CLOONEY FOUNDATION FOR JUSTICE

TRIAL MONITORING FOR NON-LAWYERS

The Courtroom

1. It is important that you familiarize yourself with the layout of the courtroom before the trial.
2. Generally speaking, the courtroom will have easily identifiable places for the judge, the defense lawyer and the defendant, the prosecutor, witnesses (often called the “witness stand”), the judge’s staff, and the jury (if there is one). The judge is usually seated at the apex of the courtroom, and the defendant and prosecution face the judge. The jury panel normally sits opposite the defendant and, as do the other parties to the proceedings, in clear view of the witness box. Defense counsel will be closest to the defendant so they can converse easily. But there are some variations.
3. There will also be a public gallery where members of the public and the press and other observers can sit and watch the proceedings. This is likely where you will sit while you are monitoring the trial.

Courtroom Layout Examples

Example 1

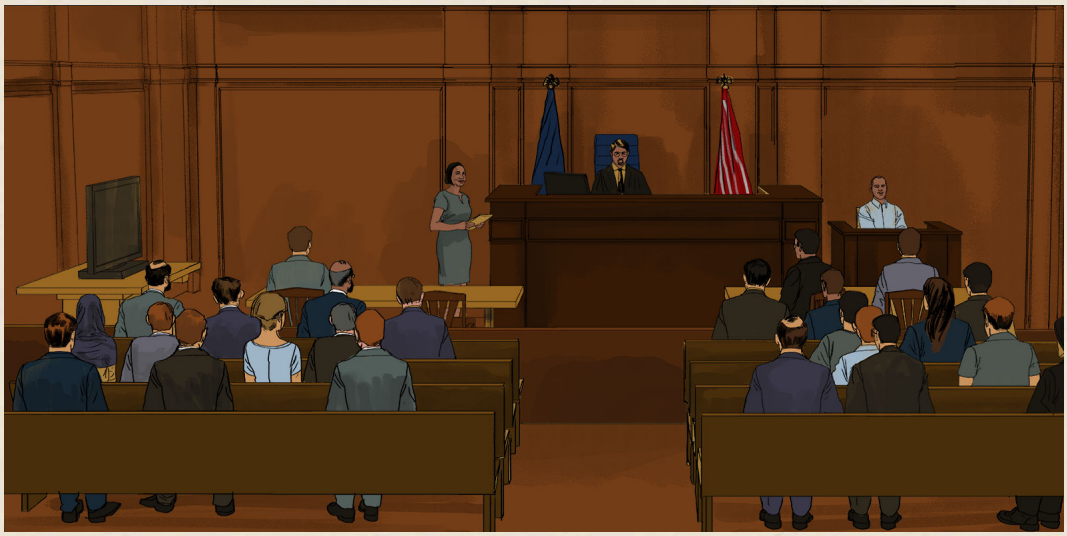
The three judges are seated behind the raised desk in the center. The prosecutor is seated to the left of the judges. The two defense lawyers are seated at the table on the right.

Example 2

The prosecutor faces the public and is on the left, by himself. The judges sit in the three middle chairs facing the public. The court clerk sits in the chair to the judges' left. Two defendants sit at the middle table. Their lawyers are sitting next to them: one is sitting at the table on the left, and one is sitting at the table on the right.

