



# INTERNATIONAL COURTS TO KNOW

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BY R. L. GOTTSFIELD

We read and hear about international courts all the time, but most of us do not know what they are and what they do.<sup>1</sup> But there is a sign of growing willingness of American courts to at least consider rulings from overseas. Therefore, it may be helpful to learn a little about courts beyond our shores.

This article describes the workings of four high-profile international courts, as well as that of a newer regional court. It also explains how such courts are classified (see sidebar on p. 26), who is bound by their rulings (p. 20), and who sits on the bench and what law is used (p. 22).

Before we begin, let's examine the trends that suggest a better understanding of those courts is necessary.

International Court of Justice, The Hague, The Netherlands

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## Citation to International Law

There may be a trend in the United States Supreme Court toward acceptance of international law and norms.<sup>2</sup> Recent decisions indicate that the Court is willing to incorporate international standards into domestic jurisprudence.<sup>3</sup> Thus in 2003, in *Lawrence v. Texas* (539 U.S. 558), the Court referred to the decision of the European Court of Human Rights in *Dudgeon*<sup>4</sup> for its ruling that an anti-sodomy law is unconstitutional as contrary to the right to develop a relationship in the privacy of one's home.

At a symposium at the Moritz College of Law at Ohio State University on April 12, 2009,<sup>5</sup> honoring her 15 years on the Court, Justice Ruth Bader Ginsburg acknowledged that the more conservative members (Chief Justice Roberts and Justices Alito, Scalia and Thomas) oppose the citation of foreign law in constitutional cases. However, she saw nothing wrong with it as long as it is clear the Court is not saying it is bound by foreign law as opposed to merely being influenced by such power as its reasoning holds.

She also stated that the failure to engage foreign decisions has resulted in diminished influence for the Court. The Canadian Supreme Court, she said, is "probably cited more widely abroad than the United States Supreme Court," and there is a reason for that: "You will not be listened to if you don't listen to others." Justice Sonia Sotomayor, given her statements in the preface to *The International Judge* (see note 2), likely feels the same.

Secretary of State Hillary Rodham Clinton has stated that she regretted the United States was not a party to the International Criminal Court.<sup>6</sup>

Moreover, there are signs that the present administration is more amenable to entering into human rights agreements, a foundational international law. For example, the first treaty signed by the Obama administration was the International Convention on the Rights of Persons with Disabilities, for which it has created a State Department post to oversee its implementation.<sup>7</sup> The administration also has supported a U.N. doctrine calling for collective military action to halt genocide.<sup>8</sup>

Admittedly, there was a setback to the trend with the 2008 decision in *Medellin v. Texas* (128 S. Ct. 1346), holding that the decision of the International Court of Justice that foreign nationals must be advised of their right to consult with officials of their home countries was not binding on U.S. courts.<sup>9</sup> That ruling was contrary to a decision of the ICJ.

Suffice it to say there is no reason why judges should not look to all authorities grappling with the same problems. We need all the help we can get.

## The Courts

The International Court of Justice (ICJ), also known as the World Court, is the oldest, established in 1946 and situated in The Hague, Netherlands, in a building aptly called The Peace Palace.<sup>10</sup> The newest is the International Criminal Court (ICC),



## INTERNATIONAL COURTS TO KNOW

which became effective in 2002. It also is headquartered in The Hague in a separate building.

In terms of compliance with its judgments, the most successful court is the European Court of Human Rights (ECtHR), located in Strasbourg, France. It became a full-time court in 1998. The Inter-American Court of Human Rights (IACtHR) became effective in 1979 and is one of the three regional human rights courts.

Finally, the African Court on Human and Peoples' Rights (ACtHPR), the newest regional human rights court, has unique features that are important to understand.

### The ICJ

The International Court of Justice, the principal judicial organ of the United Nations, was established the same day, April 18, 1946, that the League of Nations voted itself and the Permanent Court of International Justice (the predecessor to the World Court) out of existence.<sup>11</sup> All mem-

bers of the United Nations are automatically parties to it (191 nations), but non-member nations also may bring cases to the court. A State may refuse to take part in



Public hearing at the International Court of Justice (ICJ).

World Court proceedings or can withdraw from a case before final decision, as the United States did in the Nicaragua case (an unfortunate event discussed in the sidebar on p. 24). The United States has not been

bound by World Court judgments since 1985.

Fifteen judges from various countries try each case. There are also ad hoc judges specifically assigned to certain cases. Various phases of a case (jurisdiction, admissibility of evidence, merits and sanctions phases) may be tried by a different panel because of the length of time required of most cases concerning international disputes.

The Agent is entrusted with the formal representation of a party, who is assisted by counsel and other experts as needed. The Agent is usually a country's ambassador to The Hague or other high-ranking member of the diplomatic service, but can be an attorney or a professor. The Agent binds the country represented throughout the proceedings before the court.

The international law applied by the court consists of:

- (a) international conventions, whether general or particular, expressly recognized by the contesting States; (b) international custom, as evidence of a



European Court of Human Rights Building in Strasbourg, France.



