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**Master's degree in**
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# Challenges to the Universality of International Humanitarian Law: A comparative analysis of the ICTY Tadic case and ICC jurisdiction in Sudan

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# Abstract

Since the implementation of the Geneva Conventions, International Humanitarian Law has remained a critical aspect of International Law and has redefined the way the world conducts warfare and perceives armed conflict. The line between what constitutes internal affairs with domestic jurisdiction and that which meets the threshold of armed conflict has continued to shrink. Due to the controversial nature and ramifications of determining the jurisdiction between states and international institutions, it is essential to develop a thorough understanding of what constitutes International Humanitarian Law and where it is headed. The goal of this research is to analyze the history of International Humanitarian Law from its origins, its controversies and its successes in order to paint a picture of what its future holds. This has been done through the use of numerous studies and court decisions carried out by the organizations responsible for the implementation and interpretation of International Humanitarian Law such as the ICRC, ICC, UNSC and established ad hoc Tribunals such as the ICTY and ICTR. The results of this research has concluded that treaty law and customary law relating to International Humanitarian Law are undergoing a period of significant transformation. Universalization has lost significant support and customary law has been left to pick up the pieces, the outcome of which predicts a future where states become emboldened in their resistance to increased jurisdiction from international bodies and future International Humanitarian Law treaties become increasingly difficult to garner significant support.

*Keywords*: International humanitarian law, political science, conflict, human rights, universality

# Table of Contents

# Abbreviations

AU – African Union

ICC - International Criminal Court

IHL - International Humanitarian Law

ICRC - International Committee of the Red Cross

ICTY - International Criminal Tribunal for Yugoslavia

ICTR - International Criminal Tribunal for Rwanda

UNSC - United Nations Security Council

UN - United Nations

EU - European Union

IRRC - International Review of the Red Cross

ICL - International Criminal law

CIL – Customary International Law

IL - International law

EC – European Community

LOAC – Law of Armed Conflict

*casus belli –*

*jus cogens*

*jus in bello*

*jus ad bellum*

*opinio juris*

*jus contra bellum*

*sui generis*

*uti possidetis juris*

*post facto*

*nullem crimen sine lege*

# Introduction

The purpose of this research is to provide a complete analysis of the challenges facing international humanitarian Law in the current political environment in order to determine the viability of its future development. One of the primary objectives of this thesis is to emphasize the immense change which the field of IHL has undergone since the introduction of the ICTY up until the present day. There currently exists a deficit in the literature which seeks to provide a comprehensive analysis of the interconnected effects of modern customary interpretation with existing case studies and the future development of universality in IHL. Giving context to the evolutionary nature of IHL in its application and enforcement provides the necessary foundation required to assess its historical effectiveness and how it reacts when faced with modern variations of armed conflict. Given the fragmented nature of today's conflicts, the involvement of numerous actors has meant that even regional confrontations have global implications which require the involvement of the international community. This is the motivation behind highlighting universality as a crucial concept within this thesis, as it has become evident that the increasing interconnectedness of armed conflicts has both shown the necessity of universalization in IHL and the hostility which has been fostering against it.

The first chapter of this thesis is designed to present a coherent representation of what exactly IHL is, its historical origins and the development of the modern IHL regime which exists today. This is initially done by comparing the philosophical evolution of the concept of what we would call IHL between different ancient civilizations with varying cultural and religious backgrounds. The ultimate goal being to present an idea of how humans have perceived the concept of humanity and justice in conflict, as well as how they both sought to achieve or ignore it. This is followed by defining the modern sources of law which provide the basis for IHL, including highlighting some of the most influential treaties and conventions which shaped its development.

The second chapter provides an overview which covers the various challenges to IHL which have merged in the 20$^{th}$ century and continue into the present. This includes post-colonial

criticisms to modern international law regimes, the rise of non-state actors and some of the primary factors behind the degradation of the universality movement.

The third chapter focuses on the first of two case studies which make up the foundation of the analysis portion of this thesis. The first case study revolving around the ICTY's prosecution of Dusko Tadic and its legacy on the interpretation of customary IHL and determination of armed conflict. This chapter provides a background on the conflict in Yugoslavia preceding the establishment of the ICTY, the prosecution of Tadic and the implications on international law.

The fourth chapter consists of the second case study which focuses on the conflict in Darfur and the involvement of the ICC. The importance of this case study lies in the intervention of the ICC in a state not party to the Rome statute upon referral by the UNSC for the first time in its history. This case set a new precedent in the pursuit of justice against violators of IHL, the ramifications of which must be discussed in order to understand evolving perceptions and enforcement mechanisms in modern IHL.

The fifth chapter contains the analysis portion of the thesis which brings together the information covered in chapter 3 and 4 to compare and contrast their significance under the pretext of the development and future of IHL. This is where the majority of the theoretical discussion takes place as it intends to deconstruct the fundamentally complex nature of how the interconnectedness of ICL and IHL come together and the repercussions of such actions.

The sixth chapter presents the conclusions determined by a columniation of all the information and analysis covered throughout the paper. Addressing the final question as to what exactly are the challenges to IHL and the future of universality.

# Chapter 1 Development of International Humanitarian Law

Establishing a linear timeline for any body of international law is always met with the presence of an asterisk or footnote to delineate the complicated nature in which its existence or authority has come into being. As opposed to laws governing international trade and diplomatic relations, those which seek to regulate the way in which states conduct themselves in times of war have remained elusive and lacked a genuine sense of necessity for most of history.[1] War is perhaps the greatest expression of sovereignty which a state can possess and thus efforts to limit the means by which one can engage in it have not always been a serious consideration. Even in the present day, it is arguments of sovereignty which generate the majority of hostility towards the effective regulation of hostilities in both cases of international and internal conflict.[2] Historically, critiques of war were motivated by arguments of justice in the face of cruelty, and religious obligations towards the spiritual implications of an unnecessary and selfish conflict. However, these criticisms did little to affect the inevitable horrors of war which would plague mankind throughout its history.[3] While war itself has yet to be regulated out of existence, this is not to say that nothing has changed or that we as a species have been completely unsuccessful in learning from the mistakes of our past. Whether it is the unimaginable levels of brutality which technology has unleashed onto the battlefield, or the growing cooperation between states brought on by a new era of globalization, developments and standardization in all branches of international law have increased substantially since the 19th century.[4] New ideas began to emerge in both the legality and philosophical righteousness regarding both the initiation (*jus ad bellum)* and

[1] Melzer, Nils, and Etienne Kuster. "International Humanitarian Law." *A comprehensive introduction. Geneva: International Committee of the Red Cross* (2019): 34-35 https://www.researchgate.net/profile/Etienne-Kuster/publication/313589999_New_IHL_handbook/links/62e3d2953c0ea8788765ee4e/New-IHL-handbook.pdf

[2] Nils and Kuster "International Humanitarian Law" 296-297

[3] Nils and Kuster "International Humanitarian Law" 34

[4] Nils and Kuster "International Humanitarian Law" 35-36

execution (*jus in bello*) of war and conflict.[5] Since antiquity, some resistance to the ideology of total war has always existed in one form or another. What lacked was any institution or authority with the ability to implement as well as enforce regulations on the conduct of hostilities by sovereign states.[6] While these institutions do exist to a greater extent in the modern world, that does not mean the current system is perfect. There is near universal agreement between states to limit their conduct in times of conflict, although disputes between the extent of these limitations and what constitutes conflict still remain. Just as the behavior of states and typology of armed conflict never remain static, neither does international humanitarian law.

## 1.1 Sources of IHL

International Humanitarian Law derives its authority from numerous sources of varying jurisdiction and relevance, creating a legal structure that both struggles with and benefits from a diverse relationship between States, treaties, and international institutions.[7] The modern framework of IHL is still in a state of constant flux with new conflicts and legal precedents challenging traditional status quo's bringing with it both positive and negative changes to application and enforcement. To put it simply, the general sources of IHL come in the form of peremptory norms (*jus cogens*), customary and treaty law.[8] However, these classifications serve largely as broad categorical descriptions as opposed to specific definitions. The reality of IHL is that its authority is determined by the same logical principles as most bodies of International Law, that being that it represents its own branch

[5] Stahn, Carsten. "'Jus ad bellum',‘jus in bello'...‘jus post bellum'?–Rethinking the Conception of the Law of Armed Force." *The European Journal of International Law* 17, no. 5 (2006): 921-922 https://academic.oup.com/ejil/article-pdf/17/5/921/8735013/chl037.pdf

[6] Boucher, David. "The just war tradition and its modern legacy: Jus ad bellum and jus in bello." *European Journal of Political Theory* 11, no. 2 (2012): 102 https://journals.sagepub.com/doi/pdf/10.1177/1474885111425115

[7] Bouvier, A.A. and Langholtz, H.J, International humanitarian law and the law of armed conflict. *Peace Operations Training Institute, Virginia* (2012): 25 https://cdn.peaceopstraining.org/course_promos/international_humanitarian_law/international_humanitarian_law_english.pdf

[8] ICRC, What is International Humanitarian Law?, *Advisory Service on International Humanitarian Law* (2004): 1 https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf

and is subject to the same norms and standards albeit labeled as a "special regime" within the IL ecosystem.[9] Ultimately, states still remain the primary actors within IHL, as they are the bodies with the greatest ability to both violate IHL as well as enforce it to an extent that international institutions such as the United Nations cannot match in terms of capability.[10] Treaties, international institutions, and all other aspects of IL simply cannot exist without some form of cooperation and consent among states.[11] Although the extent of cooperation and universal recognition by states is certainly a controversial aspect in itself, as well as the enforcement of treaties without the express consent of one or more parties involved which will be discussed further in subsequent chapters of this thesis. However, in order to successfully interpret the development of IHL, it must be noted that IL and its branches do not necessarily have a legal code which can be treated the same way law as it is practiced on a domestic level.[12] This becomes particularly evident when discussing aspects of jurisdiction in cases of a lack of universality which in the case of IHL can create a crisis of moral responsibility. When researching sources of IHL, it is often broken down into independent categorizations which separate them for the sake of simplicity. However, it is important to keep in mind the foundational principles of IL, that being where exactly does responsibility and jurisdiction come from? For instance, treaty law can appear at face value to have a greater judicial hierarchy as states explicitly agree to the terms at the time of ratification, but this does not explain what exactly persuades states to abide by the terms of a treaty. There are multiple treaties which seek to codify the rules surrounding treaty obligations such as the 1969 Vienna Convention on the Law of Treaties.[13] However, in the case of treaty law it is in fact customary law which is the primary motivation for states to act according to the

[9] Cassimatis, A.E., "International humanitarian law, international human rights law, and fragmentation of international law". *International & Comparative Law Quarterly*, 56(3) (2007): 625 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/0E1A3DDDE90FEA651BBE67080A9BBA12/S0020589300070329a.pdf/international_humanitarian_law_international_human_rights_law_and_fragmentation_of_international_law.pdf

[10] Khan, M. A., & Khan, P, "The Status of Non-State Armed Groups in Armed Conflicts." *JL & Soc'y*, *49*, 1. (2018) https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jlsup49&section=11

[11] Thomas, Christopher A. "The uses and abuses of legitimacy in international law." *Oxford Journal of Legal Studies* 34, no. 4 (2014): 748-749 https://academic.oup.com/ojls/article-pdf/34/4/729/8878500/gqu008.pdf

[12] Greenwood, Christopher. "Sources of international law: an introduction." *United Nations Treaty Collection* (2008): 1 http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf

[13] Zemanek, Karl. "Vienna Convention on the Law of Treaties." *United Nations Audiovisual Library of International Law* (2009).

principle of "General Obligations Under International Law".[14] This part is a bit controversial as there has been a great debate surrounding what can be considered a hierarchy of International Law. *Jus Cogens* which is considered synonymous with "general obligations under International Law" remains binding upon all states and any treaties which might represent a conflict with this customary norm are considered void.[15] In many instances, principles of IHL fall under the jurisdiction of *jus cogens* such as the basic rules of international humanitarian law applicable in armed conflict.[16] However, *jus cogens* does not exist in all instances of customary IHL, for example, Rule 81 of customary IHL states that in accordance with state practice, effort must be taken to reduce the impact of landmines on civilian populations.[17] This customary law came into effect due to near unanimous state consensus and practice, however, it is not protected from future deviation through either new customary or treaty law as it is not specifically covered by *jus cogens*.[18] This does not mean that *jus cogens* has no effect on the use of landmines, as direct use of force against civilian populations is contradictory to existing peremptory norms of general international law regardless of the weapons employed.[19] Every branch of IL is unique in the way the rules which apply to them are developed, this includes how things like state practice are determined as well as how customary law can be applied. According to the ICRC's Customary International Humanitarian Law study, in order to establish state practice in formulating potential customary norms, it is perfectly acceptable to take into consideration

[14] Lukashuk, Igor I. "The principle pacta sunt servanda and the nature of obligation under international law." *American Journal of International Law* 83, no. 3 (1989): 514 https://scholar.google.com/scholar?output=instlink&q=info:pzZa_cYKeeoJ:scholar.google.com/&hl=en&as_sdt=0,5&scillfp=2215469174002631161&oi=lle

[15] International Law Commission. Chapter V Peremptory norms of general international law (jus cogens). A/74/10, (2019) https://legal.un.org/ilc/reports/2019/english/chp5.pdf

[16] International Law Commission. "Report of the International Law Commission Fifty-eighth session (1 May-9 June and 3 July-11 August 2006)." *General Assembly Official Records Sixty-first session Supplement* 10 (2006). https://legal.un.org/ilc/reports/2006/

[17] ICRC, Practice relating to Rule 81: Restrictions on the Use of Landmines, IHL Databases https://ihl-databases.icrc.org/en/customary-ihl/v2/rule81

[18] Henckaerts, Jean-Marie, and Louise Doswald-Beck. "Customary International Humanitarian Law–Volume 1: Rules International Committee of the Red Cross, *Cambridge University Press, New York* (2009): 4-8 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mllwr44&section=10

[19] Trindade, Antonio Augusto Cançado. "Jus Cogen-The Determination and the Gradual Expansion of its material content." *Revista do Instituto Brasileiro de Direitos Humanos* 9 (2009): 12 https://milas.x10host.com/ojs/index.php/ibdh/article/view/130

not only physical acts but also verbal statements as well as written documents such as national military manuals.[20] The reason I provide this example is to emphasize the point that IHL does not come explicitly from a fixed source and besides norms which explicitly fall under the umbrella of *jus cogens*, it is common for existing IHL to be altered or entirely changed by both the formation of new treaties and/or new interpretation by relevant judicial bodies including both national and international courts.[21]

## 1.2 Ancient Origins of IHL

Establishing a universal standard for International Humanitarian Law has been one of history's most defining diplomatic achievements. However, the first formal establishment of the concept which would become known as International Humanitarian Law didn't come around until the 1970's, the term itself being officially codified in the 1977 additional protocols to the Geneva Conventions.[22] In reality, rules and agreements in the form of customary law governing the actions of war had been created and discarded repeatedly since antiquity. Although in ancient times there lacked a real authority for enforcing customary norms, they did certainly exist and were expected to be followed by all relevant parties.[23] Perhaps the best documented widespread practice of customary norms in antiquity comes from the Hellenistic world, as well as those in close relation to it such as the Persian empire.[24] Recent scholarly analysis has also emphasized the importance of non-western sources of

[20] Henckaerts and Doswald-Beck. "Customary International Humanitarian Law" 4-14
[21] Roberts, Anthea. "Comparative international law? The role of national courts in creating and enforcing international law." *International & Comparative Law Quarterly* 60, no. 1, (2011): 58 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/EBDD043F6476998228443DC30E419B4A/S0020589310000679a.pdf/comparative-international-law-the-role-of-national-courts-in-creating-and-enforcing-international-law.pdf
[22] Amanda Alexander, A Short History of International Humanitarian Law, *European Journal of International Law*, Volume 26, Issue 1, (2015): 109 https://academic.oup.com/ejil/article-pdf/26/1/109/5121583/chv002.pdf
[23] Lanni, Adriaan. "The laws of war in ancient Greece." *Law and History Review* 26, no. 3, (2008): 472-476 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/A678EB08120C73CBDC01C92DEAC2A65C/S0738248000002534a.pdf/the-laws-of-war-in-ancient-greece.pdf
[24] Lanni "The laws of war in ancient Greece" 475

customary norms such as those which existed in Ancient India.[25] A disclaimer must be made that these are not necessarily the same customary norms which make up a significant portion of International Law today. However, the similarities between ancient and modern norms do deserve significant analysis and discussion. It should also be stated that much like modern customary law, these ancient norms were not static and did evolve over time as they were adapted to changing cultural and societal standards.[26] The philosophical differences between how the Hellenistic world and the various societies which made up ancient India viewed the concept of war were quite significant yet also contained various similarities.[27] The leaders of the Hellenistic world shared a fairly unified perception of the customary norms which should be followed during and after physical conflict.[28] These norms included allowing both sides to collect their dead soldiers after each battle to allow for proper burials, although this was considered as a religious obligation so as to prevent divine punishment rather than a Moral or Humanitarian effort.[29] This will prove to be a common theme throughout Hellenistic customary norms in times of war, even if some practices are in line with what we consider today as part of IHL, their existence lies in a belief that violating religious duties will result in retribution from the gods.[30] Ancient Greek religious customs did not emphasize an inherent way to conduct oneself morally, rather the primary source of customary norms in war came from the observance and protection of religious traditions.[31] Thus, leading to an acceptance of acts of brutality as normal and often going without question, limited circumstances of mercy being shown to enemies exist but were by no means a customary norm.[32] An inherently realist form of international relations arises from this philosophical

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[25] Shenoy, Amritha V. "International Humanitarian Law in Ancient India: a Multicivilizational Perspective." *The Indian Journal of International Law* , Vol. 58, no. 3-4, (2018): 426 https://link.springer.com/article/10.1007/s40901-019-00102-y

[26] Husby, Tristan K. "Justice and the justification of war in Ancient Greece: Four authors." (2009). https://digitalcommons.conncoll.edu/cgi/viewcontent.cgi?article=1000&context=classicshp

[27] Shenoy "International humanitarian law in ancient India" 427

[28] Alonso, Victor. "War, peace, and international law in ancient Greece." In *The Use of Force in International Law*, Routledge, (2017): 207-210 https://www.taylorfrancis.com/chapters/edit/10.4324/9781315084992-1/war-peace-international-law-ancient-greece-victor-alonso

[29] Alonso "War, peace, and international law in ancient Greece" 210

[30] Lanni "The laws of war in ancient Greece." 473

[31] Husby "Justice and the justification of war in Ancient Greece" 93

[32] Straight, Bilinda. "Uniquely human: Cultural norms and private acts of mercy in the war zone." *American Anthropologist* 119, no. 3, (2017): 502 https://anthrosource.onlinelibrary.wiley.com/doi/pdfdirect/10.1111/aman.12905

vision, one in which the basic principles of modern IL and IHL regarding aggression and humanitarian limitations are essentially non-existent. Zachery Ackerson's summary of an excerpt from Thucydides *The History of the Peloponnesian War* paints a compelling picture of how war was consistently justified:

*"When challenged by the Melians with a divine conception of justice, Athens still maintains its position. The Athenian delegates see the God's justice as a law of nature, wherever they can rule they will".*[33]

For all intents and purposes, one could argue that war for the sake of conquest was morally justifiable and that the right to independence was only as relevant as the power which exists to protect it.[34] This isn't to say that all political philosophers and theorists of the time agreed with this statement, considering even Thucydides would consider a war of aggression as unjust, this does not change the fact that there was no customary norm against conquest or acts of inhumanity.[35] Within the Indian Subcontinent and its bordering regions, the entire philosophical makeup of power structures and International Relations contrasted with that of the Hellenistic world.[36] For the sake of simplification, we will refer to this cultural sphere as India. First it should be determined what exactly is a non-Hellenistic customary norm? In order to do this, it is essential to take into consideration the philosophical traditions which formed the basis for the various religious underpinnings of the relevant actors. As ancient Indian societies relied upon foundational Vedic religious principles, the primary philosophical influences came from Hindu and Buddhist traditions.[37] While both of these

[33] Ackerson, Zachery. "The Essence of Justice Reconsidered: Power and Justice in Thucydides' The History of the Peloponnesian War." *Pseudo-Dionysius 17*, (2015) https://ojs.library.dal.ca/PseudoDio/article/download/5926/5258
[34] Bosworth, Albert Brian. "The humanitarian aspect of the Melian Dialogue." *The Journal of Hellenic Studies* 113 (1993): 39 https://www.jstor.org/stable/pdf/632396.pdf
[35] Husby "Justice and the justification of war in Ancient Greece" 52
[36] Pisano, Carmine. "India and Greece: Methods and Models of Comparison in The Mahābhārata and Greek Mythology by Fernando Wulff Alonso." *India and Greece: Methods and Models of Comparison in The Mahābhārata and Greek Mythology by Fernando Wulff Alonso* (2015): 3-5 https://www.torrossa.com/gs/resourceProxy?an=3119466&publisher=F34885
[37] Brekke, Torkel. "The ethics of war and the concept of war in India and Europe." *Numen* 52, no. 1 (2005): 71 https://brill.com/downloadpdf/journals/nu/52/1/article-p59_4.pdf

religions contain vast differences, they share certain moral characteristics which we would consider to be contemporarily relevant.[38]

Such moral codes stemming from these philosophies include an emphasis on non-aggression, war being a means to seek justice as opposed to being just in itself.[39] Just reasons for war have been listed in various ancient texts such as the *Kamandaka* (The Elements of Polity) whereby in theory it legitimizes the use of Humanitarian Intervention in the case of a king mistreating their citizens although such cases have not been historically documented.[40] This would constitute a similar perspective to the concept of *jus ad bellum* where there exists a recognized norm of non-aggression in which engaging in war is permissible under select circumstances.[41] Within Hinduism specifically, a significant tradition of *jus in bello* remains present essentially throughout its entire history beginning with the *Mahābhārata*[42] and further built upon by the *Kamandaka*[43]. While the *Mahābhārata* tends to make a more humanitarian approach to *jus in bello* such as preventing the killing of soldiers as they surrender and the "unfair" use of overwhelming force on the battlefield[44], *Kamandaka* takes a more realist position as it specifies that "the people" should be protected and treated fairly as they are the source of prosperity for the King.[45]

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[38] Hindery, Roderick. Comparative ethics in Hindu and Buddhist traditions. *Vol. 2. Motilal Banarsidass Publ.*, (1978): 20-21 https://books.google.com/books?hl=en&lr=&id=-FswBLvTkvQC&oi=fnd&pg=PR7&dq=Hindery,+Roderick.+Comparative+ethics+in+Hindu+and+Buddhist+traditions.+Vol.+2.+Motilal+Banarsidass+Publ.,+(1978):+20-21&ots=g1jPABDQBv&sig=jGnBYq4C0DejnOqQCFH_OHqnIlc

[39] Shenoy "International Humanitarian Law in ancient India" 436-438

[40] Kāmandaki, Dutt, and Manmatha Nath. "Kamandakiya nitisara, or, The elements of polity." (1979): 81-121 https://books.google.com/books?hl=en&lr=&id=NFMBAAAAYAAJ&oi=fnd&pg=PR1&dq=++K%C4%81mandaki,+Dutt,+and+Manmatha+Nath.+%22Kamandakiya+nitisara,+or,+The+elements+of+polity.%22+(1979):+81-121&ots=iRROTQ6sI4&sig=79Gvp5O8c69p5Bqd44lSbXRmG1s

[41] Shenoy "International Humanitarian Law in Ancient India" 435

[42] Ganguli, Kisari Mohan. "The Mahabharata" *English Translation*. (1896) https://library.bjp.org/jspui/bitstream/123456789/851/1/Mahabharata%20-%20full%20HTML.zip

[43] Kāmandaki and Nath. "The elements of polity."

[44] Penna, Lakshmikanth R. "Written and customary provisions relating to the conduct of hostilities and treatment of victims of armed conflicts in ancient India." *International Review of the Red Cross (1961-1997)* 29, no. 271 (1989): 346-347 https://international-review.icrc.org/sites/default/files/S0020860400074519a.pdf

[45] Kāmandaki and Nath. "The elements of polity." 4-5

This does not mean that the *Kamandaka* is devoid of a humanitarian basis, the document itself claims its authority by citing religious justifications which are present in Hindu philosophy.[46] The texts of *Manusmriti* contain many of the same key concepts relating to *jus in bello* as the *Kamandaka* and have been directly attributed to influencing numerous legal systems throughout ancient India and Southeast Asia[47]. While it is hard to determine whether the rules of war laid out in these manuscripts were frequently adhered to in battle, their presence in subsequent legal structures and treaties suggest the presence of a customary norm by way of *opinio juris*.[48] Comparatively as with the ancient Hellenistic world[49], the existence of a recognized customary norm without the appropriate institutions to oversee its enforcement tends to result in frequent violations.[50] The *Mahābhārata* presents this quite clearly whereas it lays out *jus in bello* and then later describes instances of conflict where these rules are seemingly violated without condemnation by any of the parties involved.[51] Despite vastly different ideologies surrounding what constitutes *jus ad bellum* and *jus in bello* as well as the basis for their existence, numerous commonalities also appear between Hellenistic and Ancient Indian philosophies in instances of conflict. While there was no religious or customary prohibition against wars of conquest in Ancient Greece, interpretations of Herodotus and Thucydides writing suggests they considered this to be inherently unjust.[52] However, the ultimate societal differences here being that Ancient Indian definitions of just and unjust were codified into domestic and international legal structures.[53]

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[46] Kāmandaki and Nath. "The elements of polity." 112

[47] Bhattacharyya, Parnasabari. "Manusmriti and Manavadhammasattham: Indian influence on Burmese legal texts." In *Proceedings of the Indian History Congress*, *vol. 54, Indian History Congress*, (1993): 71 https://www.jstor.org/stable/44142924

[48] Lubin, Timothy. "Writing and the recognition of customary law in premodern India and Java." *Journal of American Oriental Society* 135, no. 2 (2015): 227 https://www.jstor.org/stable/pdf/10.7817/jameroriesoci.135.2.225.pdf

[49] Lanni "The laws of war in ancient Greece." 471-472

[50] Shenoy "International Humanitarian Law in Ancient India" 437-438

[51] Kosuta, Matthew. "Ethics of War and Ritual: The Bhagavad-Gita and Mahabharata as Test Cases." *Journal of Military Ethics* 19, no. 3 (2020): 190 https://www.academia.edu/download/79699240/Ethics_of_War_and_Ritual_The_Bhagavad_Gita_and_Mahabharata_as_Test_Cases.pdf

[52] Syse, Henrik. "Plato, Thucydides, and the Education of Alcibiades." *Journal of Military Ethics* 5, no. 4 (2006): 290-302 https://www.tandfonline.com/doi/abs/10.1080/15027570601081044

[53] Gautam, Pradeep Kumar. *The Nitisara by Karmandaka: Continuity and Change from Kautilya's Arthashastra*. Institute for Defence Studies & Analysis, (2019): 28 http://www.idsa.in/monograph/nitisara-by-kamandaka-from-kautilya-arthashastra

Another key separating factor is that while religion was often used to provide the foundational basis for ancient Indian *jus ad bellum* and *jus in bello*, as referenced in the *Kamandaka*, fair and humane treatment of non-combatants including injured and surrendering soldiers was considered essential for the political and economic prosperity of society.[54] The legacy of these ancient norms is debatable, modern IHL as codified in various treaties with its foundational principles coming from the Geneva Conventions and additional protocols was almost entirely based on European philosophical traditions.[55] Initially, colonization and subjugation of many non-western societies meant they had little to no influence upon the creation of modern International Lagal systems throughout the 19-20th centuries.[56] However, as non-western states gained more prominence on the global stage, their scholarly and legal contributions to the development of IHL have continued to grow, as prominently emphasized in the Bangkok Declaration of 1993.[57] In-depth analysis of classical concepts of International Law from both the ancient Hellenistic world[58] and Ancient India[59] have found new relevance in the academic community as well as in studies produced by the ICRC. These new developments suggest that the earliest examples of IHL will have an ongoing impact on the legal interpretation of current and future conflicts.

[54] Kāmandaki and Nath. "The elements of polity." 81-121
[55] Kolb, Robert. "The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions." *International Review of the Red Cross (1961-1997)* 38, no. 324 (1998): 410 https://international-review.icrc.org/sites/default/files/S002086040009121Xa.pdf
[56] Moses, A. Dirk, Marco Duranti, and Roland Burke, eds. "Decolonization, Self-determination, and the rise of global human rights politics" *Cambridge University Press,* (2020): 8-11 https://www.dirkmoses.com/uploads/7/3/8/2/7382125/moses_-_cutting_out_the_ullcer_and_washing_away.pdf
[57] Davis, Michael C. "Human rights in Asia: China and the Bangkok declaration" *Buff. J. Int'l L*. 2, (1995): 226-229 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/bufhr2&section=14
[58] Bartles-Smith, Andrew. "Religion and international humanitarian law" *International Review of the Red Cross* 104, no. 920-921, (2022): 1725-1761. https://www.cambridge.org/core/services/aop-cambridge-core/content/view/F27D0820FCAE803CC6DADBB5BB2EFE3C/S1816383122000376a.pdf/religion-and-international-humanitarian-law.pdf
[59] Sinha, Manoj Kumar. "Hinduism and international humanitarian law." *International review of the red cross* 87, no. 858 (2005): 285-294 https://www.icrc.org/en/doc/assets/files/other/irrc_858_sinha.pdf

## 1.3 Emergence of Modern IHL

The Lieber Code of 1863 and 1864 Geneva Convention traditionally mark the formal establishment of the codified modern International Humanitarian Law regime.[60] While this designation is not necessarily inaccurate, it must be mentioned that international treaties (although not universal) had existed prior which contain similar language regarding how war may be conducted in the context of seemingly humanitarian principles.[61] This trend largely began to gain prominence in the 19th century, generally associated with the introduction of modern instruments of war which brought about a new level of destruction on the battlefield.[62] This is even specifically mentioned by Henry Dunant in his motivation to develop a series of recognized regulations which would evolve into the formation of the red cross and 1864 Geneva Convention;

*"Since new and terrible methods of destruction are invented daily, with perseverance worthy of a better object, and since the inventors of these instruments of destruction are applauded and encouraged in most of the great European States, which are engaged in an armament race".*[63]

However, bilateral and multilateral treaties regulating certain aspects of war did exist even prior to the 19th century, notably the "treaty of amity and commerce" between the United States and Prussia of 1785.[64] It wasn't until the 1820 "Treaty for the Regularization of War"

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[60] Nils and Kuster. "International Humanitarian Law" 35.
[61] Basdevant, Jules. "A little known convention on the law of war," *Revue generale de droit international public* (1914) https://international-review.icrc.org/sites/default/files/S0020860400019008a.pdf
[62] Daoust, Isabelle, Robin Coupland, and Rikke Ishoey, "New wars, new weapons? The obligation of States to assess the legality of means and methods of warfare," *International Review of the Red Cross* 84, no. 846 (2002): 345. https://www.icrc.org/data/rx/en/assets/files/other/345_364_daoust.pdf
[63] Durand, André, "The development of the idea of peace in the thinking of Henry Dunant," (*International Review of the Red Cross (1961-1997)* 26, no. 250 (1986): 17. https://international-review.icrc.org/sites/default/files/S0020860400022488a.pdf
[64] "Treaty of Amity and Commerce Between His Majesty the King of Prussia, and the United States of America," Proclaimed may 17th, 1786. *Treaties and Other International Acts of the United States of America. Volume 2 Documents 1-40 : 1776-1818 Washington : Government Printing Office,* (1931) https://avalon.law.yale.edu/18th_century/prus1785.asp

between the Spanish Empire and forces led by Simon Bolivar in the Colombian war of independence that humanitarian principles were explicitly used as justification to regulate warfare in a codified international treaty.[65] In this context, humanitarian principles refers to the fair treatment of everyone either directly or indirectly involved in the ongoing conflict. Subsequent treaties such as the 1848 treaty of Guadalupe Hidalgo between the United States and Mexico do contain provisions relating to the treatment of non-combatants.[66] However, these lack the passionate emphasis on the preservation of life from a philosophical basis such as that contained within the 1820 treaty for the regularization of war, the Lieber code of 1863 and Geneva convention of 1864.[67] Determining the bar of what constitutes the birth of modern International Humanitarian Law is inherently subjective, is IHL born with the establishment of bilateral treaties on laws of war? This would fit the "international" requirement, however, modern IHL relies on multilateralism and to a large extent universality.[68] This does not guarantee that multilateralism is the primary factor in establishing a "beginning" of modern IHL. For instance, the first major multilateral treaty which set a series of laws to be followed when there is an inevitable outbreak of war would be the 1856 Declaration of Paris.[69] While this treaty does have a future influence on IHL due to its impact on the concept of universalism in IL, it is significantly lacking in emphasis regarding the Humanitarian ramifications of war. The reality is that what we would consider to be an actual IHL regime did not come about after the ratification of a specific treaty or recognized custom. It took over a century of gradual developments to reach a point of actual

[65] O'leary. "Memorias Del General O'leary" *Edicion Facsimilar Digital Del le Primera Impresion Realizada Entre 1879 y 1888 Tomo XVII*, *Centro De Estudios Simon Bolivar, Republica Bolivaraiana de Venezuela* (2020): 575-577 https://drive.google.com/file/d/1ILOV2R2OKZd6aOtmORdklXCmV9jNIBdL/view?usp=sharing

[66] "Treaty of Guadalupe Hidalgo," Signed on February 2nd, 1848, *Article XXII, Perfected Treaties, 1778-1945; General Records of the United States Government, Record Group 11*; National Archives Building, Washington, DC: https://www.archives.gov/milestone-documents/treaty-of-guadalupe-hidalgo#page-header

[67] "Instructions for the Government of Armies of the United States in the Field (Lieber Code)," Adopted on April 24th, 1863, *The Laws of Armed Conflicts, Martinus Nijhoff Publishers*, (1988): pp.3-23. https://ihl-databases.icrc.org/en/ihl-treaties/liebercode-1863

[68] Sassoli, Marco, Yvette Issar, Andreas von Arnauld, Nele Matz-Lück, and Kerstin Odendahl. "Challenges to International Humanitarian Law," *100 Years of Peace through Law: Past and Future,* (2015): 47 https://sohs.alnap.org/system/files/content/resource/files/main/unige_79005_attachment01.pdf

[69] Lemnitzer, Jan Martin. "How Instant and Universal International Law Is Born and How It Dies: The 1856 Declaration of Paris." In *International Law and Time: Narratives and Techniques,* Cham: Springer International Publishing, (2022): 113-121 https://link.springer.com/chapter/10.1007/978-3-031-09465-1_6

effectiveness and even longer to achieve a recognized universality.[70] The modern, recognizable form of IHL as we know it today along with the majority of institutions which are tasked with monitoring and enforcing it came about after the ratification of the UN charter in 1945 and the 1949 Geneva conventions.[71]

### 1.3.1 1820 Treaty for the Regularization of War

The "treaty for the regularization of war" was ahead of its time in many aspects when examined from a modern perspective, the drafting and ratification of this treaty came during a brief lull in the Colombian war of independence between the Spanish Empire and Simon Bolivar's revolutionary forces following a particularly gruesome period of protracted violence.[72] Prior to the ratification of the treaty, both sides had been implementing a strategy of total war, disproportionately harming the civilian population.[73] Thus, the following excerpt from the treaties preamble defines the drafters motives;