Example 3

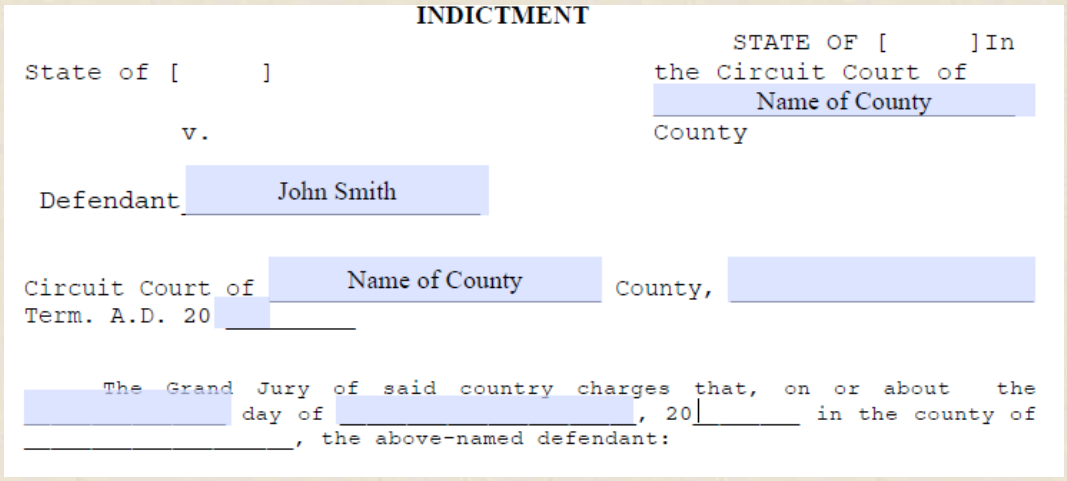
The prosecutors are seated at the table on the left (one of them is standing to present her case). The defendant and his lawyer are seated at the table on the right. The judge is seated between the flags, and the man in the white shirt is a witness.



Legal Documents

1. You should familiarize yourself with the format of the legal documents related to the case.
2. Legal documents are typically printed with a header, stamp, or other marking that identifies the name of the case, the case number, the name of the court, and, for a submission filed by one of the parties, the lawyer or party who prepared it.
3. You may be asked to gather copies of key legal documents as part of your monitoring mission. These might include the indictment or charge sheet (which sets out the crimes the defendant has been charged with) and key rulings by the judge (for example, admitting evidence or denying admission of evidence.)

Sample Indictment



INDICTMENT

State of [ ]

v.

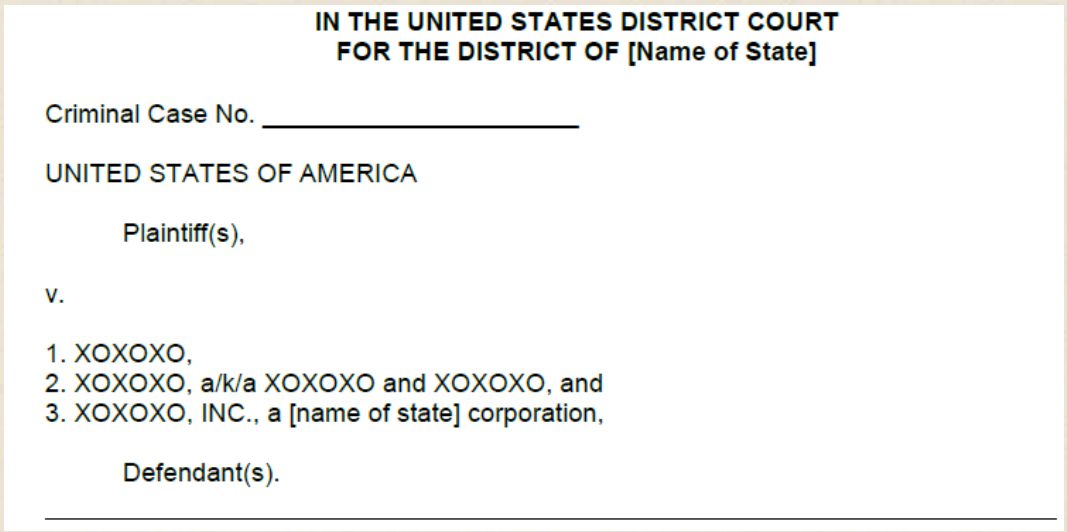
Defendant John Smith

STATE OF [ ] In the Circuit Court of Name of County County

Circuit Court of Name of County County,
Term. A.D. 20 _____

The Grand Jury of said country charges that, on or about the _____ day of _____, 20_____ in the county of _____, the above-named defendant:

Sample Pleading



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [Name of State]

Criminal Case No. _____

UNITED STATES OF AMERICA

Plaintiff(s),

v.