European Court of Human Rights.



Modern office building of the International Criminal Court; The Hague, Netherlands.

general practice recognized as law; (c) the general principles of law recognized by civilized nations; and (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of the rules of law.<sup>12</sup>

For an international law tidbit, the technical name of (c) above is *non liquet* (literally “it is not clear,” a Roman Law term) and permits the court “to deal with entirely unprecedented situations and through its pronouncements to keep the law abreast of the constantly changing developments.”<sup>13</sup>

From the court’s inception through June 2009, 144 cases have been considered by the ICJ.<sup>14</sup>

Cases brought before the court range from routine disputes between states, such as the interpretation or application of central legal issues, to major international disputes that constitute threats to international peace, such as the right of parties to fisheries, the law of the sea, territorial (called delimitation) cases, and disputes concerning continuing armed conflicts such as the dispute between Yugoslavia and the member states of the NATO alliance in relation to Kosovo. Participants in ICJ proceedings are nations rather than individuals.

The court may proceed to judgment in a case, or determine there is no jurisdiction to proceed, or settle or drop the case without a decision. According to the foremost treatise on the World Court, in a majority of cases the work of the court had a beneficial diplomatic effect.<sup>15</sup>

The World Court has no criminal jurisdiction, although cases often do involve allegations of wrongful behavior that will be judged by the court under international laws governing the behavior of states. The general rule is that each party bears its own costs.

## The ICC

The International Criminal Court, although mandated by the United Nations, is not a United Nations body but an independent permanent court established by the Rome Statute, an international multilateral treaty, which came into existence on July 1, 2002.<sup>16</sup> Three “states parties” to the Rome Statute—Uganda, the Democratic Republic

of the Congo (three separate cases) and the Central African Republic—have referred situations occurring in their territories to the ICC. Those involved allegations against individuals of crimes against humanity and war crimes, including mass murder, summary execution, forced conscription (including of children), mass rape, and forced displacement of civilians known not to be participants in each armed conflict. In addition, the Security Council has referred the situation in Darfur, Sudan, a non-state party, to the Court.

There are 105 states parties to the Rome Statute as of October 2007. The court is situated in The Hague.

The court is limited to prosecuting people for war crimes, crimes against humanity and genocide committed only on and after its effective date, July 1, 2002, and only when national judicial systems around the world are unwilling or unable to do so.<sup>17</sup>

It is not dependent on the Security Council’s approval for investigations or prosecutions. Only those states ratifying the Rome Statute must abide by its terms (the United States has not accepted jurisdiction of the ICC and is not bound by its judgments). The court typically has jurisdiction only over crimes committed by people from states that are party to it and also over crimes committed on the territory of a state party. Thus, crimes committed within countries that do not ratify the Rome Statute are exempt from prosecution. The exception is that the Security Council may vote to refer a situation to the ICC, such as it did with Darfur, for crimes committed by individuals from non-party states in a non-party state territory.

With respect to U.S. citizens, even though the United States is a non-ratifying country, an American can be indicted for crimes committed in a country, such as Afghanistan, that ratified the treaty. In that situation, the United States would not have to produce the individual to the court, as a member state is obliged to do.

States ratifying or acceding to the Rome Statute agree to cooperate with the court with respect to the investigation, arrest and transfer of suspects. States had to amend their rules prohibiting the extradition of their own nationals and assume responsibility for prosecuting subjects found in their territory. States also amended their criminal



U.S. Supreme Court Justice Sotomayor authored the preface to the book *The International Judge*.

codes to enact offenses of genocide, crimes against humanity and war crimes.

The bottom line, however, is that the court is powerless to apprehend a suspect, depending instead on national governments to hand over suspects found in their own territory (witness the problems caused to the Tribunal for the Former Yugoslavia in this respect, where suspects were not handed over for years).

There are 18 judges elected by the Assembly of States Parties, of whom three (a President and two Vice-Presidents) make up the Presidency of the Court.

Benches of three judges conduct trials. Decisions are by majority rule pursuant to Article 74 of the Rome Statute.

The accused is entitled to an interpreter, defense counsel or advisory counsel, and to defend himself or herself in person.<sup>18</sup> The International Criminal Bar was established in 2002 and is an independent representative body of counsel and legal associations from which some defense counsel may be chosen. Expertise and experience in criminal prosecutions, defense or international law are priorities. The Rome Statute and Rules of Procedure and Evidence establish the required norms for defense counsel.<sup>19</sup>

Article 67 of the Rome Statute provides for: prompt and detailed charges, adequate time and facilities to prepare a defense with counsel of choice, a fair public trial in person without undue delay, cross examination of witnesses brought against the accused, interpreters and translations in the accused’s language without charge, a right to remain silent without prejudice, to make an unsworn and/or written statement, and for the burden of proof to be on the prosecutor.



## INTERNATIONAL COURTS TO KNOW

The prosecutorial arm of the court is a separate and independent office, headed by the Prosecutor, who is assisted by Deputy Prosecutors, all of whom must be of different nationalities. They must have extensive practical experience in criminal trials and be fluent in either English or French.