"*The Governments of Spain and Colombia wish to express to the world the horror with which they view the war of extermination that has devastated these territories until now, turning them into a theater of blood; and wishing to take advantage of the first moment of calm that has arisen to regularize the war that exists between both Governments, in accordance with the laws of cultured nations, and the most liberal and philanthropic principles*."[74]

Up until this point there existed no codified international treaties which protected civilians in combat, and the concept of conducting warfare within the bounds of "liberal and

[70] De Baets, Antoon. "The view of the past in international humanitarian law (1860–2020)." *International Review of the Red Cross* 104, no. 920-921 (2022): 1617-1618 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/70964DE1E558FF369B55A3B618135937/S1816383122000145a.pdf/the-view-of-the-past-in-international-humanitarian-law-1860-2020.pdf
[71] De Baets "The view of the past" 1617
[72] O'leary "Memorias Del General O'leary" 575-577
[73] Bolivar, Simon "Proclamation to the people of Venezuela" (1813) https://faculty.chass.ncsu.edu/slatta/hi216/documents/bolivar/sbwar1813.htm
[74] O'leary "Memorias Del General O'leary" 575

philanthropic principles" would not be seriously proposed again until the introduction of the Lieber code in 1863.[75] While the 1820 treaty can be considered revolutionary in the emergence of modern IHL, as for why it has fallen into relative obscurity, there is no definitive answer. However, what is clear is that the conflict in Colombia simply didn't garner the international publicity to be seriously analyzed by legal scholars at the time. For instance, Francis Lieber and Henry Dunant never mention the treaty in either the Lieber code or 1864 Geneva Convention as well as in their personal writings. There currently exists no evidence suggesting that the 1820 treaty for the regularization of war had any influence whatsoever in the drafting of any of the following foundational implementations of IHL. This does not mean that the treaty did not leave a lasting legacy in regard to the development of domestic laws of war. This can be seen explicitly in the following Colombian civil war between 1860-1861 where multiple truces were agreed upon which set a legal standard in the identification of civilians and combatants.[76] It is possible that the modern government of Colombia's integration of IHL into its current constitution as well as its legal code can be attributed to its historical lineage of codifying humanitarian regulations for instances of armed conflict dating back to the 1820 treaty.[77] The academic community has recently begun taking interest in this connection as the historical contributions of Latin American states to the development of IHL have started being studied more thoroughly. Despite the treaty's significance from a philosophical point of view, it serves more as an indicator of changing perspectives on justice and morality due to its lack of international recognition in the 19th century.[78]

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[75] Basdevant "A little known convention on the law of war" 344-354

[76] Villa, Hernando Valencia. "*The law of armed conflict and its application in Colombia.*" *International Review of the Red Cross* (1961-1997) 30, no. 274 (1990): 5-15 https://international-review.icrc.org/sites/default/files/S0020860400075112a.pdf

[77] Muñoz, Marcela Giraldo, and Jose Serralvo. "International humanitarian law in Colombia: Going a step beyond." *International Review of the Red Cross* 101, no. 912 (2019): 1118-1121 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/4A4D4C6410CDFFC9D2903C997F2E032B/S1816383120000181a.pdf/international-humanitarian-law-in-colombia-going-a-step-beyond.pdf

[78] Coffelt, Jacob. "Codifying IHL before Lieber and Dunant: the 1820 treaty for the regularization of war" *ICRC Humanitarian Law and Policy Blog* (2024) https://blogs.icrc.org/law-and-policy/2024/04/04/codifying-ihl-before-lieber-and-dunant-the-1820-treaty-for-the-regularization-of-war/

### 1.3.2 1856 Declaration of Paris

The Declaration of Paris was originally ratified by Britain, France, Russia, Austria, Prussia, Sardinia-Piedmont, and the Ottoman Empire in the immediate aftermath of the 1853-1856 Crimean War.[79] This treaty had several significant ramifications on multiple aspects of both international treaty and customary law. The primary result of the treaty was setting an international standard for determining neutrality of merchant ships and the transportation of goods.[80] This resulted in the banning of privateering and an end to the practice of searching neutral vessels for contraband within 'the commons of the high seas'.[81] Throughout much of the 18th and 19th centuries, Britain was considered the primary antagonist in the interference of shipping and commerce of foreign ships primarily in Europe and the Americas.[82] They possessed by far the largest naval fleet of all global powers and were able to exert their policies of search and seizure of goods and ships generally uncontested despite protest from much of Europe's ruling elite.[83] While officially the British would only confiscate what is labeled as 'contraband' goods from vessels it searched, there were many exceptions to this rule.[84] However, the primary objection by European powers was that the act of searching presumably neutral vessels at all was inherently unjustified and represented an overreach of authority.[85] These searches became particularly prevalent following the initiation of the United States Revolutionary War and the subsequent entrance of France and Spain into the conflict. It was this crackdown on international commerce which led to the

[79] Lemnitzer, Jan Martin. "'That Moral League of Nations against the United States': The Origins of the 1856 Declaration of Paris," *The International History Review* 35, no. 5 (2013): 1068 https://doi.org/10.1080/07075332.2013.844194

[80] Twiss, Travers. "Belligerent Right on the High Seas: Since the Declaration of Paris (1856)," *Butterworths*, (1884): 3 https://books.google.com/books?hl=en&lr=&id=TH8NAAAAYAAJ&oi=fnd&pg=PA1&dq=1856+declaration+of+paris&ots=hjGh2GJKDd&sig=KOlbwXzbaZJSuKLyEz6rxo3XZiE

[81] Stark, Francis Raymond. "The abolition of privateering and the declaration of Paris," *Studies in history, economics and public law Vol. 8, no. 3,* Columbia University, (1897): 139-152 https://books.google.it/books?hl=en&lr=&id=16cAAAAAYAAJ&oi=fnd&pg=PA9&dq=1856+declaration+of+paris&ots=tq28x8dvQB&sig=1eLzifIsNOeA54mwoYdezr59gC0&redir_esc=y#v=onepage&q=1856%20declaration%20of%20paris&f=false

[82] Lemnitzer "The Moral League of Nations" 1069

[83] Lemnitzer "The Moral League of Nations" 1071-1073

[84] Lemnitzer "The Moral League of Nations" 1069

[85] Lemnitzer "The Moral League of Nations" 1069

development of the League of Armed Neutrality in 1780 to counter Britain's unchecked interference of neutral vessels. This policy was formally recognized in what has come to be known as the 'rule of 1756' which specifically gives British naval and privateer vessels permission to search neutral ships.[86] They would ultimately end this policy in 1854 during the Crimean war as part of an agreement with France which would be formally implemented in 1856 as part of the Paris conference which brought an end to the war.[87] Secondly, participation in this treaty was made available to all governing bodies globally as opposed to exclusively European powers. This resulted in 55 parties becoming signatories to the treaty and formally establishing the first example of what could be interpreted as universal international law.[88] Such a widely recognized multilateral treaty was unprecedented and paved the way for the introduction of future universally applicable treaties and conventions. Previously, international law was predominantly based on custom which developed through practice as opposed to instant application through treaty law.[89]

### 1.3.2 Lieber Code of 1863

The Lieber code was developed by Francis Lieber in the midst of the US Civil War eventually calumniating in the introduction of order No. 100, "*Instructions for the Government of the Armies of the United States in the Field*" by President Abraham Lincoln in 1863.[90] Francis Lieber himself was dedicated to reducing the unnecessary suffering of war wherever possible presumably due to his previous experiences as a witness and participant in the Napoleonic wars. As a child in Berlin he watched as Napoleon made his march into the city before joining in the conflict at just fifteen years of age.[91] Facing political

[86] Stark "The abolition of privateering and the declaration of Paris" 117-127
[87] Lemnitzer "The Moral League of Nations" 1069
[88] Lemnitzer, "That Moral League of Nations" 1068
[89] Lemnitzer "How Instant and Universal International Law Is Born and How It Dies" 116-121
[90] Paust, Jordan J. "Dr. Francis Lieber and the Lieber Code," *In Proceedings of the ASIL Annual Meeting*, *Cambridge University Press* vol. 95 (2001): 112 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/asilp95&section=35
[91] Paust, "Dr. Francis Lieber", 112

persecution in Germany, Lieber would eventually move to England and then to the US where he began teaching International Law.[92] The Lieber code was intended to replace the existing "rules and articles of war" which regulated how military forces were allowed to act in times of conflict.[93] This means that the code had to cover all aspects of conflict which may arise including but not limited to; rules for occupation[94], treatment of prisoners, protection of non-combatants etc. Thus, the final draft which was implemented in order No. 100 contained 156 articles and resulted in a new international standard for how nations engage in conflict.[95] While the Lieber Code itself was not an International Treaty and no other nations were obliged to conform to its standards, many of its provisions were adopted in international treaties and national military codes.[96] Its significance lies in its comprehensiveness in contrast with the following 1864 Geneva Convention which specifically targeted treatment of wounded soldiers and medical personnel.[97] Whether this comprehensiveness made it more difficult to implement or adhere to by soldiers and generals in the field has been debated, but regardless it's legal legacy appears to have been more effective than its actual contribution to the Union Army's conduct during the Civil War.[98] Similarly to the 1820 Treaty for the Regularization of War, the Lieber Code advocated for applying standards to civil conflicts resembling those applicable to IAC's.[99] However, recognition as a belligerent according to Lieber does have certain baseline requirements relating to organizational

[92] Carnahan, Burrus M. "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity." *The American Journal of International Law* 92, no. 2 (1998): 112 https://doi.org/10.2307/2998030.

[93] Roberts, Adam. "Foundational myths in the laws of war: The 1863 Lieber Code, and the 1864 'Geneva Convention'." *Melbourne Journal of International Law* 20, no. 1 (2019): 7 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/meljil20&section=11

[94] Giladi, Rotem. "A different sense of humanity: occupation in Francis Lieber's Code." *International Review of the Red Cross* 94, no. 885 (2012): 81-116. https://www.cambridge.org/core/services/aop-cambridge-core/content/view/8D0FC69EA6516A8909BE7211D874D7CB/S1816383112000525a.pdf/different_sense_of_humanity_occupation_in_francis_liebers_code.pdf

[95] Roberts, "Foundational myths in the laws of war", 7

[96] Carnahan, "Lincoln, Lieber and the Laws of War", 114

[97] Bugnion, François. "Birth of an Idea: The Founding of the International Committee of the Red Cross and of the International Red Cross and Red Crescent Movement: From Solferino to the Original Geneva Convention (1859–1864)." *International Review of the Red Cross* 94, no. 888 (2012): 1317-1326 doi:10.1017/S1816383113000088.

[98] Roberts, "Foundational myths in the laws of war" 6

[99] Bartels, Rogier. "Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-international Armed Conflicts." *International Review of the Red Cross* 91, no. 873 (2009): 53-55. doi:10.1017/S1816383109990191.

structure and conduct which have been adopted by following treaties and declarations.[100] This created several policy contradictions during the US Civil War as President Lincoln never officially recognized the Confederacy as a belligerent despite them meeting the requirements as per order No. 100.[101] Despite Lincoln's own reservations, the effects of Lieber's interpretation of jurisdiction can even be seen in the ICTY's process of determining the baseline qualifications for what constitutes armed conflict and belligerency during the Dusko Tadic case.[102]

### 1.3.3 1864 Geneva Convention

Built upon the universalist multilateralism of the 1856 Paris Declaration, the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field would become the first universally open treaty dedicated solely to establishing humanitarian standards in war.[103] Henry Dunant served as the driving force behind the creation and implementation of the 1864 Geneva Convention following his experience as a civilian observer during the battle of Solferino in northern Italy between Napolean III and the Austro-Hungarian Empire in 1859.[104] Following the evacuation of many dead and wounded soldiers to the nearby town of Castiglione delle Stiviere, Dunant helped the local population in providing medical care and humanitarian assistance to those in need. He was personally shocked at the lack of any preparation both sides had for caring for the wounded and the unnecessary deaths which could have been avoided with proper planning and agreement between the warring parties. In 1862, Dunant published a book titled "A memory of Solferino" about his experiences during the battle and proposes many of the ideas which

[100] Baxter, R. R. "The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100." *International Review of the Red Cross* 3, no. 25 (1963): 176-86. doi:10.1017/S0020860400000206.
[101] Zorgbibe, Charles. "Sources of the Recognition of Belligerent Status." *International Review of the Red Cross* 17, no. 192 (1977): 114-18. doi:10.1017/S0020860400021963.
[102] "Prosecutor v. Dusko Tadic decision on the defense motion on jurisdiction," *International Criminal Tribunal for the Former Yugoslavia*, Case no. IT-94-1-AR72 (1995) https://www.icty.org/x/cases/tadic/acdec/en/51002.htm
[103] Nils and Kuster, "International Humanitarian Law" 35-36
[104] Bugnion "Birth of an Idea" 1304-1321

would form the basis for the Geneva Conventions.[105] In 1863 he founded the International Committee for Relief to the Wounded (which would become known as the ICRC in 1876) alongside Swiss lawyer, Gustave Moynier.[106] In 1864, the Swiss government would host 16 countries to negotiate what would become known as the first Geneva convention.[107] However, despite its historical importance from the perspective of setting a future precedent for the creation of new universal treaties relating to international humanitarian law, it's overall scope was limited in what was actually being regulated as opposed to other documents such as the Lieber Code. Therefore, the first Geneva Convention of 1864 can be viewed as a foundational treaty which would become increasingly relevant as International Humanitarian Law developed throughout the late 19th and 20th century.

### 1.3.4 1945 United Nations Charter

Following the end of World War Two, the establishment of the United Nations and ratification of its charter would represent the biggest development in International Law to date.[108] Learning from the shortcomings of the League of Nations and its inability to prevent the Second World War[109], the United Nations Charter not only sought to create new ways of preventing the outbreak of war, but also how to incorporate key aspects of Human Rights Law that would thereby be binding among all member states.[110] While *jus in bello* isn't explicitly mentioned in the original charter, the emphasis on the promotion and protection

[105] Bugnion "Birth of an Idea" 1305-1306
[106] Bugnion "Birth of an Idea" 1309
[107] Bugnion "Birth of an Idea" 1322
[108] Alger, Chadwick F. "The United Nations in historical perspective." *The United Nations System: The Policies of Member States* 884 (1995): 8-10 https://books.google.com/books?hl=en&lr=&id=gEJKSHdgSewC&oi=fnd&pg=PR7&dq=The+United+Nations+in+historical+perspective.%22+The+United+Nations+System:+The+Policies+of+Member+States+884+(1995):+8-10&ots=xuNMeoHVF_&sig=cmvA6RO0mGP6YNcR1LdtQV0U8kQ
[109] Alger, "The United Nations in Historical Perspective", 3-5
[110] Henkin, Louis. "The United Nations and human rights." *International Organization, The United Nations: Accomplishments and Prospects*, Vol. 19, No. 3 (1965): 504-17 https://www.jstor.org/stable/pdf/2705867.pdf

of Human Rights intersects with International Humanitarian Law in multiple aspects.[111] As it is specifically stated that members must act within the spirit of the charter, *jus in bello* is inherently required to uphold this standard.[112] Subsequent UN resolutions and Protocols would codify this interpretation of the charter such as the implementation of the Principle of Proportionality and other methods restricting use of force in conflict.[113] The creation of the international court of justice (ICJ) within the United Nations structure as well as resolutions passed by the UNSC and general assembly would contribute greatly to the establishment and interpretation of IHL binding upon all member states, giving rise to a new era of universality.[114] Considering that the subsequent ad-hoc tribunals established by UNSC resolutions could not be possible without the ratification of the original UN charter, it has ultimately become the cornerstone which holds together the complex structure of modern international law.

### 1.3.5 1949 Geneva Conventions

The 1949 Geneva Conventions are divided into four separate conventions which both expand upon the 1863 convention as well as introduce new regulations regarding the regulation of armed conflict.[115] The first of the 1949 Conventions is an expanded version of the 1864 Convention which raises the number of articles from 10 to 64 in an effort to increase

[111] Roscini, Marco. "The United Nations Security Council and the enforcement of international humanitarian law." *Israel law review* 43, no. 2 (2010): 333-37 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/41DFC7AFC03BF346F6C6CAD0C7D3C097/S0021223700000790a.pdf/united_nations_security_council_and_the_enforcement_of_international_humanitarian_law.pdf
[112] Roscini, "The United Nations Security Council", 356
[113] Gisel, Laurent, ed. "The Principle of Proportionality in the Rules Governing the Conduct of Hostilities Under International Humanitarian Law," *International Expert Meeting*, 22-23 June 2016, Quebec, ICRC, (2018): 8 https://www.icrc.org/en/download/file/79184/4358_002_expert_meeting_report_web_1.pdf
[114] Odermatt, Jed. "The International court of justice and the court of justice of the European union: between fragmentation and universality of international law." *Research Handbook on the International Court of Justice, Edward Elgar, iCourts Working Paper Series* 158 (2019): 5-6 https://openaccess.city.ac.uk/id/eprint/22161/1/Odermatt_ICJ_CJEU.pdf
[115] Schindler, Dietrich. "Significance of the Geneva Conventions for the contemporary world." *International Review of the Red Cross* 81, no. 836 (1999): 716-717 https://international-review.icrc.org/sites/default/files/S1560775500103682a.pdf

protection for medical personnel and civilians who participate in conflict brought about by the invasion of an outside force.[116] The second convention (for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea) intends to ensure that protection is extended to maritime participants in armed conflict as well as accompanying civilians, medical staff and facilities.[117] The third convention (Relative to the Treatment of Prisoners of War) consists of 143 articles and provides by far the most comprehensive set of standards and protections for prisoners of war. This convention was intended to provided an updated and expanded set of regulations to the 1929 prisoners of war convention. While it was originally applied to international armed conflicts, the introduction of common article 3 has expanded the jurisdictional coverage of the 3rd Geneva convention to non-international armed conflicts as well.[118] The fourth convention (relative to the protection of civilians in times of war) contains 159 articles which specifically cover the treatment of civilians in situations of armed conflict.[119] This convention covers not only the physical protection of civilians, but also regulates the destruction of property and general treatment of civilians under their control. Such treatment includes allowing the freedom to practice religion and maintain some resemblance of normal life if the security situation allows for it.[120] Also, the facilitation of humanitarian assistance by the occupying force is necessitated under article 59 of the fourth convention. The comprehensiveness of this convention intends to prevent any wrongful treatment of the civilian population and allowing them to have their right to be respected and treated with dignity even in times of armed conflict.[121]

[116] "The Geneva Conventions of 12 August 1949" *ICRC Reference* (1949): 35-60 https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf
[117] "The Geneva Conventions of 12 August 1949" 61-80
[118] "The Geneva Conventions of 12 August 1949" 81-150
[119] "The Geneva Conventions of 12 August 1949" 156-160
[120] "The Geneva Conventions of 12 August 1949" 166-176
[121] "The Geneva Conventions of 12 August 1949" 151-211

## 1.4 Universalization of International Humanitarian Law

What exactly constitutes universalism in IHL goes beyond a single body of international law as IHL itself is by nature intertwined with peremptory norms of IL as well as treaty and customary law.[122] Out of all these bodies of law, only treaty law can explicitly be considered not inherently universal by nature. Despite this, there have been a number of treaties which have attained the status of universal recognition. Customary law has generally been considered as universal by nature, although lacking direct agreement by all states who supposedly fall under its jurisdiction.[123] Traditionally, it took a combination of state practice and *opinio juris* to establish the existence of a customary norm which could then be applied as law.[124] This still generally remains the theoretical defining characteristics of customary law, but new forms of interpreting the existence of customary norms began to arise in the late 20th century challenging this approach.[125] Peremptory norms of international law (*jus cogens)* have gained a particular prominence since the 1969 Vienna convention on treaties, ultimately establishing a set of principles which cannot be overruled by future treaties or determinations of customary law.[126] Customary law can be considered as the original form of universally recognized IHL as it wasn't until the first Geneva Convention that a universally applicable treaty containing aspects of IHL had been seriously proposed.[127] As previously mentioned, multilateral treaties containing provisions of IHL did exist prior to the Geneva Conventions but lacked any serious universal framework.[128] Peremptory norms

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[122] Nils and Kuster, "International Humanitarian Law", 21-26
[123] Charney, Jonathan I. "Universal international law." *American Journal of International Law* 87, no. 4 (1993): 534-543 https://www.jstor.org/stable/pdf/2203615.pdf?casa_token=568hxDCh_SgAAAAA:GHWTEBzIGq6o42QWZrkg9vyjZLpKUVz-dtEwcx74dt-63iqoeGmNfmbtKnEJTX4G4zalLCFOH-BoJNAgiXK990wLr6r-3cV4q6PyMMUnvNLnWUvzr1Q
[124] Meron "The Geneva Conventions as Customary Law" 358-361
[125] Bruderlein, Claude. "Custom in international humanitarian law." *International Review of the Red Cross (1961-1997)* 31, no. 285 (1991): 579-595 https://international-review.icrc.org/sites/default/files/S0020860400072569a.pdf
[126] Deutsch, Eberhard P. "Vienna Convention on the Law of Treaties." *Notre Dame Law.* 47 (1971): 302 https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=2926&context=ndlr
[127] Meron, Theodor. "The Geneva Conventions as customary law." *American Journal of International Law* 81, no. 2 (1987): 348-370 https://www.jstor.org/stable/pdf/2202407.pdf
[128] O'leary "Memorias Del General O'leary" 575

of IL do contain aspects of IHL and are inherently universal by nature, yet they did not fully develop standardized acceptance until the mid-to-late 20th century. As the majority of IHL is based upon both customary and treaty law, their status can in fact be subject to change depending on the actions of both states and relevant international institutions so long as it does not violate *jus cogens*.[129] However, the greatest challenge to IHL universality is not whether or not existing customary and treaty law will face significant reformation, but rather there is a possibility of future treaty law attaining universal recognition. The majority of modern universal IHL treaty law was established following the end of World War Two when the geopolitical landscape differed significantly from the present day.[130] The first Geneva Convention and following conventions preceding the Second World War were collected and built upon in the 1949 Geneva Conventions which would go on to attain true universality that continues to this day.[131] The United Nations Charter of 1945 similarly would achieve universality while focusing on upholding Human Rights as a general principle and not just *jus in bello*.[132] While not all IHL treaties would go on to become ratified universally, many of their provisions would become de facto universal as they entered into force through interpretation as customary law.[133] The additional protocols to the 1949 Geneva conventions are an example of this, while not being universally ratified, their provisions have regularly been interpreted as customary law in ICL and IHL.[134] Customary Law has become essential in the universal application of IHL as it fills in the gaps of treaty law without requiring the

[129] Deutsch, "Vienna Convention", 302
[130] Hill-Cawthorne, Lawrence. "Rights under international humanitarian law." *European Journal of International Law* 28, no. 4 (2017): 1214 https://academic.oup.com/ejil/article-pdf/28/4/1187/23981582/chx073.pdf
[131] Schindler "Significance of the Geneva Conventions" 716-724
[132] Schindler "Significance of the Geneva Conventions" 717
[133] Vincent A. Jordan, "Creation of Customary International Law by Way of Treaty," *United States Air Force JAG Law Review* 9, no. 5 (September-October 1967): 43-45. https://heinonline.org/HOL/Page?handle=hein.journals/airfor9&div=54&g_sent=1&casa_token=&collection=journals
[134] Sassòli, Marco. "How will international humanitarian law develop in the future?." *International Review of the Red Cross* 104, no. 920-921 (2022): 2063 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/0E800C47B09A29C39DFC5C3CFC4531B9/S1816383122000431a.pdf/div-class-title-how-will-international-humanitarian-law-develop-in-the-future-div.pdf?casa_token=na6pfopog9oAAAAA:mC42ozoWOXQSJZoyRnUDvdfL1rY3_yXy95ZzclAd8sPYCiQuGTVB-48I8aznLg8bGefvKF7R

creation and ratification of new treaties.[135] The universality of customary IHL has also led to significant debate surrounding issues of national sovereignty as international courts interpret existing IHL in ways potentially conflicting with national interests.[136] The ICC has become one of these controversial organizations whose mandate has intermittently been interpreted as customary law despite it being a non-universal treaty body.[137] This divergence in legal interpretation is evident when considering the ICTY chose to include the Rome Statute as evidence of *opinio juris* and thus customary law in both the Tadic and Furundžija cases.[138] Despite this, the Rome statute which established the ICC is not entirely interpreted as customary law, and the court itself has reiterated that it prefers to only refer to customary law in its judgements as a matter of last resort.[139] The ability of the ICC to establish customary law through its own interpretations of treaty law is debatable, as a non-universal treaty body it typically does not possess this authority, but things get more complicated in cases which are referred to it by the UNSC. The universality of standards in armed conflict being a relatively new concept, it has proven itself effective and one of the most progressive developments in international law.

## 1.5 International Criminal Tribunals

The first modern examples of what would become known as International Criminal Tribunals came following the end of World War Two with the intent of prosecuting crimes committed by both Nazi Germany and the Japanese empire during the war. These tribunals were originally referred to as International Military Tribunals and sought to prosecute the

[135] Sassòli "How will international humanitarian law develop in the future?" 2070
[136] Sassòli "How will international humanitarian law develop in the future?" 2054
[137] Prosecutor v. Dusko Tadic (Appeal Judgement) IT-94-1-A (15 July 1999) https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/40180
[138] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 100-101
[139] Kumar, Amit. "Custom as a Source under Article 21 of the Rome Statute." *Asian Journal of International Law* 11, no. 2 (2021): 236-243 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/EDE4EB46B83E47B227DE822DCD641E7D/S2044251321000205a.pdf/custom-as-a-source-under-article-21-of-the-rome-statute.pdf

defendants on the basis of committing crimes against peace, humanity and violations of customary laws of war.[140] The resulting trials would go on to contribute significantly to modern International Criminal Law and create a foundation for which future tribunals could build upon.[141] Despite the perceived success of these military tribunals, it wouldn't be until the establishment of the International Criminal Tribunal of Yugoslavia that a similar system would reappear. Following the collapse of Yugoslavia, the extreme violence which had broken out between both state and non-state actors was enough to convince the United Nations Security Council to agree on establishing an international criminal tribunal to investigate and prosecute potential violations of IHL.[142] Resolution 827[143] of the UNSC led to the creation of the ICTY in 1993 which would continue to operate until 2017 when it was determined that it had completed its original mission.[144] The only other ad-hoc tribunal established by the UNSC was the ICTR (International Criminal Tribunal for Rwanda) which began operating in 1994 until 2015 to prosecute those accused of supporting, orchestrating and carrying out the 1994 Rwandan Genocide.[145] Despite the ICTY and ICTR being the only examples of fully international ICT's, the United Nations has collaborated with national governments to establish hybrid courts. These hybrid courts were implemented in Cambodia, Sierra Leone, Lebanon and East Timor with the intent of using international support and expertise to have a better chance at administering justice.[146] However, the ICTY and ICTR stand out for their scale and complexity which have significantly contributed to the development of customary IHL. The authority of these ad-hoc tribunals is universal as they

[140] Reydams, Luc, Jan Wouters, and Cedric Ryngaert. "The politics of establishing international criminal tribunals." *International Prosecutors* (2012): 3-13. https://scholar.archive.org/work/w4sdpcdi65gshpdrqeg2autnri/access/wayback/https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp71-80/wp77.pdf
[141] Reydams et al. "The politics of establishing international criminal tribunals." 66-67
[142] Reydams et al. "Establishing international criminal tribunals." 15-22
[143] UNSC "Resolution 827" (1993) S/RES/827
[144] ICTY "Report of the international tribunal for the former Yugoslavia" (2017) A/72/266–S/2017/662
[145] Lilian A. Barria; Steven D. Roper, "How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR," *International Journal of Human Rights* 9, no. 3 (2005): 363-364 https://heinonline.org/HOL/Page?handle=hein.journals/ininllh9&div=26&g_sent=1&casa_token=&collection=journals
[146] Harry Hobbs, "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy," *Chicago Journal of International Law* 16, no. 2 (2016): 482-522 https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/cjil16&id=491&men_tab=srchresults

came into existence on the basis of UNSC resolutions which grants them jurisdiction among all of the territories within its mandate.[147] All United Nations member states are obliged to comply with these resolutions on the grounds of adhering to universally ratified treaty law.[148] The effectiveness of International Criminal Tribunals lies within their international recognition and the financial as well as human resources which are gained from international collaboration.[149] This is not to suggest that ad-hoc ICT's come without their own controversies and criticisms, this is inevitable when establishing international courts seeking to prosecute nationals in any state. From a jurisdictional perspective, ad-hoc tribunals such as the ICTY are often criticized for not being established by means of an independent treaty or agreement between states.[150] In the instance of the ICTY Tadic case, the defense brought up this very argument when questioning the legal basis for the creation of the court and its jurisdiction over the judicial system of a sovereign state.[151] This argument ultimately failed but it did bring up some important questions which never had to be answered prior to the establishment of the ICTY.[152] Namely to what extent can United Nations treaty obligations intervene in the judicial process of a sovereign state, and what permanent effects will these tribunals be able to have on the development and recognition of customary law? It was ultimately the introduction of these modern International Tribunals that contributed to the rapid growth of ICL and brought about a new tool which could be used to successfully prosecute individuals who have violated IHL.[153]

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[147] Barria and Roper, "How Effective Are International Criminal Tribunals?" 354
[148] Winston P. Nagan, "International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia," *Duke Journal of Comparative & International Law* 6, no. 1 (1995): 148-154 https://heinonline.org/HOL/Page?handle=hein.journals/djcil6&div=11&g_sent=1&casa_token=&collection=journals
[149] Gregory P. Lombardi, "Legitimacy and the Expanding Power of the ICTY," *New England Law Review* 37, no. 4 (2002-2003): 899-01 https://heinonline.org/HOL/Page?handle=hein.journals/newlr37&div=51&g_sent=1&casa_token=&collection=journals
[150] Lombardi "Legitimacy and the Expanding Power of the ICTY" 887-902
[151] ICTY "Decision on the Defense Motion on Jurisdiction"
[152] ICTY "Decision on the Defense Motion on Jurisdiction"
[153] Erakat, Noura. "The US v. The Red Cross: customary international humanitarian law and universal jurisdiction." *Denv. J. Int'l L. & Pol'y* 41 (2012): 261 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/denilp41&section=17

# Chapter 2 Challenges to International Humanitarian Law

Since the late 20th century, international institutions and legal systems have faced numerous challenges which did not necessarily exist at the time of their inception.[154] Evolving global security threats and cultural dynamics have threatened the International System established following the end of World War Two when universalization seemed to be an inevitable future.[155] International Humanitarian Law has not been spared from these challenges which have arisen in a new world of non-state actors and emerging global superpowers such as China and India. Philosophical conflicts, legal battles and a failure to secure universal recognition of modern IHL institutions represent just a few of the ongoing debates which ultimately will determine if it can adapt to the times or risk becoming less relevant.[156] This is not to say that we are facing the potential collapse of international humanitarian law in its entirety, rather an emphasis on the current and future challenges which have come to surface.[157] While the authority of existing treaty and customary IHL have yet to be directly challenged by state actors, a renewed emphasis on sovereignty combined with a lack of international cooperation has brought into question the possibility for development in the future.[158] Despite large scale participation in newer organizations such as the ICC, universal recognition has so far remained elusive.[159] Some progress has come to fruition through the evolution of customary law stimulated by the rise of ad-hoc tribunals and hybrid courts, but

[154] Lake, David A., Lisa L. Martin, and Thomas Risse. "Challenges to the liberal order: Reflections on international organization." *International organization* 75, no. 2 (2021): 234-243 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/2FE0E2621F702D1DD02929526703AED3/S0020818320000636a.pdf/challenges_to_the_liberal_order_reflections_on_international_organization.pdf?casa_token=LZQUpfK7ZVwAAAAA:DAQu4snv7aN0rdC7BzAV23pdQEuvjnJbU4A2xSvx8vl0KIzR0HscHDmQHGEGvkdCSiEpo9qf
[155] David et al. “Challenges to the Liberal Order” 226-248
[156] Sassòli "How will international humanitarian law develop in the future?” 2052-2057
[157] Sassòli "How will international humanitarian law develop in the future?” 2054-2056
[158] Sassoli, Marco, Yvette Issar, Andreas von Arnauld, Nele Matz-Lück, and Kerstin Odendahl. "Challenges to International Humanitarian Law." *100 Years of Peace through Law: Past and Future* (2015): 39-43 https://sohs.alnap.org/system/files/content/resource/files/main/unige_79005_attachment01.pdf
[159] Sassoli et al. "Challenges to International Humanitarian Law." 33-35

whether or not this is enough to keep up with the evolution of modern conflicts remains to be seen.

## 2.1 Post-colonial criticisms

One of the most significant developments in the International Legal sphere is the growing influence of states which have historically been under-represented in global politics due to their colonial status.[160] While the foundations of International Humanitarian Law were being established, a significant amount of the global population was under the subjugation of western powers and denied the privilege to participate in their creation.[161] These institutions are now often accused of Eurocentrism in the philosophical basis for which they use as justification for their existence.[162] Claims of Eurocentrism extend to the narrative regarding the historical and philosophical origins of International Humanitarian Law.[163] These criticisms are regularly brushed off as baseless on the claim that IHL and the modern framework of Human Rights are dedicated purely to the preservation of human life and dignity with mechanisms in place to ensure cultural sensitivity.[164] However, considering the prevalence of such opinions regarding Eurocentrism and western bias, the hardline stance to ignore such criticisms has the potential to end up proving their substantiality. This does not

[160] David et al. "Challenges to the Liberal Order" 226-232
[161] Gorman, Daniel. "Britain, India, and the United Nations: colonialism and the development of international governance, 1945–1960." *Journal of Global History* 9, no. 3 (2014): 471-473 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/82C74C81650142D0B382D3269DBEC8E7/S1740022814000217a.pdf/britain_india_and_the_united_nations_colonialism_and_the_development_of_international_governance_19451960.pdf?casa_token=ctarus7pML4AAAAA:272RZ56Er_uYXZzydSsaJwWfRZrJ3yQDumB3_pviJmRKBA9bj-gvfywCuNxQ45ND-Kg25K9O
[162] Mbengue, Makane Moïse, and Olabisi D. Akinkugbe. "The Criticism of Eurocentrism and International Law: Countering and Pluralizing The Research, Teaching, and Practice of Eurocentric International Law." *Makane M. Mbengue and Olabisi D. Akinkugbe," The Oxford Handbook of International Law in Europe, Anne Van Aaken, et al (Forthcoming)* (2022): 6-8 https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2225&context=scholarly_works
[163] Mbengue et al. "The Criticism of Eurocentrism" 5
[164] Donnelly, Jack. "Human rights and human dignity: An analytic critique of non-Western conceptions of human rights." *American Political Science Review* 76, no. 2 (1982): 303-316 https://www.jstor.org/stable/pdf/1961111.pdf?casa_token=l16jRzxv_gsAAAAA:vNxnwZnZwIhyD4th5F_Ro_YND7jVbvTYoWAOqH2JwXYbusH9GW3opnRiomu1t7FJvGcP5p3KpqG6GOhdqgRFhX7ooQhUSnOmLN2T3xb4J-1qGIRhyFY

only apply to the body of law making up IHL, but also the way it is enforced, with less influential states receiving the brunt of attention in international courts as opposed to western countries.[165] This has always been a major criticism of the ICC, as despite the involvement of many African states in the establishment of the court, the ICC is often accused of targeting Africans in particular as opposed to other individuals in their investigations.[166] This trend has shifted slightly, with ongoing investigations in southeast Asia, Russia and Palestine.[167] However, the lack of investigations into abuses by individuals from western Europe and the United States for their actions in the various wars of the 21st century has called into question the capabilities and biases of the court. With the growing economic, cultural and security influence of non-western states, the historical legacy of the development of international humanitarian law and human rights will continue to be questioned until this discrepancy is properly addressed.

