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Research Article

THE OBSTACLES TO THE RIGHT TO A FAIR TRIAL UNDER THE INTERNATIONAL LAW: A CASE STUDY OF AL-ANFAL AND SREBRENICA GENOCIDE TRIALS

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ABSTRACT

Background: *The right to a fair trial is a critical part of national and international human rights frameworks. To protect this right, the rule of law should be implemented. Currently, the approach to trying individuals accused of grave international crimes, including genocide, is different, which gives an impression of inequality. For instance, the person accused of the al-Anfal genocide was tried by a national court and sentenced to the death penalty, whereas the person accused of the Srebrenica genocide was sentenced to life imprisonment by an international tribunal. Not to mention the lack of respect for the defendants' rights during the al-Anfal genocide's trial, including the principle of due process and the right to a fair trial. The main reason for the differing decisions in these two identical cases involving genocide arises from their trials in different courts and under different legal frameworks. This paper addresses the significance of these challenges for equality under international law and emphasises the difficulties in securing fair trials by examining these examples.*

Methods: *This article analyses the application of the right to a fair trial for international criminals by using doctrinal methods. Specifically, it adopts a qualitative approach to examine relevant international statutes. To illustrate, the research chose to analyse and compare two case studies: the trial of Ali al-Majid, the leader of the al-Anfal genocide, and Ratko Mladic, the leader of the Srebrenica genocide. This comparison focuses on aspects such as judicial independence and overall fairness in the trials of war criminals. It involves desk-based research and data that are collected through the analysis of relevant literature from primary sources, such as international law instruments and secondary sources, including books and academic articles, about the inconsistency of fair trial standards in different judicial contexts.*

Results and conclusions: *Different approaches in trials for similar crimes threaten global justice and the protection of individual rights and freedoms. One practical way to address this issue is to bring those accused of grave international crimes, including genocide, to appear before the International Criminal Court (ICC), providing fair trials and punishments. However, this article demonstrates that the doctrine of state sovereignty may pose challenges to creating a uniform framework for the prosecution of war criminals. Additional challenges arise with the existence of different legal and political systems across the world. The article argues that to ensure a fair trial and maintain international peace and security, it is necessary to overcome these challenges and adopt a uniform framework for the prosecution of those accused of grave international crimes. The ICC can be the solution. The international community can overcome these challenges by encouraging all countries to join the Rome Statue and give it the sole jurisdiction over grave international crimes such as genocide, war crimes, or crimes against humanity.*

1 INTRODUCTION

The right to a fair trial is recognised as a basic human right under international human rights instruments[1] and protected under the constitutions of many countries.[2] Benefits of upholding the right of a fair trial are not limited to a domestic level but also contribute to peace efforts at a global level.[3] It is essential not only for upholding justice but also for safeguarding individual rights and freedoms. Protecting the right to a fair trial upholds the rule of law, ensuring justice and equality before the law.[4] It affirms that individuals have the right to be treated as *subjects*, not *objects*, of the law. This fundamental right cannot be restricted or given an exception according to the International Human Rights instruments.[5] This right is non-derogable under international human rights law, underscoring its critical importance. People live in peaceful and secure environments in communities that apply fair treatment, including a fair trial.

1 Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), art 10 (UDHR). Other articles such as art. 6, 7, 8 and 11 of the UDHR also cover this right. Some other instruments, like International Covenant on Civil and Political Rights (ICCPR) under arts. 14 and 16; African Charter on Human and Peoples' Rights (ACHPR) under arts. 3,7 and 26; European Convention on Human Rights under arts. 5,6 and 7; and the American Convention on Human Rights under arts 3,8,9,10, protect the right to fair trial.

2 Human Rights Act 1998 art 6; US Constitution, Amendment VI; The Constitution of the Islamic Republic of Pakistan 1973 art 10-A; The Constitution of India, 1950 art 21; Canadian Charter of Rights and Freedoms 1982 s 11(d); Basic Law for the Federal Republic of Germany as last amended by the Act of 19 December 2022 art 103; Constitution of the Republic of South Africa 1996 s 35.

3 Jonathan Hafetz, *Punishing Atrocities through a Fair Trial: International Criminal Law from Nuremberg to the Age of Global Terrorism* (CUP 2018) 30.