1. XOXOXO,
2. XOXOXO, a/k/a XOXOXO and XOXOXO, and
3. XOXOXO, INC., a [name of state] corporation,

Defendant(s).

Trial Procedure

Civil Law Systems

Criminal procedure will vary across legal systems. The system in which a trial is taking place—such as a civil law or a common law system—will also determine procedure. Civil law systems are sometimes referred to as "code" systems because much of the law is carefully spelled out in legislation. In common law systems, by contrast, judges supplement and develop statutes through case law, creating a body of precedents to guide and sometimes bind judges, particularly those in lower courts, in future cases. Another difference is that in civil law systems, judges traditionally have a more active role and are seen as the chief investigators of the facts of the case, while in common law systems, judges act as referees in the contest between the defense and the prosecution and make crucial decisions.

Preliminary Matters

1. In some jurisdictions, the trial will be preceded by a pretrial hearing, during which time the trial judge and the parties discuss preliminary matters. The judge may rule on what evidence will be admitted at the trial and what charges may be considered (although this is more likely in common law countries, which tend to have stricter rules of evidence). The judge may also rule on pretrial motions filed by the parties. The pretrial hearing is also an opportunity for the parties to discuss scheduling and other trial logistics.
2. You should expect each day of the trial to begin with some discussion of preliminary matters, disputes regarding evidence introduced the previous day, and motions on issues that are developing as the trial proceeds.
3. Important rulings are typically made during these initial discussions, and it is important that you take notes.
4. The bulk of the trial session will then involve the tendering of evidence by the parties in support of their respective cases.

Instructing the Jury

1. If the case is tried before a jury, the judge will usually give the jury basic instructions on the law and trial procedure before the trial begins and before they begin deliberations to reach their verdict.
2. The judge and the lawyers may discuss and agree on these instructions before the trial.
3. The instructions you will hear at the beginning of the trial are typically general in nature. At the conclusion of the trial, before the jury deliberates, the judge will often give the jury more specific instructions about the charges in the case and the law applicable to them.

Opening Statements/Speeches

1. The defense and prosecution typically make opening statements in which they present their case to the court.
2. The opening statements may be given one after the other. Alternatively, the defense lawyer may choose to give their opening statement after the prosecutor has presented all of their witnesses and evidence.
3. The purpose of the opening statement is to summarize what the lawyer or prosecutor intends to prove at the trial. Pay close attention: these statements will give context to the testimony you will hear.

Presentation of Evidence

1. After the opening statements, the trial proceeds with the presentation of evidence.
2. Evidence is often presented through the questioning of witnesses. In common law systems, this is the primary form of evidence. The witness testimony constitutes evidence. The witness may also be shown documents or other things (such as the alleged murder weapon or the money that was allegedly stolen) to authenticate those items so they may also be received as evidence. In civil law systems, judges are often actively involved in the questioning of witnesses, whereas judges in common law systems rarely question witnesses directly during a trial.
3. The presentation of evidence will usually start with the prosecution calling all its witnesses, after which the defense will proceed to call its witnesses. Each witness is first questioned by the party that called them—this is called "direct examination" or "examination in chief." Then the lawyer for the other party will have an opportunity to ask their own questions of the witness. This is called "cross-examination." It is typically more confrontational than direct examination and may involve questions testing the witness's evidence and their credibility.
4. After cross-examination, the lawyer who conducted the direct examination may get an opportunity to undertake a "redirect examination" (or "reexamination") to explore topics or issues raised in the cross-examination.
5. In many systems, the judge may also question the witnesses. You will want to note whether the judge's treatment of prosecution witnesses differs from their treatment of defense witnesses.
6. In common law systems, the oral testimony of witnesses is given the most weight. In civil law countries, however, more weight is attached to written evidence. But in common law proceedings, written evidence—such as an absent witness's testimony given earlier in a statement to police—can sometimes also be introduced.
7. The prosecutor or defense counsel may object to the admission of evidence. The admissibility of evidence is typically governed by rules of evidence that are part of the rules of the court or set forth in a statute.
8. Rules of evidence are designed to ensure that only trustworthy and reliable information gathered from a proper source is considered in deciding the case.
9. If the judge "sustains" an objection to the introduction of evidence, the proffered document or testimony is not admitted into evidence and cannot be considered in reaching a verdict. If the judge "overrules" an objection, the evidence is admitted and may be considered. With respect to objections to questions, if a judge sustains an objection to a lawyer's question, the witness is directed not to answer the question and/or the lawyer is instructed to rephrase the question. If a judge overrules an objection to a lawyer's question, the witness may answer the question.
10. You are not expected to know the rules of evidence, but you should note the rulings on objections so that an evaluator can later determine whether evidentiary decisions affected the fairness of the trial under international law.

