

INDIGENOUS PEOPLES AND THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court is the first permanent court meant to punish perpetrators of gross human rights and humanitarian law violations, including genocide, crimes against humanity and war crimes committed after July 2002. The crimes committed against indigenous peoples around the world can amount to crimes within the Court's jurisdiction if committed after that date. The establishment of the Court creates a forum for indigenous peoples to seek justice and is another step in helping to end the struggle for their rights.

PROTECTION OF THE RIGHTS OF INDIGENOUS PEOPLES WITHIN THE FRAMEWORK OF INTERNATIONAL LAW

Indigenous peoples¹ worldwide have been engaged in the fight to recognize their rights since the early 1920's. In 1923, Haudenosaunee Chief Deskaheh, representing the Six Nations of Iroquois, went to Geneva to implore the League of Nations to recognize the rights of his people to live on their own land, establish their own laws and practice their own faith. He was not allowed to speak, but his actions were a catalyst in the fight for indigenous rights around the world.

In the United States in particular, Native Americans have historically been discriminated against. The injustices they suffered have never been adequately addressed, and they continue to struggle for redress and full recognition of their group and cultural identity.

Since the establishment of the UN, concrete actions have been taken to promote the rights of indigenous people around the world. The Universal Declaration of Human Rights of 1948 and the International Covenant on Economic, Social and Cultural Rights of 1966 provide protection for certain rights important to indigenous peoples. These rights include the right to life, liberty and security of person and the right to take part in cultural life.

The International Convention on the Elimination of All Forms of Racial Discrimination of 1966 mandates that each State Party engages in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions act in conformity with this obligation.

In 1982, the United Nations Economic and Social Council established a Working Group on Indigenous Peoples (WGIP) of the Sub-Commission on the Promotion and Protection of Human Rights. The mandate of the Working Group is to review developments pertaining to the promotion and protection of human rights and freedoms of indigenous peoples and give attention to the evolution of international standards concerning indigenous rights.²

¹ Indigenous peoples are the descendants of those who inhabited a country or a geographical region at the time when people of different cultures and ethnic origins arrived; the new arrivals later became dominant through conquest, occupation, settlement or other means. United Nations Office of the High Commissioner for Human Rights, Fact Sheet No. 9 (Rev.1) *The Rights of Indigenous People*, G.A. Res. 50/157, December 21, 1995.

² Working Group on Indigenous People, <http://www.unhchr.ch/indigenous/mandate.htm>.

In 1989, the International Labor Organization created the Indigenous and Tribal Peoples Convention. It recognized indigenous rights of ownership and possession of lands, which they traditionally occupy, the right not to be discriminated against when attempting to obtain employment, and the rights to have governments adopt measures appropriate to the traditions and cultures of the specific groups concerned.

In 1993, WGIP agreed on a final text for the Declaration of the Rights of Indigenous Peoples. The Declaration was submitted for consideration to the Commission of Human Rights, which in turn created a working group to elaborate upon and submit the declaration to the General Assembly.

In 1995, the United Nations General Assembly launched the International Decade of the World's Indigenous People (1995-2004) to increase its commitment to promoting and protecting indigenous rights.

In 1997, the Organization of American States produced a Draft Resolution on the American Declaration on the Rights of Indigenous Peoples. The resolution addresses issues such as the right to life, humane treatment, and freedom of thought and expression.

The UN Economic and Social Council in 2000 established the Permanent Forum on Indigenous Peoples to discuss the primary concerns of indigenous peoples and to present these concerns to groups and individuals outside the UN.

In 2004, the UN continued its commitment to the rights of indigenous peoples by adopting resolution 59/174, which proclaims a second International Decade of the World's Indigenous Peoples commencing on January 1, 2005.

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The Rome Statute of the International Criminal Court (ICC) provides the Court with jurisdiction to investigate and try individuals accused of committing genocide, crimes against humanity and war crimes. Atrocities committed against indigenous populations worldwide often amount to the crimes within the Court's jurisdiction.

The following section discusses the scope of the ICC Statute and its similarities to the rights accorded to indigenous people in the UN Draft Declaration on the Rights of Indigenous Peoples.

The ICC Statute	UN Draft Declaration
<p>The Preamble declares that, “[a]ll people are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time.”</p>	<p>The Preamble affirms that “[I]ndigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and be respected as such.”</p> <p>The Preamble reaffirms that “[I]ndigenous peoples, in the exercise of their rights, should be free from discrimination of any kind.”</p>