4 Amal Clooney and Philipa Webb, *The Right to a Fair Trial in International Law* (OUP 2021) 722.

5 Curtis FJ Doebbler, *Introduction to International Human Rights Law* (Lulu.com 2006) 110.

Established in 1945, the United Nations (hereinafter, UN) aims to protect international peace and promote international collaboration in solving economic, social, cultural, and humanitarian problems.[6] The rule of law, explained further below, is an essential element to achieve peace and security. This is because without the rule of law, equal treatment cannot be ensured, and without equal treatment, people may not respect the laws. In addition, in the context of post-conflict societies, the rule of law becomes critical to maintain security and peace.[7] The UN has announced that "promoting the rule of law at the national and international level is at the heart of the UN mission".[8] The United Nations Security Council (hereinafter, UNSC), International Criminal Court (hereinafter, ICC), and other international bodies are essential to enforce international law. Indeed, the UNSC has the right to take specific cases to the Prosecutor of the International Criminal Court (ICC) if evidence of committing grave international crimes is proven.[9]

Committing serious international crimes such as genocide – defined as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,"[10] – poses a threat to global peace and security. Ensuring a fair trial, including justice and equality, for international criminals accused of committing such crimes is essential, especially in post-conflict states. An independent judiciary is the true guarantor of the right to a fair trial, ensuring that justice is administered without bias. In post-conflict societies, protecting this right becomes even more crucial as it serves as a foundation for rebuilding trust. Upholding the right to a fair trial in such contexts is not just a matter of legal obligation but also a moral imperative to restore justice for victims and ensure that perpetrators are held accountable consistently with principles of justice and fairness. While the right to a fair trial primarily focuses on individual rights and freedoms, its broader implications extend to global peace. A fair trial process helps to expect punishment and prevent impunity for serious crimes, such as genocide, which can otherwise perpetuate cycles of violence and instability. Therefore, ensuring justice through fair trials is integral to maintaining international peace, particularly in the aftermath of conflicts.

It is important to mention ensuring fairness in the international criminal process is especially challenging in cases of genocide due to the high stakes and significant political

6 Charter of the United Nations (adopted 26 June 1945) <https://www.un.org/en/about-us/un-charter> accessed 11 August 2024.

7 Bardo Fassbender (ed), *Securing Human Rights: Achievements and Challenges of the UN Security Council* (OUP 2011) 78.

8 Ulf Johansson Dahre (ed), *Predicaments in the Horn of Africa: 10 Years of SIRC Conferences in Lund on the Horn of Africa* (Media-Tryck, Lund University 2012) 332.

9 José Doria, Hans-Peter Gasser and M Cherif Bassiouni, *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko: In Memoriam Professor Igor Pavlovich Blishchenko (1930-2000)* (Martinus Nijhoff Publ 2009) 483-4.

10 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) 78 UNTS 277, art 2.

implications. International tribunals strive to maintain fairness through strict adherence to legal standards, but the influence of state sovereignty, cultural differences, and varying legal traditions can complicate this goal.

The trials of Al-Anfal and Srebrenica cases illustrate these challenges. The trials of these crimes were conducted under different judicial mechanisms, with Al-Anfal being prosecuted under a domestic tribunal and Srebrenica under an international tribunal. This contrast offers a valuable opportunity for a comparative analysis of the effectiveness, fairness, and challenges associated with domestic versus international prosecution. By examining these differing judicial approaches, we can better understand the strengths and weaknesses of each system in delivering justice for grave international crimes. The former trial's reliance on domestic courts showcases issues related to political influence and sovereignty, whereas the later trial under the ICTY highlights the capabilities and limitations of international tribunals.

In fact, fairness refers to the right to be treated fairly, rightly, and justly. Fairness in the judicial process is fundamental. This includes both procedural fairness, which guarantees that the trial is conducted impartially and transparently, and substantive fairness, which ensures that the outcome is just.[11] This means that the due process and outcomes should reflect a commitment to integrity, impartiality, and justice.

It is true that a fair trial cannot undo the immense loss of life or reverse the horrors of genocide; it serves several vital functions within the framework of international justice. A 'fair trial' is not merely about restitution but upholding fundamental human rights and ensuring accountability. It aims to provide a measure of justice that respects due process and the rule of law, which are essential for maintaining the integrity of the international legal system and preventing impunity. A fair trial ensures that those accused of grave international crimes are judged based on established legal standards, which helps to affirm the principle that even the most heinous acts must be subject to judicial scrutiny. This process holds perpetrators accountable, deter future violations as such crimes must be suppressed, and provide a sense of justice to the victims and affected communities.