Motions

1. In some jurisdictions, after the prosecutor has finished presenting their evidence, the defendant may file a motion for a full or partial dismissal of the case. This is sometimes called a “no case to answer” motion.
2. The principle at work is that the prosecutor has the burden of proof. If the prosecutor has not proven all the facts they need to prove, the defendant is entitled to have the charges dismissed and need not put on evidence to prove their innocence.
3. Thus, a motion to dismiss filed by the defense would argue that the prosecutor had failed to provide evidence of the necessary elements of the offense charged.
4. It is important that you pay attention to these arguments to ensure that the judge does not impose the burden of proof on the defendant to disprove guilt. Note that at this stage, the standard of proof the prosecution is required to meet is significantly lower than “beyond reasonable doubt,” and there may be no assessment of credibility of evidence.

Closing Statements and Judgment

1. After all the evidence presented by both parties is received, the parties can make arguments regarding their view of the case in light of all the evidence. These arguments must be limited to the evidence presented during the trial and must not include speculation about evidence that was not presented. The defense usually has the last word.
2. The judge will then take the case under submission and will reach a judgment based on the evidence before them.
3. If the case involves a jury, the jury is then excused to deliberate in private. If the deliberations take more than one day, the jurors may either be excused to their homes or be sequestered in a secure location (for example, in a case with significant media attention).
4. From time to time, the jurors may communicate a question to the judge about the law, or they may indicate they are deadlocked, meaning they cannot reach a decision with the required majority. The judge usually has discretion as to whether to answer the jury’s question, and the judge can determine whether deliberations should cease (and when the case should potentially be retried) because the required number of jurors cannot agree on a verdict.
5. The deliberations typically will conclude with the jury filling out a written form (agreed to by the parties and the court) stating their verdict. The verdict will be read aloud in open court.
6. The announcement of the verdict or judgment typically ends the trial, although the parties may subsequently engage in posttrial motion practice.
7. There may be appellate proceedings if one party decides to appeal the judgment or sentence.

Sources of Human Rights Law and Human Rights Bodies

The norms and principles that apply to evaluating the fairness of a criminal trial come from international human rights law, which is a branch of international law.

There are five main sources of international law: treaties, customary international law,[1] general principles of law,[2] judicial decisions, and the teachings of the most highly qualified experts of the various nations.[3] In addition, there are a number of international mechanisms that issue judgments, expert opinions, and recommendations on human rights law, including fair trial rights, which can serve as sources of authority.

I. Treaties

A treaty is an international agreement between states and/or international organizations. A treaty may also in some cases be called a "convention," "covenant," "agreement," "protocol," or "charter."

Since World War II, human rights law has primarily been established by treaty. Once a treaty draft has been finalized, it will be open for signature and ratification (the international act whereby a state indicates its consent to be bound). States generally must ratify a treaty before they can be bound by it.

Treaties are analogous to contracts between individuals, except they are between states. The most widely ratified treaty dealing with fair trial rights is the International Covenant on Civil and Political Rights (ICCPR).