### 2.1.1 Bangkok Declaration on Human Rights

In 1993, ASEAN nations released what has become known as the Bangkok Declaration on Human Rights following the conclusion of the Regional Meeting for Asia of the World Conference on Human Rights.[168] This declaration was intended to present an interpretation of Human Rights which took into consideration the cultural and political dynamics of Asian

[165] Kaleck, Wolfgang "Double standards: International criminal law and the west" *Vol. 26. Torkel Opsahl Academic EPublisher,* (2015): 103-106 https://books.google.com/books?hl=en&lr=&id=-iC7DwAAQBAJ&oi=fnd&pg=PR1&dq=international+criminal+law+western&ots=CXnQiihpcM&sig=nvNachoC3rRiG98jz9J4homAH3o

[166] Cannon, Brendon J., Dominic R. Pkalya, and Bosire Maragia. "The International Criminal Court and Africa." *African Journal of International Criminal Justice* 2, no. 1/2 (2016): 9-12 https://www.academia.edu/download/54720820/The_International_Criminal_Court_and_Africa.pdf

[167] Broache, M. P., Kate Cronin-Furman, David Mendeloff, and Jacqueline R. McAllister. "The International Criminal Court at 25." *Journal of Human Rights* 22, no. 1 (2023): 1-3 https://www.tandfonline.com/doi/pdf/10.1080/14754835.2022.2150518?casa_token=JuOm0r0SoEoAAAAA:WYBBCZ9ogsx3WK6B9mBnuaQIwSz4f278h6RfHnvJbyW4YgHdtRyfEh8g3qSzIIXH9Mrw_GvG3cjz

[168] "Bangkok Declaration, Final declaration of the regional meeting for Asia of the world conference on human rights." *In Report of the Regional Meeting for Asia of the World Conference on Human Rights*, vol. 29, pp. 2-5. (1993) http://faculty.washington.edu/swhiting/pols469/Bangkok_Declaration.doc

states and would go on to be endorsed by over thirty states.[169] While the declaration has remained controversial among western states, it reaffirms a commitment to the fundamental principles of Human Rights as stated in the Universal Declaration of Human Rights and subsequent international agreements. Despite its insistence on being intended to upholding human rights, western critics often argue that it is a pushback against the mainstream universalist concept of human rights intended to allow for the exploitation of citizens for political purposes.[170] The deviations which do exist from the preexisting human rights structure generally sought to alleviate potential political conflicts between sovereignty of states and international institutions. This is emphasized in article 5 of the declaration "the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure".[171] While it is easy to say that this is simply a way for ASEAN states to remove themselves from the oversight of international human rights instruments and obligations, denying any legitimacy to their skepticism about western-derived international institutions given the brutal history of colonialism and exploitation would be disingenuous. This is not to say that there is no room for criticism about the actual motivations behind the Bangkok Declaration given the human rights record of many of the countries which participated in its creation.[172] For instance, the declarations emphasis on national jurisdiction

[169] Bahrain, Bangladesh, Brunei Darussalam Bhutan, Kiribati Japan, Laos Kuwait, Maldives Malaysia, Myanmar Mongolia, and Oman Nepal. "Bangkok Declaration." *Asia-Pacific Journal on Human Rights and the Law* 1 (2000): 144-149 https://idp.springer.com/authorize/casa?redirect_uri=https://link.springer.com/article/10.1007/s12142-014-0313-7&casa_token=Utc6KIG90dUAAAAA:jn-jwvIxqjDnPW7Spv7DXJb4OfnnjrYU3bAYMrsuo95FRADrmqgAv6-wMMhDQOprp-OpwPNc_osGqQUW

[170] Davies, Mathew. "An agreement to disagree: the ASEAN Human Rights Declaration and the absence of regional identity in Southeast Asia." *Journal of Current Southeast Asian Affairs* 33, no. 3 (2014): 113-114 https://journals.sagepub.com/doi/pdf/10.1177/186810341403300305

[171] Pisanò, Attilio. "Human rights and sovereignty in the ASEAN path towards a human rights declaration." *Human Rights Review* 15 (2014): 395-396 https://idp.springer.com/authorize/casa?redirect_uri=https://link.springer.com/article/10.1007/s12142-014-0313-7&casa_token=byQjPdINgTsAAAAA:ePqDMev5SDxurlxaNxEqQlkkGSPGRpgUMYBcs5Nwzguv76AXAloyavXaiRNIxUxh9RGDT-IrbW8SrF_v

[172] Hien, B. U. I. "The ASEAN human rights system: A critical analysis." *Asian Journal of Comparative Law* 11, no. 1 (2016): 113-118 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/095F2F8A32A544F1AEEB6A2D89328F1E/S2194607816000090a.pdf/asean_human_rights_system_a_critical_analysis.pdf?casa_token=_eWVtGbVcCMAAAAA:l73mLWxmX1AMBZ-vNnMpfnVOi-SLKErPm8k2uWcYXEocepF7TcuNMOu0Xs0jEVqcxF-n_6oc

over human rights violations must take into consideration the fact that states such as China employ a judicial system which faces very little constitutional oversight and often fails to uphold even the domestic constitutional rights of its citizens.[173] Therefore, expecting it to effectively monitor and enforce its human rights violations without international oversight is woefully optimistic. Ultimately, the Bangkok Declaration has shown that a perspective of the modern universalist human rights regime being inherently Eurocentric still exists and should not be so easily dismissed

## 2.2 Evolution of Warfare

The latter half of the 20th century saw the diversification of conflict from traditional forms of warfare between states to more complex threats to global, regional and national security, which has created new challenges for International Institutions.[174] Codified International Humanitarian Law has its origins in regulating the activity of armies and state responsibility.[175] However, a significant number of conflicts in the 21st century invoke characteristics of being both NIAC's and IAC's as well as involving state and non-state actors. This creates new challenges in the forms of jurisdictional issues, interpretation of both treaty and customary law, as well as prosecution of potential violations of IHL.[176] Traditionally, IHL makes a clear distinction between what constitutes a non-international armed conflict and an international armed conflict.[177] This distinction was necessary as it determines which body of law is applicable in different forms of armed conflict.[178] For

[173] Davis "Human rights in Asia" 215
[174] Milanovic, Marko, and Vidan Hadzi-Vidanovic. "A taxonomy of armed conflict." *RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW, Nigel White, Christian Henderson, eds., Edward Elgar* (2012): 16-51 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988915
[175] Nils and Kuster "International Humanitarian Law." *35*
[176] Nils and Kuster "International Humanitarian Law" 49-73
[177] Vité, Sylvain. "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations." *International review of the red cross* 91, no. 873 (2009): 70 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9456E0C97A1A2BD6FF0C3FCC058B8211/S181638310999021Xa.pdf/div-class-title-typology-of-armed-conflicts-in-international-humanitarian-law-legal-concepts-and-actual-situations-div.pdf?casa_token=2jO37AAGkCIAAAAA:bJIJEK5dIwkJRhvKE-YBO-ILQa5Oft1uB-Yr_0ZDx_3CYTCqJfiIlBjUiM4Yl1US9XjPOz3C
[178] Vité "Typology of armed conflicts in international humanitarian law" 70

instance, civil war is by definition an NIAC (unless involving foreign intervention) and therefore captured rebels are not afforded Prisoner of War status under IHL.[179] However, determining when acts of violence eventually escalate into a recognized armed conflict can present additional challenges relating to jurisdiction and applicability. Without a determination that the acts of violence in question represent an armed conflict, the status of it being either an NIAC or IAC cannot be concluded under IHL.[180] Not only is there an issue of determining the existence of conflict, but also when an NIAC transitions into an IAC.[181] Common Article 3 of the 1949 Geneva Conventions and its 1960 commentary struggled with this question as many states were concerned about its use of the term "Armed conflict not of an international character in the territory of one of the high contracting parties".[182] The concern arose from the potential for sporadic acts of violence to be identified as an armed conflict and thus restrict the ability of the sovereign government to handle the threat.[183] The additional Protocols both I & II attempted to narrow down the definition of armed conflict in order to address this issue:

*"all armed conflicts not covered by Article 1 … of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."*[184]

While this greatly improved the ability for armed conflicts to be identified, it still left room for individual interpretation regarding what constituted "responsible command" and

[179] Bartels "Timelines, borderlines and conflicts" 57-60
[180] Bartels "Timelines, borderlines and conflicts" 36-39
[181] Vité "Typology of armed conflicts in international humanitarian law" 83-93
[182] "Convention (III) relative to the Treatment of Prisoners of War (Commentary 1960)" *ICRC IHL Database* (1960) https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3/commentary/1960?activeTab=undefined
[183] Bond, James E. "Internal Conflict and Article Three of the Geneva Conventions." *Denv. LJ* 48 (1971): 268-271 https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1587&context=faculty
[184] "Convention (III) relative to the Treatment of Prisoners of War, additional protocol II (article I)" *ICRC IHL Database* (1977) https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/article-1?activeTab=undefined

"sustained and concerted military operations".[185] It wasn't until the ICTY further elaborated upon this issue in their court proceedings that more specific thresholds for armed conflict were established through customary law.[186] However, this didn't put an end to the debate surrounding the fine line separating an NIAC and IAC in modern conflicts, leaving room for states to introduce their own interpretations which has generated significant controversy.[187] This became particularly evident during the United States invasion of Afghanistan and declaration of a war on terror. They attempted to justify their actions by establishing a universal jurisdiction through the classification of a global NIAC against al-Qaeda, triggering a rigorous debate amongst legal scholars.[188] The seemingly contradictory nature of a "global" NIAC required extensive explanation from the US administration about what justification granted them the relevant authority in this case. Common article 2 of the Geneva Conventions was explicitly used to explain why a war on terror did not meet the classification of an IAC as it labels an IAC as a conflict between two sovereign states.[189] The United States Supreme Court also played a role in the legal justification for the proclamation of the existence of a global NIAC, citing the Pictet commentary of common article 3.[190]

Criticism has been levied against the supreme court in what has been called a misrepresentation of Pictet's commentary as they quoted "non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other" while excluding the following sentence ''the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory".[191] When provided with both quotes, it becomes hard to believe that Pictet's commentary can be used to justify the existence of a global NIAC, particularly

[185] "Convention (III) relative to the Treatment of Prisoners of War, additional protocol II (article I)"
[186] ICTY "Decision on the Defense Motion on Jurisdiction"
[187] Bartels "Timelines, borderlines and conflicts" 36
[188] Bartels "Timelines, borderlines and conflicts" 60
[189] Fitzpatrick, Joan. "Speaking law to power: the war against terrorism and human rights." *European Journal of International Law* 14, no. 2 (2003): 249 https://academic.oup.com/ejil/article-pdf/14/2/241/1085566/140241.pdf
[190] Graham, David E. "Defining non-international armed conflict: a historically difficult task." *International Law Studies* 88, no. 1 (2012): 50 https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1054&context=ils
[191] Graham "Defining non-international armed conflict" 48-52

when he uses the phrase "within its territory".[192] Academia has also raised the idea that new categorizations may be necessary to deal with armed conflicts in the 21st century considering the terminology hasn't officially changed since its inception. This mostly pertains to NIAC's as new terms such as Internationalized non-international armed conflict have begun to appear in literature and commentary regarding IHL.[193] While the ICRC so far hasn't expressed a willingness to officially introduce a new system of categorization, unofficially it has published articles suggesting there are no geographic limitations to the application of common article 3;

*"There is nothing in the drafting history of Common Article 3 on the basis of which it may be concluded that the territorial clause was deliberately formulated to limit its geographical application to the territory of a single state."*[194]

Controversially, this interpretation of common article 3 rejects the notion of justifying "trans-national" NIAC's on the basis of claiming to not support any legal authority to engage in global war.[195] While a trans-national NIAC can have the possibility of crossing into IAC territory, the two aren't necessarily mutually exclusive.[196] This distinction is not aimed at changing the authority of IHL in most instances, rather it is a matter of determining *jus ad bellum* in the context that one conflict may spill over into the territory of another which may not be directly involved in hostilities.[197] In this instance the terminology has the potential to dictate whether or not the belligerents can in fact cross borders without explicit consent from the state in question using an argument of imminent threat as justification.[198]

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[192] "Convention (III) relative to the Treatment of Prisoners of War, additional protocol II (Commentary 1987)" *ICRC IHL Database* (1987) https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/general-introduction/commentary/1987
[193] Vité "Typology of armed conflicts in international humanitarian law" 71-93
[194] Pejic, Jelena. "The protective scope of Common Article 3: more than meets the eye." *International Review of the Red Cross* 93, no. 881 (2011): 199 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/E48A4A5EFE9FBD8146367BE14E8F8AFA/S1816383111000130a.pdf/div-class-title-the-protective-scope-of-common-article-3-more-than-meets-the-eye-div.pdf
[195] Pejic "The prospective scope of Common Article 3" 195
[196] Vité "Typology of armed conflicts in international humanitarian law" 80-93
[197] Vité "Typology of armed conflicts in international humanitarian law" 72-73
[198] Vité "Typology of armed conflicts in international humanitarian law" 72-73

These types of discussions have become commonplace as asymmetric conflicts have grown in both size and commonality. One of the greatest contributors to this phenomenon is the rise of non-state actors engaging in both sporadic acts of violence as well as organized, large scale military activities.[199] Perhaps the most famous and influential of these actors being al-Qaeda at the height of their power throughout the 1990's and into the 21st century. It was during their campaign of terrorism that the debates surrounding *jus ad bellum* and *jus in bello* in the context of combating non-state actors began to seriously take place, particularly in the wake of the United States invasion and subsequent occupation of Afghanistan.[200] Previously, their had been some discussion attempting to clarify how to handle issues of jurisdiction in relation to acts of terrorism, especially as hijackings and acts of terrorism began to increase in frequency in the 1960's. It was these incidents which caused US president Ronald Reagan to grant the FBI authority to carry out arrests of individuals accused of violating US law abroad in 1989 even if it may violate customary international and treaty law.[201] The justification for this decision had no basis in international law rather it specified that since it did not violate the fourth amendment of the US constitution, it was in fact legal.[202] This emphasizes that terrorism by non-state actors had become so prevalent that the American administration at the time was willing to contravene international obligations in order to counter it.[203] While whether or not this decision was necessary is a separate debate, it indicates the inadequacy of existing international law to deal with issues of jurisdiction when it came to non-state actors. Since then, there have been significant developments in international law which have attempted to ensure that these issues are addressed through international law and not at the whim of national judicial decisions. However, this has not stopped states from carrying out policies based on loose interpretations of international law

[199] Stephen, Matthew D., and Michael Zürn. "Contested World Orders: Rising powers, non-state actors, and the politics of authority beyond the nation-state." No. SP IV 2014-107. *WZB Discussion Paper*, (2014): 24-33 https://www.econstor.eu/bitstream/10419/103313/1/799294993.pdf
[200] Pejic "The prospective scope of Common Article 3" 196
[201] Barr, William. "Authority of the Federal Bureau of Investigation To Override International Law In Extraterritorial Law Enforcement Activities" *Attorney General Office of legal counsel* (1989) https://www.justice.gov/file/151131/dl
[202] Barr "Authority of the Federal Bureau" 183-184
[203] Barr "Authority of the Federal Bureau" 183-184

which has led to its own set of issues.[204] For instance, it has become a common occurrence for states to use the classification of conflicts as NIAC's in order to manipulate the application of IHL in their own interest.[205] Non-state actors can be attributed as both the cause and effect of these policies as they primarily exist if there is a state acting in either the role of an antagonist or supporter.[206] Exceptions to this exist in cases where multiple groups of non-state actors are competing with each other, but they generally share a common enemy which is the governing authority of the territory which they operate within.[207] These points must be taken into consideration when trying to determine whether or not IHL can be applied to groups of non-state actors.[208] This all occurs within the debate of when can acts of violence reach the threshold required to fulfil the requirements of being a recognized armed conflict. Non-state actors participating in sporadic acts of terrorism not meeting this threshold are generally considered as falling under the jurisdiction of national judicial and law enforcement authorities.[209] As this isn't by definition an armed conflict, IHL would not apply and neither side is obliged to act within its mandate. The fight against groups such as ISIS and al-Qaeda have been designated as NIAC's which does require the application of IHL.[210] However, largely due to emotional and public appeals, certain aspects of IHL are often withheld when engaging and prosecuting members of terrorist organizations such as the case of British citizens acting as medics for ISIS.[211] While IHL is very clear that medical personnel are not to be prosecuted or treated as POW's, this protection is still debated for

[204] Pejic "The prospective scope of Common Article 3" 197
[205] Pejic "The prospective scope of Common Article 3" 191-192
[206] Pejic "The prospective scope of Common Article 3" 190
[207] Pejic "The prospective scope of Common Article 3" 195-197
[208] Pejic "The prospective scope of Common Article 3" 191
[209] ICRC. "Characteristics of Armed Conflicts & Other Situations of Violence" *Training for media professionals* (2017) https://www.icrc.org/en/download/file/67234/handout_3_-_characteristics_of_armed_conflicts_other_situations_of_violence.pdf
[210] Kreβ, Claus, and Frédéric Mégret. "The regulation of non-international armed conflicts: Can a privilege of belligerency be envisioned in the law of non-international armed conflicts?" *International Review of the Red Cross* 96, no. 893 (2014): 33-34 https://international-review.icrc.org/articles/regulation-non-international-armed-conflicts
[211] Khairullin, Elem. "Syria: Medical support for ISIS" *ICRC Case study* https://casebook.icrc.org/case-study/syria-medical-support-isis

those who have returned to Great Britain.[212] The rise of proxy conflicts and foreign involvement in NIAC's has further exacerbated the crisis within IHL scholarly debate, such as those which arose during the collapse of Yugoslavia. This trend has continued and remains prevalent in most large-scale conflicts of the 21st century including the civil wars in both Yemen and Syria where foreign actors have participated in either direct military intervention and/or support of belligerent parties to the conflict.[213] In many cases, it has been determined that both an NIAC and IAC exist simultaneously within a single territory in a legal attempt to segregate what is perceived to be multiple separate (although not necessarily unrelated) conflicts.[214] Despite several conflicts occurring within a single territory involving multiple state and non-state actors, this does not necessarily mean that any states involved who may be indirectly engaging in military activity against the government of the territory are inherently acting in violation of *jus contra bellum*. However, when the United States carried out missile strikes against a Syrian government airbase in 2017 there emerged a major legal debate surrounding how exactly this could be justified.[215] To put it into context, Syrian government forces had been using chemical weapons repeatedly throughout their war against rebel forces.[216] In 2013, the United Nations passed a resolution demanding that Syria work with the Organization for the Prohibition of Chemical Weapons (OPCW) to dispose of its remaining stockpiles.[217] In spite of these efforts, the Syrian government continued to use chemical weapons and in 2017 they carried out an attack in the town of Khan Shaykhun.

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[212] Rubenstein, Leonard S., and Melanie D. Bittle. "Responsibility for protection of medical workers and facilities in armed conflict." *The Lancet* 375, no. 9711 (2010): 330 https://www.sciencedirect.com/science/article/pii/S0140673609619267?casa_token=FaswiQ5xmoMAAAAA:_AxfBLD1aM3b-3YFCCqn-Krfukdhwk5yFvjt_5YqNPCr7SDBKZx4ZUGWiHqcd-Iy3PD7OQT-Uw

[213] Gill, Terry D. "Classifying the conflict in Syria." *International Law Studies* 92, no. 1 (2016): 354-355 https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1691&context=ils

[214] Gill "Classifying the conflict in Syria." 374-377

[215] Daugirdas, Kristina, and Julian Davis Mortenson, eds. "United States strikes Syrian government airbase in response to chemical weapons attacks by Syrian forces; two additional strikes on Syrian government forces justified by defense of troops rationale." *The American Journal of International Law* 111, no. 3 (2017): 781-783 https://www.jstor.org/stable/pdf/26568886.pdf?casa_token=26WAn9PlIkgAAAAA:XF8pJjQ5wMEyYje5XqhbIYIoDBmN3fMFTkqTI9gMHxbefimLirBq3wa-Ddl0HENEi23KieR2tPZT4hr3MJo5jWF4I_CWX_ZCjeY2Pa833f1YsNyCRDc

[216] Geis, Anna, and Gabi Schlag. "The facts cannot be denied': legitimacy, war and the use of chemical weapons in Syria." *Global Discourse* 7, no. 2-3 (2017): 2-3 https://www.academia.edu/download/57610414/Geis_and_Schlag_2017_The_facts_cannot_be_denied.pdf

[217] Daugirdas and Mortenson "United States strikes Syrian Government Airbase" 783-785

Following an investigation by the UN and OPCW, it was determined that the Syrian government had indeed used Sarin gas.[218] United States President Donald Trump proceeded to order a barrage of cruise missiles upon the airbase from which Syrian Forces launched the attack, reportedly destroying aircraft and killing multiple Syrian government soldiers.[219] Previously, it was arguable that the United States was not actively engaged in an IAC against the Syrian government based on the principle that it had not directly engaged Syrian Forces.[220] Following this strike, it was impossible to deny that the United States had intentionally used force against the Syrian government and therefore confirmed the presence of an IAC between both parties.[221] The issue here however is not whether an IAC exists, but if the United States had a legal basis to cross the line of *jus contra bellum* when it openly carried out an attack against another state? The United States has not necessarily attempted to provide a serious legal defense or discussion of its actions, however the debate amongst academia has been significant considering the future legal implication of such an attack. The only legal justification that could be argued would be under the United Nations Charters article 2(4) In light of these challenges, the reality is that IHL has had to not only adapt its policies to these new forms of conflict, but also accept that it will never be able to remain static.[222]

[218] Daugirdas and Mortenson "United States strikes Syrian Government Airbase" 781
[219] Daugirdas and Mortenson "United States strikes Syrian Government Airbase" 782
[220] In this instance, it must be taken into consideration that US forces had carried out an airstrike previously which resulted in the death of Syrian government forces. However, they stated that this was not intentional, and they were targeting ISIS members in the area and expressed remorse for their actions. This claim was not rebuked by the Syrian government therefore it isn't regarded as an explicit violation of *jus ad bellum*.
[221] Bachmann, Sascha Dov, and Meredith Jones. "Syria–a hybrid war case study." *Journal of Military and Strategic Studies* (2021): 41 https://jmss.org/article/download/73754/55220
[222] Daugirdas and Mortenson "United States strikes Syrian Government Airbase" 784

## 2.3 Decline of Universality

Initially, the concept of codifying Human Rights in a manner which would ensure universal recognition seemed to be a permanent fixture of the international legal system.[223] This idea was reinforced following the universal recognition of both the Geneva Conventions, universal declaration of human rights and United Nations charter. However, as times have changed and global participation in the formulation of international law has increased substantially, so has the number of disagreements between states regarding exactly what constitutes Human Rights and how it should be enforced.[224] As previously mentioned, the Bangkok Declaration on Human Rights was a clear example regarding the polarization of global opinions.[225] While this may seem like IHL might be unable to adapt to future crisis because of this lack of support for universalization, it must also be taken into consideration that customary law and new contributions from existing treaty organizations still remain binding.[226] However, the issue isn't necessarily disputes over the legality of existing human rights regimes, rather disagreements over the direction and overall importance of IHL in the future of International Law.[227] While states have little ability to dispute existing treaty obligations and long-established norms in customary law, they can express a lack of willingness to cooperate with the international systems designed to promote and maintain IHL. This type of behavior has become mainstream when we take into account recent examples of what appears to be a clear disdain for international institutions such as the ICJ and ICC by countries as influential as the United States and Russia.[228] The 21st century has presented a complex geopolitical environment which has challenged traditional norms of

[223] Özsu, Umut. "Agency, universality, and the politics of international legal history." *WORLD* 1980 (1974): (1989): 59 https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/2010/10/HILJ-Online_52_Ozsu1.pdf
[224] Mutua, Makau Wa. "The ideology of human rights." In *International Law of Human Rights*, pp. 103-172. Routledge, (2017): 598-561
https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1571&context=journal_articles
[225] "Bangkok Declaration (1993)"
[226] Henckaerts "Customary International Humanitarian Law" xxxv-xxxvi
[227] Sassòli "How will international humanitarian law develop in the future?" 2053-2054
[228] Groenleer, Martijn. "The United States, the European Union, and the international criminal court: similar values, different interests?." *International Journal of Constitutional Law* 13, no. 4 (2015): 924
https://academic.oup.com/icon/article-pdf/13/4/923/7374671/mov054.pdf

international law. It has become rare for states to agree on anything in a universal manner which satisfies all parties, resulting in a lack of new universal treaties relating to IHL.[229] An example of this is the establishment of the ICC, although garnering significant support among United Nations member states allowing it to officially come to fruition, it still lacks ratification by key states such as Russia, China, and the United States.[230] Currently, 124 countries are state parties to the Rome Statute and recognize the jurisdiction of the ICC.[231] A recent example of the consequences from a lack of universal jurisdiction is when the ICC issued an arrest warrant for Russian president Vladimir Putin.[232] As Putin resides in Russia, national authorities are not forced to carry out the ICC's warrant, however, Putin was planning on visiting South Africa in 2023 who is a member of the ICC. If Putin had indeed traveled to South Africa, the national authorities would have been under a treaty obligation to place him in custody upon his arrival.[233] One of the most well-known cases of this the court came when former United states President Donald Trump placed sanctions on multiple members of the ICC for suggesting they would open an investigation on US soldiers in Afghanistan for potential war crimes.[234] Despite the fact that the United States is not a party to the statute and therefore does not face any obligation to comply with the court, the ICC can still technically issue an arrest warrant for a US citizen if they committed the crime in a state which has ratified the Rome statute.[235] In this case, Afghanistan ratified the statute in 2003 which allows the court to carry out investigations into potential crimes which occurred since its accession.[236] Therefore, American soldiers can be issued arrest warrants under the

[229] Maybee, Larry, and Benarji Chakka. "Custom as a source of international humanitarian law." In *Proceedings of the Conference to Mark the Publication of the ICRC Study "Customary International Humanitarian Law" held in New Delhi*, pp. 8-9. (2005): 25-40 https://www.icrc.org/data/rx/en/assets/files/other/custom_as_a_source_of_ihl.pdf

[230] Groenleer "The United States, the European Union, and the international criminal court" 924

[231] ICC "Assembly of States Parties to the Rome Statute" https://asp.icc-cpi.int/states-parties

[232] Jay, Zoë, and Matt Killingsworth. "To Arrest or Not Arrest? South Africa, the International Criminal Court, and New Frameworks for Assessing Noncompliance." *International Studies Quarterly* 68, no. 2 (2024): 10 https://academic.oup.com/isq/article-pdf/doi/10.1093/isq/sqae005/56972287/sqae005.pdf

[233] Jay and Killingsworth "To Arrest or Not Arrest?" 10

[234] Ducci, Cecilia, and Flavia Lucenti. "'Contestation from Within': US Escalating Aversion to the International Criminal Court and the Non-impunity Norm in the Trump Era." *Interdisciplinary Political Studies* 8, no. 2 (2022): 282 https://iris.luiss.it/bitstream/11385/227478/1/Ducci%20Lucenti%20Contestation%20from%20Within.pdf

[235] Ducci and Lucenti "Contestation from Within" 289

[236] Ducci and Lucenti "Contestation from Within" 289

same legal principles as those which were used against Vladimir Putin. However, even though states who have ratified the Rome statute are under treaty obligation to extradite individuals who have been issued an arrest warrant by the ICC, it does not guarantee that this will actually happen. The case of Sudan and most prominently Omar al-Bashir comes to mind as he continued to travel to numerous states who had ratified the Rome statute even after the issuing of an arrest warrant for him by the ICC.[237]

# Chapter 3 ICTY: Dusko Tadić

Following the breakup of the Republic of Yugoslavia and the violent conflict which ensued, reports of serious breaches of International Humanitarian Law would trigger a massive outcry from the International Community demanding action.[238] Ultimately it would be the United Nations security council which would prove to be where the most significant developments seeking an end to the conflict and the pursuit of justice would take place. Numerous UNSC resolutions were passed addressing the reported violations of International Humanitarian Law culminating in the deployment of United Nations Peacekeeping forces as well as the establishment of an international ad-hoc tribunal which would become known as the International Criminal Tribunal for Yugoslavia (ICTY).[239]

The ICTY would face many difficulties and criticisms throughout the course of carrying out its mission, as the first ad-hoc tribunal established since the end of world war two, it was

[237] Jay and Killingsworth "To Arrest or Not Arrest?" 2
[238] ÓTuathail, Gearóid. "Theorizing practical geopolitical reasoning: the case of the United States' response to the war in Bosnia." *Political Geography* 21, no. 5 (2002): 602-603 https://www.sciencedirect.com/science/article/pii/S0962629802000094?casa_token=vStGHlfQJkoAAAAA:fNNIKjCsxVkF3fICdKsMyZx7j9HmDrAsOPzc5S9ivd1dVCD5ot3LRQjKG1RrOCW95Nc7AMBrYw
[239] "UN Resolutions on BiH" *Office of the High Representative* https://www.ohr.int/cat/un-resolutions-on-bih/page/7/

setting a new precedent in International Law which would have lasting implications.[240] In 1997, Bosnian Serb Dusko Tadic would be prosecuted by the ICTY for multiple charges including crimes against humanity and violations of the Geneva conventions in relation to his actions against civilians in the town of Kozarac and surrounding area.[241] The trial and appeal process which followed it would become one of the most referenced cases in modern ICL, influencing the way IHL would be applied and the interpretation of customary law for decades to come.[242]

## 3.1 Collapse of Yugoslavia

The 1980's would be a tumultuous period for Yugoslavia as a number of detrimental factors would ultimately prove themselves to be too difficult to overcome.[243] Once praised for its rapid economic growth and successful propagation of the neutral foreign policy approach to cold war era politics, the 1990's would see the word Yugoslavia become synonymous with war and crimes against humanity.[244] A number of theories exist as to what exactly caused this breakdown in Yugoslavian society or what development proved to be the tipping point at which conflict became inevitable.[245] The reality is much more complex than what can be

[240] Barria, Lilian A., and Steven D. Roper. "How effective are international criminal tribunals? An analysis of the ICTY and the ICTR." *The International Journal of Human Rights* 9, no. 3 (2005): 349-350 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/ininllh9&section=26&casa_token=4RbH3PEpRIEAAAAA:ajxZaAUXjTa5nBMwPIFDxZYHigE493OFwwWs5CutVBY28N9IthYedvtg969ldHQrHJSjSMouAw

[241] "Tadic: Case information sheet", *ICTY (IT-94-1)*. https://www.icty.org/x/cases/tadic/cis/en/cis_tadic_en.pdf

[242] Swart, Mia. "Tadic revisited: Some critical comments on the legacy and the legitimacy of the ICTY." *Goettingen J. Int'l L.* 3 (2011): 1008-1009 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gojil3&section=46&casa_token=DWgBebzZD-cAAAAA:CprBNelOvqJUC7Lh4s4Oya4yFMCu18gWIHPAzk-TX9ogq9QkInAQPtMyMROsjF8VnZG6sniwRg

[243] Hoare, Marko Attila. "The war of Yugoslav succession." *Central and Southeast European politics since* (1989): 107-112 https://www.researchgate.net/profile/Marko-Hoare/publication/336064620_The_War_of_Yugoslav_Succession/links/5f5a4eeb4585154dbbc6b39d/The-War-of-Yugoslav-Succession.pdf

[244] Hoare "The war of Yugoslav succession." 111-135

[245] Hoare "The war of Yugoslav succession." 111-135

attributed to single explanations or simple anecdotal examples which seemingly trivialize real and undeniable concerns face by the various parties to the conflict. Faced with a monumental economic collapse and escalating ethnic tensions, fractures in Yugoslav society began to emerge which led to the eventual fracturing of the republics.[246] While the international community attempted to negotiate a peaceful solution to the growing crisis, the inevitable dissolution of the country became increasingly apparent.[247] As violence broke out, the United Nations would attempt to physically and diplomatically intervene with little initial success as the conflict would become the deadliest in Europe since the end of the second world war.[248] What emerged from the rubble was a series of newly independent states forced to build a new national identity and society from the remnants of a once united Yugoslavia.

### 3.1.1 Social dissolution

The Socialist Federal Republic of Yugoslavia consisted of the 6 constituent republics of Bosnia and Herzegovina, Croatia, Montenegro, Serbia and Slovenia as well as the autonomous provinces of Kosovo and Vojvodina.[249] All of these republics remained united by a federal entity under a hybrid liberal-socialist political system that originally sought to suppress any independent nationalist sentiments based on ethnic identity.[250] Following the

[246] Jovic, Dejan. "The disintegration of Yugoslavia: A critical review of explanatory approaches." *European journal of social theory* 4, no. 1 (2001): 101-103 https://journals.sagepub.com/doi/pdf/10.1177/13684310122225037?casa_token=4hniOA5ooRMAAAAA:WlLjuCESvAO9BCT4hIL_ND_QFK0_sPm4ezHlXIk2fGdGOjRV1N78kJh9EH6bcmWRyMyFPYESloFy
[247] Dragovic-Soso, Jasna. "Why did Yugoslavia disintegrate? An overview of contending explanations." *State collapse in South-Eastern Europe: New perspectives on Yugoslavia's disintegration* (2008): 24-29 https://eclass.uoa.gr/modules/document/file.php/PSPA327/W4%20A%20critical%20assessment%20of%20the%20disintegration%20of%20Yugoslavia/SOSO%20Why%20did%20Yugoslavia%20disintegrate.pdf
[248] Cooley, Laurence. "The European Union's approach to conflict resolution: Insights from the constitutional reform process in Bosnia and Herzegovina." *Comparative European Politics* 11 (2013): 173 https://idp.springer.com/authorize/casa?redirect_uri=https://link.springer.com/article/10.1057/cep.2012.21&casa_token=xn_dgD_SStoAAAAA:UuUynSOrSxPuIVpp2huigvBpAbE8_F8GvYGWtvBOJG2Q76bGYksg4Mc3DNXc96NqKEWAlLtGGubjHk5q
[249] Johnson, A. Ross. "Political Leadership in Yugoslavia: Evolution of the League of Communists." *The Rand Corporation* (1983): V https://apps.dtic.mil/sti/tr/pdf/ADA412414.pdf
[250] Johnson "Political Leadership in Yugoslavia" 4-13

end of World War Two, the Socialist Federal Republic of Yugoslavia sought to create an identity that would transcend ethnic divisions that have repeatedly plagued the Balkans throughout history.[251] Under the rule of Joseph Tito between 1944-1980, everything appeared to be relatively stable and ethnic tensions seemed to be relieved by the generous amount of autonomy granted to each republic, especially after the passing of the 1974 constitution.[252] However, following the death of Tito in 1980 and faced with compiling economic challenges, the fragile social fabric holding Yugoslavia together was being torn apart at the seams.[253] Economically, the era of rapid growth and rising living standards had come to a standstill by 1980 as the amount of debt Yugoslavia had taken on from the IMF and foreign entities was becoming unsustainable. Around 20% of their annual revenue from Exports of Goods and Services (EXPGS) was being consumed entirely by the cost of covering their outstanding debts which throughout the 1980's was estimated to be in the range of 20+ billion USD.[254] This would in turn incite future social unrest which was further compounded by existing societal inequalities relating to the large gap between economic and infrastructural development disparities of the Northern and Southern parts of the country. A deep animosity between the more productive republics and the less productive republics began to form which would go on to advocate for further autonomy and eventually independence spurred by developing nationalist and ethnocentric ideologies.[255] Animosity turned to hatred and economic woes exchanged for violence, war became inevitable.