The research purpose is to explore the application of the right to have a fair trial for those committing grave international crimes, including genocide, with a focus on two cases, the trial of Ali al-Majid, the leader of the al-Anfal genocide, and Ratko Mladic, the leader of the Srebrenica genocide, as examples. The key focus of these two case studies is that they represent significant and well-documented examples of international crimes that have been prosecuted under different legal frameworks, one under a domestic tribunal and the other under an international tribunal.

11 Rachel Kerr, 'Procedure: "Justice Must Not Only Be Done, but Must Be Seen to Be Done"' in Rachel Kerr (ed), *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law Politics and Diplomacy* (OUP 2004) doi:10.1093/0199263051.003.0005.

By analysing the procedures and judgments of these two trials, this research will determine whether applying different approaches in prosecuting persons accused of committing grave international crimes, like genocide, can undermine the principles of justice and fairness. It seeks to contribute to the broader discourse on improving the efficacy and fairness of grave international crimes such as genocide prosecutions under international law. Finally, the paper will explore key challenges and obstacles to ensure fair trials for those committing international crimes, including genocide.

2 THE RULE OF LAW

The definition of the "rule of law" is often debated as there is no universal consensus on its precise elements.[12] This debate revolves around which aspects should be included in the concept.[13] According to the World Justice Project, the rule of law requires governments and their officials to be held accountable under the law. It mandates that laws be transparent, constant, fair, protecting fundamental rights, and publicly accessible.[14] A fundamental aspect of the rule of law is respecting human rights, which is crucial to its material understanding.[15]

The UN Secretary-General (hereinafter, UNSG) further defines the rule of law as follows:

> "The principle of governance demands that every individual, organisation/institution, at both public and private levels, including the government itself, are responsible for publicly declaring, uniformly applying, and impartially judging laws that align with international human rights principles and standards. It also demands the implementation of measures to ensure the observance of fundamental principles, for instance, the rule of law, equal treatment under the law, accountability to legal standards, inclusive participation in decision-making processes, division of powers, prevention of arbitrary actions, clear legal rules, and transparent legal procedures."[16]

The UN was established on three pillars: "human rights, international peace and security, and development".[17] To achieve these aims, accountability, independent adjudication, and

12 E Thomas Sullivan and Toni Marie Massaro, *The Arc of Due Process in American Constitutional Law* (OUP 2013) 3.

13 T Zoroska Kamilovska, 'Privatization of Civil Justice: Is It Undermining or Promoting the Rule of Law?' (2020) 3(1) Access to Justice in Eastern Europe 39, doi:10.33327/AJEE-18-3.1-a000027.

14 Christopher Reynolds, *Public and Environmental Health Law* (Federation Press 2011) 23.

15 Tetiana Slinko and others, 'The Rule of Law in the Legal Positions of the Constitutional Court of Ukraine' (2022) 5(1) Access to Justice in Eastern Europe 170, doi:10.33327/AJEE-18-5.1-n000099.

16 'What Is the Rule of Law?' (*United Nations and the Rule of Law*, 8 March 2015) <https://www.un.org/ruleoflaw/what-is-the-rule-of-law-archived/> accessed 11 May 2024.

17 'The Three Pillars' (*United Nations and the Rule of Law*, 7 October 2019) <https://www.un.org/ruleoflaw/the-three-pillars/> accessed 11 May 2024.

equal enforcement align with international human rights standards. These requirements are central to the rule of law; thus, for the UN to realise its goals, it must uphold the rule of law. This means fair and equal treatment under the law, ensuring that everyone is subject to the law and that no one is above it.[18]

Currently, the rule of law on an international level plays a vital role in addressing modern society's complex challenges and opportunities. Complying with the principles and regulations of the rule of law has advantageous effects on many aspects, including maintaining peace and stability.[19] It is critical to prevent the misuse of power, combat corruption, ensure access to public services, and develop a social contract between the citizens and the government. The rule of law is intertwined with development and strong links with the Sustainable Development Goals (SDGs) outlined in the 2030 Agenda.[20] Goal number 16 of the SDG primarily allows member states to endorse policy reforms that promote progress in other SGDs.[21] This goal can be achieved by prioritising an inclusive and accountable justice system and facilitating meaningful participation of marginalised groups. It also aims to prevent human rights violations by ensuring accountability and empowering individuals and communities to protect their rights. The rule of law is crucial for sustaining peace and requires a comprehensive approach across the UN system. It includes respecting international norms, forming the foundation of humanitarian protection regimes, and addressing displacement and statelessness. Furthermore, emerging issues, such as cybercrime, artificial intelligence and climate change, also fall within the scope of the rule of law considerations.[22]

Protecting the rule of law in post-conflict states is a primary challenge due to chaotic conditions in such societies. Therefore, the UN Office of the High Commissioner for Human Rights (OHCHR) has enacted the Rule of Law Tools for Post-Conflict States on National Consultations on Transitional, establishing the rule of law as a part of international justice efforts of the UN in post-conflict states.[23] The UNSG defines international/transnational justice as "the full range of processes and mechanisms associated with a society's attempts

18 Robert L Nelson and Lee Cabatingan, *Global Perspectives on the Rule of Law* (James J Heckman ed, Routledge-Cavendish 2010) 20.