Trials *in absentia* are not provided for under any circumstances in the Rome Statute, unlike at Nuremberg after World War II where Martin Bormann, a major war criminal, was tried in his absence (although it was later determined that he was already dead when the trial took place).

The court cannot impose the death

penalty (unlike 35 states in the United States that can and do<sup>20</sup>). The court also may order reparations to victims, including restitution, compensation and rehabilitation, and may make an order directly against a convicted person. A person who has been unlawfully arrested or detained is entitled to compensation.

The ICC is a court of last resort, trying only those accused of the gravest crimes. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are a sham, such as formal proceedings undertaken solely to shield a person from criminal responsibility.

### The ECtHR

The European Court of Human Rights, a civil court, interprets and enforces the European Convention on Human Rights (ECHR, or the Convention).<sup>21</sup> The Convention is a 1950 product of the Council of Europe<sup>22</sup> (not to be confused with the European Union<sup>23</sup>). The Convention in turn is based on the United Nations' Universal Declaration of Human Rights of 1948.<sup>24</sup> While initially a part-time court commencing in 1953, the ECtHR became a full-time court in 1998.

The European Convention on Human Rights, consisting of 59 articles and 13 Protocols, sets forth human rights guaran-

Bronze carving of 'Pax' and goddess on the gate of the Peace Palace in The Hague.



## WHO IS BOUND?

The United States is not a member of any of the international courts discussed in this article, and thus is not bound by their judgments. None of the courts has a specific mechanism to force a state to comply with a judgment; all have to rely on the good will of a violating state, voluntary acceptance, and diplomatic, political and "peer pressure." In the past, this has been sufficient to enforce the judgments of the European Court of Human Rights to a remarkable degree.

Judgments of the courts only bind participating parties, but there are procedures that permit members affected by a decision to enter a case, and *amicus* briefs and participation are entertained. There is a procedure for advisory opinions. Each court attempts to have the parties settle disputes amicably before a decision is rendered.

The official languages are English and French, although decisions are also published in other languages. Spanish, French, English and Portuguese are the official languages of the Inter-American Court of Human Rights. Participants at each court are supplied interpreters in their own language, and there is a system of legal aid for those who cannot afford such services in the International Criminal Court, ECtHR, and IACtHR, the only courts where individuals are parties. There is a registry or administrative arm of each court headed by an administrative officer handling all non-judicial functions.



## INTERNATIONAL COURTS TO KNOW

tees and prohibitions.

The guarantees are:

- the right to life
- the right to a fair hearing in civil and criminal cases
- the right to respect for private and family life
- freedom of expression
- freedom of thought, conscience and religion
- the right to an effective remedy
- the right to peaceful enjoyment of one's possessions
- the right to vote and to stand for election

Certain Protocols have made these guarantees more specific, such as the right to education (Protocol No. 1), freedom of movement (No. 4), equality between spouses (No. 7), not to be tried twice and the right to appeal in criminal matters (also No. 7).

The prohibitions are:

- torture and inhuman or degrading treatment or punishment
- slavery and forced labor
- arbitrary and unlawful detention
- discrimination in the enjoyment of the rights and freedoms set out in the Convention
- the expulsion or removal by a state of its own nationals
- the death penalty
- the collective expulsion of foreign nationals

Additional more specific prohibitions are the prohibitions of imprisonment for debt (Protocol No. 4), and the prohibition against discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (No. 12).

The ECtHR is regarded as

“the world’s most effective international human rights tribunal.”<sup>25</sup> It has developed an American-style body of constitutional law so that it is called “the Supreme Court of Europe.”<sup>26</sup> While each of the 47 member States of the Council of Europe are bound to carry out any final judgment against it, enforcement is really by “political peer pressure” and “by shaming European nations.” The Parliamentary Assembly in particular, which includes delegates from each state’s legislature, prods member states to bring their laws into conformity. Close observers of the court speak of its unique ability to

“command[] near-total compliance by nation states.”<sup>27</sup>

Compliance means state amendments to legislation, rewriting legal doctrine, issuing regulations or changing a form of practice to make certain the violation is not repeated. The Convention also provides for awards of compensation that must be paid. Compliance also may mean reopening a trial, rescinding a prohibition or confiscation order, correcting a criminal record, and the like.

Any individual, group of individuals or nongovernmental organization (NGO) may prepare an application for relief to the court. Complaints by one state against another also may be lodged. Jurisdiction of the court is limited to applications against member states of the Council of Europe. Because the United States is not a member of the Council or of the Convention, it cannot have complaints lodged against it.

The workload is staggering, a product, in part, of its success as a court. There has been exponential growth of its caseload—from 404 pending applications in 1981 to approximately 97,000 today.<sup>28</sup> In 2008 alone, there were 42,376 applications processed for determination of admissibility.<sup>29</sup>

The court consists of 47 judges, one from each member country. Unlike the World Court, none of the judges on the ECtHR is from the United States,<sup>30</sup> which is not a member of the Convention. There is a President of the Court, two Vice-Presidents and three Section Presidents.