Many human rights treaties are multilateral treaties, which means that they are open to more than two states—and, in many cases, to all states—thus having the potential to be universal in scope. The ICCPR, for example, has been ratified by 170 states.[4]

Other human rights treaties are open only to states within particular regions. For instance, only states that are members of the Organization of American States (OAS) may ratify the American Convention on Human Rights.

II. Other Human Rights Instruments

There are other human rights instruments—often called "declarations," "resolutions," "codes of conduct," or "voluntary principles"—that embody shared principles, statements of expected behavior, and/or political commitments to human rights norms. The Universal Declaration of Human Rights (UDHR), the most important such instrument in the human rights field, was adopted by the United Nations (UN) General Assembly and marked a milestone in the development of human rights. It is generally agreed to be the foundation of international human rights law. Adopted in 1948, the UDHR has inspired a rich body of legally binding international human rights treaties.

These forms of "soft law" are not considered to be binding under international law unless they embody or have crystallized into customary international law. Although such soft law instruments do not have the same status as treaties, they are still important because they may reflect emerging norms or practice.

Some important soft law instruments relevant to the right to a fair trial include the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights to supplement the African Charter; the UN Principles and Guidelines on

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[1] Customary international law is one of the primary sources of international law, although often not written. For a rule to be customary international law, there must be widespread and consistent state practice accompanied by what is called *opinio juris*, usually translated as "a belief in legal obligation" (i.e., states are adhering to a rule out of a sense of being required to do so).

[2] General principles of law include general principles of fairness and justice that are applied universally in legal systems around the world. International tribunals rely on these principles when they cannot find authority in treaties or customary international law.

[3] Statute of the International Court of Justice art. 38(1).

[4] United Nations Treaty Collection.
Click here to learn more.

Access to Legal Aid in Criminal Justice Systems, adopted by the UN General Assembly in 2012; the UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly in 1988; and the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985.

III. Human Rights Mechanisms

There are a number of human rights mechanisms that seek to foster compliance with human rights treaties and rules. These institutions include:

- UN treaty bodies created under the global human rights treaties
- The UN Human Rights Council and subsidiary bodies
- The Office of the UN High Commissioner for Human Rights (OHCHR)
- Regional human rights commissions and courts
- International and hybrid criminal tribunals.

A. UN Human Rights Treaty Bodies

In addition to containing binding substantive rules, many human rights treaties have also created international mechanisms ("Committees") composed of independent experts of recognized competence in human rights, who are nominated and elected for fixed renewable terms of four years by states parties. The various Committees are responsible for monitoring State Party compliance with the relevant treaty and with issuing important interpretations of the treaty's provisions.[5] Members of these Committees serve in their personal capacity and not as representatives of the governments that nominated them.

These bodies undertake a number of different functions, including the following:

- They examine periodic reports compiled by State Parties to the relevant treaty and issue "concluding observations" setting forth their concerns and recommendations for the reporting State Party.
- Some treaty bodies can consider complaints of violations of the provisions of the treaty they are charged with monitoring. This can occur in three ways. First, treaty bodies may, under certain conditions, consider complaints or communications from individuals. Second, several of the human rights treaties contain provisions allowing States Parties to complain about alleged violations of the treaty by another State Party. These procedures have never been used. Third, upon receipt of reliable information on serious, grave or systematic violations by a State Party of the convention they monitor, some treaty bodies may, on their own initiative, initiate inquiries.
- They issue "general comments" or "general recommendations," which are important interpretations of the provisions of the treaty they are charged with monitoring. These cover a wide range of subjects, from the comprehensive interpretation of substantive provisions, to general guidance on the information that should be submitted in state reports relating to specific articles of the treaties. General comments have also dealt with wider cross-cutting issues, such as the role of national human rights institutions, the rights of persons with disabilities, violence against women, and the rights of minorities.

The UN Human Rights Committee is the body of independent experts that monitors state compliance with the provisions of the ICCPR, including the right to a fair trial.

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[5] OHCHR, "Human Rights Treaty Bodies."
Click here to learn more.