19 Adnan Mahmutovic and Abdulaziz Alhamoudi, 'Understanding the Relationship between the Rule of Law and Sustainable Development' (2023) 7(1) Access to Justice in Eastern Europe 171, doi:10.33327/AJEE-18-7.1-a000102.

20 Transforming our World: The 2030 Agenda for Sustainable Development (adopted 25 September 2015 UNGA Res 70/1) <https://sdgs.un.org/2030agenda> accessed 29 June 2023.

21 'Goal 16: Peace, Justice and Strong Institutions' (*United Nations Sustainable Development Goals*, 2023) <https://www.un.org/sustainabledevelopment/peace-justice/> accessed 29 June 2023.

22 'Emerging Challenges' (*United Nations and the Rule of Law*, 3 September 2019) <https://www.un.org/ruleoflaw/thematic-areas/emerging-threats/> accessed 11 May 2024.

23 OHCHR, *Rule of Law Tools for Post-Conflict States on National Consultations on Transitional Justice: National Consultations on Transitional Justice* (UN Publ 2009).

to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation."[24]

The tools provided by the OHCHR to achieve international justice include prosecution initiatives and truth commissions. These truth commissions are designed to be temporary, focusing on investigating patterns of abuse over time and concluding with a formally authorised public report.[25] Vetting is considered significant in post-conflict or post-authoritarian contexts by helping exclude those responsible for past abuses who have not been criminally prosecuted from public service.[26] Reparations programs aim to achieve justice from victims' perspective due to human rights abuse.[27] Additionally, amnesty is a significant tool in transitional justice and supports the rule of law in post-conflict states.[28] It involves a sovereign power granting a general pardon for past offences to individuals or groups.[29]

In pursuit of international justice, monitoring the legal system is to conduct an all-inclusive assessment of institutions and the overall system. This analysis aims to identify and reinforce effective practices while addressing the limitations. Moreover, valuable insights can be gained by mapping the justice sector and monitoring the legal system to seek improvement in the working and quality of the whole legal system.[30]

These tools for establishing the rule of law in post-conflict states are grounded in international human rights.[31] The rule of law, in addition, is essential as "it implies a law based on constitutional principles and which the governors and the governed must both obey".[32] The reconstruction of security is thought to be the basis of rebuilding post-conflict societies and is a *sine qua non* in a post-conflict environment.[33] It is believed that there is a consensus on the significance of the rule of law in peacebuilding as it aims to establish stability and security by providing a mechanism for the settlement of conflicts, including

24 UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General* (S/2004/616, UN 2004) para 8 <https://digitallibrary.un.org/record/527647> accessed 13 May 2024.

25 Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2010) 11.

26 Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007) 484.

27 Sabine C Carey, Mark Gibney and Steven C Poe, *The Politics of Human Rights: The Quest for Dignity* (CUP 2010) 204.

28 Charles Villa-Vicencio and others (eds), *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice* (Institute for Justice and Reconciliation 2004) 44.

29 Austin Sarat and Nasser Hussain (eds), *Forgiveness, Mercy, and Clemency* (Stanford UP 2007) 209.

30 Hakeem Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge 2010) 65.

31 Daniel Terris, Cesare Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Brandeis UP 2007) 101.

32 Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (University of Chicago Press 2012) 73.

33 Peter Davis, *Corporations, Global Governance, and Post-Conflict Reconstruction* (Routledge 2013) 26.

governance mechanisms, addressing underlying conflict grievances, and preventing the re-emergence of violent conflicts.[34]

The absence of the rule of law can lead disenfranchised groups to resort to strategies to seek justice, which results in armed struggles and violent conflicts.[35] Without the rule of law to provide a framework for conflict resolution, conflicts can arise within such societies. This can have devastating consequences for both the communities involved in the conflict and the broader society. The UN report focuses on the fact that peacebuilding cannot be achieved unless the population has confidence in obtaining a fair resolution of grievances through genuine structures for dispute settlement in a peaceful way and for the administration of justice.