While proceedings before the court are adversarial, public hearings are held in only a small minority of cases. The following gives a sense of the wide range of issues it considers:

- That English law accorded conclusive effect to a refusal

## INTERNATIONAL JUDGES

International law can mean public international law (the law governing the relations between states) or private international law (treaties governing relations between persons in international states, such as taking foreign depositions, child abduction and divorce).<sup>1</sup>

There are 215 “international judges” serving as permanent members of the bench.<sup>2</sup> They are on 13 major international courts and tribunals, with 86 countries represented. Europeans dominate (137), with the United Kingdom having the most (9), followed by France, Italy and Germany (7 each). There are 37 citizens of the Americas, with the United States presently having 4 citizens. There are 20 Africans. Asians are underrepresented, with 6 judges, although having more than half of the world’s total population.<sup>3</sup> Men still predominate, with only 45 of the judges on the 13 courts being women.<sup>4</sup>

Typically, international judges have studied law in leading universities of their countries. The majority also have graduate or doctoral degrees, usually in international relations and/or international economics.<sup>5</sup>

1. There are myriad international laws today, such as humanitarian law, criminal law, human rights laws, trade law, financial law, environmental law, intellectual property law, law of the sea, space law and health law. According to the U.S. State Department, the United States is a signatory to more than 10,000 treaties.
2. DANIEL TERRIS, CESARE P.R. ROMANO, & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES* (2007), at 17 *et seq.* as of January 2006.
3. *Id.* at 17.
4. *Id.* at 18.
5. Many factors limit the pool of international judges besides limited job availability. In addition to high moral character and integrity, the judge needs to have “the right” nationality, extensive professional experience in specific fields, and command of one or more languages beyond his or her native tongue. Those fields include criminal law, human rights law and international law. It also usually means leaving a high-profile or highly paid job and relocation abroad. It also means you must be well known in your field of endeavor in your native country. *Id.* at 22.



# THE NICARAGUA CASE AT THE WORLD COURT

One of the most significant cases to come before the court (lasting seven years, from 1984 until 1991) concerned prohibitions on the use of force (as found in the United Nations Charter and international law in general) and the rule of law where force is used. Nicaragua, then governed by the Sandinista National Liberation Front, claimed that the United States was using military force against and intervening in Nicaragua's internal affairs.

The United States, which initially supported the Sandinistas, believed they were fomenting insurgent movements in neighboring Central American States, especially El Salvador, and in 1981 cancelled its aid and began covertly supporting the Contras (for counter-revolutionary). What began as an attempt to stop the flow of material from Nicaragua to El Salvador eventually turned into an attempt to overthrow the Sandinistas.

Nicaragua, by filing in the World Court, sought a cease-and-desist order against the United States to stop its aid to the Contras as well as alleged military and paramilitary activity by the CIA.

In 1986 the World Court ruled in favor of Nicaragua and ordered payment of restitution in the future, which the United States refused to accede to on the basis it had previously withdrawn from court jurisdiction.<sup>1</sup> Eventually the Sandinistas lost power in February 1990, and the World Court case terminated without a decision in the compensation phase.

It is significant that revelations discovered after the case was discontinued in 1991 "indicate that Nicaragua was misleading in its presentation of evidence and sworn statements relating to certain key factual aspects of the case." The U.S. "position on the facts regarding Nicaraguan involvement in El Salvador has since been vindicated," so that even the Contras apologized to the Secretary-General.<sup>2</sup>

1. TERRY D. GILL, ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS (6th ed. 2003) at 78. For a complete discussion of this case, see chapter 5, at 92-125.

2. *Id.* at 93 and 125. For a different view of the Nicaragua case, see Paul S. Reichler, *Holding America To Its Own Best Standards: Abe Chayes and Nicaragua in the World Court*, 42 HARV. INT'L. L.J. 15 (Winter 2001).

in the United Kingdom abandoning its policy on gays in the military in 2000.

- Extreme air pollution in a Russian steel mill town violated family rights.

On Jan. 30, 2009, it was announced that the ECtHR had agreed to hear a massive claim against the Russian government brought by bankrupt oil giant OAO Yukos, which brought worldwide condemnation of the Kremlin.<sup>31</sup> Yukos is represented by two American former executives who are seeking \$42 billion for the company, making it reportedly the largest claim ever heard by the court.

On June 9, 2009, the court ruled against Turkey in a gender discrimination case, finding that it failed to adequately prosecute a man who repeatedly attacked his wife and eventually shot and killed his mother-in-law. The husband was freed from jail after having served several years. The court awarded \$41,700 in damages and severely criticized the Turkish judicial system.

