



**American
Red Cross**

Prosecution of Violations of IHL

INTERNATIONAL HUMANITARIAN LAW

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Since World War II, a number of methods for investigating and prosecuting war crimes under international humanitarian law (IHL), crimes against humanity and genocide have become prominent. Four of the most common methods are discussed below.

Military Tribunals and Courts in the United States

Military tribunals and courts administer justice for members of the United States (U.S.) Armed Forces under the U.S. Uniform Code of Military Justice (UCMJ). These tribunals have jurisdiction over crimes ranging from domestic criminal acts to violations of IHL. All nations that are parties to the Geneva Conventions are required to pass domestic legislation that provides penalties for IHL violations. They are obligated to prevent breaches of the Geneva Conventions and to investigate and prosecute them when they occur. In the U.S., each branch of the Armed Forces is responsible for investigating and prosecuting violations of the Geneva Conventions committed by U.S. military personnel. The U.S. has tried members of the military for IHL violations, such as in the My Lai trials of the 1970s.

Military Commissions in the United States

A military commission is a type of military court. The U.S. has used military commissions for three basic purposes:

1. To try enemy belligerents for violations of IHL;
2. To administer justice in territory occupied by the U.S.; and
3. To replace civilian courts where martial law has been declared.

Although U.S. courts have tried enemy nationals since the American Revolution, the term “military commission” was first used during the Mexican War (1846-1848). It was used to distinguish “commissions,” which tried enemy nationals, from military tribunals/courts, which tried American soldiers. That distinction has continued to the present day.

Historically, military commissions have been used to try persons not otherwise subject to military law, including U.S. citizens, for violations of IHL and other statutory offenses (such as terrorism). Military commissions can be established either in the U.S., on territory occupied by the U.S., or on foreign territory with consent of the local authorities.

The recent U.S. military commissions have undergone various alterations since their inception. On November 13, 2001, President Bush issued a military order decreeing that foreign nationals detained for terrorist acts would be tried by military commissions. In June 2006, the U.S. Supreme Court ruled in the case of *Hamdan v. Rumsfeld* that the military commissions were not expressly authorized by any congressional act, and violated the legal protections for individuals set forth in the UCMJ and the Geneva Conventions. As a result, the U.S. Congress passed the Military Commissions Act (MCA) of 2006

The Red Cross and International Humanitarian Law

The Red Cross and the Geneva Conventions were born when Henry Dunant witnessed the devastating consequences of war at a battlefield in Italy. In the aftermath of that battle, Dunant argued successfully for the creation of a civilian relief corps to respond to human suffering during conflict, and for rules to set limits on how war is waged.

Inspired in part by her work in the Civil War, Clara Barton would later found the American Red Cross and also advocate for the U.S. ratification of the first Geneva Convention.



B. Schaeffer/CRC

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with new rules for the commissions. Under the MCA of 2006, a new executive order dated February 14, 2007, established military commissions to try individuals designated as “alien unlawful enemy combatants.”

On January 22, 2009, President Obama issued an executive order that suspended the military commissions in order to review the status of each individual detained by the U.S. at Guantanamo Bay. On May 15, 2009, President Obama announced that military commissions were appropriate for trying individuals who violated IHL, provided that the commissions were properly structured and administered, and that several changes to the rules governing them would be sought. Subsequently, Congress passed the Military Commissions Act (MCA) of 2009. Attorney General Holder, on November 13, 2009, announced that he had decided to refer five defendants back to the Department of Defense to face military commission trials.

International Criminal Tribunals

The most well-known form of prosecution for violations of IHL is an international war crimes tribunal. The first tribunals were the International Military Tribunals held in Nuremberg (1945-1946) and Tokyo (1946-1948) after World War II. These ad hoc tribunals were exceptions to the general means of IHL enforcement. More commonly, war crimes trials were conducted by States in accordance with their domestic legislation. For example, after World War II, trials of German war criminals were held in France, Netherlands, Poland and Israel.