Furthermore, in conflict and post-conflict situations, numerous vulnerable groups, such as displaced persons, detainees, prisoners, children, women, minorities, and refugees, face heightened vulnerability. This necessitates urgent actions to reinstate the rule of law.[36] Upholding the rule of law is essential to peacebuilding efforts as it promotes accountabilities for all individuals, maintains that no one is above the law, and protects human rights. By safeguarding the rule of law, societies can establish the conditions necessary for sustainable peace and justice. Peacebuilding aims to transform societies affected by conflict and manage economic, political, and social disputes in a non-violent way.[37] Thus, the rule of law becomes a critical element in facilitating effective peacebuilding efforts.

2.1. The right to have a fair trial under international law

Every individual has the right to a fair trial in civil and criminal courts, and access to competent and independent courts of law is essential to protect this human right.[38] Courts must be equipped and committed to conducting fair trials, as this pillar of justice contributes to the preservation of equitable societies and limits the abuse of power. The state's ability to capture, bring to justice, and penalise an individual is the most forceful exertion of state authority, and this authority must be exercised carefully, with necessary measures in place to safeguard the rights of the persons accused throughout the legal proceedings. Those suspected of committing an international war crime deserve to be

34 Timothy Donais, *Peacebuilding, and Local Ownership Post-Conflict Consensus-Building* (Routledge 2013) 26.

35 Jane Stromseth, David Wippman and Rosa Brooks, *Can Make Rights? Building the Rule of Law after Military Interventions* (CUP 2006) 60.

36 Eric de Brabandere, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (Martinus Nijhoff Publ 2009) 190.

37 Matthijs van Leeuwen, *Partners in Peace: Discourses and Practices of Civil-Society Peacebuilding* (Ashgate Publ 2013) 31.

38 OHCHR, 'The Right to a Fair Trial: Part 1 – From Investigation to Trial' in OHCHR, *Human Rights in The Administration of Justice: A Manual on Human Rights for Judges, Persecutors and Lawyers* (UN Publ 2003) ch 6, 215.

treated empathically and respectfully, and their convictions should not overshadow their fundamental entire identity as human beings with inherent rights.

As discussed earlier, the international legal framework, like the UDHR, underscores the importance of the right to a fair trial. For a fair trial, the UDHR provides several provisions, including equality before law (Article 7), trial by a competent tribunal (Article 8), and freedom from arbitrary arrest and trial (Article 9).[39] Inspired by the UDHR, ver eighty human rights treaties are now in force on a global and regional scale.[40]

Furthermore, Article 10 of the UDHR states that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal".[41] This mandates establishing international standards which provide public hearings irrespective of the background of the accused. Article 11 of the UDHR asserts that everyone must have the right to a fair trial, which includes adequate legal protections and the right to counsel.[42]

As stated above, several international instruments on fair trials have been enacted to protect the right to a fair trial. A legal system based on equal and just values can foster long-lasting peace and help prevent the emergence of new conflicts. To achieve this, the rule of law must be respected.

3 CASE STUDIES

3.1. The international criminal court for the former Yugoslavia (ICTY)

The International Criminal Court for the former Yugoslavia (ICTY) was established to try persons accused of committing the Srebrenica genocide. The Srebrenica genocide, known as Bosnia's genocide, was committed in July 1995 and is considered the "worst massacre in Europe since World War II".[43] The estimated number of Bosnian individuals killed by the Serb forces surpassed the figure of 8,000 in Srebrenica.[44] Mladic, the former Bosnian Serb military chief, is believed to be one of the responsible persons for the Srebrenica genocide.[45] Mladic famously declared, "We present this city to the Serbian people as a gift, and the time has come to take revenge on the Turks in this region,"[46] referring to the suppression of

39 Universal Declaration on Human Rights (n 1) arts 6, 7, 8, 9.
40 OHCHR (n 38) 215.
41 Universal Declaration on Human Rights (n 1) art 10.
42 ibid, art 11.
43 Frida Ghitis, *The End of Revolution: A Changing World in the Age of Live Television* (Algora Publ 2001) 168.
44 Alexander Mikaberidze (ed), *Atrocities, Massacres, and War Crimes: An Encyclopaedia* (ABC-CLIO 2013) 727.
45 Tony Taylor, *Denial: History Betrayed* (Melbourne Univ Publ 2008) 137.
46 David L Bosco, *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (OUP 2009) 193.