	<p>Article 1 states that “[I]ndigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the UN Charter, the Universal Declaration of Human Rights and international human right law.”</p>
<p>The Preamble is “[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”</p>	<p>The Preamble emphasizes concern that “[I]ndigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, <i>inter alia</i>, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.”</p>
<p>The Preamble states that the ICC is “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” It is “[r]esolved to guarantee lasting respect for and the enforcement of international justice.”</p>	<p>The Preamble emphasizes “[t]he need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world.”</p>
<p>Article 5 states “[C]rimes within the jurisdiction of the Court include Crime of genocide, Crimes Against Humanity, War crimes and Crime of aggression (yet to be defined).”</p>	
<p>Article 6: Genocide: “[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”</p>	<p>Article 6 states the collective right of indigenous peoples to “[I]ive in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including removal of indigenous children from their families and communities under any pretext. In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.”</p>
<p>Article 7: Crimes against humanity The Statute mentions specific crimes, which are of particular interest to indigenous peoples worldwide. These include “[d]eportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender grounds; the crime of apartheid; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental and physical health.”</p>	<p>Article 2 reaffirms that “[i]ndigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.”</p> <p>Article 3 establishes the right of self-determination for indigenous peoples: “[b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”</p>

	<p>Article 4 elaborates the right of indigenous peoples “[t]o maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”</p> <p>Article 10 states “[i]ndigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”</p>
<p>Article 8: War crimes Crimes identified as war crimes include “[g]rave breaches of the Geneva Conventions of August 12, 1949 and other serious violations of the law and customs in armed conflict, including intentionally launching an attack knowing that such attack will cause incidental loss of life or injury to civilians; intentionally directing attacks against the civilian population; conscripting or enlisting children under the age of fifteen years into the national armed forces; and ordering the displacement of the civilian population for reasons related to the conflict;” to name a few.</p>	<p>Article 10 states that “[i]ndigenous peoples shall not be forcibly removed from their lands and territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”</p> <p>Article 11 specifies the right of indigenous peoples “[t]o special protection and security in periods of armed conflict” and asserts that “[s]tates shall observe international standards, in particular the Fourth Geneva Convention of 1949... and shall not... Recruit indigenous individuals against their will into the armed forces... Recruit indigenous children into the armed forces under any circumstances... Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centers for military purposes.”</p> <p>Article 28 lays emphasis on the right of indigenous peoples “[t]o the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.”</p>

CURRENT ICC INVESTIGATIONS

Darfur, Sudan

The clash between the Government of Sudan and two Sudanese rebel groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), started in February 2003 after rebel forces attacked government positions in the Darfur region of Sudan. The government responded to the insurgency by arming Arab militias called the Janjaweed. The Fur, Masaleet and Zagawa ethnic groups have been the primary victims of the war and resulting humanitarian crisis. The conflict, labeled genocide by the Bush administration, has claimed at least 180,000 lives and more than two million people have been displaced.

The UN created an International Commission of Inquiry on Darfur in September 2004. The Commission completed its work and presented its finding to the Secretary-General in January 2005. The Commission concluded that the government of Sudan committed crimes against humanity and war crimes. The Commission recommended that the perpetrators be brought to justice through the International Criminal Court (ICC). The UN Security Council referred the situation in Darfur to the ICC on March 21, 2005. ICC Prosecutor Luis Moreno Ocampo initiated an investigation on June 6, 2005. During the first stage of the investigation, the OTP has made good progress in collecting evidence pertaining to the crimes in Darfur and groups and individuals responsible for them. In the second stage, the Prosecutor will select number of criminal incidents and those bearing the greatest responsibility for them. The Prosecutor has established cooperation with the Sudanese government and his team will travel to Sudan in February 2006 to meet with the Special Courts and other relevant judicial bodies to assess the national proceedings related to the alleged crimes carried out in Darfur.

Uganda

Northern Uganda has been suffering from an ongoing civil war for the last 20 years. The Lord's Resistance Army (LRA), led by self-proclaimed prophet Joseph Kony, is fighting to oust President Yoweri Museveni and his army, the Ugandan People's Defense Forces (UPDF). The primary victims of this conflict are members of the Acholi tribe, where two-thirds of the tribe's population was forced to flee their homes and many are still living in government run camps. Children are often abducted, indoctrinated, and physically abused. Boys are forced to fight along with LRA forces while many girls become wives of the rebel forces. These crimes fall within the jurisdiction of the ICC. They include murder, rape and other sexual violence, kidnapping and forced recruitment of children.

President Museveni referred the situation to the ICC in December 2003. On July 29, 2004, the Prosecutor determined there was a reasonable basis to initiate an investigation in Uganda. The Prosecutor opened its first field office in Kampala, Uganda and continues to collect evidence and testimonies from all sides. The Court issued its first arrest warrants on July 8, 2005, which remained sealed until October 13, 2005. The five senior leaders of the LRA will be charged with several counts of crimes against humanity and war crimes.

The Court recognizes that prosecution of the senior LRA leadership is not enough to establish peace in Uganda. Reconciliation must be achieved through integration of peace talks, the ICC and traditional justice. The Court understands the importance of other forms of justice and sees their presence as

complementary to its work. The peace dialogue has not stopped after the issuance of arrest warrants. If a peaceful solution to the conflict is found, the Prosecutor under article 53 can stop prosecution if it would be in the interest of justice to do so.