## The IACtHR

The Inter-American system for the protection of human rights is found

in the American Declaration of the Rights and Duties of Man (Bogotá, Columbia, 1948)<sup>32</sup> and the American Convention on Human Rights (San Jose, Costa Rica, 1969),<sup>33</sup> which Convention entered into force in 1978. Both are products of the Organization of American States (OAS) and its Charter<sup>34</sup> signed in Bogotá, in 1948. Under the OAS Charter, all member states are bound by the provisions of the American Declaration.

The pillars of the OAS human rights system, providing recourse for people in the Americas who have suffered violations of their rights by the state, are the Inter-American Commission on Human Rights (IACHR),<sup>35</sup> found in Chapter VII of the Convention, and the Inter-American Court of Human Rights (IACtHR),<sup>36</sup> Chapter VIII of the Convention. Both were formal-

of a woman's estranged partner to consent to the implantation of an embryo produced using his sperm during *in vitro* fertilization, does not violate the Convention under Articles 2 (sanctity of human life, 8 (right to respect for private and family life), or 14 (prohibiting discrimination).

- The search of a lawyer's office in support of a criminal investigation violated the lawyer's Article 8 privacy rights.
- Rebuked France for police torture, as violations of Article 3 (prohibition of torture) and Article 6 (right to hearing within a reasonable time). Under Article 41 (just compensation) the court awarded the applicant 500,000 francs for pecuniary and non-pecuniary damage, and 113,364 francs for legal costs and expenses.

- Held Britain liable for shooting IRA operatives during a terrorist attack in Gibraltar.
- The right of self-incrimination may be used by corporations to protect against civil discovery demands and not merely to bar the use of a defendant's confession.
- The fining of a journalist for publishing in a Vienna magazine comments about the behavior of the Austrian Chancellor, such as "basest opportunism," "immoral" and "undignified," violated Article 10 (freedom of the press).
- An 1861 anti-sodomy law violated a gay man's right to family and personal life under Article 8.
- Soldiers cannot be fired for being gay, as it is a violation of the Convention's right to privacy. The decision resulted



ly established in the 1969 Convention, becoming effective in 1979 under their respective Statutes.

The American Declaration of the Rights and Duties of Man shares a common background with the United Nations' Universal Declaration of Human Rights (1948), which it predates by some three months. Both are responses to the events of the Second World War and give meaning to the references to human rights in the OAS and UN Charters.<sup>37</sup>

Unlike the 47 members of the Council of Europe where there is an obligation to ratify the European Convention on Human Rights (1950) upon becoming a Council member, there is no such obligation within the OAS.<sup>38</sup> Thus 10 of the 35 member states of the OAS, including the United States, Canada and Cuba, are not American Convention parties.<sup>39</sup> Those not parties to the Convention are not bound by edicts and regulations of the IACHR or the jurisdiction of the IACtHR.<sup>40</sup> Pursuant to the Statute of the commission, the commission shall nevertheless receive and act on peti-

tions concerning human rights violations committed by member states of the OAS that are not parties to the Convention.<sup>41</sup>

The United States, while a signatory to the Convention, has not ratified or acceded to it and has not recognized the jurisdiction of the IACtHR.

The IACHR, as a principal organ of the OAS, promotes the observance and protection of human rights<sup>42</sup> and has jurisdiction over petitions from individuals, which includes NGOs, alleging violations by their governments of rights enumerated in the American Declaration. The Statute of the IACHR was formally approved by the General Assembly of the OAS in October 1979.

The commission, headed by a Chairman, convenes several times a year and is headquartered in Washington, D.C.

The commission is very busy, having conducted 93 hearings and processed 1,376 cases in 2008. The IACHR is presently processing more than 800 individual cases, meaning the submission of briefs and the holding of hearings where required. As

noted, any person, group of persons, or NGO may present a petition to the commission alleging violations of rights protected by the American Convention on Human Rights and/or the American Declaration of the Rights and Duties of Man.

The petition may be presented in any of the four official languages of the OAS: Spanish, French, English and Portuguese.

After a petition is filed alleging a human rights violation, the commission attempts to settle the dispute, failing which it may recommend specific measures to be taken by the member state. If a state does not follow the recommendation the commission may publish one or more reports or take the case to the Inter-American Court of Human Rights, assuming the state involved has accepted the court's jurisdiction.<sup>43</sup> Pursuant to Article 19 of the Commission Statute, the commission is given the authority to request the court to take such provisional measures as it considers appropriate in serious and urgent cases, but it also may make such requests of a member state in its own right.



The International UN tribunal in The Hague for war crimes in the former Yugoslavia.



# CLASSIFYING INTERNATIONAL COURTS

This is taken from the book *THE INTERNATIONAL JUDGE*,<sup>1</sup> which has an introduction by our newest Supreme Court Justice, Sonia Sotomayor, then a Judge on the Second Circuit Court of Appeals. It will be interesting to see if her interest in international courts will find its way into her opinions.