[251] Johnson "Political Leadership in Yugoslavia" 4-7
[252] Johnson "Political Leadership in Yugoslavia" V
[253] Güzelipek "Why Did Yugoslavia Collapse." 108
[254] Babić, Mate, and Emil Primorac. "Some causes of the growth of the Yugoslav external debt." *Soviet studies* 38, no. 1 (1986): 69-88 https://www.jstor.org/stable/pdf/151992.pdf
[255] Jovic "The disintegration of Yugoslavia" 101-120. https://journals.sagepub.com/doi/pdf/10.1177/13684310122225037

### 3.1.2 Secession

The divide between the North and South in Yugoslavia had become impossible to ignore as the disparity in levels of industrialization became further exacerbated by a stagnating global economy.[256] As the southern republics were forced to sell their exports for less, they also had to pay the northern republics more for their finished goods.[257] While all of this was going on, the costs of servicing the federal debts was increasing and inflation was getting out of control.[258] The primary economic powerhouses in the north were Croatia and Slovenia, and their vastly larger economic contribution to the Socialist Federal Republic compared to the other republics was a source of significant controversy.[259] They felt that the south wasn't contributing enough on a federal level, and that the Serbian dominated central leadership was mismanaging the economy.[260] Slovenia and Croatia began to seek greater autonomy from the federal governmental authorities and used their economic leverage to attain it. However, further decentralization of the economy would only worsen the situation and the potential threat of secession would ultimately become a reality.[261] These economic challenges would become most apparent in Kosovo, Macedonia and Montenegro who were faced with bankruptcy.[262] Bosnia was also in a period of economic freefall particularly after the collapse of Agrokomerc and the corruption scandals which followed suit.[263] This essentially left the republics of Croatia, Slovenia and Serbia with the most bargaining power and influence in determining the future of Yugoslavia itself. However, these republics had

[256] KUKIĆ, LEONARD. "Socialist Growth Revisited: Insights from Yugoslavia." *European Review of Economic History* 22, no. 4 (2018): 426/427 https://www.jstor.org/stable/26578317.
[257] Jovic "The disintegration of Yugoslavia" 101-103
[258] Babić "Some causes of the growth of the Yugoslav external debt." 71-74
[259] Lang, Nicholas R. "The Dialectics of Decentralization: Economic Reform and Regional Inequality in Yugoslavia." *World Politics* 27, no. 3 (1975): 314 https://doi.org/10.2307/2010123.
[260] Yarashevich, Viachaslau, and Yuliya Karneyeva. "Economic Reasons for the Break-up of Yugoslavia." *Communist and Post-Communist Studies* 46, no. 2 (2013): 272 https://www.jstor.org/stable/48609746.
[261] Jovic "The disintegration of Yugoslavia" 101-120
[262] Hammel, Eugene A., Carl Mason, and Mirjana Stevanović. "A fish stinks from the head: Ethnic diversity, segregation, and the collapse of Yugoslavia." *Demographic Research* 22 (2010): 1127 https://escholarship.org/content/qt5h8380z3/qt5h8380z3.pdf
[263] Mujanović, Jasmin. "The Baja class and the politics of participation." *Unbribable Bosnia-Herzegovina: The Fight for the Commons* (2014): 139-140 https://www.academia.edu/download/36405624/MujanovicWritingSample.pdf

drastically different visions for what this future should look like, as the economy continued to collapse and nationalist rhetoric became commonplace, the likelihood of a united Yugoslavia seemed to disappear. While economic concerns were initially the primary motivation behind the secessionist movements in Yugoslavia, the republics themselves were largely divided on an ethnic basis with a plurality of minority groups also existing within each territory.[264] This is particularly true in Slovenia and Croatia where Slovenians and Croats make up the overwhelming majority of their respective republics. Croatians made up approximately 78.1%[265] of the population of Croatia according to the 1991 census of Yugoslavia, with Slovenes making up approximately 87.8% of the population of Slovenia.[266] This meant that the push for independence was nearly unanimous in both republics and the primary threat came not from ethnic tensions within but from the JNA (Jugoslav National Army) and minority Serb paramilitaries.[267] This was not the case with Bosnia and Herzegovina, where there was a much greater plurality of ethnic and religious groups. According to the 1991 Yugoslavian government census, the primary ethnic/religious groups in Bosnia where the Bosnian Muslims (43.5%), Bosnian Serbs (31.2%) and Bosnian Croats (17.4%).[268]

[264] Yarashevich and Karneyeva "Economic Reasons for the Break-up of Yugoslavia." 263
[265] Šterc, Stjepan, and Ivan Crkvenčić. "The Population of Croatia." *GeoJournal* 38, no. 4 (1996): 417–24. http://www.jstor.org/stable/41146861.
[266] Gosar, Anton. "Nationalities of Slovenia—changing ethnic structures in Central Europe." *GeoJournal* 30 (1993): 215-223. https://link.springer.com/content/pdf/10.1007/BF00806709.pdf
[267] Hoare, Marko Attila. "The war of Yugoslav succession." *Central and Southeast European politics since* (1989): 110-113 https://www.researchgate.net/profile/Marko-Hoare/publication/336064620_The_War_of_Yugoslav_Succession/links/5f5a4eeb4585154dbbc6b39d/The-War-of-Yugoslav-Succession.pdf
[268] Markowitz, Fran. "Census and sensibilities in Sarajevo." *Comparative Studies in Society and History* 49, no. 1 (2007): 42 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/03DCDA6B498EFE9B159026B71996E4BF/S0010417507000400a.pdf/div-class-title-census-and-sensibilities-in-sarajevo-div.pdf

| *Category* | *Total* | *Percentage* |
|---|---|---|
| TOTAL | 4,377,033 | 100 |
| Crnogorci (Montenegrins) | 10,071 | 0.2 |
| Hrvati (Croats) | 760,852 | 17.4 |
| Makedonci (Macedonians) | 1,596 | 0.1 |
| Muslimani (Muslims) | 1,902,956 | 43.5 |
| Slovenci (Slovenes) | 2,190 | 0.1 |
| Srbi (Serbs) | 1,366,104 | 31.2 |
| Jugoslaveni (Yugoslavs) | 242,682 | 5.6 |
| Albanci (Albanians) | 4,925 | 0.1 |
| Česi (Czechs) | 590 | 0 |
| Italijani (Italians) | 732 | 0 |
| Jevreji (Jews) | 426 | 0 |
| Mađari (Hungarians) | 893 | 0 |
| Nijemci (Germans) | 470 | 0 |
| Poljaci (Poles) | 526 | 0 |
| Romi (Gypsies) | 8,864 | 0.2 |
| Rumuni (Romanians) | 162 | 0 |
| Rusi (Russians) | 297 | 0 |
| Rusini (Ruthenians) | 133 | 0 |
| Slovaci (Slovaks) | 297 | 0 |
| Turci (Turks) | 267 | 0 |
| Ukrajinci (Ukrainians) | 3,929 | 0.1 |
| Ostali (Others) | 17,592 | 0.4 |
| Undeclared | 14,585 | 0.3 |
| Regional affiliation | 224 | 0 |
| Unknown | 35,670 | 0.8 |

SOURCE: Federacija Bosne i Hercegovine 2003b, p. 61.

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Following the cessation of Croatia and Slovenia and the seemingly inevitable collapse of Yugoslavia, the tensions between the Serb, Croat and Muslim populations reached a critical threshold.[270] This tension was exacerbated primarily by the leadership of the SR Serbia as it sought to unite all ethnic Serbs within the territory of Yugoslavia under a single 'Greater Serbian' state.[271]

Ultimately, Slovenia would be the first to hold a referendum regarding independence in 1990 following the implementation of multi-party elections for the first time in its history.[272] This referendum didn't stipulate an immediate secession, rather that the country would default to independence if after 6 months there was no meaningful progress in negotiations for

[269] Markowitz, Frank "Census and Sensibilities in Sarajevo" *Comparative Studies in Society and History* 49(01) (2007): 42 http://dx.doi.org/10.1017/S0010417507000400
[270] Hoare "The war of Yugoslav succession." 121-122
[271] Hoare "The war of Yugoslav succession." 112
[272] Hoare "The war of Yugoslav succession." 112

reconfiguring the republic of Yugoslavia into a less centralized confederation of republics.[273] As the deadline expired, Slovenia officially declared secession from Yugoslavia on June 26th, 1991.[274] Croatia was simultaneously undergoing its own constitutional reforms with the ultimate goal being a gradual transition to independence. However, the immediate decision was to remain within Yugoslavia "until a new agreement is reached by the Yugoslav republics, or until the Croatina Sabor decides otherwise.".[275] By the end of February 1991, Croatia's Sabor had passed a resolution supporting the disunion of Yugoslavia and a referendum held in May of that year saw 93% of participating voters support the creation of an independent Croatia.[276] However, this referendum was boycotted by the Serbian minority within the country who had passed their own resolution supporting the disunion of the SAR Krajina with Croatia in February 1991. Because of this large minority Serbian population, Croatia carefully worded their choice for independence in the 1991 referendum as follows:

*"Are you in favour of the Republic of Croatia, as a sovereign and independent State which guarantees the cultural autonomy and all civil rights of Serbs and members of other nationalities in Croatia, entering into a federation of sovereign States with the other republics".*[277]

Despite this, the SAR Krajina officially declared its independence from Croatia in December of 1991.[278] While Croatia had already declared its status as an independent state, it is hard to pinpoint when exactly it became fully separated from Yugoslavia. However, in October

[273] Ramet, Sabrina Petra. "Slovenia's Road to Democracy." *Europe-Asia Studies* 45, no. 5 (1993): 872 http://www.jstor.org/stable/153060.
[274] Ramet "Slovenia's Road to Democracy." 873
[275] Radan, Peter. "Secessionist self-determination: The cases of Slovenia and Croatia." *Анали Правног факултета у Београду* 42, no. 3-4 (1994): 243-261.
[276] Vukas, Budislav, and Katarina Peročević. "The Process of the Establishment of Independence of the Republic of Croatia and the Foundation of Its National Policy in Culture and Art." *Santander Art and Culture Law Review* 2 (2015): 225 https://www.ceeol.com/content-files/document-413989.pdf?casa_token=exqmwOkc624AAAAA:qo8J1-AxQ3xRSkQF3mvs3luw3II9ohGa0KOszzhRr5yqXq1z63X-FFN9Q569Dj36FO_PfMlq
[277] Vukas "The Process of the Establishment of Independence of the Republic of Croatia" 225
[278] Zakošek, Nenad. "Democratization, state-building and war: The cases of Serbia and Croatia." In *War and Democratization*, Routledge, (2013): 598 https://commonweb.unifr.ch/artsdean/pub/gestens/f/as/files/4760/46438_140419.pdf

of 1991 the Croatian Parliament had announced the complete severance of all constitutional ties with the Socialist Federal Republic of Yugoslavia. This effectively ended any remaining connections between the two entities.[279]

Macedonia was the next republic to declare independence following a referendum held in November of 1991.[280] The primary ethnic makeup of Macedonia according to the 1991 Yugoslavia census consists of Macedonians (65.3%) and Albanians (21.7%). However, there have been long standing disputes regarding the accuracy of these numbers by all sides who claim to be underrepresented.[281] Subsequent Censuses have resulted in similar disagreements so their must be a disclaimer regarding the precise accuracy of the data available.[282] Despite some tensions between the Albanian and ethnic Macedonian populations, the move to independence was somewhat uneventful in comparison to the other Yugoslav Republics.[283] There did exist reservations from the Albanian community over the declaration of the state as a Macedonian republic, as they believed it undermined their own status within society. However, these issues did not escalate into full fledged conflict and even the SR Serbia did not protest the cessation of Macedonia and the two states have maintained friendly relations ever since.[284] The case of Bosnian secession was perhaps the most complex and indisputably had the most drastic consequences when compared to the other Republics. Following Croatia and Slovenia, in 1990 Bosnia and Herzegovina held their own multi-party elections which resulted in nationalist parties dominating the parliament.[285] To avoid potentially initiating an internal conflict, the government did not immediately press for independence as the ethnic makeup of the country put it in a much more vulnerable

[279] Bjelajac, Mile, and Ozren Žunec. "The war in Croatia 1991–1995" *The Scholars' Initiative Research Team Seven* na, (2009): 12 https://www.academia.edu/download/33074624/team_7_full_text_report.pdf
[280] Grillot, Suzette R., Wolf-Christian Paes, Hans Risser, and Shelly O. Stoneman. "Macedonia: Past, Present, and Future." *A Fragile Peace: Guns and Security in Post-Conflict Macedonia*. Small Arms Survey, (2004): 5 http://www.jstor.org/stable/resrep10730.7.
[281] Vrgova, Roska. "Census, identity, and the politics of numbers: The case of Macedonia." *Contemporary Southeastern Europe* 2, no. 2 (2015): 107-125.
[282] Gaber, Natasha, and Aneta Joveska. "Macedonian Census Results – Controversy or Reality?" *SEER: Journal for Labour and Social Affairs in Eastern Europe* 7, no. 1 (2004): 105-110 http://www.jstor.org/stable/43293032.
[283] Gaber and Joveska "Macedonian Census Results – Controversy or Reality?" 105
[284] Hoare "The war of Yugoslav succession." 128-129
[285] Hoare "The war of Yugoslav succession." 119

position than the other Republics.[286] However, following the European community's recognition of Croatian and Slovenian independence in January of 1992, the parliament made the decision to hold their own referendum as they saw the dissolution of Yugoslavia as inevitable and permanent. The referendum was held in March of 1992 with only 64% of eligible voters participating due to a boycott from the Bosnian-Serb population. Despite this turnout, the support of the non-Serb population for independence was predictably overwhelming at 99.4%. The independent republic of Bosnia and Herzegovina was subsequently admitted to the United Nations in May of 1992.[287]

### 3.1.3 International Recognition

As calls for independence began to grow throughout the Republics, the international community largely supported the territorial integrity of Yugoslavia. Throughout most of 1991, there was still a general consensus that Yugoslavia was a united entity, and that the central government held some form of legal authority over the country.[288] This was despite the fact that Slovenia had already defeated the JNA and expelled its remnants from the republic, and Croatia was in the process of fighting Serb militants in Krajina following its own declaration of independence.[289] This insistence on the survival of the SFRY as a united political entity would end up causing tension among the international community as differences arose regarding when and how recognition should be granted.[290] Throughout

[286] Hoare "The war of Yugoslav succession." 119-120
[287] Mulaosmanović, Admir. "Bosnia and Herzegovina after independence until Dayton agreement (1990-1995)." *Bosnia and Herzegovina: law, society and politics* (2016): 66-67. https://www.researchgate.net/profile/Yucel-Ogurlu/publication/357394648_Ogurlu-Kulanic_Bosnia_Law_Society_and_Politics/links/61cc1dabe669ee0f5c701cda/Ogurlu-Kulanic-Bosnia-Law-Society-and-Politics.pdf#page=61
[288] Weller, Marc. "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia." *The American Journal of International Law* 86, no. 3 (1992): 570 https://doi.org/10.2307/2203972.
[289] Hoare "The war of Yugoslav succession." 114-118
[290] Hodge, Carl Cavanagh. "Botching the Balkans: Germany's recognition of Slovenia and Croatia." *Ethics & International Affairs* 12 (1998): 1-18 https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1747-7093.1998.tb00035.x?casa_token=OxRpBGt7mgwAAAAA:3SBDPKJRgODCF1Oz8_bzVYq-3yn9aw0U-vbb8odsNNor7_lh--mURAhxIZGmK_g3eRmsjKods4yFz18

1991, the European Community (EC) was the primary international actor intervening in the territorial crisis as it was actively unfolding.[291] In August of 1991, the EC had established a body known as the Arbitration commission of the conference on Yugoslavia who were responsible for providing legal advice regarding issues of secession and border disputes between the republics.[292] By November of 1991, the first opinion by the commission was released which declared Yugoslavia as being in an active state of dissolution. Opinion No.1 specifies:

"*The composition and workings of the essential organs of the Federation, be they the Federal Presidency, the Federal Council, the Council of the Republics and the Provinces, the Federal Executive Council, the Constitutional Court or the Federal Army, no longer meet the criteria of participation and representatives inherent in a federal state*".[293]

While the declaration of an active state of dissolution is a significant development in the debate regarding self-determination, it did not represent an immediate intent to recognize the independence of the individual republics. The arbitration commission itself did not have the legal capacity to unilaterally implement its determinations, being an international arbitration body, its primary role was to produce opinions for the peace conference on Yugoslavia.[294] Negotiations were still in place between what remained of the SFRY and its breakaway republics and the European community was very worried that any potential immediate change in the status quo could jeopardize ongoing discussions.[295] Thus, it wasn't until Germany announced their intent to recognize Croatia and Slovenian independence on December 8th, 1991, that it became evident that international recognition was going to come

[291] Weller "The International Response" 570-573
[292] Weller "The International Response" 576
[293] Pellet, Alain. "The opinions of the Badinter Arbitration Committee: a second breath for the self-determination of peoples." *Eur. J. Int'l L.* 3 (1992): 183 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/eurint3&section=20&casa_token=MEwJ5JOYMfcAAAAA:U4e7Z8wY0_j0zA1cokrD2LWk2r4mz8TFlEgtXEEfKh296plcyRiZjAPAarVmiv1WlmhRyPyDHQ
[294] Craven, Matthew CR. "The European community arbitration commission on Yugoslavia." *British Yearbook of International Law* 66, no. 1 (1995): 334-335 https://eprints.soas.ac.uk/2572/1/Badinter%20Commission.pdf
[295] Weller "The International Response" 569

sooner rather than later.[296] The German announcement was not viewed favorably by many other states party to the negotiations such as the US and the UK. Attempts to convince the Germans to abandon or postpone their decision were futile and by December 23rd, 1991, Germany had officially recognized the newly independent republics of Slovenia and Croatia.[297] By announcing that they were serious about recognition, Germany forced the European community and their allies to abandon their policy of supporting the unity of SFRY and instead shift to accepting its territorial dissolution as inevitable.[298] The EC would go on to release a series of guidelines that would have to be met before any of the breakaway republics could achieve internationally recognized independence. Recognition by Germany and the EC came into effect in mid-January as it was determined that Slovenia and Croatia had met the threshold set forth in the guidelines.[299] Bosnia, Croatia and Slovenia were all admitted to the United Nations on the same day, May 22nd, 1992, by resolution of the General Assembly.[300] While Bosnia and Herzegovina did not meet the full criteria set out in the guidelines provided by the EC, it was still ultimately recognized and admitted to the United Nations.[301] This decision to disregard conflicts with the EC guidelines has often been criticized yet it must be taken into consideration that by this point it was clear that Bosnia and Herzegovina was not going to remain part of Yugoslavia and refusing to accept this fact would have been counterproductive to solving the crisis.[302] The majority of the international community had at this point fallen in line with the German train of thought which assumed any act of prolonging recognition was only contributing to the possibility of violent escalation. Therefore, the independent republic of Bosnia and Herzegovina was officially recognized by the European Community in April of 1992.[303] Despite the secession of Macedonia itself being much less dramatic in comparison to the other republics, its process

[296] Weller "The International Response" 575
[297] Weller "The International Response" 588
[298] Hodge "Botching the Balkans" 810
[299] Weller "The International Response" 588
[300] "Yugoslavia and Successor States: Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Serbia, Slovenia" *United Nations* https://www.un.org/en/about-us/member-states/yugoslavia
[301] KALYVAS, STATHIS N., and NICHOLAS SAMBANIS. "Bosnia's Civil War: Origins and Violence Dynamics." Edited by Paul Collier and Nicholas Sambanis. *UNDERSTANDING CIVIL WAR: Evidence and Analysis*. World Bank, (2005): 193 http://www.jstor.org/stable/resrep02484.11.
[302] Weller "The International Response" 586-596
[303] Weller "The International Response" 593

of recognition took longer than anticipated. Former Slovenian President Danilo Turk sums up the situation quite accurately in an article he wrote for the European Journal for International law in 1993:

*"Macedonia which also fulfilled these criteria, at least since the end of 1991, has remained unrecognized for a much longer period due to a dispute over its name; a dispute which carries a great deal of irrationality in conformity with the history of the Balkans."*[304]

This dispute is still ongoing between Greece and the Republic of North Macedonia, however, in 1993 the United Nations finally agreed to admit them under the name Former Yugoslav Republic of Macedonia (FYROM) as a full member.[305] Montenegro remained in a union with Yugoslavia and then Serbia until 2006 when they voted for independence and were subsequently recognized and admitted into the United Nations.[306] While the international community sought to maintain the territorial integrity of Yugoslavia at the onset of the secession crisis, ultimately, they would be forced to face with the inevitable reality that the country was collapsing and switch from a policy of resist to one of assist.

### 3.1.4 Conflict

As Slovenia was the first republic to declare independence from Yugoslavia, they would also be the first ones to face an outbreak of hostilities between the JNA as well as Serb paramilitary forces.[307] Slovenia officially recognized its own independence on June 25th, 1991, and the JNA subsequently launched an offensive to retake control of the republic on

[304] Danilo Turk, "Recognition of States: A Comment," *European Journal of International Law* 4, no. 1 (1993): 69 https://heinonline.org/HOL/Page?handle=hein.journals/eurint4&id=88&collection=journals&index=
[305] Grillot et al. "Macedonia: Past, Present, and Future." 5
[306] Hockenos, Paul, and Jenni Winterhagen. "A Balkan Divorce That Works? Montenegro's Hopeful First Year." *World Policy Journal* 24, no. 2 (2007): 39–44. http://www.jstor.org/stable/40210090.
[307] Hoare "The war of Yugoslav succession." 151

Jun 27th.[308] Prior to the complete secession of Slovenia from Yugoslavia, the JNA had been purging Slovenian soldiers from its ranks in preparation for this exact scenario.[309] However, this action would prove unnecessary as a ceasefire was quickly brokered and the Brioni agreement which resulted in the withdrawal of JNA forces was implemented on July 8th, 1991.[310] The first outbreak of violence in Croatia occurred in 1990, before any formal declaration of independence. Ethnic Serbs in the region known as Krajina overthrew the local moderate political leaders and announced their own secession from the republic of Croatia while receiving military and political support from the JNA. In contrast, the Croatian authorities had been systematically stripped of any weapons they could use to regain control of Krajina by the JNA throughout the late 1980's.[311] Croatia simply did not possess the weaponry, which was required to engage in any direct conflict, especially not a group which is supported by the JNA. This problem was amplified by the decision of the EC to ban the sale and shipment of arms to any of the territories of the former Yugoslavia.[312] While this ban on arms shipments had good intentions, it ended up giving the overwhelming military advantage to the JNA who had massive stockpiles of weapons and manufacturing facilities as opposed to the Croatians and Bosnians who had been nearly entirely disarmed by the Serbian authorities in Belgrade.[313] By the latter half of 1991, the Croatian authorities were still reluctant to directly engage both the Serb separatists as well as the JNA garrisons which were still inside of the country.[314] However, the JNA had simultaneously been moving more mechanized and infantry units into Croatian territory in preparation for a seemingly inevitable full-scale conflict.[315] In July of 1991, Serb paramilitary groups began ethnically cleansing parts of the country and Croatian authorities were prevented from intervening by

[308] Hoare "The war of Yugoslav succession." 151
[309] Banac, Ivo. "The Fearful Asymmetry of War: The Causes and Consequences of Yugoslavia's Demise." *Daedalus* 121, no. 2 (1992): 161 http://www.jstor.org/stable/20025437.
[310] Hoare "The war of Yugoslav succession." 115
[311] Hoare "The war of Yugoslav succession" 112-114
[312] Hoare "The war of Yugoslav succession." 115-118
[313] Hoare "The war of Yugoslav succession" 116
[314] Hoare "The war of Yugoslav succession" 116
[315] Marijan, Davor. "The Yugoslav National Army Role in the Aggression Against the Republic of Croatia from 1990 to 1992." *National security and the future* 2, no. 3-4. (2001): 151-159 https://hrcak.srce.hr/file/28808

JNA units.[316] Throughout August-September of 1991, the JNA had begun openly assisting the paramilitaries and in some instances even directly engaging and killing Croatian forces. At the same time, the Croatian authorities protested the Federal Military court in Yugoslavia regarding their clear participation in hostilities yet were dismissed outright.[317] However, as the Paramilitary groups pressed onwards aided by the JNA, they began running into a serious problem. The JNA was a conscription-based military and relied on the Yugoslav republics to send them new recruits annually in order to replace those who had completed their mandatory one-year service. In June of 1991 the JNA had already begun to release the previous year's recruits but were unable to receive a reliable stream of new soldiers due to the ongoing disputes between the republics. Slovenia, Bosnia and Herzegovina as well as Croatia had stopped enforcing the mandatory service initiative for the JNA thus creating a serious personnel problem within the military. Essentially, the conscription system of Yugoslavia ceased to exist.[318] The Croatian Parliament ordered the JNA to withdraw all forces from the republic on August 3rd which the military refused, then on September 11th, the president of the SFRY ordered the JNA to withdraw from Croatia and again the military refused. At this point the Croatian forces were blockading JNA garrisons in an effort to prevent their continued support of Serb paramilitary units. Upon the realization that a major offensive would be the only way to successfully defeat the Croatian forces, the JNA dedicated all available units to achieve this goal.[319] The Offensive began in late September 1991, at its peak, the JNA and Serb paramilitary forces managed to take around one third of Croatian territory and ethnically cleanse most of the Croat population within the areas they conquered.[320] Ultimately, this offensive would begin to stall out as the Croatian army pushed back and regained control over most of the republic excluding the region of Slavonia by 1992. Fighting continued up until 1995 with Slavonia eventually being ceded back to Croatia in 1998 as part of a UN brokered agreement.[321] The conflict in Bosnia and Herzegovina

[316] Hoare "The war of Yugoslav succession" 113
[317] Marijan "The Yugoslav National Army" 160
[318] Marijan "The Yugoslav National Army" 160-161
[319] Marijan "The Yugoslav National Army" 161
[320] Pusic, Vesna. "Croatia at the Crossroads." *J. Democracy* 9 (1998): 114 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jnlodmcy9&section=18
[321] Hoare "The war of Yugoslav succession" 118-129

would reach a threshold of brutality which had not existed in Slovenia or Croatia following their own confrontations with the JNA and Serb paramilitary organizations.[322] Following the recognition of independence by the European Union in April of 1992, Serb paramilitary forces along with the JNA launched a full-scale campaign to take control of the country.[323] Immediately, Serb forces initiated the siege of Sarajevo which lasted until 1996 and led to the death of over 9,000 people.[324] Neither side had the ability to break the stalemate and what resulted was the longest siege of a European city in modern history. Within the first few months of the war, Serb forces had control of over 70% of the country including most of the major Muslim cities which were subsequently ethnically cleansed along with the Croat populations of the territories they controlled.[325] This was done through a combination of organized executions, random killings, rape and forced expulsion. The dissolution of the SFRY at the end of April 1992 resulted in the newly formed FRY (Federal Republic of Yugoslavia) transferring control of a large portion of the JNA over to Republika Srpska. These JNA units would be integrated into the VRS and be used to continue the expansion of Republika Srpska and the establishment of a Serb-ethnic state.[326] Initially, the Croat (HVO) and Bosniak (ARBiH) forces within the country agreed to cooperate in the fight against JNA and VRS paramilitaries. However, by 1993, tensions between the two sides had escalated into full blown conflict which further complicated the situation as all sides were now divided among ethnic lines. Despite this, both sides hadn't completely stopped working with each other in the fight against the VRS even as they fought against each other on different fronts.[327] As this was now a three-sided conflict, all sides would on occasion ally with each

[322] Marijan "The Yugoslav National Army" 162
[323] Marijan "The Yugoslav National Army" 162-163
[324] Tabeau, Ewa, Jakub Bijak, and Neda Lončarić. "Death Toll in the Siege of Sarajevo, April 1992 to December 1995: A Study of Mortality Based on Eight Large Data Sources." *ICTY.* (2003): 2 https://www.icty.org/x/file/About/OTP/War_Demographics/en/slobodan_milosevic_sarajevo_030818.pdf
[325] Hoare "The war of Yugoslav succession" 119-121
[326] Jackson, Major Michael, Cadet Samuel Ruppert, and Cadet David Stanford. "Contemporary Battlefield Assessment-Bosnia and Herzegovina." *Modern War Institute, Department of Military Instruction, United States Military Academy* (2015): 16-19 https://mwi.westpoint.edu/wp-content/uploads/2015/12/20151020_Bosnia_Trip_Report.pdf
[327] Finlan "The collapse of Yugoslavia: 1991–99." 44-45

other in order to gain an advantage if the situation could benefit them.[328] Following serious negotiations by the United States, the HVO and ARBiH signed the Washington Agreement in 1994 which ended the fighting between them and allowed them to focus again on a combined offensive against the VRS.[329] 1994 would also be the first time that NATO directly engages in combat operations as it downs four Serbian aircraft violating the active no-fly zone. NATO would go on to carry out airstrikes repeatedly against Serbian positions up until the end of the war.[330] Beginning in 1994, following the successive failures of multiple European led ceasefire attempts which featured a common theme of attempting to divide the republic up between the groups which leaned in favor of the Serbs, the United States began to change its own strategy. Using backchannels, the US circumvented the existing weapons embargo by going through Iran in order to arm the ARBiH.[331] This was coupled with a further increase in NATO air support as well as US assistance in training Bosnian military units which all culminated in a serious resurgence in their general effectiveness.[332] These new developments resulted in a string of victories by the ARBiH and HVO forces in both Bosnia and Croatia against the VRS and RSK. However, it was the massacre of 8,000 civilians in Srebrenica in July of 1995 that cemented public opinion against the Serbs and guaranteed an increase in military support from the United States.[333] Following the election of the French president Francois Mitterrand in May of the same year, European policy began to fall more in line with that of the US.[334] As the ARBiH and HVO began to retake considerable amounts of territory from the VRS, a forced exodus of Serbian civilians from these regions began due to retaliation for the treatment of the Croat and Muslim

[328] Finlan "The collapse of Yugoslavia: 1991–99." 44-46 http://www.amas.hk/pdf/lishishenxue/1/The%20Collapse%20of%20Yugoslavia%201991-1999%20(Alastair%20Finlan)%20(z-lib.org).pdf
[329] Hoare "The war of Yugoslav succession" 125
[330] Figà-Talamanca, Niccoló. "The role of NATO in the peace agreement for Bosnia and Herzegovina." *Eur. J. Int'l L.* 7 (1996): 167 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/eurint7&section=25
[331] Hoare "The war of Yugoslav succession" 126
[332] Hoare "The war of Yugoslav succession" 126-128
[333] Gibbs, David N. "How the Srebrenica massacre redefined US foreign policy." *Class, Race and Corporate Power* 3, no. 2 (2015): 6-8 https://digitalcommons.fiu.edu/cgi/viewcontent.cgi?article=1061&context=classracecorporatepower
[334] Hoare "The war of Yugoslav succession" 127

populations.[335] Following the seemingly inevitable defeat of Serb forces, a ceasefire was agreed upon and both sides entered into negotiations which resulted in the 1995 Dayton Accords, effectively ending the war and dividing the country.[336]

## Chapter 3.2 Establishment of the ICTY

The International Criminal Tribunal for Yugoslavia was officially created on May 25th, 1993 as part of the United Nations Security Council resolution 827.[337] The initial objective of the court was to prosecute those guilty of violating International Humanitarian Law as well as deter any further potential violations.[338] Despite announcing its first indictment in 1994, it had little to no effect on preventing or limiting the most serious crimes such as the genocide in Srebrenica.[339] However, following the end of the war in 1995, the ICTY began to make serious progress in issuing indictments and carrying out detailed investigations.[340] Initially, the court faced many difficulties when it came to gaining the cooperation of the authorities in both Serbia and Republika Srpska even following the end of the war.[341] This hampered efforts by the court to both extradite those who have been issued indictments to face trial, as well as prevent on the ground investigations without interference. Eventually, these problems would be resolved and even the most high-profile figures such as Slobodan

[335] Finlan "The collapse of Yugoslavia: 1991–99." 40
[336] Finlan "The collapse of Yugoslavia: 1991–99." 83-84
[337] "UNSC Resolution 827" /RES/827 (1993) https://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf
[338] Ramet, Sabrina P. "The ICTY–controversies, successes, failures, lessons." *Southeastern Europe* 36, no. 1 (2012): 1 https://www.researchgate.net/profile/Sabrina-Ramet/publication/273601621_The_ICTY_-_Controversies_Successes_Failures_Lessons/links/60f01e14fb568a7098af2d63/The-ICTY-Controversies-Successes-Failures-Lessons.pdf
[339] Boelaert-Suominen, Sonja. "The International Criminal Tribunal for the former Yugoslavia and the Kosovo conflict" *IRRC VOL.82 N.837* (2000): 218-220 https://international-review.icrc.org/sites/default/files/S1560775500075490a.pdf
[340] Murphy, Sean D. "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia." *The American Journal of International Law* 93, no. 1 (1999): 58-63 https://doi.org/10.2307/2997956.
[341] Murphy "Progress and Jurisprudence" 60-76

Milošević and Ratko Mladić were brought before the court.[342] By the time the ICTY completed its mission in 2017, it had 161 indictments resulting in the prosecution of 90 individuals.[343] However, the biggest legacy the court has left behind is the numerous precedents it set on the future of ad-hoc tribunals and International Humanitarian Law.