B. UN Human Rights Council and Subsidiary Bodies

The Human Rights Council is the principal intergovernmental body within the UN system responsible for strengthening the promotion and protection of human rights around the globe, addressing situations of human rights violations, and making recommendations on them.[6] It has the ability to discuss all thematic human rights issues and situations that require its attention throughout the year.

The General Assembly created the Human Rights Council as a subsidiary body by resolution in 2006. The Council comprises representatives from 47 states elected by the General Assembly, which is expected to choose states based upon their "contributions…to the promotion and protection of human rights and their pledges and commitments" pursuant to a strict formula for geographical representation.

One of the activities of the Human Rights Council is to review of the human rights situation in each UN member state once every 4.5 years on the basis of a report prepared by the state under review. This Universal Periodic Review process is cooperative and based on an "interactive dialogue" between the state involved and its "peers" on the Council. By 2011, the Council had reviewed the situation in all UN member states and then started over from the beginning. The second cycle of review was completed in 2016.

The Council normally meets three times a year for a total of 10 weeks, but it can convene urgent meetings on short notice to respond to emerging human rights crises. The Council can also establish international commissions of inquiry and fact-finding missions to investigate and respond to human rights violations, help expose violators, and facilitate their being brought to justice.

The Human Rights Council appoints, and the OHCHR supports, a number of so-called Special Procedures. These are made up of special rapporteurs, special representatives, independent experts, and working groups that monitor, examine, advise, and publicly report on thematic issues or human rights situations in specific countries. Examples include the Working Group on Arbitrary Detention and the Special Rapporteur on Torture. As of 2018, there were 80 active Special Procedures mandate holders for 56 mandates: 44 were thematic mandates, such as arbitrary detention and torture, and 12 were country-specific mandates.

Special procedures undertake country visits; act on individual cases and concerns of a broader, structural nature by sending communications to states and other actors bringing alleged violations or abuses to their attention; conduct thematic studies and convene expert consultations; contribute to the development of international human rights standards; engage in advocacy; raise public awareness; and provide advice on technical cooperation. These independent experts report at least once a year to the Council on their findings and recommendations, as well as to the UN General Assembly. At times they are the only mechanism alerting the international community to certain human rights issues. Finally, there are a number of specialized subsidiary bodies of the Human Rights Council.

C. Office of the UN High Commissioner for Human Rights

The UN High Commissioner for Human Rights is the principal human rights official of the United Nations.[7] The High Commissioner heads the OHCHR and spearheads UN human rights efforts. This position was created by the General Assembly in 1993 to assume principal responsibility for UN human rights activities.

OHCHR is a part of the UN Secretariat and is headquartered in Geneva, with an office at UN headquarters in New York and offices in numerous countries and regions.

OHCHR is mandated to promote and protect the enjoyment and full realization, by all people, of all rights established in the Charter of the United Nations and in international human rights laws and treaties.[8]

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[6] OHCHR, Human Rights Council, 2018.
Click here to learn more.
[7] OHCHR.
Click here to learn more.
[8] OHCHR, "Who We Are."
Click here to learn more.

OHCHR is guided in its work by the mandate provided by the General Assembly in resolution 48/141, the Charter of the United Nations, the UDHR and subsequent human rights instruments, the Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights, and the 2005 World Summit Outcome Document.

The mandate includes preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities throughout the United Nations, and strengthening and streamlining the UN system in the field of human rights. In addition to its mandated responsibilities, OHCHR leads efforts to integrate a human rights approach within all work carried out by UN agencies.

OHCHR also supports the work of the UN human rights mechanisms, including the treaty bodies and the Special Procedures of the Human Rights Council.

D. Regional Commissions and Courts

Several regional treaties have also created regional enforcement bodies. Some of these bodies are courts, presided over by international judges capable of issuing binding judgments. Other bodies are more in the nature of experts' commissions empowered to issue recommendations and other nonbinding pronouncements.