The ICC can only initiate investigations if the country in question is unwilling or unable to prosecute. The Amnesty Act passed by the Ugandan parliament in 2000 provides blanket immunity for rebels who renounce the rebellion. The amnesty excludes the individuals indicted by the ICC and therefore does not question the issue of complementarity.

Traditional justice reflects similar concepts as outlined in the Rome Statute. Both systems seek to punish the perpetrators, using different forms of punishment, and believe that ending impunity will prevent recurrence of heinous crimes. Acholi traditional justice is based on forgiveness. The Acholi do not believe that perpetrators should be sentenced to death because they will not realize the effect of their crimes. Perpetrators live among the community, undergo cleansing rituals, receive mild punishment and are made to feel the burden. Acholi justice represents a restorative approach and reflects people's desires to end war and establish peace. Forcing the perpetrators to live among the community and feel the blame is supposed to serve as deterrence for future crimes.

Democratic Republic of Congo

The Democratic Republic of Congo (DRC) is emerging from one of the world's most brutal wars in modern history. The beginning of the conflict dates back to 1997, when Laurent–Desire Kabila deposed President Mobutu Sese Seko with the support of both Ugandan and Rwandan armed forces. After becoming president, Kabila received military assistance from Zimbabwe and Angola and fell out of favor with Rwanda, which wanted to depose him. In 1999, Ugandan forces took control over the northern part of DRC. The country at this point was divided into three territories and the war was raging on all fronts. The eastern part of Congo has suffered the most and continues to experience ongoing violence.

The Banyamulenge ethnic group, who consists primarily of Tutsis, has been the primary target of the violence. Following the genocide in Rwanda, members of the former Hutu regime, genocidaires and others responsible for genocide, fled into the DRC. They continued attacks on the Tutsi population in the eastern part of the DRC. Crimes committed during the conflict constitute serious violations, including rape, sexual violence, murder and torture, and fall within the jurisdiction of the ICC.

In March 2004, DRC referred its situation to the ICC. After careful consideration, the Prosecutor announced on June 23, 2004 that he was opening an investigation there. A field office has been set up in Kinshasa and the OTP has conducted several investigative missions, particularly in the Ituri region in eastern DRC.

POTENTIAL INVESTIGATIONS OF CRIMES AGAINST INDIGENOUS WITHIN THE COURT'S JURISDICTION

The following examples represent potential cases that may come before the Court:

- The pygmies in the Great Lakes region of Africa have been forced off their land by logging interests and governments. They were victimized by cannibalism and raped by rebel groups. These atrocities could be prosecuted as crimes against humanity and war crimes.
- The Jumma of Bangladesh have been subjected to massacres by the Bangladeshi Government since the mid-1980s, brutal and humiliating rapes, displacement from their lands by settling Bengalis on their land, destruction of places of worship, and to specific acts of torture. Thus, the Jumma have been victims of genocide, the crimes against humanity and war crimes.
- The Ashaninkas of the rainforests in Peru have been driven off their lands by logging interests; forcibly conscripted by a rebel group, Sendero Luminoso; murdered, tortured, and subject to having their lands destroyed by coca farmers who often use the crop for cocaine production. The Ashaninkas have a strong case for the crime against humanity, the war crimes and the genocidal acts.

It seems unlikely that the Court will prosecute human rights violations committed against the Jumma of Bangladesh and the Ashaninkas of Peru. The Court can only prosecute violations that have occurred after the Rome Statute entered into force on July 1, 2002. The ICC does not have a universal jurisdiction. It can only exercise jurisdiction over crimes committed by nationals of a State party or in the territory of a State Party, through the UN Security Council referral or if a non- state party consents to the ICC jurisdiction over the situation in which the crimes occurred. The Court is a court of last resort and can only prosecute individuals if a state party is unwilling or unable to prosecute them.

The crimes in Peru have occurred before July 1, 2002 and since the end of atrocities, the Peruvian government established a Truth and Reconciliation Commission to investigate crimes, which destabilized Peru for a period of twenty years. Truth and reconciliation commission and other forms of traditional justice (ex. Gacaca trials in Rwanda) often compliment the prosecution carried out by the ICC. The Court and the other mechanisms for justice all contribute to restoring peace, ending impunity and deterring heinous crimes.

Atrocities committed against the Jumma in Bangladesh have continued since 1980 but Bangladesh has not ratified the Rome Statute and the Security Council is unlikely to refer the situation to the ICC.

Victimization of the Pygmies has been carried out in the entire Great Lakes region. Two countries within the region, the Central African Republic (CAR) and Democratic Republic of Congo (DRC) referred their situation to the ICC. DRC referred the situation to the Prosecutor in March 2004 and he has already started investigation. CAR referred the situation to the ICC on January 7, 2005 but he has yet to start an investigation.

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