### 3.2.2 Structure of the Court

The ICTY is a completely independent court system which possesses every necessary organ required to function on its own.[344] The Chamber body consists of three individual trial chambers and the appeals chamber which handle individual cases and is where the trial is carried out between the prosecution and the defendant.[345] The appeals chamber is where the defendant may appeal the judgement granted by the trial chamber, the judges in the appeals chamber have the ability to change and/or reverse decisions made in the trial chamber.[346] It is divided into three primary bodies:

- The Chambers
- Office of the Prosecutor
- Registry

The Office of the prosecutor is the body responsible for not only supporting the prosecution during the trial itself, but also for assisting in the gathering of information in cooperation with states and organizations.[347] They also deal with matters relating to the appeals process

[342] "SLOBODAN MILOŠEVIĆ: (IT-02-54)" *Case information sheet* https://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf
[343] "Key figures of the cases" *ICTY* https://www.icty.org/en/cases/key-figures-cases
[344] "Organization of the International Criminal Tribunal of Yugoslavia" *ICTY* https://www.icty.org/en/about/tribunal/organisational-chart
[345] "Organization of the International Criminal Tribunal of Yugoslavia"
[346] "Organization of the International Criminal Tribunal of Yugoslavia"
[347] "Organization of the International Criminal Tribunal of Yugoslavia"

as well as assembling reports which may be requested by the United Nations. It is divided into three separate sections:

- Prosecution Division
- Immediate Office
- Appeals Division

The Registry is primarily responsible for the "behind the scenes" and administrative activities of the ICTY in order to keep it functioning efficiently.[348] The division of judicial support services provides the necessary legal support for the defense counsel as well as witnesses and victims in order to ensure they are represented fairly throughout the trial.[349] The Immediate Office is in charge of interacting with the general public as well as dealing with relations with the host state of the ICTY. [350]The Chambers legal Support Section regularly provides assistance in conducting research and other services for the chambers should it be requested.[351] The administrative division is responsible for most of the matters related to the budget, human resources, security etc.[352] The Registry is divided into four bodies:

- Division of Judicial Support Services
- Immediate Office
- Chambers Legal Support Section
- Administrative Division

[348] "Organization of the International Criminal Tribunal of Yugoslavia"
[349] "Organization of the International Criminal Tribunal of Yugoslavia"
[350] "Organization of the International Criminal Tribunal of Yugoslavia"
[351] "Organization of the International Criminal Tribunal of Yugoslavia"
[352] "Organization of the International Criminal Tribunal of Yugoslavia"

Between the years 2010-2015, the court had an average annual budget of $143,365,040 USD provided by a number of member states with a small percentage coming from individual donations by organizations and other parties.[353]

## Chapter 3.3 Investigations

The ICTY was initially limited in its investigative potential by a number of factors, forcing it to adopt a unique strategy and method of procuring evidence and acquiring witness testimonies. The primary goal of the ICTY's prosecutor was not just gathering evidence against the individuals who actually carried out the alleged crimes, but building a solid case against the leadership who are directly responsible for the policies and orders which led to the perpetration of said crimes.[354] The prosecutor referred to this method as a pyramid strategy, starting at the bottom with the soldiers and militants who carried out the orders, and using information gathered from them to identify higher ranking officials and continuously carrying out this process until they get to the very top of the command structure.[355] This strategy proved to be effective and resulted in the identification of many high ranking officers and public officials being prosecuted.[356] However, identification is only part of the process required to successfully prosecute an individual in court. Finding hard evidence as well as gathering witness testimonies is what ultimately would lead to these individuals being found guilty.[357] The first challenges which the prosecutor faced in this process were issues of limited resources which would go on to be remedied to increased support by state sponsors as well as collaborations with international organizations.[358] The next challenge which proved to be the most significant was that posed by lack of cooperation from the government of Yugoslavia (now Serbia) and Republika Srpska located within

[353] "Organization of the International Criminal Tribunal of Yugoslavia"
[354] "Investigations" *ICTY Office of the Prosecutor* https://www.icty.org/en/about/office-of-the-prosecutor/investigations
[355] "Investigations"
[356] "Investigations"
[357] "Investigations"
[358] Murphy "Progress and Jurisprudence" 96-97

Bosnia.[359] While there was some cooperation from the authorities within these territories, the ICTY has stated that there were instances of "deliberate obstruction". This obstruction also extended to areas within Bosnia that were still under the control of Bosnian Serb officials who would often refuse or restrict permission to access specific sites for investigation.[360] An example of this behavior occurred in Prejidor where the ICTY investigators had to be escorted by a military convoy from the NATO peace implementation force (IFOR) in order to be granted safe access to the area.[361] The investigators were eventually able to gain full access to all of the sites which they sought to investigate, gathering significant amounts of physical evidence to use in the following trials.[362]

The process of gathering witness testimonies was tedious yet extremely effective, requiring investigators to seek out witnesses who had either remained in Bosnia or were displaced from the country across Europe and the United States.[363] By the end of the ICTY's mandate, over 4,500 witnesses had testified regarding the events relating the conflict in the former Yugoslavia.[364] In the case of Dusko Tadic, the prosecution had produced over 86 witnesses to corroborate the allegations against the accused regarding his alleged crimes. These statements from survivors and witnesses were crucial to his ultimate prosecution and sentencing.[365] This was a common theme across all of the trials under the ICTY, as unlike in previous tribunals such as the Nuremburg trials, there was limited physical documentation which specified the individuals responsible for the crimes being investigated by the court.[366] While there was an abundance of physical evidence as to the crimes which had occurred, there was not always direct indicators as to who specifically had carried them out. This is

[359] "History" *ICTY Office of the Prosecutor* https://www.icty.org/en/about/office-of-the-prosecutor/history
[360] "Investigations: The Crime Scenes" *ICTY* https://www.icty.org/en/content/investigations-0
[361] "Investigations: The Crime Scenes"
[362] "Investigations: The Crime Scenes"
[363] "Investigations: The Strategy" *ICTY* https://www.icty.org/en/content/investigations-0
[364] "Witness Statistics" *ICTY Registry* https://www.icty.org/en/about/registry/witnesses/statistics
[365] "Tadic: Case information sheet"
[366] "Investigations: Documents" https://www.icty.org/en/content/investigations-0

where witnesses and survivors were able to fill in the gaps in the evidence to bring the perpetrators to justice.[367] These investigations are largely attributed as being very successful as every suspect issued an arrest warrant has either faced trial by the ICTY, national courts, or died before they were able to appear in court.[368]

## Chapter 3.4 The Case of Dusko Tadic

Dusko Tadic was a Bosnian Serb born in the town of Kozarac, Bosnia and Herzegovina on October 1st, 1955.[369] At the time of the conflict within Bosnia, he was involved in the Serb Democratic party (SDS), serving as president of their local board in Kozarac.[370] The SDS were involved in numerous breaches of International Humanitarian Law throughout Bosnia as they participated in the attempted establishment of an ethnic Serbian majority state within the country.[371] Acting as both paramilitary units as well as shadow governments, they established autonomous ethnic Serb regions through the use of violence and forced displacement of non-Serb ethnic groups.[372] They acted in coordination with the Yugoslav People's Army (JNA) to receive weapons and support which would enable them to create

[367] "Witnesses" *ICTY Registry* https://www.icty.org/en/about/registry/witnesses
[368] Trahan, Jennifer, and Iva Vukušić. "The Legacy of the ICTY: The Three-Tiered Approach to Justice in Bosnia-Herzegovina and Benchmarks for Measuring Success." *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach* (2020): 462-77. https://academic.oup.com/book/33759/chapter-abstract/288442234?redirectedFrom=fulltext
[369] "Tadic: Case information sheet"
[370] "Tadic: Case information sheet"
[371] Carron, Djemila. "When is a conflict international? Time for new control tests in IHL." *International Review of the Red Cross* 98, no. 903 (2016): 1024-1025 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/650A70F1B5CDC73CEB3617C60BD61E31/S1816383117000698a.pdf/div-class-title-when-is-a-conflict-international-time-for-new-control-tests-in-ihl-div.pdf?casa_token=A492iCriUDoAAAAA:XQn5JiNVoFC_xDBSKSEHUGwsyZcsnEOW5Mdzk8Kf4qmMHCIQ5rO4fXqGgX6BD5xg7OetdNC8
[372] "Tadic: Case information sheet" 4-5

"crisis headquarters" in various regions around Bosnia which served as control centers where they would orchestrate a widespread campaign of ethnic cleansing.[373]

Kozarac is a village near the city of Prijedor and was the site of a major attack by Bosnian-Serb forces as well as members of the JNA in 1992.[374] As president of the board for the Kozarac chapter of the SDS, Tadic was unsurprisingly involved in the subsequent occupation of both Kozarac and Prijedor.[375] It was Dusko Tadic's actions during this period which would result in his arrest and indictment for grave breaches of the 1949 Geneva conventions as well as Crimes against Humanity.[376]

## Chapter 3.4.1 Trial

Dusko Tadic was arrested on February 12th, 1994 by German authorities in Munich where he had been living for several months along with his wife and child.[377] On April 25th of 1995 he was transferred to the ICTY's detention facility in the Hague where he would await the start of his trial.[378] The prosecution during the Trial Chamber judgement initially alleged that Tadic was responsible for several violations of International Humanitarian Law including:

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[373] Banac, Ivo. "What happened in the Balkans (or rather ex—Yugoslavia)?." *East European Politics and Societies* 23, no. 4 (2009): 467-468 https://journals.sagepub.com/doi/pdf/10.1177/0888325409346821?casa_token=OPJWmbrWyU8AAAAA:H_PqtOiQfz-JMB3y40DBQ7mtdno9hVC2crG5nqA2vS4nH8FC9eTJQaq1SX7-eAfQdpC0rsD56qo8

[374] Karcic, Hikmet. "4. Prijedor." (2022): 107-147 https://muse.jhu.edu/pub/166/oa_monograph/chapter/3153372

[375] "Tadic: Case information sheet" 1

[376] "Tadic: Case information sheet" 5

[377] Ungar, Deborah L. "The Tadic war crimes trial: The first criminal conviction since Nuremberg exposes the need for a permanent war crimes tribunal." *Whittier L. Rev.* 20 (1998): 677 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/whitlr20&section=41&casa_token=00Qb0kb3G8MAAAAA:req2XisL8hlDW6sPqL9QxOL9-5a8b2J7zRzONUI5jrh4VN7PLW4w2HNep79H2M3paZwCREeUvA

[378] Sassòli, Marco, and Laura M. Olson. "The judgment of the ICTY Appeals Chamber on the merits in the Tadic case." *International review of the Red Cross* 82, no. 839 (2000): 733 https://international-review.icrc.org/sites/default/files/S1560775500184718a.pdf

• Grave breaches of the 1949 Geneva conventions (Article 2 of the Statute - willful killing; torture or inhuman treatment; willfully causing great suffering or serious injury to body or health). [379]

• Crimes against humanity (Article 5 thereof - murder).[380]

• Violations of the laws or customs of war (Article 3 thereof – murder).[381]

Tadic would immediately plead not guilty as his defense counsel mounted an initial attempt to dismiss the legal jurisdiction of the court.[382] The defense first attempted to question the legitimacy of the court itself by invoking the argument that such a judicial body should not be established simply by UNSC resolution, but rather as a treaty or agreement between states.[383] They supported their argument by stating that drafters of the UN charter could not have foreseen the UNSC being used to establish such an ad-hoc criminal tribunal.[384] While there does not exist anywhere within the UN charter anything indicating that the UNSC has the legal capacity to form such tribunals, the prosecution instead brought up that the UNSC specifically was given the authority to do whatever is necessary to promote and maintain peace and security.

*"Wide freedom of judgment is left as regards the moment [the Security Council] may choose to intervene and the means to be applied, with sole reserve that it should act 'in accordance with the purposes and principles of the [United Nations]."*[385]

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[379] "Tadic: Case information sheet" 5
[380] "Tadic: Case information sheet" 5
[381] "Tadic: Case information sheet"
[382] "Tadic Case: The Verdict" *ICTY Press Release* (1997) https://www.icty.org/en/press/tadic-case-verdict
[383] "Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)", *IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY)*, (1997): 5-6 https://www.refworld.org/jurisprudence/caselaw/icty/1997/en/40193
[384] Abi-Saab, Judge, Judge Deschnes, Judge Li, and Judge Sidhwa. "Decision on the defence motion for interlocutory appeal on jurisdiction." In *Criminal Law Forum*, vol. 7, no. 1. (1995): 58-64 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/crimlfm7&section=5&casa_token=8KD7qhW99cIAAAAA:Liwd3_DrNLsE53gUoy9x_W1tHv0HN4K_R4ZLlQ6jobeAgbruzbiqgpdeqK14sW_hwd1moNWD4w
[385] v Tadic, Prosecutor. "Decision on the Defence Motion on Jurisdiction." *Case No IT-94-1*.

It was this argument that essentially affirmed the UN charter isn't necessarily there to dictate the "means", but rather the "ends" for which the UNSC must ultimately strive for.[386] This would end up shutting down the defense's attempt to continue questioning the legal basis for the existence of the court, shifting their focus to the issue of conflicting jurisdiction between an ad-hoc tribunal and national legal systems.[387] However, this argument was also baseless considering the fact that resolutions by the UNSC are binding upon all UN member states therefore giving the ICTY *de jure* authority under the government of Yugoslavia's treaty obligations.[388] Tadic's defense was that the UNSC was violating state sovereignty which is upheld in article 2(7) of the UN charter; "*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter*".[389] This argument was invalidated by the second part of article 2(7); "*but this principle shall not prejudice the application of enforcement measures under Chapter VII",* meaning that the UNSC did in fact have the authority to establish the ICTY as an enforcement measure of chapter VII of the UN charter.[390]

The ICTY also rejected the defense from Tadic's counsel which again questioned the court's jurisdiction but this time on the basis of the non-international characteristics of the conflict in Bosnia.[391] This argument would also prove futile as the appeals chamber stated that the conflict possessed both "internal and international aspects", and that due to the types of crimes alleged by the prosecution, they have the authority to continue with the trial despite not providing an immediate classification of the type of armed conflict which occurred in Bosnia.[392]

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[386] Abi-Saab et al. "Decision on the defence motion for interlocutory appeal on jurisdiction." 67-79
[387] Abi-Saab et al. "Decision on the defence motion for interlocutory appeal on jurisdiction." 79-90
[388] "United Nations Charter" *United Nations Treaty Collection* (1945): 6-8 https://treaties.un.org/doc/publication/ctc/uncharter.pdf
[389] "United Nations Charter" 3
[390] "United Nations Charter" 3
[391] Abi-Saab et al. "Decision on the defence motion for interlocutory appeal on jurisdiction." 90-114
[392] Abi-Saab et al. "Decision on the defence motion for interlocutory appeal on jurisdiction." 95

Dusko Tadic was found guilty on 11 counts of persecution and beatings by trial chamber II of the ICTY and sentenced to twenty years in prison on May 7th, 1997.[393] Following the determination of guilt, Tadic immediately appealed the decision.[394]

## Chapter 3.4.2 Appeal

In 1999, the appeals chamber began hearing from the defense and prosecution regarding Tadic's attempt to appeal the trial court's initial verdict.[395] While the appeal as sought by the defendant, the cross-appeal by the prosecution would be the most consequential in terms of its overall impact on CIL and IHL.[396] Tadic's counsel brought the appeal before the chamber on 3 separate grounds, although only 2 would actually be addressed in the following proceedings.[397]

*"Ground (1): The Appellant's right to a fair trial was prejudiced as there was no "equality of arms between the Prosecution and the Defence due to the prevailing circumstances in which the trial was conducted.[398]*

*Ground (3): The Trial Chamber erred at paragraph 397 of the Judgement when it decided that it was satisfied beyond reasonable doubt that the Appellant was guilty of the murders of Osman Didovic and Edin Be(i)."[399]*

[393] "Tadic: Case information sheet" 4-5
[394] "Tadic case: Defence Counsel appeals against Sentencing Jugdment of 14 July 1997." *ICTY Press Release* (1995) https://www.icty.org/en/sid/7479
[395] "Tadic Case: Appeals Proceedings to Commence on Monday 19 April 1999" *ICTY Press Release* (1999) https://www.icty.org/en/sid/7772
[396] Sassòli "How will international humanitarian law develop in the future?" 2063-2064
[397] "Prosecutor v. Dusko Tadic (Appeal Judgement)" *IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY)* 15 July (1999): 7 https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/40180
[398] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 7
[399] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 7

The prosecution's cross appeal consisted of 5 separate grounds which were aimed at addressing a different series of issues that they found were inadequately examined by the original trial court.[400]

"*Ground (1): The majority of the Trial Chamber erred when it decided that the victims of the acts ascribed to the accused in Section III of the Judgement did not enjoy the protection of the grave breaches regime of the Geneva Conventions of 12 August 1949 as recognised by Article 2 of the Statute of the International Tribunal ("Statute").*[401]

*Ground (2): The Trial Chamber erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had played any part in the killing of any of the five men from the village of Jaskici, as alleged in Counts 29, 30 and 31 of the Indictment.*[402]

*Ground (3): The Trial Chamber erred when it held that in order to be found guilty of a crime against humanity, the Prosecution must prove beyond reasonable doubt that the accused not only formed the intent to commit the underlying offence but also knew of the context of a widespread or systematic attack on the civilian population and that the act was not taken for purely personal reasons unrelated to the armed conflict.*[403]

*Ground (4): The Trial Chamber erred when it held that discriminatory intent is an element of all crimes against humanity under Article 5 of the Statute of the International Tribunal.*[404]

*Ground (5): The majority of the Trial Chamber erred in a decision of 27 November 1996 in which it denied a Prosecution motion for production of defence witness statements ("Witness Statements Decision").*"[405]

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[400] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 7-8
[401] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 7
[402] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 8
[403] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 8
[404] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 8
[405] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 8

The initial goals of the defense when making their appeal were to both review the current sentencing as well as consider the possibility to going to a retrial to potentially lessen the current sentence being served.[406] The relief requested by the defendant would seek to remove the definitive guilty status of all the crimes he had been prosecuted for, and a retrial to be ordered.[407] In case these conditions of relief were not met, the defendant sought to have his role in the murders of Osman Didovic and Edin Be reviewed and his overall sentencing reevaluated.[408] The relief sought by the prosecution covered a much larger variety of legal questions and contained significantly more provisions.[409]

- The first of these grounds was for the appeals chamber to reverse the decision that the victims involved in the case did not meet the status of protected individuals and thus were not granted protection against grave breaches as prescribed in article 2 of the statute of the tribunal.[410]
- The second provision was aimed at challenging the courts determination that the defendant was not guilty beyond a reasonable doubt of the murders of 5 men from Jaski.[411]
- The third provision asked to change the requirements relating to intent of the appellant in whether they can be found guilty of crimes against humanity.[412]
- The fourth is related to the third as it seeks to remove "discriminatory" intent from the requirements of a crime against humanity.[413]
- The fifth and final provision simply asks for the witness statements from the trial court to be reviewed.[414]

[406] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 9-10
[407] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 9
[408] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 9
[409] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 10
[410] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 10
[411] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 10
[412] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 10
[413] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 10
[414] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 10

Both grounds of appeal by the appellant were dismissed by the chamber as they concluded that the defense failed to provide adequate evidence to substantiate any of the claims they brought before the court.[415] However, the cross-appeals by the prosecution ended up proving to be quite a bit more complex and were not so easily dismissed.

- The first ground regarding the application of protected persons status inline with the grave breaches legal regime was found to be in favor of the prosecution and the decision of the original trial court was reversed. Therefore, Tadic was found guilty of grave breaches of the Geneva Conventions.[416]

- The second ground involving the murder of 5 men in the village of Jaski also was ruled in favor of the prosecution and reversed the initial findings of the trial court. While it was upheld that there was no evidence of the appellant's direct commission of the murders, it was beyond a reasonable doubt that his group was guilty and thus he must also be held responsible by association. As the first grounds from the cross-appeal found the victims to be under the status of protected persons, the participation in the killings of the 5 men in Jaski thus represented grave breaches of the Geneva Conventions.[417]

- On the third grounds, the appellant and cross-appellant both agreed that the issue of personal intent and/or motives being a requirement/disqualifier for the threshold of crimes against humanity was not something which effected the outcome of the trial at hand. However, the importance of the legal precedent for such a question was deemed important enough for the court to rule on. The court came to the conclusion that while a crime against humanity requires the context of being either a widespread or systematic attack on a civilian population, the personal motivation of the perpetrator(s) is irrelevant. [418]

[415] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 144
[416] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 75
[417] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 108
[418] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 121-122

- The fourth ground would rule in favor of the prosecution as the appeal's chamber found that the trial court had erred in its initial findings that established a requirement of discriminatory intent for the commission of crimes against humanity. The appeals chamber determined that article 5 of the statute did not present any information which would suggest discriminatory intent was required for the general application of crimes against humanity status. As article 5 of the statute is largely based on the Nuremberg charter, the court took into consideration that in article 6(c) of the charter regarding crimes against humanity, it specifically mentions persecution as a specific type of crime against humanity. In this context, the court suggested that a discriminatory intent would only be relevant in determining the existence of persecution-based crimes but would not be an essential criterion for the other forms of crimes against humanity. Therefore, it was ruled that only article 5(h) of the statute would require some form of discriminatory intent to be linked to the crime being committed.[419]

- Grounds 5 were partially reversed by the court in the sense that while it was determined that the defense cannot unilaterally withhold witness statements if so ordered by the court. However, the prosecution does not necessarily have a right to demand the release of witness statements from the defense unless permitted by the court. The stipulation being that the court can only order the disclosure of a witness statement if it is deemed necessary to help ascertain the truth.[420]

[419] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 135
[420] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 143

## Chapter 3.5 Implications

The case of Dusko Tadic remains one of the most iconic and influential case studies in the development of modern International Humanitarian Law.[421] While the entire history of the ICTY is full of significant cases which will continue to have long lasting effects, Tadic stands out for the effect it has had in contrast to the relatively minor part he played in the conflict in Bosnia in comparison to the other trials which took place.[422] The outcome of the case triggered immediate reactions from the international community as it seemed that the entire definition of customary law and its creation were being altered and implemented in a legally binding way.[423] For example, in establishing the standard for identifying customary law of IHL, state practice was determined to be less relevant than *opinio juris* and thus more status was given to official statements, military manuals and judicial decisions.[424] It was here that for the first time, customary practice was no longer the primary factor in establishing the existence of custom.[425] State practice and *opinio juris* are not actually mutually exclusive, traditionally state practice is an essential part of developing *opinio juris* which is essentially the *de jure* recognition of state practice as law.[426] In the Tadic case it is not only evident that the development of customary law itself was being challenged, but also what can be applied as *opinio juris* when that challenge is being presented.[427] The dominant explanation behind the appeals chamber's decision is that it is simply easier to identify

[421] Sassòli "How will international humanitarian law develop in the future?" 2063-2064
[422] Alvarez, Jose E. "Rush to Closure: Lessons of the Tadić Judgment." *Michigan Law Review* 96, no. 7 (1998): 2079-2082 https://doi.org/10.2307/1290059.
[423] Meron, Theodor. "Revival of Customary Humanitarian Law." *The American Journal of International Law* 99, no. 4 (2005): 827-831 https://doi.org/10.2307/3396670.
[424] Meron "Revival of Customary Humanitarian Law." 820-827
[425] Bourgeois, Hanna, and Jan Wouters. "Methods of identification of international custom: A new role for opinio juris?." *Global Justice, Human Rights and the Modernization of International Law* (2018): 90-106 https://www.researchgate.net/profile/Christian-Tomuschat-2/publication/326662304_General_International_Law_A_New_Source_of_International_Law/links/62017b9480f0ea5eb5360462/General-International-Law-A-New-Source-of-International-Law.pdf#page=94
[426] Alcala, Ronald "Opinio juris and the essential role of states" *Articles of war. Lieber Institute, West Point* (2021) https://lieber.westpoint.edu/opinio-juris-essential-role-states/#:~:text=States%20may%20engage%20in%20behaviors,is%20not%20always%20so%20straightforward.
[427] Bourgeois and Wouters. "Methods of identification of international custom" 90-95

customs relevant to the prosecution of IHL violations if less emphasis is placed on state practice.[428] The reason why it was easier to purposefully sidestep the consideration of state practice was mainly due to the fact that previous examples of applying individual criminal responsibility through CIL in the given context were almost non-existent.[429] However, this also created a new series of problems which remain to be solved. The Tadic case presented new methods of distinguishing between International armed conflicts and non-international armed conflicts in relation to the application of the Geneva Conventions.[430] In this instance, it shares many similarities with the 1984 ICJ case between the United States and Nicaragua regarding the role of the US government in the conflict between paramilitary organizations (primarily the Contra's) and the government of Nicaragua.[431] It was determined ultimately that common article 2 could not be applied as the conflict was not of international character, the ICJ came to the conclusion that the US did not have any real level of control over the paramilitary groups and thus the criteria of being an IAC was not met.[432] This precedent was challenged in the Tadic case as the appeals court had to change the standard by which an IAC could be declared for the purpose of applying article 2 of the ICTY statute for committing grave breaches.[433] The ICTY did not necessarily seek to contradict the ICJ's ruling in the Nicaragua case but instead chose to establish more qualifications which could determine a link between a foreign state actor and paramilitary group within the territory in question.[434] In the Tadic case, the trial court may have concluded that the VJ did not exercise significant control over the VRS following the withdrawal of what remained of the JNA.[435] The appeals chamber referenced the fact that the JNA never actually disbanded or restructured, in reality the only thing which changed was the name and despite pulling most of their physical forces out of Bosnia and Herzegovina, their influence and end goals

[428] Bourgeois and Wouters. "Methods of identification of international custom" 106
[429] Bourgeois and Wouters. "Methods of identification of international custom" 73
[430] Murphy "Progress and Jurisprudence of the International Criminal Tribunal" 67-79
[431] Murphy "Progress and Jurisprudence of the International Criminal Tribunal" 90-106
[432] "CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA v. UNITED STATES OF AMERICA)" *ICJ Jurisdiction of the Court and admissibility of the application* (1984): 432-434 https://www.icj-cij.org/sites/default/files/case-related/70/070-19841126-JUD-01-00-EN.pdf
[433] Murphy "Progress and Jurisprudence" 67-89
[434] Murphy "Progress and Jurisprudence" 66-79
[435] Murphy "Progress and Jurisprudence" 67

remained in place.[436] As was the case in Nicaragua, there was no evidence of the FRY explicitly commanding the actions of the VRS.[437] However, it was insisted that a lack of evidence regarding direct overriding orders did not represent a lack of authoritative control which appears to have introduced a new precedent that could be used to discount emphasis on "control" in exchange for highlighting the importance of direct/indirect "support".[438] The general concept of "control" can thus be narrowed down to assuming the potential of a foreign state actor to assume direct control as opposed to actually exercising that authority.[439] The terminology used refers to effective control versus overall control, citing the Nicaragua case as an example of effective control and the VJ/VRS as overall control.[440] The difference between de facto and de jure recognition of control was less important than the more substantive argument of could the group have survived or committed the alleged violations without the support and/or leadership of the foreign state in question.[441] Obviously, the potential for control can't just be assumed and certain conditions must be examined, and in the Tadic case it was the ICTY appeals chamber who would use their jurisdiction to determine exactly what conditions should be considered. A major factor in the appeals chamber's decision-making process was the fact that it was universally accepted that an IAC had indeed existed prior to the 19th of May, 1992.[442] The trial court did not ultimately believe that an IAC existed after this point, which is when the JNA officially began its withdrawal and subsequent change of identity.[443] However, given the evidence presented by the prosecution which also relied on recognition of VJ involvement in the VRS command structure recognized by the trial chamber, the appeals chamber felt that the IAC did not actually cease after the 19th of May, 1992.[444] Despite a potential legal gap between the approach of the ICJ and the ICTY, the appeals chamber proceeded with this decision and

[436] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 62-72
[437] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 68-69
[438] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 69
[439] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 62-72
[440] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 68-69
[441] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 68
[442] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 38
[443] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 38
[444] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 76

ultimately would conclude the existence of an IAC.[445] This had several effects which have been described as both consequences or positive results depending on personal preferences regarding the jurisdiction of IHL and ad-hoc tribunals.

In this sense, it can be argued that the trial court took an orthodox approach to addressing the issue of determining the type of armed conflict while the appeals chamber sought to challenge what could be considered an existing norm. Interestingly, following the decision by the appeals chamber, the ICTY did not seek to assert the existence of an IAC in a similar manner in any of the following trials which took place.[446] When it came to determining the appropriate method for the prosecution to proceed with in regard to the ICTY statute, the issue of applying customary law as authorized in article 3 to a non-international armed conflict proved to be contentious.[447] It was not the idea that customary law itself had no place in NIAC's but rather the use of CIL to distribute individual criminal responsibility in the case of violations of International Humanitarian Law.[448] Prior to the Tadic case, it had never been explicitly determined that CIL could be used to prosecute individuals for violating IHL in the context of an internal armed conflict.[449] The appeals chamber would produce a series of legal arguments to explain their position, even quoting directly from the Nuremburg trials to justify the applicability of individual criminal responsibility:

*"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."*[450]

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[445] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 76
[446] Erakat, Noura. "The US v. The Red Cross: customary international humanitarian law and universal jurisdiction." *Denv. J. Int'l L. & Pol'y* 41 (2012): 256 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/denilp41&section=17&casa_token=w4zVtt_01HAAAAAA:fJmayLkt3_dLEX1ETuWVaFZV7KlI5FGf-oIdAULB4MPlAflW-W0MpJCNtUDfJ6xczlNw-jezFQ
[447] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 156-157
[448] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 41-105
[449] Barzegarzadeh, Abbas, Mahmuod Jalali Karveh, and Leila Raisi. "Principle of Legality and Its Relation with Customary Law in International Criminal Law." *Mediterranean Journal of Social Sciences* 6, no. 5 (2015): 400 https://pdfs.semanticscholar.org/6e31/1da8cf6bce8de7b3e73203b09b2efb8bc5de.pdf
[450] Kirsch, Philippe. "Applying the Principles of Nuremberg in the ICC." In *makalah disampaikan dalam Seminar Conference "Judgment at Nuremberg" held on the 60th Anniversary of the Nuremberg Judgment,*

While the Nuremburg trials were obviously aimed at addressing crimes committed by individuals during an International Armed Conflict, the appeals chamber intended for the actual text to be read as applying to international law more broadly.[451] Despite the fact that common article 3 of the Geneva Conventions does not actually mention the applicability of individual criminal responsibility, the chamber used *opinio juris* as a method to justify this position.[452] This was determined partly through the presentation of national judicial codes and military manuals leading to the court to conclude that:

*"Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts."*[453]

The appeals chamber considered the existence of such responsibility in both national judicial systems as well as previous international judgements as evidence of existing custom:

*"Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts."*[454]

These new decisions have the potential to reduce the general acceptance of newly determined CIL amongst states, particularly when these new customs can be identified and implemented by a non-permanent tribunal. This essentially streamlines the process for identifying and applying customs as binding in contexts which they may have never previously existed. While in the case of an ad-hoc tribunal who is tasked with prosecuting

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*Washington University, St. Louis, USA*, vol. 30. (2006): 3 https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/ED2F5177-9F9B-4D66-9386-5C5BF45D052C/146323/PK_20060930_English.pdf

[451] "ICTY Prosecutor v. Tadic, appeals chamber, jurisdiction" *ICRC Casebook* https://casebook.icrc.org/case-study/icty-prosecutor-v-tadic

[452] "ICTY Prosecutor v. Tadic, appeals chamber, jurisdiction"

[453] "ICTY Prosecutor v. Tadic, appeals chamber, jurisdiction"

[454] "ICTY Prosecutor v. Tadic, appeals chamber, jurisdiction"

those accused of crimes against humanity, this can make their job easier as they can ultimately avoid much of the politicization which comes when states act in their best interests at the potential expense of justice.[455] However, looking at these developments from the point of view of the nation-state, a worrying trend of distributing legal authority away from states and into the hands of non-state entities may threaten not only their international influence but also domestic sovereignty over one's own judicial system.[456] As was highlighted by the defense counsel of Tadic, is it in fact dangerous for an international entity, in this case non-permanent, to have ultimate authority over a domestic, sovereign judicial system? While the appeals chamber concluded that the ICTY did indeed have the legal authority stemming from their creation by the UNSC, it does not answer the question as to whether or not any consequences may arise from an ad-hoc tribunal having authority over a domestic, sovereign judicial system.[457] It must be taken into consideration that when customary international humanitarian law is brought into question, it threatens the viability of the concept of universality. Every new precedent established in the Tadic case was done so without allowing states who will now be bound by such obligations to negotiate/accept/reject the results of the tribunal.[458] Clearly, the argument here is that they agreed to be members of the UN and are thus bound by UNSC resolutions, but this explanation does not necessarily mean states will enthusiastically accept the reality of existing treaty obligations if they view them unfavorably.[459]

[455] Bourgeois and Wouters. "Methods of identification of international custom" 72-74
[456] Sassoli et al. "Challenges to International Humanitarian Law." 54-56
[457] ICTY "Decision on the Defense Motion on Jurisdiction" 19
[458] Sassòli "How will international humanitarian law develop in the future?" 2057-2065
[459] Sassoli et al. "Challenges to International Humanitarian Law."

# Chapter 4 ICC: Sudan

The history of modern Sudan is filled with reoccurring periods of violent conflict and war between opposing factions over resources, ideological differences and political disputes.[460] As a former British colonial holding, Sudan has struggled to establish a united identity since its independence in 1956 which exacerbated underlying social divisions that would go on to undermine the legitimacy of the central authorities in Khartoum.[461] As was typical of states recently released by their colonial masters, their borders are rarely based on any sort of historical or cultural context, rather these post-colonial nations such as Sudan would face the challenging task of creating a national identity from scratch.[462] Sudan contained numerous ideological and ethnic groups which were largely divided geographically between the Northern and Southern portions of the country.[463] The resulting clashes would plunge the country into civil war on three separate occasions and cause some of the worst humanitarian catastrophes of the 21st century.[464] Sudan's inability to establish stability within its own borders would be replicated in its foreign policy, particularly in regard to the governments support for globally recognized terrorist organizations which would see it become isolated by the international community.[465] Despite this isolation diplomatically, international efforts would be made to both end the cycle of conflict as well to administer some semblance of

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[460] Szabó, Zsolt. "The history of the Darfur conflict and its recent developments." *Journal of Central and Eastern European African Studies* 1, no. 4 (2021): 83-86 https://jceeas.bdi.uni-obuda.hu/index.php/jceeas/article/download/25/154

[461] Yifei, Gao. "A Study of Tribal Composition and Conflict in Darfur." In *2020 5th International Conference on Humanities Science and Society Development (ICHSSD 2020)*. Atlantis Press (2020): 237 https://www.atlantis-press.com/article/125942244.pdf

[462] De Waal, Alex. "Who are the Darfurians? Arab and African identities, violence and external engagement." *African affairs* 104, no. 415 (2005): 181-205 https://items.ssrc.org/contemporary-conflicts/who-are-the-darfurians-arab-and-african-identities-violence-and-external-engagement/

[463] De Waal "Who are the Darfurians?"

