pay up on their monetary promises on time and many of the courts have suffered financial crises over their lifetimes. There have been some suggestions that an international justice fund akin to the global fund for malaria, TB, and AIDS be

established to meet the needs of the temporary courts, but no moves have yet been made in this direction.

On a more conceptual level, war crimes courts unless set up, as in Cambodia's case, years after the conflicts are over, must deal with the eternal issue of peace versus justice. The two should not be incompatible, but often attempts to bring war crime perpetrators to justice are criticized as intensifying the animosities between conflicting parties and impeding efforts to negotiate peace agreements. The ICC's current indictments in Uganda have been so criticized, as have their investigations in the Darfur situation even though those activities are pursuant to a Security Council Resolution. Obviously this balance has to be reached on a case to case basis but it is one that is not likely to recede for courts operating in a conflict setting.

C. Implications for U.S. Judges

From its early beginnings, the U.S. has professed to follow the "law of nations." Early Supreme Court cases made frequent references to foreign sources of law and to the "law of nations." Recently however a lively debate has arisen as to whether it is not only undesirable but impermissible for US judges to refer to international or foreign courts' decisions in interpreting our own constitution or even our own statutes. Several recent Supreme Court decisions have done so in deciding it was unconstitutional to impose the death penalty on a mentally disabled person or a minor under the age of 18. These references to foreign sources however were severely criticized by the dissenting Justices Scalia, Thomas, and former chief Justice Rehnquist. Other members of the court, Justices Breyer, Ginsburg, and former Justice O'Connor have endorsed the practice of looking abroad in appropriate cases out of a "decent respect for the Opinion of Mankind." That debate continues and was pursued in the recent confirmation hearings of Chief Justice Roberts and Justice Alito. There have been bills introduced in Congress to deter US judges from citing

foreign international sources in their rulings on constitutional or statutory interpretation, but these general bans have not gone anywhere.

There are however areas in which the decisions of international and hybrid tribunals would seem to be vital, and that is in the interpretation of international humanitarian law or the law of war in war crimes prosecution in both military and civilian courts. The recently passed Military Commissions Act of 2006 contains a somewhat strange dichotomy in this respect. The sections which define the war crimes for which aliens may be tried before military commissions will presumably be subject to interpretation in light of the myriad of illuminating decisions brought down by the international tribunals on the details of these crimes. The recent Supreme Court decision in *Hamdan v. Rumsfeld* ruled that the law of war including Common Article 3 of the Geneva Conventions dealing with treatment of detainees and their trials for war crimes must be complied with in these commissions. On the other hand the War Crimes Act of our US criminal code which governs prosecutions for war crimes in our civilian courts was amended in the same recent legislation to spell out the definitions of the prosecutable crimes in great detail but then to require that no source of foreign or international law be used as a basis for ruling in such cases, thus creating at least the potential for different criteria and results for the same war crimes when tried in the two types of courts.

The Alien Tort Statute has long been a unique forum in which civil actions may be brought in US federal courts by aliens based on the “ law of nations.” In their endeavors to find and articulate the law, federal courts have often relied heavily on international court decisions including those of the international criminal courts. For instance, in a recent ATS Southern District case dealing with the claims of non-Muslim Africans against the Sudanese government and oil companies operating in that region, the district court judge described the summary judgment as involving whether the oil company “ violated the customary international law relating to genocide, torture, war crimes, crimes

against humanity.” In evaluating those claims, the judge had to decide whether conspiracy was a part of international criminal law and if so whether it extended to make defendants liable for the acts of their coconspirators as American law does. Then the court referred several times to decisions by the ICTR in making that determination. Similarly in deciding what the international criteria for “aiding and abetting” were, it used the Rome Statute’s elements of Crime Annex as well as the ICTY statute as authority. The claims of genocide, war crimes, and crimes against humanity necessitated several pages of extensive discussion of ICTY and ICTR precedent; thus the jurisprudence of the international criminal courts spills over into the adjudication of civil claims under the ATS. Space does not permit discussion of numerous other examples of U.S. Courts using international courts decisions as an aide to decisions in both criminal and civil cases.