Serbian-uprising by the Turks during the Ottoman Empire in 1804.[47] It is estimated that more than 200,000 Muslims were killed in the war of Bosnian, including 17,000 children.[48]

On 22 February 1993, the UNSC first enacted Resolution 808, stating that an international tribunal should be established to try those accountable for grave breaches of international humanitarian law committed in the former Yugoslavia since 1991.[49] The Regulation was based on Chapter VII of the UN Charter. Article 39 states the following:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[50]

The International Criminal Tribunal for the Former Yugoslavia (hereafter, ICTY) was fully established on 25 May 1993 in the Hague, Netherlands, by the UNSC Resolution 827.[51] The court's main purpose was to prosecute individuals responsible for grave violations of the Geneva Conventions in the region of former Yugoslavia since 1991.[52] Establishing the ICTY was a prominent milestone as it was the first international tribunal after the Nuremberg Tribunal of 1945-46 to try crimes, including acts of genocide.[53] In terms of jurisdiction, the ICTY was granted primacy over national courts, meaning it could request national authorities to defer cases to its jurisdiction.

The establishment and operation of the ICTY were not unilateral processes but involved extensive consultation and scrutiny to ensure its rules met international legal standards. Although its establishment lacked the direct backing of the United National General Assembly (UNGA), it was authorised by the UNSC and is responsible for maintaining global peace by all means, including the establishment of a tribunal.

After more than 15 years, General Mladic was found and captured in Serbia in May 2011.[54] Mladic and Radovan Karadzic, former President of Republika Srpska, were charged for their role in the 1995 Srebrenica genocide.[55] Despite being found guilty of genocide, the ICTY

47 Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Polity Press 2001) 246.
48 Robert Bideleux and Ian Jeffries, *The Balkans: A Post-Communist History* (Routledge 2007) 353.
49 UN Security Council Resolution 808 (1993) of 22 February 1993 <https://digitallibrary.un.org/record/243008?ln=en> accessed 15 June 2024.
50 Charter of the United Nations (n 6) art 39.
51 UN Security Council Resolution 827 (1993) of 25 May 1993 <https://digitallibrary.un.org/record/166567?ln=en> accessed 15 June 2024.
52 Christopher C Joyner, *International Law in the 21st Century: Rules for Global Governance* (Rowman & Littlefield 2005) 153.
53 Robert Stallaerts, *Historical Dictionary of Croatia* (3rd ed, Scarecrow Press 2010) 168.
54 Nigel D White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (2nd edn, Manchester UP 1997) 101.
55 Michael P Scharf, *Slobodan Milošević and William Schabas, Slobodan Milosevic on Trial: A Companion* (Continuum 2002) 83.

statute limits the maximum sentence to life imprisonment.[56] Mladic's trial commenced on 3 June 2011, with a range of charges presented against him. The verdict was delivered on 2 November 2017, where he was sentenced to lifetime imprisonment.[57]

3.2. The Iraqi High Tribunal (IHT)

The Iraqi High Tribunal (hereafter, IHT) was established to try persons accused of committing the Kurdish genocide. The al-Anfal campaign, known as the Kurdish genocide, is a military campaign committed by the Baathist regime, led by Saddam Hussein, the former president of Iraq, against the rebellious Kurdish population, demanding independence from Iraq between 1987 and 1988.[58] Ali al-Majid, also known as Chemical Ali, was the first cousin of Hussein and served as defence minister and intelligence chief. In 1987, he launched aggressive offensives against Kurdish villages, destroying settlements to force the Kurds to leave their home. However, the Kurds resisted this forcible relocation; consequently, the regime killed anyone refusing to leave their village. Between 23 February 1998 and 6 September 1998, there were eight major phases to the al-Anfal operation, which included shooting squads, aerial assaults and extensive use of chemical weapons. One of the campaign's goals was to Arabize the northern region of Iraq. It is estimated that this campaign caused the deaths of almost 150,000 Kurds, many of whom were gassed.[59] As per a directive issued by al-Majid in January 1987, individuals captured were to be interrogated, and if they were between 15 and 70 years old, they were to be executed after the extraction of valuable information.[60] For these crimes, al-Majid was tried in a domestic tribunal along with other perpetrators.[61]

When the United States (US) entered Iraq and ousted Hussein from power, the question of the utmost importance was how to hold the perpetrators of grave international crimes accountable. There were four options. Four options were considered:

1. Holding the trial outside Iraq but under Iraqi jurisdiction, asserting universal jurisdiction for crimes of this magnitude.
2. Establishing a hybrid court, consisting of both national and international judges, like the Special Court for Sierra Leone or the Kosovo Specialist Chambers.[62]

56 Lilian Manka Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (Pretoria University Law Press 2007) 35.

57 Aryeh Neier, *The International Human Rights Movement: A History* (Princeton UP 2020) 269.

58 Alexander Mikaberidze (ed), *Conflict and Conquest in the Islamic World: A Historical Encyclopedia* (ABC-CLIO 2011) 66.