[464] Saxum, Erica J. "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity." *Eyes on the ICC* 6 (2009): 5 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/eyesicc6&section=4&casa_token=65rV0yx0dxAAAAAA:mRFhOaKTh3vCEBXvH3brGlz7fhTYBSv2BgOoNy_IndoTefx0IBfPbjLaWXO-m1coi2-rKZR_WA

[465] SHETRET, LIAT, TRACEY DURNER, DANIELLE COTTER, and PATRICK TOBIN. "Sudan." *Tracking Progress: Anti-Money Laundering and Countering the Financing of Terrorism in East Africa and the Greater Horn of Africa*. Global Center on Cooperative Security, (2015): 51 http://www.jstor.org/stable/resrep20268.13.

justice for the numerous acts of brutality carried out by the political leadership.[466] Following the overthrow of Omar al-Bashir in 2019 by members of the Sudanese military, the transitional military council (TMC) which took control of the government announced that they would establish a path towards a civilian led democratic government.[467] Many promises were made including the introduction of a new constitution that would uphold new human rights standards and cooperation with international organizations to alleviate the humanitarian crisis in Darfur.[468] However, there were many concerns about the sincerity of the TMC considering that it was being led by General Abdel Fattah al-Burhan from the SAF, and commander of the RSF, Mohamed Hamdan Dagalo.[469] Despite this, the TMC did eventually appoint Abdallah Hamdok as civilian prime minister, indicating the possibility that a transition to democracy may actually be possible.[470] This optimism would come to a close in 2021 following a military coup against the newly established civilian government led by al-Burhan and effectively ending any hope for a democratic government in the near future.[471] There were many factors attributed to the military ultimately taking back control over the government, although it is speculated that they never fully intended on backing out of politics even after the establishment of a democratic, civilian government.[472] Al-Burhan did reappoint Hamdok as prime minister following the coup, but his legitimacy was tarnished by now being associated with the military who were actively opposing democratic transition.[473] While during the transition period there was a significant de-escalation of

[466] Lipscomb, Rosanna. "Restructuring the ICC framework to advance transitional justice: A search for a permanent solution in Sudan." *Colum. L. Rev.* 106 (2006): 184-187 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr106&section=15&casa_token=16NA9tHX6KYAAAAA:enbh3qiAVaWcPyoTAMpV3aDLHaonOeXJA9CHsVXwzXGHOgreRAWWNvgLd8xsZO9s7FpHVOOXnw
[467] Knight, Tessa, and Lujain Alsedeg. "Revolution, Transition, and Coup." Edited by Iain Robertson and Andy Carvin. *DEMOCRACY DERAILED: Sudan's Precarious Information Environment, 2019-2022*. Atlantic Council, (2023): 4 http://www.jstor.org/stable/resrep52679.5.
[468] Ali, Hager, Salah Ben Hammou, and Jonathan M. Powell. "Between coups and election: Constitutional engineering and military entrenchment in Sudan." *Africa Spectrum* 57, no. 3 (2022): 330-335 https://journals.sagepub.com/doi/pdf/10.1177/00020397221136581
[469] Knight and Alsedeg. "Revolution, Transition, and Coup." 4
[470] Knight and Alsedeg. "Revolution, Transition, and Coup." 5
[471] Knight and Alsedeg. "Revolution, Transition, and Coup." 5
[472] Manfredi Firmian, Federico, and Osman Mirghani. "Can Sudan's democratic transition be salvaged?." *Middle East Policy* 29, no. 2 (2022): 136-138 https://onlinelibrary.wiley.com/doi/pdf/10.1111/mepo.12622?casa_token=jGJcaNhuuL0AAAAA:u9UbQ3fG7vSksE2DiCeTcmF8ghVC56Fqk7pAYYTyR7EwENwyFRz3HUWWjWG-rKc6ukdLs35HCCJOJws
[473] Knight and Alsedeg. "Revolution, Transition, and Coup." 6

violence in the country, including in Darfur, the coup led to a renewed campaign by the RSF in the region.[474] Things became even worse as tensions between the SAF under al-Burhan and the RSF commanded by Dagalo would erupt into open conflict, plunging Sudan into a civil war which is still ongoing.[475]

## 4.1 Darfur

Darfur is a traditionally ethnically diverse region where Arab and non-Arab, sedentary and nomadic, Muslim and non-Muslim populations have coexisted for centuries.[476] The actual name Darfur is derived from the words "Dar" and "Fur", Dar being the Arabic word for house/land and Fur referring to the predominantly black tribal/ethnic group in the region.[477] The ethnic and cultural divide between northern and southern Darfur mirrors the general north/south divide in Sudan in general.[478] The geographic division of the region separates the populations who represent very different lifestyle groups, yet they continued to live in a relatively peaceful coexistence with each other until tensions came to the forefront in the 1980's.[479] The conflict in Darfur was part of the larger series of conflicts between rebel groups and the government in Khartoum over alleged mistreatment and discrimination against non-Arab members of the population.[480] This was escalated by the successful military coup led by Omar al-Bashir in 1989 which brought about a period of Islamization and Arab-centric policies forced upon the diverse population.[481] As tensions continued to increase rapidly, fighting spread among the general population within Darfur pitting local militias against each other on the basis of ethnicity and sedentary versus nomadic cultural

[474] Manfredi and Mirghani. "Can Sudan's democratic transition be salvaged?" 147
[475] "One Year of War in Sudan." *Armed Conflict Location & Event Data Project*, (2024): 2 http://www.jstor.org/stable/resrep59176.
[476] De Waal, Alex. "The Conflict in Darfur, Sudan: Background and Overview." *Fletcher School of Law and Diplomacy, Tufts University, https://sites. tufts. edu* (2022): 13-20 https://worldpeacefoundation.org/wp-content/uploads/2024/04/AdW-expert-witness-statement-DF-for-ICC.pdf
[477] De Waal "The Conflict in Darfur, Sudan: Background and Overview." 5
[478] De Waal "The Conflict in Darfur, Sudan: Background and Overview." 6-9
[479] De Waal "The Conflict in Darfur, Sudan: Background and Overview." 2-39
[480] De Waal "The Conflict in Darfur, Sudan: Background and Overview." 45-46
[481] Yongo-Bure, Benaiah. "Sudan's Deepening Crisis." *Middle East Report*, no. 172 (1991): 9 https://doi.org/10.2307/3013177.

affiliation.[482] With the ultimate objective for the rebel groups being the secession of the Darfur region from the rest of Sudan, the central government was willing to do whatever it took in order to prevent this from happening. The response from Khartoum to the rebels would be the use of unrestricted acts of violence against civilians and militants alike, harnessing both their superior firepower as well as conscripting local militias to eradicate the rebel threat.[483] International attempts to mediate a peaceful end to the fighting came too little too late as the gravity of the humanitarian consequences were already being seen by the time any meaningful effort was given towards resolving the conflict.[484] Multiple peacekeeping missions were carried out by the United Nations and African Union as a means of deterring further acts of brutality, particularly against the already beleaguered civilian population but failed at completely stemming the violence.[485] Despite multiple negotiated ceasefires and agreements between various parties to the conflict and the scale of the overall violence decreasing, the situation is far from resolved and human rights abuses are repeatedly reported throughout the region by both government supported forces and rebel militia groups.[486]

### 4.1.1 Historical Grievances

Prior to the outbreak of conflict in Darfur, the region had been relatively free of widespread, organized resistance groups despite the crippling poverty and its mixed cultural and ethnic makeup.[487] However, the underlying seeds of a future conflict began to be sown during the period of British-Egyptian colonial rule as the overwhelming economic and infrastructural development in the country was concentrated in the capital and areas around the Nile

[482] De Waal "The Conflict in Darfur, Sudan: Background and Overview." 42-44
[483] De Waal "The Conflict in Darfur, Sudan: Background and Overview." 50-54
[484] Slim, Hugo. "Dithering over Darfur? A Preliminary Review of the International Response." *International Affairs (Royal Institute of International Affairs 1944-)* 80, no. 5 (2004): 812-813 http://www.jstor.org/stable/3569473.
[485] Cocodia, Jude, and Fidelis Paki. "Achieving Stability in African Conflicts: The Role of Contingent Size and Force Integrity." *African Conflict and Peacebuilding Review* 6, no. 1 (2016): 53-55 https://doi.org/10.2979/africonfpeacrevi.6.1.03.
[486] "One Year of War in Sudan." 41-47
[487] Yifei "A Study of Tribal Composition and Conflict in Darfur." 236-237

River.[488] Darfur itself was left essentially abandoned by the governing authority which left the region both poor and undeveloped.[489] The situation did not improve following the newfound independence of Sudan as development was still yet to come, and instead new policies were implemented which would further alienate the people of Darfur. These new policies consisted of prioritizing Arabs in positions of influence and higher social status which brought about significant criticism from both internal and external voices who would accuse the Sudanese government of an Arab-centric apartheid government.[490] The 1989 coup which brought about the rise of Omar al-Bashir to power saw this Arabization policy of the central government increase substantially alongside his Islamization campaign.[491] While Arabs still makeup a large proportion of the population of Darfur, the lack of development combined with ethnic discrimination caused tensions between the various communities to escalate.[492] Some Arab communities in Darfur were treated equally as poorly by the central government purely because of where they live despite coming from a similar cultural and ethnic background as those in power.[493] Decades of drought had also caused clashes between the nomadic and sedentary populations in the region, highlighting the influence natural resources would play in the conflict.[494] It is difficult to pinpoint the exact policy which caused the people of Darfur to rebel against the government, more than likely it was a culmination of many factors which eventually reached a boiling point.

### 4.1.2 Conflict

The precise beginning of the crisis in Darfur is debated among experts, as exactly which event constitutes the start of the descent into humanitarian catastrophe remains elusive. However, it is known that the Zaghawa, Fur and Masalit tribal communities united to form

[488] Sharkey, Heather J. "Arab Identity and Ideology in Sudan: The Politics of Language, Ethnicity, and Race." *African Affairs* 107, no. 426 (2008): 21–43. http://www.jstor.org/stable/27666997.
[489] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 12-50
[490] Yifei "A Study of Tribal Composition and Conflict in Darfur." 237
[491] "Sudan: Country Reports on Human Rights Practices Bureau of Democracy, Human Rights, and Labor " *U.S. State Department* (2004) https://2009-2017.state.gov/j/drl/rls/hrrpt/2003/27753.htm
[492] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 47-50
[493] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 47
[494] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 41-42

the majority of the rebel groups who would carry out military operations in Darfur.[495] The first official attack by the Darfur Liberation Movement against the government happened on February 25th, 2002, targeting a military facility in the mountains.[496] Multiple small-scale skirmishes ensued in the following months including attacks against the police headquarters in the town of Golo, and a full-scale assault and occupation of Tine on the border with Chad.[497] These attacks brought about verbal threats of retaliation by President Omar al-Bashir, but due to the ongoing war in the south of the country, a serious physical manifestation of strength by the government was unlikely to occur.[498] However, the Sudan Liberation Movement combined with the Justice and Equality Movement in order to carry out an attack against the regional capital of Northern Darfur (al-Fashir) on April 25th, 2003 in what would be the biggest blow against Sudanese government forces up until that point.[499] These two groups were the primary belligerents on the side of the rebels, and the attack on al-Fashir proved so devastating that it forced the Sudanese government to give a new priority to the conflict in Darfur.[500] The failure of the Sudanese military in al-Fashir emphasized the need for a new strategy in order for al-Bashir to take control of the conflict and prevent the rebels from gaining both a psychological or strategic edge.[501] This was done by the formation of the infamous Janjaweed militia groups consisting of a diverse mix of recruits from various Arab tribes in Western Sudan and even the region of Darfur.[502] These recruits would become known for their indiscriminate hit-and-run tactics, which proved to be devastatingly effective against both rebel soldiers and the civilian population.[503] The Janjaweed primarily targeted the black population in Darfur as they made up the vast majority of rebel forces.[504] This meant the pillaging, destruction and murder of entire villages in an effort to both Arabize the

[495] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 46-50
[496] Salih, Mohamed Abdel Rahim Mohamed. "Understanding the conflict in Darfur." *Centre of African Studies, University of Copenhagen,* 2005: 1 https://teol.ku.dk/cas/publications/publications/occ._papers/muhamed_salihsamletpaper.pdf
[497] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 49-50
[498] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 50
[499] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 49
[500] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 50
[501] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 50
[502] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 50-52
[503] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 52-54
[504] Yifei "A Study of Tribal Composition and Conflict in Darfur." 238

region as well as destroy the support structure which the rebels relied on.[505] The attacks on civilian infrastructure combined with the ongoing drought and inability of international aid to reach those in need resulted in the estimated deaths of hundreds of thousands of civilians from starvation alone.[506] As reports of the extent of death and destruction being carried out by the Janjaweed militias started to circulate outside of Sudan, Omar al-Bashir would claim to have no connections to them and staunchly denied providing any material support despite significant evidence suggesting the opposite.[507] Government and Janjaweed forces were able to make several major offensives against the minority tribes within Darfur, forcing a significant amount of the population to flee into neighboring Chad.[508] The border region with Chad would prove to be a source of major contention throughout the conflict as the cross-border flow of refugees from varying ethnic backgrounds in both directions had been going on for decades.[509] Libya's invasion and occupations of Chad and subsequent pan-Arabist claims in the region would further impact the conflict in Darfur as well.[510] Despite the mounting civilian and belligerent casualties on both sides, by 2006 there was still no realistic military solution to the conflict in sight.[511] The conflict in Southern Sudan had been effectively resolved following the signing of the Comprehensive Peace Agreement granting autonomy and eventually independence to the south in 2004.[512] However, any hopes that a similar agreement could be reached in Darfur that would establish a permanent resolution to the conflict were dashed in 2006 when the May Agreement between the central government and SLA was rejected by the other rebel groups.[513] This did signify a reduction in the overall scale of violence in Darfur, but the Janjaweed and remaining militias continue to carry out

[505] Slim "Dithering over Darfur?" 814-826
[506] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 55-58
[507] Waal, Alex de. "Darfur and the Failure of the Responsibility to Protect." *International Affairs (Royal Institute of International Affairs 1944-)* 83, no. 6 (2007): 1050 http://www.jstor.org/stable/4541909.
[508] Reeves, Eric. "Darfur and international justice." *Dissent* 56, no. 3 (2009): 13-17 https://www.academia.edu/download/103581283/dss.0.006020230620-1-vmsuum.pdf
[509] Tubiana, Jérôme, and Emily Walmsley. The Chad-Sudan proxy war and the'Darfurization'of Chad: myths and reality. Geneva: Small Arms Survey, (2008) https://www.ecoi.net/en/file/local/1209149/1002_1257165499_swp-12-chad-sudan-proxy-war.pdf
[510] Tubiana and Walmsley "The Chad-Sudan proxy war and the 'Darfurization' of Chad" 20-23
[511] "Waal "Darfur and the Failure of the Responsibility to Protect." 1049-1050
[512] "Waal "Darfur and the Failure of the Responsibility to Protect." 1040
[513] "Waal "Darfur and the Failure of the Responsibility to Protect." 1048-1050

operations up into the present day.[514] In 2013, Omar al-Bashir established the Rapid Support Forces (RSF), a paramilitary organization which is largely composed of the Janjaweed militias which the Sudanese government had previously denied being associated with.[515] Following the 2019 revolution which overthrew al-Bashir and the following military coup, the SAF (Sudan Armed Forces) and RSF would go on to drag the country into a civil war.[516]

### 4.1.3 Foreign Involvement

The evidence available suggests that there was little foreign involvement as the outset of the conflict in Darfur, and it started as a purely domestic dispute between Sudanese rebel groups and the central government.[517] However, this would quickly change as the ethnic and cultural dimension of the conflict began to spillover into the border regions with Libya and Chad.[518] In order to better understand the significance of the involvement of Chad in the war in Darfur, it is important to take into consideration the ethnic and historical dimension of their relationship. Many of the minority tribes which exist in Darfur also extend across the border and into Chad, and the population has regularly traversed the border back and forth with little acknowledgement by their respective governments.[519] During the civil wars and Libyan occupation of Chad in the 1980's, refugees would flee across the border into Sudan in order to escape the war.[520] The government in Libya had similar pro-Arab policies as Omar al-Bashir had enacted in Sudan which meant that the predominantly black African tribes in Chad near the border with Darfur were also facing discrimination during the period of

[514] D'Agoôt, Majak. "How the Rise of the Rapid Support Forces Sparked Sudan's Meteoric Descent." *Middle East Policy* 30, no. 3 (2023): 107-119 https://onlinelibrary.wiley.com/doi/pdf/10.1111/mepo.12702?casa_token=Aj3dZ9cpzHUAAAAA:dunINnOXwSdU5A2Xoks5pkS7bCBwF_2WpwFkKFofEVy8_xv3ny3ymVrFlwOLEwL8fmMhIkMrYBtnEi4
[515] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 34-36
[516] "One Year of War in Sudan."
[517] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 46-60
[518] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 48-59
[519] "Tubiana and Walmsley "The Chad-Sudan proxy war and the 'Darfurization' of Chad" 10-13
[520] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 39-41

occupation.[521] Libyan president Muammar Gaddafi was still actively pursuing a long-term strategy of pan-Arabism which would require the virtual extermination of resistance to Arab dominance in the region.[522] Despite this, Gaddafi supported many of the rebel movements within Darfur as a method of undermining Omar al-Bashir and the government in Khartoum.[523] The government in Chad played an even more confusing role, at times supporting the government of Sudan and at times supporting rebel groups in Darfur depending on tribal loyalties.[524] China also played a small part in the conflict as they provided the Sudanese government with weapons and money in exchange for Chinese influence in the local oil industry.[525] China also staunchly supported the humanitarian efforts in Darfur albeit while simultaneously arming the government of Sudan and providing an important stream of revenue.[526] This convergence of regional and global interests as well as direct and indirect participation in the conflict suggests the existence of an internationalized armed conflict.[527]

[521] Tubiana, Jérôme, and Claudio Gramizzi. "Tubu trouble: state and statelessness in the Chad-Sudan-Libya triangle." (2017): 107-118 https://ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/SAS-Tubu%20Trouble,%20State%20and%20Statelessness%20in%20the%20Chad-Sudan-Libya%20Triangle.pdf
[522] Tubiana and Gramizzi. "Tubu trouble: state and statelessness in the Chad-Sudan-Libya triangle." 108-123
[523] Yifei "A Study of Tribal Composition and Conflict in Darfur." 237-238
[524] De Maio, Jennifer L. "Is war contagious? The transnationalization of conflict in Darfur." *African Studies Quarterly* 11, no. 4 (2010): 26 https://asq.africa.ufl.edu/wp-content/uploads/sites/168/Maio-Vol11Is4.pdf
[525] Lee, Pak K., Gerald Chan, and Lai-Ha Chan. "China in Darfur: humanitarian rule-maker or rule-taker?." *Review of International Studies* 38, no. 2 (2012): 429-430 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/920DAC5585F1E8DB941A922BF0EB9672/S0260210511000040a.pdf/china_in_darfur_humanitarian_rulemaker_or_ruletaker.pdf?casa_token=aFTnollHtv8AAAAA:95DBHkRFHdiN6AZxD4EUbLGsIFU1tfxM7xItH5cFR8GcZnA4YkfQ5C5I5NPSsyK0LJ8dVLpO
[526] Biswal, Sabyasachi. "Understanding the Primary Reason (s) Responsible for the Conflict in Darfur under the Larger Backdrop of the Sudanese Civil War." *Global Journal of Human-Social Science* 21, no. F1 (2021): 3-5 https://gjhss.com/index.php/gjhss/article/download/1477/1477
[527] Karamalla-Gaiballa, Nagmeldin. "The Armed Conflict in Darfur: Analysis of the Motives and Objectives of the Rebel Group." *African Journal of Economics, Politics and Social Studies* 1, no. 1 (2022): 66 https://www.ceeol.com/content-files/document-1246520.pdf?casa_token=d0EuOlnnfnMAAAAA:8fXQMYGY2W_AeryxuB_JvK9-a_3mv3TX7tJIWu5JMxmAqUY0Ft0QpPophL3FR1AMoCLgKxRW

### 4.1.4 Role of the International Community

Beginning in 2003, the United Nations and Amnesty International had begun to report large scale acts of violence against civilian targets in Darfur and that the situation was worsening.[528] By 2004, more information began to emerge displaying the extreme extent of violence and destruction which had befallen the region as well as the dire ongoing humanitarian disaster.[529] Essential international aid deliveries were being blocked by Khartoum and the region was essentially cut off from most of the outside world.[530] Despite the clearly disintegrating social fabric of Darfur and brutal crackdown of the Sudanese government, the immediate actions of the international community were relatively limited and fruitless. The UNSC was busy with the civil war between the north and south of Sudan which prevented the spotlight from shifting to the developing situation in Darfur.[531] This was despite the fact that Human Rights Watch had already presented evidence from its own investigation suggesting the Sudanese government was carrying out a policy of ethnic cleansing in the region.[532] In June of 2004, the UNSC passed resolution 1547 which sought to create a UN body which would facilitate the implementation of peace negotiations between the north and south.[533] While this was a positive development in general, it provided almost no provisions relating to the conflict in Darfur and only resulted in a further delay in action by the international community.[534] The African Union (AU) became directly involved in the conflict as of July 2004, when representatives from the European Union and the AU were sent to monitor the implementation of the recently established ceasefire agreement.[535] Known

[528] "Sudan: Looming crisis in Darfur" *Amnesty International AFR 54/041/2003* (2003) https://www.amnesty.org/en/documents/afr54/041/2003/en/
[529] Slim "Dithering over Darfur?" 812-818
[530] Szabó "The history of the Darfur conflict and its recent developments." 86-87
[531] Slim "Dithering over Darfur?" 812
[532] "Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan" *Human Rights Watch* (2004) https://www.hrw.org/report/2004/05/06/darfur-destroyed/ethnic-cleansing-government-and-militia-forces-western-sudan
[533] "Security Council resolution 1547" *S/RES/1547(2004)* (2004) https://digitallibrary.un.org/record/523368?ln=en&v=pdf
[534] "Security Council resolution 1547"
[535] Keith, Adam. "The African Union in Darfur: an African solution to a global problem?." *Journal of Public and International Affairs* 18 (2007): 153-156 https://jpia.princeton.edu/sites/g/files/toruqf1661/files/2007-7.pdf

under the acronym AIMIS (African Union Mission in Sudan), its limited budget and international support resulted in numerous difficulties.[536] What initially started out as a few hundred AU troops assigned with the responsibility to protect the monitoring teams in 2004 was then authorized to reach 7000 soldiers by mid-2005 in an effort to improve the security of the IDP camps and local villages.[537] While the AU force was a welcomed improvement, 7,000 scantily equipped soldiers was not nearly sufficient to cover an area around the same size as France which resulted in the death of AU soldiers and civilians by Sudanese supported militias and Janjaweed forces.[538] The African Union repeatedly requested assistance from the United States and United Nations in an effort to gain further financial and military support for their mission with little initial success.[539] While the primary attacks against AU forces came from government sponsored militia groups, hostility against the AU force by rebel groups began to escalate as time went on.[540] Verging on the brink of collapse, the African Union was facing the potential suspension of its peacekeeping force in not reinforced by the international community which finally came in July of 2007 as part of UNSC resolution 1769 formally establishing the United Nations-African Union Mission in Darfur (UNAMID).[541] The combined UN-AU force consisted of over 19,000 personnel at its peak, providing a significant bolstering of security capabilities in the region.[542] Alongside efforts to improve the physical security situation on the ground, the international community was also involved in long series of peace negotiations between the rebel groups and the Sudanese Government as they had also done during the conflict in South Sudan albeit with less success.[543]

[536] Keith "The African Union in Darfur: an African solution to a global problem?." 153-156
[537] Keith "The African Union in Darfur: an African solution to a global problem?." 155
[538] Sarwar, Nadia. "Darfur Crisis: Why Has the U.N. Failed?" *Strategic Studies* 29, no. 4 (2009): 136 https://www.jstor.org/stable/48527706.
[539] Sarwar "Darfur Crisis: Why Has the U.N. Failed?" 134-137
[540] Cocodia and Paki "Achieving Stability in African Conflicts" 54
[541] "Security Council Resolution 1769" *S/RES/1769(2007)* (2007) https://digitallibrary.un.org/record/604309/?v=pdf&ln=es#files
[542] Cocodia and Paki "Achieving Stability in African Conflicts" 54
[543] "Waal "Darfur and the Failure of the Responsibility to Protect." 1043

**Peace Negotiations**

As the hostilities between rebel groups and the Sudanese government escalated between 2003-2004, an immediate attempt at negotiating ceasefire agreements was brokered by Chad in order to alleviate the growing humanitarian crisis.[544] These negotiations would eventually result in the 2004 N'Djamena Ceasefire Agreement signed in Chad, originally intended to serve as the basis for a permanent resolution to the conflict, it would immediately run into a series of roadblocks.[545] While the original parties to the agreement were limited to Chad, Sudan and the participating Darfur rebel groups, the African Union would later become involved in bolstering its implementation as part of the first AMIS mission.[546] The ceasefire agreements was structured as to guarantee that all belligerents to the conflict would immediately cease hostilities in order to create a safe environment for future negotiations to take place.[547] Unfortunately, violence continued to escalate, particularly by government backed militias against rebels and IDP camps as well as AU soldiers attempting to monitor and enforce the ceasefire.[548] Because of the failure to quell the violence, this ceasefire attempt is seen generally as a failure and it wouldn't be until the 2005-2006 Abuja talks that serious discussions would resume between the Sudanese government and rebel forces.[549] These negotiations took place in Abuja, Nigeria in collaboration with the African Union which led to the signing of the Darfur Peace Agreement (DPA) between the Sudanese government and the Sudanese Liberation Movement.[550] While these were two of the primary actors in the conflict, the Justice and equality Movement as well as a number of smaller rebel groups

[544] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 52
[545] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 53
[546] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 53
[547] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 53
[548] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 53-61
[549] Karamalla-Gaiballa, Nagmeldin. "The Armed Conflict in Darfur: Analysis of the Motives and Objectives of the Rebel Group." *African Journal of Economics, Politics and Social Studies* 1, no. 1 (2022): 69 https://www.ceeol.com/content-files/document-1246520.pdf?casa_token=EDhicVb_hhcAAAAA:8gJbDH52uK--kALm9u0EaiNIHcUQvF1NGcfu-2M69ZWWxUGI8hZtZZyaIXi9wvi3k1Pr59Cp
[550] Tanner, Victor, Jérôme Tubiana, and Michael Griffin. "Divided they fall: The fragmentation of Darfur's rebel groups." *Geneva: Small Arms Survey*, (2007): 40-41 https://www.files.ethz.ch/isn/87840/SWP%206%20Darfur%20rebels.pdf

rejected the negotiations and refused to stop fighting.[551] The main force of the SLM did cease the majority of its military activities, but the rejection of the agreement by the other rebel groups allowed the fighting to continue and the humanitarian situation to continue spiraling out of control.[552] The African Union and United Nations remained fully supportive in trying to convince the other parties to abide by the DPA albeit with little to no success.[553] Between 2009 – 2011, a new series of talks emerged hosted by Qatar in Doha between the Sudanese government and rebel groups who had not previously agreed to the terms of the DPA.[554] The primary rebel group participating was the Justice and Equality Movement, who possessed a significant amount of influence in the region and bringing them to the negotiations was seen as a positive step in the right direction.[555] Most of these discussions were centered around the same issues as the Abuja talks, namely the distribution of resource wealth, regional development and autonomy status in relation to federal and regional governance.[556] Despite significant progress made during the negotiations, the main body of the JEM ultimately did not sign the Doha Document for Peace in Darfur (DDPD), however, a splinter group of the JEM known as the Liberation and Justice Movement (LJM) did agree to the terms of the agreement.[557] The DDPD did lead to some reduction in violence and allowed significantly more humanitarian assistance to reach the region, but it faced the same failure to reign in all of the major rebel groups and was ultimately unable to completely put an end to the conflict. It wouldn't be until 2020 that another major attempt at negotiations to resolve the conflict would arise, this time in Juba again under the auspices of the South Sudanese government.[558]

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[551] Tanner et al. "Divided they fall: The fragmentation of Darfur's rebel groups" 40
[552] Tanner et al. "Divided they fall: The fragmentation of Darfur's rebel groups" 40
[553] Nathan, Laurie. "No ownership, no peace: the Darfur peace agreement." *London: Crisis States Research Centre*, (2006): 15-17 https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=cc6bc17c683ff2ba10664f0da52e65e5e8778b17
[554] Karamalla-Gaiballa, Nagmeldin. "The Qatari efforts to resolve the armed conflict in Darfur–the challenges and obstacles." *International Journal of Sudan Research* 7, no. 1 (2017): 4-9 https://www.researchgate.net/profile/Nagmeldin-Karamalla-Gaiballa/publication/344403831_The_Qatari_efforts_to_resolve_the_armed_conflict_in_Darfur_-_the_challenges_and_obstacles/links/5f71da5f458515b7cf544198/The-Qatari-efforts-to-resolve-the-armed-conflict-in-Darfur-the-challenges-and-obstacles.pdf
[555] Karamalla-Gaiballa "The Qatari efforts to resolve the armed conflict in Darfur" 7-8
[556] Karamalla-Gaiballa "The Qatari efforts to resolve the armed conflict in Darfur" 5-6
[557] Karamalla-Gaiballa "The Qatari efforts to resolve the armed conflict in Darfur" 5-6
[558] Karamalla-Gaiballa "The Armed Conflict in Darfur" 70

This would be known as the Juba Peace agreement which was not solely focused on the conflict in Darfur, but rather was aimed at bringing together all of the major rebel movements in Sudan to the negotiation table.[559] It must be taken into consideration that at this time, the Sudanese government was being led by the transitional authority following the deposition of Omar al-Bashir and was intended to be more comprehensive than those before it.[560] This means that fundamental changes to the constitutionality and federal structure of the nation were up for potentially being adjusted in an effort to establish a lasting solution to the country's wider issue of chronic instability.[561] The negotiations were meant to be part of the larger 2019 constitutional declaration and transition to civilian government, opening up the possibility of these armed groups to have a position in the new government.[562] While this effort was more ambitious than other peace negotiations, it too failed for a number of reasons. Despite significant international support and assistance in the transitional political process, the comprehensiveness of the 2019 constitutional declaration proved to be overly ambitious when met with reality. The positive developments of the Juba agreement were quickly extinguished following the 2021 military coup in Khartoum and the outbreak of civil war between the SAF and RSF.[563]

**Humanitarian Operations**

The conflict in Darfur has been plagued by interruptions to the flow of humanitarian assistance to those suffering from the effects of constant war, drought and famine.[564] The most obvious and immediate challenges to the distribution of aid and assistance come simply from the geographic positioning of Darfur and the lack of effective infrastructure leading into

[559] Karamalla-Gaiballa "The Armed Conflict in Darfur" 70
[560] Al-Ali, Zaid. "The Juba Agreement for Peace in Sudan: Summary and Analysis." *International Institute for Democracy and Electoral Assistance (International IDEA)*, (2021): 5 https://www.idea.int/sites/default/files/publications/the-juba-agreement-for-peace-in-sudan-en.pdf
[561] Al-Ali "The Juba Agreement for Peace in Sudan: Summary and Analysis." 7-43
[562] Al-Ali "The Juba Agreement for Peace in Sudan: Summary and Analysis." 11
[563] "One Year of War in Sudan." 4
[564] Grono, Nick. "Briefing: Darfur: The International Community's Failure to Protect." *African Affairs* 105, no. 421 (2006): 621–31 http://www.jstor.org/stable/3876768.

the region.[565] Far away from the Sudanese coast, ships carrying aid face many logistical problems in trying to transport any supplies to the distant region of Darfur.[566] The war in Libya has thrown another roadblock into the equation as the border region has become dangerous and using it almost entirely out of the question. Due to Chad's close proximity and relative political stability, it has served as a major logistical hub for facilitating aid shipments to Darfur although not in the quantities necessary to effectively address the needs of the populations. Apart from natural logistical difficulties, security concerns and political interference have been a constant impediment to the distribution of aid shipments. Nearly all participants in the conflict have been accused of attacking and/or stealing from humanitarian convoys attempting to reach their destinations. This is not limited to the rebels, but also pro-government armed groups and general criminal gangs. This has resulted in the deaths of many humanitarian workers killed while trying to help those in need. The government has often been criticized for obstructing and often outright blocking humanitarian organizations from being able to operate in Darfur. Whether this comes in the form of denying them visas and/or permits allowing them to travel to the region or treating them with open hostility with threats of violence and expulsion.[567] While this was briefly relieved in 2005 as the government appeared to be implementing an expedited visa and permit process for humanitarian operations, this policy was seemingly reversed and by 2009 Omar al-Bashir even expelled a number of NGOs from the country for allegedly collaborating with the ICC.[568] It was this period that the security situation deteriorated even further for aid workers, as kidnappings began to occur often at the hand of government backed Janjaweed militias speculated to be in retaliation for the findings of the ICC.[569] As the government became increasingly hostile towards international organizations, the United Nations continued to comply with the

[565] "Sudan: Protection brief – Darfur region" *UNHCR* (2023): 6-7 https://reporting.unhcr.org/sudan-protection-brief-darfur-region
[566] "Sudan: Protection brief – Darfur region" 7
[567] Eckroth, Karoline. "The protection of aid workers: principled protection and humanitarian security in Darfur." (2010): 32-33 https://nupi.brage.unit.no/nupi-xmlui/bitstream/handle/11250/277951/SIP-02-10-WP-770-Eckroth.pdf?sequence=3
[568] Peskin, Victor. "The International Criminal Court, the Security Council, and the politics of impunity in Darfur." *Genocide studies and prevention* 4, no. 3 (2009): 309 https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=1124&context=gsp
[569] Eckroth "The protection of aid workers" 14

restrictive policies which prevented it from effectively distributing aid and operating in the areas which needed it most.[570] Many international aid organizations were forced to simply suspend their operations in Darfur and Sudan as a whole, severely diminishing civilian access to vital services the most fragile parts of the country.[571] Following the departure of Omar al-Bashir from power and the adoption of the transitional authority in Khartoum, it seemed that humanitarian operations may be able to finally ramp up to an effective scale. However, these hopes were diminished following the outbreak of COVID-19, collapse of the new government and subsequent outbreak of civil war.[572]

## 4.2 Violations of IHL

From the very beginning of what is considered the start of the current conflict in Darfur involving rebel groups and the Sudanese government around 2002-2003, violations of IHL were alleged to have been carried out by both sides.[573] Everything from the killing of unarmed civilians, sexual violence as a weapon of war and ethnic cleansing have become regular occurrences within Darfur throughout the course of the conflict.[574] These are just a short list of examples of the crimes which have been committed and still continue to be perpetrated with seemingly no recourse or punishment for those responsible. Despite the involvement of the AU, UN, ICC and numerous NGOs operating within the region, all parties to the conflict

[570] Parmar, Parveen. "Aid to Darfur Threatened After ICC Actions." *Disaster Medicine and Public Health Preparedness* 3, no. 2 (2009): 73-74 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/48B6E4D84541799A83F9C11586D95B26/S1935789300001592a.pdf/aid-to-darfur-threatened-after-icc-actions.pdf?casa_token=COLjrVFpLCgAAAAA:iBs5S_CRiSRPSQlYw9VD744gtUho13ZrEG6oH8IT-euSbfX9caoLHs4RGnUNLKnB1EmhHdCG

[571] Duursma, Allard, and Tanja R. Müller. "The ICC indictment against Al-Bashir and its repercussions for peacekeeping and humanitarian operations in Darfur." *Third World Quarterly* 40, no. 5 (2019): 892-901 https://www.tandfonline.com/doi/pdf/10.1080/01436597.2019.1579640

[572] "Sudan: Impact of the current conflict on WASH needs" *ACAPS Analysis hub* (2023): 7 https://www.acaps.org/fileadmin/Data_Product/Main_media/20230911_ACAPS_thematic_report_Sudan_impact_of_current_conflict_on_WASH_needs.pdf

[573] "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General: Pursuant to Security Council Resolution 1564 of 18 September 2004." *United Nations* (2005): 4-5 https://www.legal-tools.org/doc/1480de/pdf/#:~:text=In%20particular%2C%20the%20Commission%20found,and%20forced%20displacement%2C%20throughout%20Darfur.