Ad hoc international criminal tribunals have received renewed attention with the establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) by the United Nations (U.N.) Security Council in 1993 and 1994, respectively. These tribunals have been granted powers to hear cases addressing:

1. Grave breaches of the Geneva Conventions, including willful killing, torture and inhumane treatment;
2. Violations of the laws and customs of war;
3. Genocide; and
4. Crimes against humanity, such as murder, deportation, torture and rape.

Although they are both still in place, these tribunals are not permanent international criminal courts. They only have jurisdiction to deal with crimes committed in, respectively, the former Yugoslavia since 1991 and in Rwanda or by Rwandan nationals in neighboring countries in 1994. Although these tribunals have faced many challenges, their work has renewed interest and efforts toward making judicial mechanisms a vital component of IHL implementation.

Recently, hybrid or mixed courts with both international and domestic components have been established. The Special Court for Sierra Leone was established in 2000 by an agreement between the government of Sierra Leone and the U.N. to prosecute violations of both international and domestic crimes committed since 1996 in the conflict in Sierra Leone. In 2003, an agreement between the government of Cambodia and the U.N. was signed

to set up the Extraordinary Chambers in the Courts of Cambodia (ECCC) for the prosecution of Khmer Rouge-era crimes in Cambodia. Lebanon and the U.N. entered into an agreement in 2007 to establish the Special Tribunal for Lebanon (STL) in order to prosecute individuals responsible for the attack of February 14, 2005, resulting in the death of former Prime Minister Rafiq Hariri and in the death or injury of other persons.

For more information, please see the websites of:

- International Criminal Tribunal for the former Yugoslavia (<http://www.icty.org>)
- International Criminal Tribunal for Rwanda (<http://www.icttr.org>)
- Special Court for Sierra Leone (<http://www.sc-sl.org>)
- Extraordinary Chambers in the Courts of Cambodia (<http://www.eccc.gov.kh>)
- Special Tribunal for Lebanon (<http://www.stl-tsl.org>)

International Criminal Court (ICC)

The ICC is the first permanent international court that has the right to investigate and bring to justice individuals who commit the most serious violations of IHL, as well as war crimes, genocide, crimes against humanity and the crime of aggression. Unlike the International Court of Justice (the World Court) in The Hague, which hears only cases between States or provides advisory opinions, the ICC tries individuals. The ICC is also located in The Hague.

The ICC was created based on the Rome Statute, a treaty adopted in Rome, Italy, on July 17, 1998. On April 11, 2002, the Rome Statute received its 60th ratification and entered into force on July 1, 2002. The inaugural session of the ICC took place on March 11, 2003. As of February 2011, 114 countries are States Parties to the Rome Statute. All the members of the European Union and the North Atlantic Treaty Organization (NATO), except for the United States and Turkey, are party to this treaty.

As of February 2011, three States party to the Rome Statute, the Central African Republic, Democratic Republic of the Congo and Uganda, have referred situations occurring on their respective territories to the Office of the Prosecutor (OTP). The OTP has opened investigations into all three situations. On March 31, 2005, the United Nations Security Council referred the situation in Darfur, Sudan, to the ICC. Furthermore, in November 2009, the OTP requested authorization from the Pre-Trial Chamber for an investigation regarding post-election violence in Kenya. The OTP, as of November 2009, is conducting preliminary examinations in a number of countries including Colombia, Côte d'Ivoire, Afghanistan, Georgia, Palestine, Guinea, Honduras, Nigeria and the Republic of Korea. On January 26, 2009, the ICC began its first trial for the case of Thomas Lubanga Dyilo regarding his involvement in the situation in the Democratic Republic of the Congo. The trial continued into 2011.

Definition of crimes: The Rome Statute and its subsidiary document, The Elements of Crimes, give detailed definitions of genocide, war crimes and crimes against humanity. On June 11, 2010, the ASP adopted a resolution at the Review Conference in Kampala, Uganda, regarding the crime of aggression, including the definition of the crime. However, pursuant to the resolution, the ICC will not have jurisdiction over the crime of aggression until certain conditions are met. These conditions include ratification or acceptance by 30 States of the proposed amendments to the Rome Statute, and a decision to take place after January 1, 2017.

For more information, please see:

- American Red Cross fact sheet on the ICC (www.redcross.org/ihl)
- International Criminal Court website (<http://www.icc-cpi.int>)