International courts can be classified in four ways:

1. *The classical state-only court*, such as the International Court of Justice (ICJ) (World Court), a civil court and an organ of the United Nations, situated in The Hague, in which only states may appear; the International Tribunal for the Law of the Sea (ITLOS); and the World Trade Organization Appellate Body (WTOAB);
2. *The human rights courts*, such as the three regionals: the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), and the African Court of Human and Peoples’ Rights (ACtHPR);
3. *The courts of regional economic and/or integration agreements*, such as the European Court of Justice (ECJ), which is situated in Luxembourg, and resolves mainly economic disputes among the 27 member states of the European Union (EU); European Free Trade Area Court of Justice (EFTA); and the Caribbean Court of Justice (CCJ); and
4. *The international criminal courts* such as the International Criminal Court (ICC), a product but independent of the United Nations, situated in The Hague, which is presently trying Thomas Lubanga Dyilo, a former rebel leader from the Democratic Republic of the Congo, whose forces are accused of ethnic massacres, murder, torture, rape and forcibly conscripting child soldiers; the International Criminal Tribunal for the Former Yugoslavia (ICTY), whose trial of Slobodan Milosevic, the former Yugoslav present, ended prematurely because of his death; the International Criminal Tribunal for Rwanda (ICTR); the Special Court for Sierra Leone (SCSL), which has been trying Charles Taylor,<sup>2</sup> former president of Liberia, for the past three years for war crimes and crimes against humanity; Extraordinary Chambers in the Courts of Cambodia; and the Special Panels for Serious Crimes in East Timor.

Except for the ICC, which is a permanent court, most of the criminal courts are “ad hoc”— they have a limited lifespan—and have jurisdictions limited to a specific period and region. Another term that is used is the “hybrid” international court, consisting of local and international judges and uses international and local law in its rulings. An example is the Special Court for Sierra Leone (2003), which is seated where the alleged crimes occurred (though the Charles Taylor trial is being tried in The Hague for security concerns, pursuant to a treaty between Sierra Leone and the U.N.).

## ACCUSED OF WAR CRIMES

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Charles Taylor  
Liberia

Thomas Lubanga Dyilo  
Democratic Republic of Congo

Slobodan Milosevic  
Bosnia

1. DANIEL TERRIS, CESARE P.R. ROMANO, & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES* (2007), at 6-7.
2. Judge Gottsfeld, as a participant in the Fifth Sir Richard May Seminar on International Law and International Courts held in The Hague, Netherlands, Sept. 20-25, 2009, attended the war crimes and crimes against humanity trials of Thomas Lubanga Dyilo, held at the International Criminal Court and Charles Taylor (who was testifying), former President of Liberia, who went to college in the United States, held at the Special Court for Sierra Leone. Participants also observed the case of Pulp Mills on the River Uruguay (*Argentina v. Uruguay*) at the International Court of Justice.



Unlike other international courts where petitions are presented to the court in the first instance, only petitions presented by the commission or a state party are considered by the IACtHR.<sup>44</sup> Pursuant to Articles 48-51 and 61 of the Convention, individual citizens of an OAS member state who believe their rights have been violated must first lodge a complaint with the commission and have that body rule on the admissibility of the claim.

The court is based in the City of San José, Costa Rica, with its main purpose to enforce and interpret the provisions of the American Convention on Human Rights. It has an adjudicatory function, hearing and ruling on the specific cases of human rights violations referred to it by the commission. Pursuant to Article 67 of the Convention, its decisions are final. The court consists of seven judges from member states of the OAS elected to six-year terms by the OAS General Assembly.<sup>45</sup> Five judges constitute a quorum for purposes of deliberation, and decisions of the court are made by a majority vote of the judges present.<sup>46</sup> Hearings are public except in extraordinary circumstances.<sup>47</sup>


Through June 17, 2008, there have been 147 decisions of the court.<sup>48</sup> Nine new cases were presented since that date. There were 17 cases in process as of the end of 2008.<sup>49</sup> There were also 40 provisional measures in force.<sup>50</sup>

### The ACtHPR

The African Court on Human and Peoples' Rights is another court worth noting. It is the newest of the three regional human rights judicial bodies (the others being the ECtHR and the IACtHR), established Jan. 1, 2004, and a product of the Organization of African Unity (OAU), now known as the African Union (AU). Neither the Statute nor the Rules of Procedure of the ACtHPR have been promulgated and ratified, so the court is non-functioning at this time, even though 11 judges have been elected. The present seat of the court is Arusha, Tanzania.

There are three proposed features of this court that differ significantly from the other two regional human rights courts, and indeed from any other international judicial body.

The 1998 Protocol to the 1981 African Charter on Human and People's Rights provides that actions may be brought before the court on the basis of a violation of any instrument, including international human rights treaties. The only condition is that the state party to be charged must have ratified the instrument in question. In addition, the court may rely for its decision on any law relevant to human rights in addition to the African Charter, again with the proviso that the instrument relied on has been ratified by the state party in question. Finally, unlike any other international judicial body, advisory opinions may be sought not only by member states and OAU/AU organs, but by any individual or African NGO recognized by the OAU/AU (if the member state involved has declared acceptance of this type of court jurisdiction).