[574] "Sudan, Report of the UN Commission of Enquiry on Darfur" *ICRC Casebook* (2005) https://casebook.icrc.org/case-study/sudan-report-un-commission-enquiry-darfur

refuse to act with restraint. Many organizations such as amnesty international and human rights watch released the first public reports on their findings from investigations in Darfur in 2004 presenting compelling evidence of ethnic cleansing and possible genocide.[575] In September of 2004, United States Secretary of State Colin Powell announced before the Senate foreign relations council that based on evidence gathered as part of an investigation into the situation in Darfur, a genocide had in fact been committed and was possibly still ongoing.[576] Colin Powell placed the majority of the responsibility for perpetrating the genocide on the Sudanese government and their Janjaweed militia's.[577] Just a few days earlier, the UNSC established the International Commission of Inquiry on Darfur as part of Resolution 1564 specifically tasked with gathering information regarding these alleged violations of IHL and Human Rights. The first report by the commission was released on January 25th, 2005, and contained a very detailed account of the specific crimes which it had found evidence for, this was by far the most comprehensive report which had been compiled at that time and accused the Sudanese government as well as the various rebel groups and militias of a number of gross violations.[578] Despite the critical position taken by the commission in the report, it stopped short of accusing the government and Janjaweed militias of partaking in genocide.[579] The commission ended the report by suggesting responsibility for further investigation and possible prosecution be handed over to the ICC. However, even though the ICC was given the referral by the UNSC to carry out investigations within Darfur on March 31st, 2005, as part of resolution 1593, alleged violations of IHL and human rights continue to be committed into the present day.[580]

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[575] "Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan"
[576] Powell, Colin. "The Crisis in Darfur" *U.S. Department of State* (2004) https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm
[577] Powell "The Crisis in Darfur"
[578] International Commission of Inquiry on Darfur. "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General: Pursuant to Security Council Resolution 1564 of 18 September 2004*." International Commission of Inquiry on Darfur*, (2005) https://www.legal-tools.org/doc/1480de/pdf/#:~:text=In%20particular%2C%20the%20Commission%20found,and%20forced%20displacement%2C%20throughout%20Darfur.
[579] "International Commission of Inquiry on Darfur"
[580] "Security Council resolution 1593" *S/RES/1593(2005)* (2005) https://digitallibrary.un.org/record/544817?ln=en&v=pdf

### 4.2.1 Targeting of Civilians

Attacks against civilians have been a reoccurring theme throughout the course of the conflict in Darfur, as early as 2003, organizations such as Amnesty International have reported armed attacks against civilians and villages resulting in significant casualties.[581] As the scale of the fighting increased, coincided by the rise of government backed Janjaweed militias, so did the recorded instances of targeted attacks on civilian populations.[582] By 2005, the United Nations had estimated that over 1.65 million people had been internally displaced by the fighting in Darfur with at least 200,000 refugees escaping into neighboring Chad.[583] The International Commission of Inquiry on Darfur concluded that the majority of violence in the region was carried out specifically against civilians mostly by government backed militias such as the Janjaweed and even the Sudanese Armed Forces themselves.[584] The commission did also find evidence of attacks against civilians by members of the various rebel groups but not on the same scale or systematic basis as was being carried out by the government of Sudan.[585] Regardless of the perpetrator, the existence of a non-international armed conflict in Darfur requires the adherence of all parties to the basic principles of applicable customary and treaty IHL obligations. As targeting of civilian populations is a clear violation of IHL even in the case of an NIAC as specified in the second additional protocol of 1977 as well as customary IHL, this constitutes a breach of international law.[586] Examples of civilian targeting include the constant attacks on IDP camps which are primarily made up of civilians and contain little to no strategic value as a military target. In June of 2023, the RSF and allied forces were reported to have attacked the Kassab IDP camp resulting in the death of at least 54 IDPs.[587] The UNHCR has reported that in the recent resurgence of major clashes at least 3,900 people

[581] "Sudan: Crisis in Darfur - urgent need for international commission of inquiry and monitoring" *Amnesty International* (2003) https://www.amnesty.org/en/wp-content/uploads/2021/06/afr540262003en.pdf
[582] "De Waal "The Conflict in Darfur, Sudan: Background and Overview." 50-54
[583] "International Commission of Inquiry on Darfur" 61-62
[584] "International Commission of Inquiry on Darfur" 159
[585] "International Commission of Inquiry on Darfur" 3-4
[586] International Committee of the Red Cross (ICRC) "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II)" *1125 UNTS 3*, (1977) https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977
[587] UNHCR, "Protection Brief, Darfur Region" 9

have been killed between April-August of 2023, simultaneously an estimated 29 villages/cities were destroyed in a similar period of time.[588] While a significant amount of civilian casualties and damage to civilian infrastructure have been attributed to general fighting between armed groups. It appears that both direct and indirect killing of civilians continues to be a major point of concern, recently exacerbated by the fighting between RSF and SAF forces within Darfur.[589]

### 4.2.2 Sexual Violence

The use of rape and sexual violence has been widespread and particularly brutal throughout the course of the conflict, with women overwhelmingly making up the majority of the victims.[590] Concerningly, due to multiple factors such as lack of opportunity to report such crimes as well as fear of ostracization from the community, the existing documentation of sexual violence still does not represent the actual extent of the problem.[591] The International Commission of Inquiry on Darfur reported extensively on the use of sexual violence and rape particularly by the Janjaweed militias and even the Sudanese armed forces themselves.[592] The Commission even argued that the use of sexual violence was systematic and part of a larger strategy to strike fear into IDPs and civilians in general.[593] Many cases of rape and sexual violence have been reported within and nearby IDP camps against government soldiers and militias who commit these crimes with impunity and fear from prosecution.[594] This had forced many girls and women to be forced to not stray outside of the central parts

[588] UNHCR, "Protection Brief, Darfur Region", (2023): 3 https://data.unhcr.org/en/documents/download/103953
[589] "One Year of War in Sudan." 4
[590] Nihar, Samia. "Sexual violence in Sudan: From denial to recognition." (2024): 2-3 https://open.cmi.no/cmi-xmlui/bitstream/handle/11250/3119479/Sexual%20violence%20in%20Sudan%3A%20From%20denial%20to%20recognition?sequence=1&isAllowed=y
[591] Nihar "Sexual violence in Sudan: From denial to recognition." 2
[592] "International Commission of Inquiry on Darfur" 3
[593] "International Commission of Inquiry on Darfur" 94
[594] "International Commission of Inquiry on Darfur" 87-89

of the IDP camps out of fear of being raped.[595] In extreme cases, there is evidence of girls being kidnapped by armed groups and sold into sexual slavery. Despite the creation of a system of committees against rape by the Sudanese government in 2004 under the supervision of the United Nations, the use of sexual violence by government forces and militias continued.[596] One of the most brutal examples of this occurring in the village of Tabit, where at least 200 girls were systematically raped over a 36-hour period by the Sudanese armed forces in October of 2014 according to a detailed investigation by Human Rights watch.[597] This is not an isolated incident as mass rapes have been an ongoing occurrence despite numerous denials by the Sudanese government.[598]

### 4.2.3 Ethnic Cleansing and genocide

Allegations of ethnic cleansing have been present since the outbreak of hostilities in Darfur, primarily consisting of reports suggesting the Arab dominated militias and government forces attempting to forcibly displace and kill members of the "African" (minority tribes identified as non-Arab) ethnic groups such as the Zaghawa, Fur and Masalit groups who have historically inhabited the region of Darfur.[599] Ultimately the ICC itself would determine that a genocide had taken place as it sought to prosecute Omar al-Bashir for his role in facilitating it between the time period 2003-2008.[600] The ICC listed numerous crimes which were ordered by al-Bashir including targeting of civilians, mass rape, and forced displacement just to name a few. When all of these policies are put together, the ICC argued that it shows a clear intent to at least partially destroy the Zaghawa, Fur and Masalit ethnic groups and

[595] "International Commission of Inquiry on Darfur" 88
[596] "International Commission of Inquiry on Darfur" 108
[597] Human Rights Watch "Mass Rape in North Darfur: Sudanese Army Attacks against Civilians in Tabit", *Human Rights Watch news release* (2015) https://www.hrw.org/report/2015/02/11/mass-rape-north-darfur/sudanese-army-attacks-against-civilians-tabit#:~:text=Over%20the%20course%20of%2036,treatment%20of%20scores%20of%20people.
[598] "International Commission of Inquiry on Darfur" 89
[599] "International Commission of Inquiry on Darfur" 3
[600] "Situation in Darfur, Sudan The Prosecutor v. Omar Hassan Ahmad Al Bashir" *ICC ICC-02/05-01/09 Case Information Sheet* https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/AlBashirEng.pdf

forcibly displace the survivors.[601] The Sudanese government vehemently denied these allegations and placed the primary blame upon the rebel groups, and as of recently, the SAF and RSF have taken to accusing each other of being complicit in the human rights abuses which occurred throughout the conflict.[602]

### 4.2.4 Denial of Humanitarian Aid

Apart from the logistical challenges of delivering aid to Darfur, the constant bureaucratic hurdles from the government coupled with attacks against humanitarian convoys, detainment of personnel and killing of workers has hampered efforts to provide assistance to those effected by the conflict.[603] While the government of Sudan has remained the primary obstacle to safely allowing civilians to access humanitarian aid, all parties to the conflict have been found responsible for sabotaging efforts by the international community to operate in the region.[604] For instance, the Sudanese government went as far as expelling thirteen international organizations who made up over half of the humanitarian assistance resources from the country in response to Omar al-Bashir's arrest warrant issued by the ICC in 2009.[605] This is only a single example but represents the type of hostility to international aid efforts which remained a constant challenge since the start of the conflict. Darfur has continued to be one of the most dangerous places in the world for aid workers, particularly Sudanese nationals who are overwhelmingly killed in larger numbers than foreign staff.[606] There are several theories behind this trend which revolve around both the tribal nature of the conflict and security resources available for international organizations as opposed to domestic

[601] "Situation in Darfur, Sudan The Prosecutor v. Omar Hassan Ahmad Al Bashir"
[602] "DEATH CAME TO OUR HOME" *WAR CRIMES AND CIVILIAN SUFFERING IN SUDAN Amnesty International* (2023) https://www.amnesty.org/en/documents/afr54/7037/2023/en/
[603] Eckroth "The protection of aid workers" 14-16
[604] Reeves, Eric. "Humanitarian Obstruction as a Crime Against Humanity: The Example of Sudan." *African Studies Review* 54, no. 3 (2011): 169-173 http://www.jstor.org/stable/41304799.
[605] Reeves, Eric. "Darfur and international justice." *Dissent* 56, no. 3 (2009): 13 https://www.academia.edu/download/103581283/dss.0.006020230620-1-vmsuum.pdf
[606] Eckroth "The protection of aid workers" 19-20

ones.[607] In the case of tribal related violence, the targeting of Sudanese aid workers is often attributed to the fact that belligerents do not value their neutral status over discrimination on an ethnic basis. As foreign workers do not have any ancestral affiliation to Darfur, their neutral status is more likely to be observed. However, this is not to suggest that international aid workers are free to operate without fear of being targeted. The physical threat to humanitarian missions is just as dynamic as the conflict itself, depending on the extent of hostilities there may be casualties from indiscriminate military operations or general criminal activity such as banditry.[608] While the ICC has yet to charge anybody with denial of humanitarian assistance as a crime against humanity in regard to Darfur, it does not discount the possibility of the prosecution doing it in the future. The ICC does recognize denial of humanitarian assistance as a general war crime in the context of an NIAC as well as a crime against humanity under its statute as part of a policy of extermination on behalf of the aggressor.[609]

## 4.3 ICC in Sudan

As the international community gradually became more aware of the atrocities unfolding in Darfur, attention began to turn towards trying to bring those responsible to justice. Upon the recommendation of the International Commission of Inquiry on Darfur in their report delivered to the United Nations in 2005, the case was handed over to the ICC by a referral from the UNSC as part of resolution 1593.[610] While many in the international community applauded this move as a step forward in the pursuit of justice, organizations such as the African Union and Arab League criticized the decision.[611] The criticisms they levied against the ICC are still used to this day, claiming that the decision to give the ICC authority in

[607] Eckroth "The protection of aid workers" 19-20
[608] Eckroth "The protection of aid workers" 16
[609] "Rome Statute" 6-9
[610] "Security Council resolution 1593"
[611] Elagab, Omer Yousif. "Indicting the Sudanese President by the ICC: Resolution 1593 revisited." *The International Journal of Human Rights* 13, no. 5 (2009): 654-667 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/ininllh13&section=45&casa_token=YVo6SGEXfLIAAAAA:QgsEQdA_xavx1-WM8m9EsT1r0aBIzr-ox9ns35g-TADo2fLDmih-mx_BgZ8zlovmdonHyjHnAA

Sudan was a violation of their sovereignty and possibly even an example of modern neocolonialism.[612] This argument gained traction as there were legitimate concerns over allowing the ICC to operate in a country which was never a party to the Rome statute. However, despite these objections, the ICC began its investigations and initial attempts to cooperate with the Sudanese judicial system in order to setup a system where alleged perpetrators could be held before the domestic courts within Sudan.[613] The decision to first try and work with the Sudanese government came from article one of the Rome statute which specifies "shall be complementary to national criminal jurisdictions".[614] The point of the ICC itself is not to overrule national judicial systems, rather to take their place in cases where a country does not have the political will or capability to handle it themselves. Sudan in particular lacked both the will and capability which ultimately forced the ICC to carry out proceedings on its own without any assistance from the national government.[615] The government of Sudan and Omar al-Bashir in particular would eventually end up treating the ICC with outright hostility, greatly hindering the investigations and later attempts to enforce arrest warrants issued against those within the country.[616] As this represented the first major assignment for the ICC since its inception, a lot of lessons were learned and many questions regarding its general effectiveness were raised.

### 4.3.1 Lack of cooperation from Sudan

From the moment the UNSC passed resolution 1593 referring the Sudan case to the ICC, the Sudanese government has openly expressed its dissatisfaction with the decision.[617]

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[612] Elagab "Indicting the Sudanese President by the ICC: Resolution 1593 revisited."
[613] Erica J. Saxum, "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," Eyes on the ICC 6, no. 1 (2009): 8-11
[614] United Nations. Preparatory Commission for the International Criminal Court. *Rome Statute of the International Criminal Court*. UN, (1998): 2 https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf
[615] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 10-11
[616] Reeves, Eric "Darfur and international justice" Dissent, Volume 56, Number 3, University of Pennsylvania Press (2009): 15-18 https://doi.org/10.1353/dss.0.0060
[617] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 8

However, as a United Nations member state, they were legally obliged to cooperate with the court as specified in the resolution and outlined in the Rome statute.[618] Initially, Sudan attempted to prevent the ICC from directly operating within its territory by showing that they are capable of carrying out their own meaningful and effective investigations through the national judicial system.[619] This is allowed under the concept of complementary jurisdiction where the ICC has no reason to operate within a country which has proven willing and capable to effectively administer justice, therefore, Sudan was challenging the general jurisdiction of the ICC.[620] The ICC was more than willing to allow Sudan to handle the investigations, but in order for this to happen it has to do its own independent assessment of whether or not this is a genuine possibility. Considering the fact that the Sudanese leadership would certainly be implicated in any legitimate investigation into the atrocities committed in Darfur, it was unlikely that the government would be able to persuade the ICC that it could handle this responsibility.[621] After many discussions and meetings between the Sudanese government and officials from the ICC regarding the ability of the national legal systems to proceed on its own, the ICC came to its own conclusion.[622] In 2007, the ICC began releasing arrest warrants for multiple Sudanese nationals to appear before the court in regard to war crimes committed in Darfur.[623] This marked the end of any possible positive relationship between the ICC and Sudanese government with tensions reaching their breaking point in 2009 following the issuing of an arrest warrant against president Omar al-Bashir.[624] The government of Sudan flatly refused to enforce any of the arrest warrants issued by the ICC, arguing that the court had no jurisdiction over its citizens and that only its own national courts had the authority to prosecute Sudanese nationals.[625] The government attempted to bolster its defense by

[618] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 5-7
[619] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 10-11
[620] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 10-11
[621] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 11
[622] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 11
[623] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 6-7
[624] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 7
[625] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 9-10

bringing up the fact it had never ratified the Rome statute or agreed to cooperate with the ICC, thus excusing itself from any obligation to comply.[626] While this would be a valid argument in normal circumstances, the referral from the UNSC in resolution 1593 inherently rendered this as a violation of the responsibilities of the government as a UN member state.[627] Simultaneously, Sudan sought to convince the UNSC to overturn the arrest warrant against Omar al-Bashir under the assumption that it did more to prolong the conflict which would be detrimental to the people in Darfur. While the UNSC never gave into these demands, this argument was received with more enthusiasm by many states in the African Union and Arab League.[628] Omar al-Bashir made significant progress in framing the narrative from one of the ICC pursuing justice, to one of a neocolonialist western court unfairly targeting African countries and allowing the conflict in Darfur to escalate.[629] Omar al-Bashir would further retaliate against the ICC by going after international organizations and humanitarian agencies. He would accuse them of being accomplices of the ICC and proceed to harass and expel them from the country, causing many to question the benefits of the ICC's direct approach to seeking accountability.[630] The ICC itself was put into a seemingly unwinnable situation, it had a mandate to prosecute those guilty, yet lacked the necessary enforcement mechanisms to effectively implement its mission.[631] Had it refrained from issuing arrest warrants on senior members of the Sudanese government, it would be inherently going against its own mandate. This was not helped by

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[626] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 9-10
[627] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 6-7
[628] Murithi, Tim. "The African union and the international criminal court: An embattled relationship." *Institute for Justice and Reconciliation* 8 (2013): 1-2 http://www.ijr.org.za/home/wp-content/uploads/2017/05/IJR-Policy-Brief-No-8-Tim-Miruthi.pdf
[629] Murithi, Tim. "Ensuring Peace and Reconciliation While Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan." *Africa Development / Afrique et Développement* 40, no. 2 (2015): 89 http://www.jstor.org/stable/afrdevafrdev.40.2.73.
[630] Bahadory, Azelle, Mia Bodell, Katie Davis, Megan Freney, Emily Laskowski, Aaron Long, Olivia Pingul et al. "Humanitarian aid under stress: Assessing the role of ngos." (2019): 39-40 https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/43773/TaskForce_J_Ward.pdf?sequence=1&isAllowed=y
[631] Barnes, Gwen P. "The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir." *Fordham Int'l LJ* 34 (2010): 1584 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/frdint34&section=53&casa_token=rkYvTszhkr4AAAAA:B5ZuKWiU0hjC1yfXVN7hNaekUEhGMKwTFrMTh7bBsNbt82Uyq7pezGjaSIHkZFFPmq59quhwmQ

the lack of support from the UNSC when it came down to forcing Sudan to adhere to resolution 1593 and cooperate with the court.

### 4.3.2 Investigations

ICC investigations into the situation in Darfur have faced significant challenges from the very outset of the referral from the UNSC. Prior to the Sudanese authorities cutting off cooperation with the ICC in 2009, the first impediment to the investigation was the dire security situation in the region which posed as a threat to investigators as well as potential witnesses who may be seen as a threat to the regime.[632] This concern was raised in the 2006 ICC report "Observations on issues concerning the protection of victims and the preservation of evidence in the proceedings on Darfur pending before the ICC", explicitly pointing out the physical threat of retaliation by the military.[633] In this report, a strategy of initially investigating the military chain of command as a separate process from investigations into rebel activity was proposed.[634] By conducting interviews with members of the Sudanese military and allied militias, the court hoped to establish a body of evidence which could lead to the implication of senior officials for their complicity in the atrocities in Darfur.[635] The report also specified that while large scale investigative techniques such as exhuming mass graves would be too dangerous given the security situation, but that brief interviews and smaller evidence collecting missions could be possible.[636] It was then suggested that ICC investigators should request assistance from the Sudanese government to provide security and cooperation throughout the course of these investigations.[637] In the report it is plainly

[632] "Prosecutor's Response to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC" *ICC Office of the Prosecutor* (2006) https://www.icc-cpi.int/court-record/icc-02/05-16
[633] "Prosecutor's Response to Cassese's Observation"
[634] "Prosecutor's Response to Cassese's Observation"
[635] "Observations on issues concerning the protection of victims and the preservation of evidence in the proceedings on Darfur pending before the ICC" *ICC Office of the Prosecutor* (2006) https://www.icc-cpi.int/court-record/icc-02/05-14
[636] "Observations on issues concerning the protection of victims" 5
[637] "Observations on issues concerning the protection of victims" 11

written that any lack of cooperation by the Sudanese authorities would violate their obligations enshrined in resolution 1593 and assumes that the UNSC would react by implementing measures forcing the government to work with the court.[638] However, as previously discussed, the UNSC would not end up taking the necessary steps to back up the ICC when Sudan actually began openly defying the court. The first arrest warrant issued in the Darfur case was for Minister of State for the Interior of the Government of Sudan, Ahmad Muhammad Harun in 2007.[639] This arrest warrant was issued following an initial investigation which collected a significant amount of evidence against the minister, charging him with over 50 individual crimes in relation to the conflict in Darfur in the original arrest warrant.[640] The prosecutor accused Harun of being one of the leading figures behind the policy of displacing millions of civilians from their homes and into IDP camps. Following the announcement of the arrest warrant, the prosecutor stated that:

*"Ahmad Harun is controlling the victims inside the camps, controlling their access to food, humanitarian aid and security; attacks against the civilians and the displaced in particular take multiple forms; women are raped; emerging local leaders are targeted; the displaced are surrounded by hostile forces; their land and homes are being occupied by new settlers. The rationale is the same as before: target civilians who could be rebel supporters."*[641]

As of 2024, the ICC currently lists 22 counts of crimes against humanity and 20 counts of war crimes in the open case against Harun.[642] An arrest warrant was issued simultaneously for Ali Muhammad Ali Abd-Al-Rahman who is suspected of being the leader of the Janjaweed militia in 2003 and 2004 while they allegedly committed numerous war crimes

[638] "Observations on issues concerning the protection of victims" 11
[639] "The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun")" *ICC-02/05-01/07 Case Information Sheet* https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/haruneng.pdf
[640] "The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun")"
[641] "ICC Prosecutor: "Massive crimes continue to be committed in Darfur today, Sudan is not complying with Security Council resolution 1593 and is not cooperating with the Court" *ICC Press Release* (2007) https://www.icc-cpi.int/news/icc-icc-prosecutor-massive-crimes-continue-be-committed-darfur-today-sudan-not-complying
[642] "The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun")"

and crimes against humanity in Darfur.[643] He is currently being held in custody by the ICC on pending charges of 31 counts of war crimes and crimes against humanity due to his position as head of the Janjaweed militia.[644] In 2020, he voluntarily surrendered himself to the court and his trial began officially began in April of 2022 and is currently still ongoing.[645] The next arrest warrant was issued in March of 2009 against Sudanese president Omar al-Bashir on alleged war crimes and crimes against humanity.[646] In July of 2010, further charges would be announced in another arrest warrant upon review of further evidence submitted by the prosecutor to the court.[647] These charges are predicated on the fact that al-Bashir bears responsibility for the crimes committed during his time as acting president, especially when taking into consideration his explicit control over all branches of the Sudanese government.[648] The ICC has suggested that it was ultimately his decision to establish the Janjaweed militias and support them despite being aware of the atrocities they were carrying out.[649] The ICC has also stated that the Sudanese armed forces and several government branches and organizations were explicitly directed by al-Bashir to participate in crimes against humanity and war crimes in Darfur.[650] Due to his position in the hierarchy of the government of Sudan throughout the conflict in Darfur, the prosecution of al-Bashir is considered one of the highest priorities for the ICC's mission in Sudan. However, his high-ranking status in the government has made the likelihood of his extradition to the ICC unlikely. The African Unions opposition to the ICC's arrest warrant against al-Bashir has meant that his diplomatic immunity as a head of state has essentially been upheld even in countries who have ratified the Rome statute.[651] Following the issuance of the arrest warrant against him, al-Bashir has traveled to ICC member states Chad, Kenya, Malawi, South

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[643] "The Prosecutor v. Ali Muhammad Ali Abd–Al-Rahman" *ICC-02/05-01/20 ICC Case Information Sheet* *https://www.icc-cpi.int/sites/default/files/2023-08/abd-al-rahmaneng.pdf*
[644] "The Prosecutor v. Ali Muhammad Ali Abd–Al-Rahman"
[645] "The Prosecutor v. Ali Muhammad Ali Abd–Al-Rahman"
[646] "The Prosecutor v. Omar Hassan Ahmad Al Bashir" *ICC-02/05-01/09 ICC Case Information Sheet* https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/AlBashirEng.pdf
[647] "The Prosecutor v. Omar Hassan Ahmad Al Bashir"
[648] "The Prosecutor v. Omar Hassan Ahmad Al Bashir"
[649] "The Prosecutor v. Omar Hassan Ahmad Al Bashir"
[650] "The Prosecutor v. Omar Hassan Ahmad Al Bashir"
[651] Van der Vyver, Johan D. "The Al Bashir debacle." *African Human Rights Law Journal* 15, no. 2 (2015): 565-569 http://www.scielo.org.za/pdf/ahrlj/v15n2/17.pdf

Africa, DRC, Djibouti, Uganda and Nigeria without being arrested by the local authorities.[652] Following the collapse of Omar al-Bashir's regime in 2019, despite promises by the transitional government to cooperate with the ICC and their eventual arrest of the former president, he has yet to be extradited to the ICC to face prosecution.[653] More arrest warrants would be issued against rebels and members of the government of Sudan as well as the militias they commanded in years to come. A summons to appear was issued against Abu Garda in 2009 before the pre-trial decided to drop the charges against him in 2010 after he voluntarily agreed to appear before the court.[654] In 2011, charges against Abdallah Banda Abakaer Nourain were confirmed and an arrest warrant was issued in 2014 to encourage his appearance before the court.[655] Despite voluntarily appearing in 2010, he has not yet surrendered himself to the court following the issuance of his 2014 arrest warrant and remains at large.[656] An arrest warrant was issued against former Sudanese Minister of national defense Abdel Raheem Muhammad Hussein in 2012 but he has yet to appear before the court and his case remains pending.[657]

# Chapter 5 Analysis

The conflicts in the former Yugoslavia and Sudan do not necessarily share many visible similarities apart from the fact that there were significant breaches of International Humanitarian Law and in both cases the UNSC got involved in an effort to de-escalate the situation and provide justice for the victims. However, the UNSC choose vastly different

[652] Van der Vyver "The Al Bashir debacle." 565-569
[653] Nte, Timothy. "The 2019 Sudan coup and conflict resolution by the African Union." *International Journal of Comparative Studies in International Relations and Development* 6 (2020): 4 https://internationalpolicybrief.org/wp-content/uploads/2023/10/ARTICLE1-103.pdf
[654] "The Prosecutor v. Bahar Idriss Abu Garda" *ICC-02/05-02/09 ICC Case Information Sheet* *https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/AbuGardaEng.pdf*
[655] "The Prosecutor v. Abdallah Banda Abakaer Nourain" *ICC-02/05-03/09 ICC Case Information Sheet* *https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/BandaEng.pdf*
[656] "The Prosecutor v. Abdallah Banda Abakaer Nourain"
[657] "The Prosecutor v. Abdel Raheem Muhammad Hussein" *ICC-02/05-01/12 ICC Case Information Sheet* *https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/HusseinEng.pdf*

routes to hold those accountable for the crimes which were committed in either case. The most obvious being that it chose an ad hoc tribunal for Yugoslavia while opting for a permanent international court in the case of Sudan. The answer may be as simple as the fact that there was no permanent international court at the time the ICTY was established and thus an ad hoc tribunal was the only option available. This begs the question as to was the use of a permanent court without universal recognition the best solution, particularly in this case as the state in question is not even a party to the Rome statute? The decision of the UNSC to refer the issue of Darfur in Sudan to the ICC remains one of the most controversial cases in modern International Criminal Law. This chapter intends to create an in-depth analysis of the two primary case studies covered throughout this thesis using the historical context provided regarding the development of IHL and universality. By comparing and contrasting the facts surrounding both cases as well as their significance to IHL as a whole, it is possible to establish commonalities which may indicate a direction for the future development of its jurisdiction and enforcement.

## 5.1 Why the ICC in Sudan?

The decision by the UNSC to choose the ICC in the case of Sudan represents a pivotal moment in ICL, particularly when we take into consideration the fact it is the first time the UNSC ever referred something to the ICC.[658] However, a question must be asked as to why did the UNSC go this route instead of creating another ad hoc tribunal or hybrid court as they have in other cases such as the Extraordinary Chambers in the Courts of Cambodia (ECCC)?[659] This route may have even avoided the criticisms which would be raised regarding the issue of sovereignty and judicial independence. Unfortunately, this approach would have most likely been impossible considering the fact that a hybrid court system

[658] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 8
[659] Cayley, Andrew T. "Prosecuting mass atrocities at the Extraordinary Chambers in the Courts of Cambodia (ECCC)." *Wash. U. Global Stud. L. Rev.* 11 (2012): 445 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/wasglo11&section=17&casa_token=lSAS1JO4B4gAAAAA:w4OvpI4ws2O6eByn-tBo0l3f1sD-O-gKarOlq00QusE6NCtCuURbBNtvo12gV3OSIdjaHTpMjg

requires consent from the national government, which was unlikely to happen considering they would be agreeing to investigate themselves. In the case of the ICTY, the lack of cooperation from states such as Serbia came precisely from the fact that in the immediate aftermath of the conflict many high-ranking individuals under investigation were still either in leadership positions or being protected by the state.[660] Had the UNSC proposed to Serbia the establishment of a hybrid tribunal, the likelihood of it ever coming to fruition would have been extremely low. In the case of the ECCC, most of the Khmer Rouge leadership had already been purged from the government before any agreement had been reached regarding the establishment of a hybrid court.[661] That leaves two options left for the UNSC if they wish to pursue any attempt at garnering justice for the victims in Sudan, an ad hoc tribunal like the ICTY and ICTR, or a referral to the ICC. The ICC inherently acts as a court of last resort in the states under its mandate, only establishing jurisdiction when national courts are either unable or unwilling to fairly and effectively enforce the rule of law in cases of serious crimes against humanity and war crimes.[662] The reasoning behind this method is to both reassure states of their own judicial independence, as well as pressure those who lack effective judicial mechanisms to reform. In these cases, the ICC does offer the ability to provide assistance to national judicial systems in establishing and operating the courts necessary to prosecute crimes which fall under its mandate. In fact, one of the biggest goals for the ICC is to facilitate the growth of national judicial systems around the world in order to make international tribunals less necessary.[663] While the reformation of Sudan's judicial system is certainly an objective, interestingly it was not one of the primary reasons listed by the UN Commission of Enquiry on Darfur in their decision to make a referral to the ICC as opposed to establishing an ad hoc tribunal.[664] In their January 25th, 2005 report, they outlined the six major contributing reasons for selecting the ICC in this instance:

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[660] "Investigations: The Crime Scenes"
[661] Cayley "Prosecuting mass atrocities at the Extraordinary Chambers in the Courts of Cambodia" 445
[662] Erica "The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity," 6-7
[663] Burke-White, William W. "Proactive complementarity: The International Criminal Court and national courts in the Rome system of international justice." *Harv. Int'l LJ* 49 (2008): 84-85
[664] UN Commission of Enquiry on Darfur "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General" *ICRC Casebook, Geneva* (2005): Paragraph 648 https://casebook.icrc.org/case-study/sudan-report-un-commission-enquiry-darfur

1. The ICC's statute is specifically conducive to dealing with threats to peace and security. The situation in Sudan fits the requirements for article 13(B) of the Rome statute and therefore provides justification to be invoked by the UNSC.
2. The ICC's authority and physical location far away from Sudan reduces the ability of high-ranking suspects and individuals to influence the outcome of the court's proceedings. This physical distance will theoretically provide a neutral space away from tensions and perceived hostilities among those involved.
3. Only the ICC has the authority as an international body to convince high ranking officials and those in positions of leadership to cooperate in investigations and potentially submit to prosecution.
4. The composition of the court and its statute ensure it is the most qualified judicial body to carry out a fair and effective trial.
5. The ICC benefits from its position as a permanent judicial body by requiring less time to activate and pursue its mission as opposed to establishing a new ad hoc tribunal.
6. The ICC would not require a significant financial investment in order to begin new proceedings in Sudan.[665]

## 5.2 Why not an ad hoc tribunal in Sudan?

While the UN commission of enquiry on Darfur certainly presented a compelling case why the ICC was the best choice for the pursuit of justice in Sudan, that does not mean its decision was unanimously agreed upon. The United States was a major objector to the referral of the Sudan case to the ICC for multiple reasons generally relating to their lack of jurisdiction

[665] UN Commission of Enquiry on Darfur "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General" 648

over nationals of states not party to the Rome statute.[666] While no members of the commission voted against the referral to the ICC, the United States, Algeria, Brazil and China did abstain.[667] The argument against the referral promoted by the United States was that the best course of action in regard to Sudan would have been the establishment of a hybrid African court.[668] Presumably this is because a hybrid African court could provide the legally binding nature of a UNSC mandated ad hoc tribunal with the perceived legitimacy of a more locally composed judiciary. However, while this wasn't further elaborated upon by the United States and the issues which could be associated with actually establishing this type of hybrid tribunal haven't been addressed in the context of Sudan. The primary issue being how to convince the leadership in Sudan to agree on establishing a real court with the authority to investigate and arrest anyone regardless of rank or position in the government. This still doesn't answer the question as to why a fully international ad hoc tribunal wasn't seriously considered by the commission, the six reasons provided do not actually suggest any real benefit of the ICC when put under scrutiny. For instance, the claim that the ICC is the only international body with the status and authority to coerce governments to cooperate with investigations and comply with arrest warrants had no basis in reality. This point would only be confirmed following the issuing of two arrest warrants for Sudanese president Omar al-Bashir in 2009 and 2010 which as of 2024 still remain unfulfilled.[669] The lack of enforcement mechanisms by the ICC was made even more apparent when al-Bashir travelled to Chad, Kenya, Malawi, South Africa, DRC, Djibouti, Uganda and Nigeria who are all member states of the ICC without any repercussions.[670] The AU even went so far as to specifically tell its member state not to enforce the arrest warrant against al-Bashir as it would only contribute to regional instability. The AU directly refuted the ICC's claims by citing article 98 of the Rome statute:

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[666] "United States Abstains on Security Council Resolution Authorizing Referral of Darfur Atrocities to International Criminal Court." *The American Journal of International Law* 99, no. 3 (2005): 691–93. https://doi.org/10.2307/1602302.
[667] "United States Abstains"
[668] "United States Abstains"
[669] "The Prosecutor v. Omar Hassan Ahmad Al Bashir"
[670] "Van der Vyver "The Al Bashir debacle." 565-569

*Article 98 Cooperation with respect to waiver of immunity and consent to surrender*

*1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.*

*2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.*[671]

Considering Omar al-Bashir was the sitting head of state in Sudan at the time, it would appear Chad had a legitimate argument for refusing to execute the arrest warrant in accordance with article 98 (1). Chad could even make an argument for article 98 (2) on the grounds that as a member of the AU, it was under an international obligation to not place Omar al-Bashir under arrest.[672] Taking these factors into consideration, it is impossible to accurately determine any sort of positive reason for referring the Sudan case to the ICC as opposed to establishing an independent ad hoc tribunal. It should have been apparent that Sudan ultimately would not comply with an organization it is not a part of in order to prosecute senior members of a government that is still in power.