59 ibid.

60 George Black, *Genocide in Iraq: The Anfal Campaign against the Kurds* (Human Rights Watch 1993) 60.

61 Michael J Kelly, *Ghosts of Halabja: Saddam Hussein and the Kurdish Genocide* (Praeger 2008) 96.

62 Kiran Satish, 'The Trial of the Tribunal: An Evaluation of the History of Iraq and the Iraqi Special Tribunal' (2022) 5(1) International Journal of Law Management & Humanities 1660-1, doi:10.10000/IJLMH.112677.

3. Creating an international court created by treaty, pooling jurisdiction from multiple states, similar to the Nuremberg Trials.
4. Setting up a national tribunal in Iraq with significant international assistance in terms of resources and expertise.[63]

Ultimately, the fourth option was chosen as a viable option. The IHT was established to prosecute Iraqi nationals for crimes against humanity, genocide, and violators of Iraqi laws between 17 July 1968 and 1 May 2003.[64]

The IHT charged all the defendants with crimes against humanity, and only two of them, Saddam Hussein and Ali Hassan al-Majid, were particularly accused of genocide.[65] The first trial concluded in November 2006 against Hussein; seven additional individuals were convicted of offences related to a genocide that occurred in *Dujail* in 1982. Among the defendants, three, including Hussein, received death sentences, while four were sentenced to imprisonment.[66] On 21 August 2003, al-Majid was captured alive by the US forces and was held in custody to face a series of cases against him before the IHT.[67] In the trial of the al-Anfal campaign, beginning on 21 August 2006, al-Majid was one of Hussein's co-defendants and one of the most responsible leaders of the al-Anfal campaign.[68] Al-Majid justified the campaign by saying that there was internal rebellion and the region was filled with Iranian agents. He argued that based on history, what Iran had done with Iraq, considering these, he carried no guilt nor considered his actions a mistake.[69]

The Defence Office under the IHT was underfunded and lacked the necessary resources, leading to inadequate defence preparations. The IHT operated under the traditional Iraqi Penal Code, which did not align with international judicial procedures. Iraq's unstable state, marked by conflicts and threats, further exacerbated the situation. Three defence counsels were murdered, highlighting the tribunal's failure to provide adequate security.[70] Statements from absent witnesses and complainants were admitted without the defence having the opportunity to cross-examine them, as these were recorded by the investigative judge without defence counsel present. Prosecutorial gaps were evident, with reliance on assumptions rather than actual evidence. For instance, the trial of Awwad al-Bandar was deemed a show trial without considering the role of the Revolutionary Court during

63 ibid.
64 L Tabassi and E van der Borght, 'Chemical Warfare as Genocide and Crimes Against Humanity' (2007) 2(1) Hague Justice Journal 5.
65 Michael J Kelly, 'The Anfal Trial against Saddam Hussein' (2007) 9(2) Journal of Genocide Research 237, doi:10.1080/14623520701368628.
66 Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 399.
67 Samuel Totten, *Paul R Bartrop, and Steven L Jacobs, Dictionary of Genocide* (Greenwood Press 2008) 10.
68 ibid.
69 '"Chemical Ali" Admits Ordered Kurd Villages Cleared' (*Reuters*, 9 August 2007) <https://www.reuters.com/article/economy/quotchemical-aliquot-admits-ordered-kurd-villages-cleared-idUSPAR850014/> accessed 13 May 2024.
70 Satish (n 62) 1666.

Saddam's regime. This disregard for proper judicial procedures and heavy reliance on assumptions indicated systemic flaws and potential bias, suggesting that judges may have been selected for their political leanings.[71]

Despite having charges of war crime, war against humanity, and genocide, deviating from international norms of due process, al-Majid was tried and sentenced to death by IHT on 24 June 2007.[72] Nevertheless, his execution was delayed until 25 January 2010 due to various political and judicial factors.[73] It is worth noting that he had received five death sentences at the time of his death as a punishment for his crimes against humanity, war crimes, and genocide attempts.[74] While the IHT aimed to provide justice and accountability, its effectiveness was significantly constrained by its operational context and procedural shortcomings. The tribunal's challenges reflect broader issues in establishing fair trials in complex political settings. It emphasises the need for a robust framework that ensures justice and accountability.