It will be interesting to see if the yet-to-be-promulgated Statute of the Court provides for a comprehensive enforcement mechanism to ensure compliance with the foregoing unique features and, more important, whether any African state will declare acceptance of such far-reaching provisions. 

### endnotes

1. The author has published separate articles on the four featured courts, as well as the African Court of Human and People's Rights, in the N.Y. International Chapter News, NYSBA, of the International Law and Practice Section. Unfortunately the Web site is open solely to members, so the articles cannot be cited.
2. The divide at present seems to be 5-4 in favor of such a trend, with Justice Kennedy the swing vote, and he presently appears sympathetic to the trend. See his opinion in *Lawrence v. Texas*, 539 U.S. 558. Justice Sotomayor, given her preface to THE INTERNATIONAL JUDGE, may well be in the majority of five justices. Daniel Terris, Cesare P. R. Romano, & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES 6-7 (2007).
3. Aya Gruber, *Who's Afraid of Geneva Law*, 39 ARIZ. ST. L.J.

1017 (Winter 2007); Steven Arrigg Koh, Note, *Respectful Consideration After Sanchez-Llamas v. Oregon: Why the Supreme Court Owes More to the International Court of Justice*, 93 CORNELL L. REV. 243 (Nov. 2007).

4. (Jeffrey) *Dudgeon v. United Kingdom* (1981).
5. Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law*, N.Y. TIMES, April 12, 2009, at 14.
6. *International Justice in the News*, International Center for Ethics, Justice and Public Life, Sept. 2009, at 3. See also Russell G. Murphy, *Executing The Death Penalty: International Law Influences on United States Supreme Court Decision-Making in Capital Punishment Cases*, 32 SUFFOLK TRANSNAT'L L. REV. 599 (Summer 2009). The White House also nominated Stephen Rapp, well known in the international criminal law area, to be ambassador at large for war

crimes issues. He will coordinate responses to international courts and tribunals and to violations anywhere in the world of human rights law. Marlise Simons, *Lawyer Picked For U.S. War Crimes Post*, N.Y. TIMES INT'L, July 9, 2009, at A6.

7. Joe Lauria, *United Nations: U.S. Signs Disability Treaty*, WALL ST. J., July 30, 2009, at A13.
8. Joe Lauria, *U.S. Backs Implementing U.N. Doctrine Against Genocide*, WALL ST. J., July 30, 2009, at A11.
9. The Vienna Convention requires that upon arrest, foreign nationals must be advised of their right to consult with officials of their home countries. When Texas arrested Medellin, a Mexican national, in a capital case, it failed to honor the Convention. Medellin was convicted and Mexico initiated proceedings in the International Court of Justice (World Court) on behalf of 51 Mexican nationals,

including Medellin, based on violations of the Convention. In 2005 the ICJ ruled that the United States, who had previously opted out of ICJ jurisdiction in 1985, should re-examine Medellin's conviction for failing to observe its treaty obligation to provide foreign nations with consular notification. The Supreme Court ruled the ICJ decision was not binding on Texas or the United States. The Court further held that the president has no independent authority to transform the ICJ decision into binding domestic law. Medellin was thereafter executed. See also *Sobitan v. Glud*, 589 F.3d 379 (7th Cir. 2009) (failure to inform of consular rights under Vienna Convention does not set forth a claim under Federal Tort Claims Act, the exclusive remedy for alleged torts of federal employees). And see Anne E. Nelson, *From Muddled to Medellin: A Legal History of*



## INTERNATIONAL COURTS TO KNOW

*Sole Executive Agreements*, 51

ARIZ. L. REV. 1035 (2009).

10. This was built by Andrew Carnegie for the first international legal tribunal, the Permanent Court of Arbitration (PCA), which began work in 1902 and is still a very active functioning court. The Peace Palace today houses the PCA on one side of the building and the ICJ on the other.
11. Professor and diplomat Shabtai Rosenne is the acknowledged foremost scholar of the World Court. *See* the latest edition of his work, revised and updated by Professor Terry D. Gill, known as ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS (6th ed. 2003). The brief examination of the ICJ is taken from this work and specifically at 18 for this endnote.
12. *Id.* at 120.
13. *Id.*
14. *See* [www.icj-cij.org](http://www.icj-cij.org).
15. Rosenne, *supra* note 11, at 235-241.
16. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2d ed. 2004) is considered the authoritative source for the ICC. *See also* the Court's Web site [www.icc-cpi.int/home.html](http://www.icc-cpi.int/home.html) and JASON RALPH, DEFENDING THE SOCIETY OF STATES: WHY AMERICA OPPOSES THE INTERNATIONAL CRIMINAL COURT AND ITS VISION OF WORLD SOCIETY (2007). For this endnote *see* SCHABAS at ix, 185 and 187.
17. This is referred to as the principle of complementarity.
18. *See* SCHABAS, *supra* note 16, at 182.
19. *Id.* at 184.
20. *See* Death Penalty Information Center, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org), for list of states without death penalty.
21. In addition to sites mentioned hereafter, I have relied in the main on MICHAEL GOLDHABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS (2007); EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES

- AND EXECUTION OF JUDGMENTS (Theodora A. Christou & Juan Pablo Raymond eds., British Institute of International and Comparative Law, 2005); Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT'L L.J. 1 (Winter 2008); Rosy Thornton, *European Court of Human Rights: Consent to IVF Treatment*, 6 INT'L J. CONSTITUTION. L. 317 (April 2008); Laurence R. Helfer, *Redesigning The European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125 (Feb. 2008). The court's site is [www.echr.coe.int](http://www.echr.coe.int).
22. The Council of Europe, founded in 1949, consists of 47 contracting or member States. Its purpose is to develop throughout Europe common civil, political and democratic principles based primarily on the Convention. Following the admission to the Council of former Soviet bloc states, the ECtHR's reach "extends to more than 800 million people in 47 countries stretching the length and breadth of the continent and beyond, from Azerbaijan to Iceland and from Gibraltar to Vladivostok." Helfer, *Redesigning*, *supra* note 21, at 126. The Committee of Ministers is the main deliberative decision-making body of the Council of Europe. It is composed of the 47 Foreign Ministers of each member country or their deputies, such as ambassadors and permanent representatives, who are usually based in Strasbourg. The Committee, and in particular the Parliamentary Assembly, being 636 members (318 representatives and 318 substitutes) from the 47 national parliaments, are the driving forces responsible for the demonstrated record of compliance with ECtHR decisions.
  23. The EU is an economic and political union of 27 member States formed in 1993. The

- EU as an entity is not a member of the Council of Europe. The EU has its own court, the European Court of Justice (ECJ), situated in Luxembourg, which is mostly concerned with economic disputes between its members and resolving challenges to EU regulations. Sixteen members have adopted a common currency, the euro. Twenty-one EU countries are members of NATO.
24. The full name of the ECHR is the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, as amended by Protocol No. 11, 155 E.T.S. (1994) (entered into force Nov. 1, 1998) available at <http://conventions.coe.int>. The Convention, entered into force as a part-time Court in 1953. There have been amendments, including Protocol No. 14, adopted in 2004 by the Council of Europe; to date it has been ratified by 46 of the 47 member states (Russia remains). Protocol 14 will streamline the application process and give power to institute suit against a non-complying state.
  25. Helfer, *Redesigning*, *supra* note 21, at 126.
  26. GOLDHABER, *supra* note 21, at 1.
  27. *See generally* discussion in GOLDHABER, *supra* note 21, at 6-8, and Christou & Raymond, *supra* note 21 (Hunt chapter).
  28. *See The European Court of Human Rights, Some Facts and Figures* (1998-2008), at 1, available at [www.echr.coe.int](http://www.echr.coe.int) and link to The Court.
  29. *Id.* While the decisions of the Court will reference what guarantee or prohibition was violated, a criticism has been that the Court has not clearly set forth what steps the offending member state should take with reference to its criminal code and internal policies to remedy the problem. Recent decisions have discussed the measures needed to be taken by the state whose actions have been found in violation of the Convention.
  30. Although the United States is not bound by decisions of the World Court, there have continued to be judges on the court from our country. We also pay a substantial amount of its funding.
  31. For the text of the American Declaration of the Rights and Duties of Man: [www.cidh.oas.org](http://www.cidh.oas.org)
  32. For the American Convention on Human Rights and its two Protocols, the Protocol of San Salvador (11/17/88) and the Protocol to Abolish the Death Penalty (6/8/90) (neither signed by United States), *see id.*
  33. For the OAS Charter and its four Protocols: [www.oas.org](http://www.oas.org)
  34. For the Statute of the Inter-American Commission on Human Rights: [www.cidh.oas.org](http://www.cidh.oas.org)
  35. For the Statute of the Inter-American Court of Human Rights, *see id.*
  36. THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS (David J. Harris & Stephen Livingstone eds. 1998), at 4.
  37. *Id.*
  38. *Id.*
  39. *See also* Article 44 of the Rules of Procedure of the Commission by linking to Basic Documents at note 35, *supra*.
  40. Article 20 of the Commission Statute. *See* note 34, *supra*.
  41. The Commission is found in Article 106 of the Charter of the OAS. For the Charter *see* note 33, *supra*.
  42. Harris and Livingstone, *supra* note 36, at 36.
  43. Articles 48-51 of the Convention.
  44. Convention, Article 61. The Web site of the Court is [www.corteidh.or.cr/](http://www.corteidh.or.cr/).
  45. Chapter VIII, Articles 52 and 54, of the Convention.
  46. Statute of the IACtHR at Article 23.
  47. *Id.* at Article 24.
  48. *See* [www.worldlii.org/int/cases/IACHR](http://www.worldlii.org/int/cases/IACHR). *See also* [www.corteidh.or.cr](http://www.corteidh.or.cr).
  49. *Id.*
  50. <https://www.cidh.oas.org/annualrep/2008eng/TOC.htm>.