[671] "Rome Statute of the International Criminal Court"
[672] Gwen P. Barnes, "The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir," *Fordham International Law Journal* 34, no. 6 (June 2011): 1515-1516 https://heinonline.org/HOL/Page?handle=hein.journals/frdint34&div=53&g_sent=1&casa_token=&collection=journals

## 5.3 Converging criticisms of the ICTY and ICC.

Despite the inherent differences which exist between a permanent international court like the ICC and an ad hoc tribunal such as the ICTY, there are many points where both their positive and negative attributes intersect.[673] Perhaps the first major legal criticism of the ICTY was submitted by the defense for Dusko Tadic when they questioned the jurisdiction and legitimacy of the court over national judicial systems.[674] At first glance, it would seem that the ICC shouldn't have these same debates considering its member states knowingly agreed to its statute beforehand and thus will willingly abide by its judgements. However, this couldn't be further from the truth, particularly in the case of Sudan we see member states of the ICC repeatedly challenge and dismiss orders from the court.[675] This type of behavior from states is not limited to the ICC or ICTY in particular, rather it is a common response to perceived interference by international actors in the affairs of sovereign states. While both courts are aimed at prosecuting individuals and not states themselves, the interconnectedness between those being prosecuted and their prospective governments politicizes the arguments against judicial jurisdiction. In the case of the ICTY, many states feared the potential repercussions which could come from the establishment of an international court possessing such a broad range of authority in interpreting and implementing binding decisions on international law.[676] This concern feeds back into the sovereignty argument, which would seemingly prefer a court such as the ICC which is based upon the direct consent of states to its statute before being bound by its decisions. However, states not party to the ICC have a similar fear that particularly in cases of UNSC involvement, decisions taken by the ICC may have repercussions which can potentially affect them in the future.[677] This coincides with

[673] Boas, Gideon. "Comparing the ICTY and the ICC: Some Procedural and Substantive Issues." *Netherlands International Law Review* 47, no. 3 (2000): 267–91. https://doi.org/10.1017/S0165070X00000991.
[674] ICTY "Prosecutor v. Dusko Tadic (1999)"
[675] "Van der Vyver "The Al Bashir debacle." 565-569
[676] Lombardi "Legitimacy and the Expanding Power of the ICTY" 887-902
[677] "The African Union's Submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on the NonCompliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir**"** *ICC-02/05-01/09-370 ICC Court Record* (2018) https://www.icc-cpi.int/court-record/icc-02/05-01/09-370

the ongoing debates surrounding the role and evolution of customary International Humanitarian Law in relation to international institutions and tribunals. Both concerns are not necessarily invalid as the status of sovereignty in regard to international law has been a contentious topic since its very inception.[678] The key difference in these two cases being that particularly in cases where ICL and IHL converge, international law is essentially forcing the state to limit the way it handles matters of security under threat of criminal charges by external actors.[679] While upholding IHL is generally universally agreed upon, its legitimacy is often questioned once those who previously supported it are now being accused of violating it. This is one of the primary challenges when it comes to enforcement of decisions and cooperation for both the ICC and ICTY. While the Rome statute could have gone further in establishing enforcement mechanisms for members who do not abide by decisions of the court, it would have likely resulted in less states becoming party to the ICC. The ICTY statute as drafted by the CSCE could have similarly named more specific and effective enforcement mechanisms but that may have jeopardized the likelihood of it passing through the UNSC. This means that the ICC and ICTY remain at the mercy of how much states are willing to cooperate as well as whether or not international institutions or organizations are willing and able to provide assistance. Luckily for the ICTY, they had the added benefit of a NATO-led peacekeeping force strong enough to essentially force local Bosnian Serb leaders into compliance and capture individuals wanted by the court within Bosnia.[680] While there was a multinational peacekeeping force in Sudan at the time the arrest warrant for Omar al-Bashir was issued, it lacked the mandate and physical capability to assist in placing him under arrest.[681]

[678] Besson, Samantha. "Sovereignty, international law and democracy." *European Journal of International Law* 22, no. 2 (2011): 373-387 https://academic.oup.com/ejil/article-pdf/22/2/373/1439231/chr029.pdf
[679] Cryer, Robert, Darryl Robinson, and Sergey Vasiliev. *An introduction to international criminal law and procedure*. Cambridge University Press, (2019) https://toc.library.ethz.ch/objects/pdf/z01_978-0-521-11952-8_01.pdf
[680] "Investigations: The Crime Scenes"
[681] "Security Council Resolution 1769"

## 5.4 Limitations of Modern IHL Treaty Law

As the 20th century progressed past the era of treaty based IHL universalization, new introductions to the bodies of international law were increasingly met with controversy and resistance by states in the name of sovereignty and judicial independence.[682] While the 1949 Geneva Conventions attained universal recognition, subsequent attempts to build upon them have been met with non-unanimous consensus such as the case with additional protocols I & II.[683] The ICC has met the same fate, despite receiving significant support by the majority of states around the world, it still lacks universal recognition and jurisdiction, hampering its ability to operate effectively.[684] This represents a general pushback against the transition of responsibilities traditionally applied to states to international organizations, however, its implications extend far beyond the immediate nationalist rhetoric. Universal Treaty law has historically represented the most effective way to provide solutions to serious threats to IHL. This has given the United Nations the ability to apply its mandate universally in instances of cases involving both *jus in bello* and *jus ad bellum* within a reasonable timeframe.[685] This is not to suggest that the situation is perfect or works all of the time, rather emphasizing that its effectiveness lies in its universality. However, the decline of universalism in modern state relations has left the international community ineffective when it comes to dealing with many recent violations of IHL.[686] The idea of a permanent International Criminal Court has been around for decades but has always faced an uphill battle against states reluctant to

[682] Sassoli et al. "Challenges to International Humanitarian Law."
[683] Aldrich, George H. "Prospects for united states ratification of additional protocol I to the 1949 Geneva conventions." *American Journal of International Law* 85, no. 1 (1991): 1-20 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/ajil85&section=9&casa_token=vrreTMdAgswAAAAA:07Tdh00CssUiNgrYBPMIANtU2YFnrqdxScfw0KffEdSROyx09gS4-AN6WcFiIy_Fesz_romg4A
[684] Shaik, Anjum. "Ratification Attitudes towards the Rome Statute: A Quantitative Study of Current Parties." *Minnesota Undergraduate Research & Academic Journal* 4, no. 4 (2021) https://pubs.lib.umn.edu/index.php/muraj/article/download/3667/2760
[685] Fassbender, Bardo. "The United Nations Charter as constitution of the international community." *Colum. J. Transnat'l L.* 36 (1998): 529 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/cjtl36&section=37&casa_token=xZQc46F_9wgAAAAA:TUAIK0QrIAOSojBOiEdvWC4THgvn0-V94v6bBruM4XylqWtB4wfuqZOfuz-1hdnc0IZlpm29CQ
[686] Sassoli et al. "Challenges to International Humanitarian Law."

accept its potential universal jurisdiction over national courts.[687] In today's climate of complex conflicts containing a diverse array of both state and non-state actors, such a universal criminal court could be quite useful in achieving justice and deterring future breaches of IHL. Instead, the ICC which was established possesses no universal jurisdiction and even when called upon by UNSC resolution is still unable to effectively pursue its own mandate. Realistically, the age of universalism has passed and other avenues besides proposing new treaties for enforcing IHL standards should continue to be investigated. The ICTY's approach, regardless of how controversial it was at the time proved to be extremely effective in not only completing its stated mission, but also essentially advancing new standards of IHL as well as how to prosecute those who violate it in the future.[688] The ICTY was able to fast track the development of customary IHL in a way which had not previously been seen without the need for a new treaty, simply by being formed under the jurisdiction of an already existing universal treaty body (the UNSC).[689] In this case, it is not existing universal treaties which are inherently limiting, rather the insistence on establishing new ones which are lacking in multiple categories. In order for a new treaty relating to IHL to have any chance of coming into existence, its contents must not be so comprehensive as to prompt an immediate rejection by potential participants. As previously mentioned, the threshold of how much states are willing to allow international jurisdiction over their own affairs has shrunk dramatically since the mid-20th century.[690] Therefore, new treaties which suggest any serious changes to established doctrine are highly unlikely to garner any significant support by a large margin of the international community. The ICC possesses no real enforcement mechanisms or method of punishing members who violate the Rome statute and ignore demands for cooperation, yet still it was not able to gain universal recognition.[691] As we have seen in the case of the ICC and Omar al-Bashir in Sudan, both this lack of universality and enforcement mechanisms have created serious questions as to

[687] Boehme, Franziska. *State Behavior and the International Criminal Court: Between Cooperation and Resistance*. Routledge, (2022) https://www.taylorfrancis.com/books/mono/10.4324/9781003181002/state-behavior-international-criminal-court-franziska-boehme
[688] Trahan and Vukušić. "The Legacy of the ICTY"
[689] Barria and Roper, "How Effective Are International Criminal Tribunals?" 354
[690] Maybee and Chakka "Custom as a source of international humanitarian law." 25-40
[691] "Van der Vyver "The Al Bashir debacle." 565-569

the real purpose of an International criminal court. The pushback against the ICC from other treaty-based organizations such as the African Union have continued to highlight the limitations of modern treaty law.[692] The ability of the ICC to really carry out its mission is severely hampered by its own charter which prevents it from acting on an equal ground as other international treaty organizations or even holding its own members accountable for their actions.[693] Yet if any of these issues were addressed before the introduction of the Rome statute, it is unlikely that the ICC would have received the same amount of support that it was able to achieve.

## 5.5 Future Development of IHL

A decline of universal agreement on the establishment of IHL treaties does not necessarily mean the end of developing new standards and methods of IHL enforcement. The ICTY and ICTR as well as cases heard by the ICJ and other international courts have proven effective at continuing to evolve the law of armed conflict in a way which is universally binding. Not that this is completely without its own set of criticisms and debates, but the interpretation of custom has proven to be essential in safeguarding IHL in the modern era.[694] This has been particularly important as the presence of ad-hoc tribunals and the ICC in the prosecution of those allegedly responsible for violating IHL has created significantly more opportunities for the interpretation of custom by courts who possess some form of binding authority. In the case of the ICC, its contributions to determining customary law are far more complicated and restricted than ad-hoc tribunals established by UNSC resolution. For instance, the ICC as previously mentioned is not universally recognized and they also are constrained to only

[692] Bachmann, Sascha Dov, and Luke Eda. "Pull and push—Implementing the complementarity principle of the Rome Statute of the ICC within the African Union: Opportunities and challenges." *Brooklyn journal of international law* 43, no. 2 (2018): 514-515 http://eprints.bournemouth.ac.uk/31055/1/Pull%20and%20Push%27-%20Implementing%20the%20Complementarity%20Principle%20of%20the%20Rome%20Statute%20of%20the%20ICC%20within%20the%20AU_%20Opportunities%20and%20Challenges.pdf

[693] "Rome Statute of the International Criminal Court"

[694] Sassoli et al. "Challenges to International Humanitarian Law." 3

act within the rules of the ICC statute when delivering judgements.[695] As a non-universally recognized treaty body they are also not technically able to declare the existence of custom in a way which is binding upon states, although this point can theoretically be challenged.[696] In instances where the ICC is called upon by the UNSC it technically possesses some form of authority similar to an ad-hoc tribunal when it comes to identifying customs and thresholds in that particular case.[697] This is extremely controversial as even tribunals such as the ICTY which was established by a universal treaty body experienced significant controversy over their interpretations of IHL and how they applied it in the case of Yugoslavia.[698] The ICC as a non-universal entity being given such authority by the UNSC is unprecedented in the history of International Law and deserves serious consideration. A simplified explanation is that a universal treaty body is forcing a non-universal treaty body upon states who have not agreed to ratify said treaty. In this case, not only can the UNSC give the ICC jurisdiction over states not party to the treaty, but this non-universally recognized entity can theoretically interpret customary IHL in a similar manner to the ICTY. However, while this is a theoretical possibility, it remains highly unlikely that the ICC will go as far as the ICTY did in its interpretation of IHL for the sake of not pushing the limits of its authority and risk further alienation by certain state and non-state members of the international community. The existence of such a possibility alone is enough to necessitate future discussion on the subject, especially when interpretation of custom is only going to become increasingly relevant as time goes on. The Rome statute's influence has been felt in other instances of customary law such as when the ICTY referenced it when rejecting the Dusko Tadic's defence argument suggesting discriminatory intent is required for the prosecution of crimes against humanity in customary international law.[699] As of now, it is courts established and/or are part of the United Nations which possess the universal authority necessary to continue developing IHL. This does not necessarily mean that they are the only important actors in contributing to the evolution of customary IHL, as these courts must also

[695] "Rome Statute of the International Criminal Court"
[696] "Prosecutor v. Dusko Tadic (Appeal Judgement)" 100-101
[697] "Rome Statute of the International Criminal Court"
[698] Lombardi "Legitimacy and the Expanding Power of the ICTY" 887-902
[699] ICTY "Prosecutor v. Dusko Tadic (1999)" 130

look upon other actors and their actions in order to justify the identification of custom. National courts and contributions from scholars as well as the conduct of states contribute towards customary IHL so long as legal bodies continue to exist which can formally recognize these contributions. Integration of IHL principles into domestic judicial systems can play a crucial role in encouraging a wider acceptance of non-universally codified practices.[700] State practice allows IHL to develop naturally without a seemingly forced evolution by international organizations which may be met with skepticism or even outright hostility by other states. The other benefit to this is that if IHL principles are already well established within a states own national judicial system then it is generally much more effective for prosecution of violations to be carried out domestically. Colombia is a great example of this, as they have it enshrined in their own constitution that all aspects of International Humanitarian Law must be respected domestically, and violators will be brought to justice in front of a national court.[701] This has been very beneficial to them as they currently have multiple armed conflicts occurring within their territory which has created complex situations of recognition of belligerency and application of IHL.[702] By enshrining IHL in their constitution, this has provided a whole host of protections for all parties involved in the conflicts including both belligerents and civilians alike. Such a hybrid system combining domestic and international law has not only strengthened Colombia's own ability to uphold its commitment to IHL, but also sets an example for other states to follow. The more states that implement similar legal regimes as Colombia, the more domestic interpretations of IHL principles which translates to a greater body of law for future courts to argue for the establishment of existing custom. While identifying custom is essential in determining new contributions to IHL, the positive role of international tribunals is also to build upon previous interpretations of existing treaty law. The ICTY's use of articles 2, 3, 5 and the additional protocols of the 1949 Geneva Conventions in order to build a case in Bosnia is a good example of this.[703] The ICTY established a threshold for what constitutes an armed conflict, the appeals chamber during the decision on the defense motion for

[700] Muñoz and Serralvo "International humanitarian law in Colombia: Going a step beyond." 1118-1121
[701] Muñoz and Serralvo "International humanitarian law in Colombia: Going a step beyond." 1128-1130
[702] Muñoz and Serralvo "International humanitarian law in Colombia: Going a step beyond." 1122
[703] "Prosecutor v. Dusko Tadic (Appeal Judgement)"

interlocutory appeal on jurisdiction interpreted article 3 to mean that an armed conflict exists:

*"Whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".*[704]

The court then proceeded to specify that this threshold for what constitutes an armed conflict is applicable to both International armed conflicts as well as non-international armed conflicts.[705] A seemingly simple statement by the appeals court ended up setting a new precedent that can be applied to a seemingly endless variety of currently ongoing conflicts throughout the world. Thus, opening them up for the potential application of a designation which would require a whole new investigation into statuses of belligerency and the conduct of operations by state and non-state actors.

### 5.5.1 Removing "Custom" From Customary IHL

The ICTY set a number of new precedents throughout its existence, however its most significant legacy may be the way it sought to identify customary law. Its universally accepted authority gave it the ability to determine its own jurisdiction and halted any outside challenges to its own methods of asserting the customary status of suggested norms. This occurred even in situations where there was limited evidence of state practice or *opinio juris*, occasionally requiring the use of the Martens Clause in order to justify the humanitarian necessity of identifying such a norm as customary law.[706] This is exactly what happened in

[704] "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" 93
[705] "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" 112-113
[706] Mero, Theodor. "The Martens Clause, principles of humanity, and dictates of public conscience." *American Journal of International Law* 94, no. 1 (2000): 82-83 https://www.jstor.org/stable/pdf/2555232.pdf?casa_token=fLFMj6IInBEAAAAA:GGIb6EqwETjaaO8zYOE5OtZ5IXnUQ8KoQDRDLN-TN0-YToKHkkN76wpsyqna71yYASShK-CZrMTqYhjVt3kCpDSai3ogfrycwfPf7R0KJDerr-shD-k

the Kupreskić case.[707] Traditionally, establishing the existence of customary law required a combination of extensive evidence surrounding *opinio juris* and state practice.[708] The idea being that something becomes legally binding through general de facto acceptance by way of state practice or even general indifference to its continued use.[709] The Martens Clause has always been somewhat controversial due to its intentional vagueness regarding what exactly it is intended to cover and how.[710] However, the use of the Martens Clause in the Kupreskić case suggests that the ICTY views it as a method to establish the existence of customary law.[711] While this may not appear strange at first, the Martens Clause has historically been interpreted in a way that a lack of evidence does not inherently mean there is a lack of protection.[712] The point being that while there exists no customary or treaty law which could afford protection in this instance, the lack of legal protection does not suggest that the potential victim can be dealt with anyway the perpetrator sees fit.[713] For the ICTY to interpret this as evidence of an existing norm, justifying its elevation to customary law status certainly seems to signal their intent to make customary law conform to their needs as opposed to the ICTY conforming to customary law. This isn't to say that the ICTY is guilty of directly violating or contradicting customary law, rather that they have chosen a progressive approach to achieving the desired results of their mission instead of following an orthodox/conservative route. Aside from the Martens Clause, the ICTY made it clear in the Tadic case that they were going to place a new emphasis on factors aside from state practice which made a lot of international actors uncomfortable.[714] State practice and *opinio juris* traditionally are intertwined with one another and are not distinctly separate concepts.[715] Increasingly, particularly in the case of IHL, it has become common for *opinio juris* to no

[707] Konderla, Joanna. "International Customary Law in the Jurisprudence of the ICTY and the ICTR." *Wroclaw Review of Law, Administration & Economics* 8, no. 2 (2018): 292 https://sciendo.com/pdf/10.1515/wrlae-2018-0048
[708] Sassoli et al. "Challenges to International Humanitarian Law." 4
[709] Sassoli et al. "Challenges to International Humanitarian Law." 4
[710] Mero "The Martens Clause, principles of humanity, and dictates of public conscience." 79
[711] Mero "The Martens Clause, principles of humanity, and dictates of public conscience." 82-83
[712] Mero "The Martens Clause, principles of humanity, and dictates of public conscience." 79
[713] Mero "The Martens Clause, principles of humanity, and dictates of public conscience." 79
[714] Meron "Revival of Customary Humanitarian Law." 827-828
[715] Sassoli et al. "Challenges to International Humanitarian Law." 4

longer be completely inline with actual state practice.[716] While the standard in international law still remains that state practice takes precedence over *opinio juris* when identifying customary law, IHL has been at the forefront of challenging this principle. The lack of examples of state practice regarding the prosecution of individuals for IHL violations accordingly necessitated an emphasis on *opinio juris* which is exactly what the ICTY did.[717] Does this mean that no evidence of a prosecutable crime existed and therefore *nullem crimen sine lege* takes precedence, nullifying the arguments provided by the ICTY? Not necessarily, modern IHL has begun to diverge from other branches of international law in the way it has sought to limit the negative impacts which a reliance on state practice may incur.[718] For instance, if a uniform pattern of brutality by states during armed conflict emerges that doesn't directly violate existing treaty law, should it then be identified as a customary norm? This is one of the justifications for sidestepping the state practice requirement along with the previously mentioned instance where state practice just doesn't exist so the only option left is *opinio juris* or potentially Martens Clause. This interpretation of identifying custom was not limited to the ICTY and has been replicated in both the ICTR as well as the Extraordinary Chambers in the Courts of Cambodia. While states often tend to greet any developments which limit their influence on matters of international importance suspiciously, the decisions by ad-hoc tribunals haven't been met with the same level of hostility as the ICC. This is despite the fact that the historical emphasis on state practice left states as the primary drivers of the development of customary law. What we are left with is a body of international law which is primarily driven by *opinio juris* at the explicit discretion of international tribunals and the identification of an existing custom is no longer a prerequisite to the establishment of customary international humanitarian law.

[716] Sassoli et al. "Challenges to International Humanitarian Law." 48
[717] Sassoli et al. "Challenges to International Humanitarian Law." 48
[718] Sassoli et al. "Challenges to International Humanitarian Law." 4

### 5.5.2 Assessing the Role of States

With state practice becoming less influential in the determination of customary international humanitarian law, it may seem that states themselves are stepping out of the driver's seat and allowing international actors to take charge. The reality is somewhat more complicated than acknowledging the waning influence of one actor in favor of another, as ultimately despite the growing impact of non-state actors on the global order, states are still the primary powerhouses in international relations.[719] First of all, international organizations and legal systems can only exist so far as they retain the support of enough states to justify their authority and jurisdiction. Secondly, even if an international organization possesses universal recognition and authority, if a state chooses to ignore its obligations to said organization, little can be done to punish such behavior unless bolstered by another states own political, economic or military power.[720] This is the wakeup call which the ICC was forced to take when it became evident that not only would Sudan simply choose to ignore its demands, but so would Chad, Kenya, Malawi, South Africa, DRC, Djibouti, Uganda and Nigeria.[721] Aside from telling its member states to comply, there is not much more that the ICC can do on its own which serves as the basis for why critics are calling for a reform of the courts statute in order to enhance enforcement mechanisms. One of the potential enforcement mechanisms being proposed is explicitly requesting the UNSC to issue disciplinary measures such as sanctions in an effort to force states to comply to their obligations to the ICC.[722] If this sort of mechanism did in fact come into fruition, it would

[719] Hobson, John M. "The state and international relations." *Cambridge University Press*, (2000) https://www.academia.edu/download/104970155/43b6942b5af0a374a74d87f0c4e07ffbab99.pdf
[720] Barnett, Michael N., and Martha Finnemore. "The politics, power, and pathologies of international organizations." *International organization* 53, no. 4 (1999): 699-705 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/8D7D4BACDF573D26E3A40682A6195F89/S002081839944086Xa.pdf/div-class-title-the-politics-power-and-pathologies-of-international-organizations-div.pdf?casa_token=ZsmJQD8H6eAAAAAA:rZwnMqr6ZkOfi_U4E5Bb98vquK92wT28nDG5gWSejjLRnIrtvbG5NKCxUPEYH_A2t6bIKOgf
[721] "Van der Vyver "The Al Bashir debacle." 565-569
[722] Ciampi, Annalisa. "Security Council targeted sanctions and human rights." *Securing human rights* (2011): 134-139 https://www.researchgate.net/profile/Annalisa-Ciampi/publication/287345967_Security_Council_Targeted_Sanctions_and_Human_Rights/links/61b6fd96fd2cbd720098774a/Security-Council-Targeted-Sanctions-and-Human-Rights.pdf

raise a number of new questions which would have to be addressed regarding the interplay between both the relationship of non-universal and universal treaty bodies, as well as the role of states in carrying out such a change in enforcement protocol. Could the UNSC then apply sanctions on Sudan for not complying with the demands of the ICC in handing over Omar al-Bashir even against the explicit direction of their obligations to the African Union own directives? In order for this enforcement mechanism to be integrated into the ICC's statute, and then actually triggered by the UNSC, it would require the cooperation of member states from both parties. The resulting decision would potentially impact the future direction regarding the limits of state sovereignty over the judicial process when it comes to prosecuting violations of IHL. Signing a treaty and agreeing to allow an international body to have some degree of influence of your national legal system is one thing, but that same international body being forced upon a state by threat of sanction or other method of compliance signifies a deeper change in the development of international law.[723] While the UNSC can be seen as the driving force behind this change as they ultimately have the authority to refer cases to the ICC regarding states not party to the Rome statute, the UNSC itself is a body of states and its actions are a result of their deliberation.[724] Now the ICC itself does not use customary law as its primary legal foundation unlike the ICTY, they instead use the Rome statute as their charter and main source for interpretation.[725] The ICC is designed to prioritize the use treaty law as opposed to customary law, with its statute being at the forefront in terms of authority, although they do have a provision to allow the consideration of customary law if necessary.[726] As treaties themselves are the products of state collaboration, this signifies that the role of states at least in the field of international criminal law continues to maintain priority when it comes to prosecuting violations of IHL. However, the actual long-term impact of the ICC's actions on the development of customary IHL is not so straightforward, as previously eluded to, the non-universal nature of the ICC

[723] Arbour, Louise. "The Relationship between the ICC and the UN Security Council." *Global Governance* 20, no. 2 (2014): 195 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/glogo20&section=16&casa_token=Tp2CfkBK5dIAAAAA:ZH-aeESHnrkDq8WHyRE9qYvgvT7pcc-dJwiMYHAbOPH2V-SVKNOo92yiKdEWWmYzFqWc6uhDcg
[724] "United Nations Charter" 6-8
[725] "Rome Statute of the International Criminal Court"
[726] "Rome Statute of the International Criminal Court" 18-19

has made their overall contributions inconclusive. The ICC does fulfill the relevant categories to attribute it the status of having international legal personality, but to a much lesser extent than states.[727] States ultimately represent the only entities which can possess a general legal personality in contrast to international organizations which may possess similar characteristic regarding their ability to interact and negotiate with other actors also possessing international personalities.[728] This personality status does help solidify the legitimacy of the ICC in regards to its position in the international system, arguably even more so than the ICTY and ICTR which were simply subsidiary organs of a separate international organization. Yet it still does not position itself above the influence of the state when determining the emergence of new customary law. While state practice is generally considered the foundational role played by states in establishing customary norms, it is clear that the contributions of states in the actual process of creating and assisting international legal bodies is simultaneously playing its own role. Essentially, states are still in charge of influencing every part of the process of creating customary law, whether it be through state practice, creating and/or influencing international courts as well as enforcing their decisions.[729] If strictly talking about the relevance of state practice, it is impossible to judge the long term authority it will continue to have in the traditional sense of the term. Peter Niels describes the divided opinions of the academic community on the future of state practice in relation to *opinio juris*, outlining one argument aptly named the "sliding scale approaches" which highlight the way these standards can positively interact with each other. The idea being that an abundance of state practice lowers the threshold of *opinio juris* required to prove the existence of a custom and vice versa.[730] This approach does have a

[727] "Rome Statute of the International Criminal Court" 2
[728] Brölmann, Catherine M., and Janne Elisabeth Nijman. "Legal Personality as a Fundamental Concept for International Law." *Catherine Brölmann and Janne Nijman in: J d'Aspremont & S Singh (eds), Concepts for International Law-Contributions to Disciplinary Thought (London, E Elgar, 2017), Amsterdam Law School Research Paper* 2016-43 (2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2845222
[729] Danilenko, Gennady M. "The theory of international customary law." *German YB Int'l L.* 31 (1988): 9 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gyil31&section=4&casa_token=QHldpKyJLPoAAAAA:yqcBh1Qv86t4D7SnO1-pldYjCS68sdMxWHiyPu6f9ahjSr6K5my6EglLWvQ5YvseQq-36JOBng
[730] Petersen, Niels. "Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation." *Am. U. Int'l L. Rev.* 23 (2007): 283. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amuilr23&section=15

basis in what has actually been practiced by the ICJ and ad-hoc tribunals, yet it does not answer some of the key questions regarding whether state practice or *opinio juris* have become equal or whether custom is necessary to create customary law at all anymore. A sliding scale does in a sense suggest equality of both standards, but we see cases where state practice is essentially non-existent yet *opinio juris* seems to always have to be established in order to be seen as custom suggesting an inherent inequality.[731] But is it a bad thing that state practice may be considered less relevant than *opinio juris* in the field of IHL? Should the determination of customary international humanitarian law be contingent on the explicit actions of states? These are questions which remain unanswered and will continue to be actively debated as it is only inevitable that these views will eventually be addressed in a legal setting.

# Chapter 6 Conclusion

As we take a look at the past, present and future of International Humanitarian Law, it becomes evident that remaining static in the face of challenges to its own credibility has the potential to end in irreversible repercussions to its effectiveness. In the face of growing politicization and nationalist rhetoric from states, it is clear that the traditional formula for developing IHL is no longer sustainable in the current international environment. Where states historically were willing to cooperate, albeit from a position of cautious skepticism, the probability of significant contributions to universal treaty law now seems increasingly unlikely. However, this is not to say that IHL itself is doomed to becoming increasingly irrelevant in the face of these ongoing developments. The massive initial support for the creation of the ICC by way of treaty can be seen as setting a somewhat optimistic outlook on the existence of a desire for cooperation by the majority of the international community. It is possible to also view the story of the ICC from a pessimistic perspective given its lack of universality and constant challenges presented from both states who have signed the

[731] Sassoli et al. "Challenges to International Humanitarian Law." 4

Rome statute and those who haven't. Despite this, it still exists and continues to function as it always has in pursuit of its original mission. Perhaps the most compelling examples of IHL's ability to evolve in order to adjust to the demands of modern conflicts is the resurgence of the ad-hoc tribunal concept initially in the form of the ICTY and later the ICTR as well as subsequent hybrid courts. The contributions to the interpretation of customary international law by these tribunals are only outshone by their effectiveness at delivering justice. This is not intended to downplay the many challenges and criticisms which ad-hoc tribunals have faced since the establishment of the ICTY, namely those revolving around the controversial approaches developed to interpreting customary law. Rather the aim is to suggest that the results of these tribunals may present a positive basis for which this new direction of customary law interpretation can be judged. On the other hand, an argument could also be made that overreliance on customary law to fill the gaps which remain missing in IHL treaty law can provoke a future hostility of states to institutions which are tasked with customary interpretation. The ICTY certainly continues to elicit criticism regarding its methods of interpretation, particularly in the Tadic case and its distancing from the traditional emphasis on state practice. The ICC also faces issues which are parallel to those faced by the ICTY when it comes to enforcement of its mandate, despite authority being granted by the UNSC. The government of Yugoslavia's response to the initial request by the ICTY to comply with demands for extradition of nationals within its territory was met with rejection on the grounds of sovereignty and obligation to adhere to the national constitution. The refusal of the government of Sudan to extradite nationals from its own territory to the ICC shows that enforcement still remains a major impediment to prosecuting violations of IHL, an issue which has yet to be adequately resolved. However, the ICC and ad-hoc tribunals are not treated equally by states despite their similarities, something that seems potentially impossible to overcome. The ICC still faces an unprecedented level of open hostility by many countries in a manner which the few ad-hoc tribunals which have been established have not elicited. The recent announcement of potential arrest warrants from the ICC in the case of the conflict in Gaza is an accurate example of this, simultaneously also providing another perspective into the modern politicization of international law. While generally the majority of the hostility comes from states who have not ratified the Rome

statute, this has not stopped states who have ratified the statute from vocalizing their own criticisms of decisions taken by the court. There may be several reasons for the intense reactions which the ICC elicits aside from the ones which are expected when dealing with criminal cases of such a high magnitude. The idea of a permanent court which can be granted jurisdictional authority outside of traditional treaty limitations by the UNSC generates a sense of fear in those reliant on judicial sovereignty and immunity to shield themselves from potential accountability. While this may be true, ad-hoc tribunals are also capable of prosecuting those hiding behind the veil of national sovereignty by way of UNSC resolution, so what makes the ICC more susceptible to criticism on this issue? As previously discussed in the case of Sudan, the African Union was able to exploit article 97(a) of the Rome statute by creating a treaty obligation by AU member states to not enforce the arrest warrant against Omar al-Bashir. By creating this treaty obligation, they were able to persuasively argue that the ICC could not punish any AU member for not arresting al-Bashir. In this case it seems that the Rome statute can often be the ICC's worst enemy, and that perhaps in the process of trying to negotiate a treaty that satisfied such a large number of parties, its actual effectiveness was watered down in favor of wider recognition. This at least appears to be a possible reality in cases where the ICC is carrying out investigations into events which occurred within a state without gaining the explicit consent of the state to cooperate.

When it comes down to designating the fundamental purpose of IHL, the obvious answer would be to reduce the unnecessary violence, suffering and destruction which is often a byproduct of armed conflict. But once you address the question from a purely legal point of view, the utilitarian purpose of IHL must be evaluated in regards to its effectiveness as an actual body of law. Has the current system of laws and enforcement mechanisms been a successful deterrent to would-be IHL violators? While achieving justice after a violation has occurred is important, deterring them from happening in the first place is a much more crucial aspect of IHL. Thus, when the universality of IHL is challenged, the whole premise of effective deterrence comes under threat. When leaders such as Omar al-Bashir remain above even international law, protected by other states who openly act in defiance of their treaty obligations with no repercussions from the UNSC, it becomes difficult to argue for

the effectiveness of deterrence. Where the ICTY and ICTR facilitated an optimistic outlook on the enforcement of IHL, the ICC has delivered more questions than answers and has yet to achieve the same level of respect as an ad-hoc tribunal. Whether this is the fault of the ICC or the UNSC for not actively providing support for the organization it passed the responsibility onto in the first place is a debate of its own. What is evident is that the ICC will continue to face challenges presented by states to its authority, and that either it needs to implement a reformation of the Rome statute to bolster its effectiveness, or the UNSC needs to provide a serious guarantee of support to the court when it comes to enforcement. However, as the Rome statute is a treaty ratified by 124 countries, it is doubtful that there will be a popular enough consensus to voluntarily expand the powers of the ICC. Considering that the Rome statute in its current form was not able to attain universal recognition, any meaningful expansion of its powers could trigger a self-inflicted exodus of state parties from its ranks.

When taking into consideration all of the factors contributing to modern challenges to IHL, it is difficult to ascertain exactly what its future will look like. As we have seen, cooperation between states remains limited albeit still occurring to some extent and customary law has proven itself to be quite important in filling in where universal treaty law has left off. Whether this strategy will be viable in the long term is still yet to be determined, attempts to regulate the actions of states will always be met with some form of hesitation. The behavior of non-state actors involved in armed conflict can only be regulated to such an extent that they see a benefit to following the LOAC, while they do face a legal responsibility, enforcing compliance is often not as easy as it is with states. What all of this amounts to is that IHL does not exist in a black and white world, therefore it cannot rely on a black and white strategy for future development and enforcement. Placing all of the blame for challenges to universality on one factor or another do nothing to further the original mission of IHL, states may oppose new treaties out of self-interest, they always have to some extent. Non-state actors may continue to often fall out of reach of their obligations under IHL, and international organizations won't ever be able to perfectly carry out their mandates. The important thing is that is applied as effectively as possible, regardless of the circumstances.

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