1. Council of Europe

The most developed European human rights system exists under the auspices of the Council of Europe, which now has 47 members (as compared with the European Union's 28 members). All Council of Europe members have ratified the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.

The Convention established the European Court of Human Rights, the first regional human rights court of its kind. The Court has evolved considerably since its establishment; most of its work now involves adjudicating claims brought against States Parties by individuals claiming their human rights have been violated. States Parties can also file complaints against other States Parties, although this mechanism has been used only sparingly. The Court—which sits in Strasbourg, France—is capable of issuing binding judgments. These are enforced by the Council of Ministers, which is a political body of the Council of Europe.

2. Organization of American States

The American Declaration on the Rights and Duties of Man was issued in 1948 at the same time as the Charter of the Organization of American States. The Declaration is nonbinding. In 1960, the OAS established the Inter-American Commission on Human Rights to promote respect for the rights set forth in the Declaration by all OAS members. The Commission's powers have expanded over time, and it is now empowered to prepare country and thematic studies, adopt resolutions, conduct on-site visits, and entertain individual petitions from victims. The Commission also appoints thematic rapporteurs who devote attention to particular countries or human rights issues in the region.

In 1978, the American Convention on Human Rights—a binding human rights treaty—came into force. It created the Inter-American Court of Human Rights, which sits in San José, Costa Rica. Only states that have ratified the Convention can be brought before the Court, but the Commission continues to assert jurisdiction over all OAS member states. Victims do not have direct access to the Court; rather, they must first petition the Commission, which has discretion to advance their claims before the Court. States parties can also file complaints against other States Parties; this process has been used only twice.

3. African Union

The core treaty is the African Charter on Human and Peoples' Rights, which has been ratified by all members of the African Union. Like the Inter-American system, the African system has a human rights commission and court. The African Commission on Human and Peoples' Rights includes both individual and interstate complaints procedures as well as a special procedure for situations of systemic human rights violations.

In January 2004, the Protocol to the African Charter on Human and Peoples' Rights established the African Court on Human and People's Rights, which can issue advisory opinions as well as hear contentious cases involving individual victims. As of April 2018, 30 states have ratified the Protocol, but only eight of these states have made the declaration recognizing the competence of the African Court to receive cases directly from nongovernmental organizations and individuals.[9] For the remaining 22 states, cases can brought to the Court through the African Commission, and for the 15 West African states that are party to Economic Community of West African States (ECOWAS), cases can also be brought to the ECOWAS Court of Justice.

4. Association of Southeast Asian Nations

There is no regional human rights treaty or instrument for all of Asia. The Association of Southeast Asian Nations (ASEAN), however, did commit to create a human rights body in Article 14 of its 2007 Charter. An ASEAN Intergovernmental Commission on Human Rights (AICHR) composed of member state representatives rather than independent experts, is charged with promoting and protecting human rights and fundamental freedoms.

In 2012, ASEAN adopted a Human Rights Declaration, which is a precursor to a binding treaty for the region. The United Nations welcomed ASEAN's commitment to human rights but expressed concern that the text of the Declaration retained language that was not consistent with international standards.[10]

5. League of Arab States

The League of Arab States has approved a Charter on Human Rights. An Arab Human Rights Committee established in 2009 oversees compliance with the Charter. The Committee cannot hear individual or interstate complaints, but it reviews state reports and makes recommendations to States Parties.

E. International and Hybrid Criminal Tribunals

The international community has created several international and hybrid criminal courts, some of which are dedicated to particular conflict situations. By "hybrid," we mean courts combining both international and domestic elements, including personnel, substantive law, and procedural law. There is also a permanent International Criminal Court that was created by treaty and is not part of the UN framework.

These courts are meant to adopt procedures that comply with international human rights law. They regularly issue procedural decisions concerning fair trial rights, which are cited in this course.

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[9] Website of the African Court.
Click here to learn more.
[10] "UN Official Welcomes ASEAN Commitment to Human Rights, but Concerned over Declaration Wording," *UN News*, Nov. 19, 2012.