4 INTERNATIONAL LAW AND COMPARISON OF ALI AL-MAJID AND MLADIC

Al-Anfal and the Srebrenica genocides were committed before 2002, i.e., before the establishment of the ICC. The UNSC members, led by the US, met and agreed to create an international tribunal based on Chapter VII of the UN Charter to try the criminals of the Srebrenica genocide.[75] Nevertheless, they did not do so with the case of the al-Anfal genocide, which was tried in a domestic court. This raises questions about the consistency and fairness of handling such severe international crimes. In both cases, the crimes were acknowledged as international crimes having the capacity to jeopardise international peace and security. This recognition granted the UNSC the authority to undertake measures to maintain international peace and security, according to Article 39 of Chapter VII of the UN Charter.[76] The UNSC drew jurisdiction from this provision to enact the ICTY, unlike the creation of the IHT.

The different approaches to these cases have implications for the rule of law. The establishment of the ICTY underscores the international community's commitment to justice. It set a precedent for future tribunals, demonstrating that the international community can unite to hold perpetrators accountable, thus reinforcing the rule of law.

71 ibid.

72 M Cherif Bassiouni (ed), *International Criminal Law* (2nd edn, Transnational Publishers 1999) 315.

73 Spencer Tucker and Priscilla Mary Roberts (eds), *The Encyclopedia of Middle East Wars: The United States in the Persian Gulf, Afghanistan, and Iraq Conflicts* (ABC-CLIO 2010) 764.

74 Paul R Bartrop, *A Biographical Encyclopedia of Contemporary Genocide Portraits of Evil and Good* (ABC-CLIO 2012) 12.

75 Stallaerts (n 53) 168.

76 Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development* (Routledge 2013) 28.

In contrast, the domestic trial of Ali al-Majid illustrated the limitations of national courts in addressing international crimes. If there had been an international tribunal with a clear mandate to try those responsible for the al-Anfal genocide, there might have been no questions on fairness. The differing outcomes of these trials for similar offences highlight ongoing debates about varying standards in the international criminal system, which can violate the rule of law.

The al-Anfal trial's perceived lack of fairness and transparency not only undermined the judicial process but also highlighted the potential for political interference. This inconsistency suggests that accountability for international crimes can be selective and politically driven, eroding public trust and weakening the rule of law. Many scholars argue that trials for crimes like those committed in the al-Anfal and Srebrenica genocides should have been before an international court to ensure fair trial and prevent such crimes.[77]

Enforcing the rule of law on an international level is crucial, and powerful countries such as the US play a significant role in achieving this. Former US President Barak Obama has declared, "The US Government is committed to the rule of law is not questioned".[78] Upholding the rule of law and preventing impunity for perpetrators of heinous crimes requires concerted international efforts.

Comparing these two cases of genocide, the al-Anfal campaign, conducted by the Iraqi government under Saddam Hussein, involved the systematic targeting and extermination of the Kurdish population. This genocide was perpetrated by the state's own authorities against its ethnic minority based on ethnic grounds. This internal conflict highlights the complexities of state responsibility and the challenges of addressing human rights abuses when the perpetrators are state actors. It raises questions about the role of international intervention and accountability mechanisms when the genocide is committed by the government itself.

In contrast, the Srebrenica genocide was carried out by Bosnian Serb forces during the Bosnian War. It involved not only local actors but also the military support of neighbouring Serbia. The genocide was directed at Bosnian Muslims and involved external regional actors in addition to internal dynamics. This case underscores the international dimensions of genocide, including the role of external state actors and the implications for international law and intervention. The involvement of neighbouring states complicates the legal and political responses to genocide, highlighting issues of sovereignty and international responsibility.

Comparing these two cases reveals how the nature of the perpetrators and the context of the genocides shape the legal and procedural challenges faced in international trials. While both cases involve severe human rights violations, including genocide, the differences in

77 Kelly (n 61) 62.
78 Katja LH Samuel, *Counter-Terrorism and International Law* (Routledge 2017) 338.

perpetrators, state versus regional actors, and the complexities of their interactions with international mechanisms are crucial for understanding the broader implications for fairness in international criminal justice. Regardless of whether domestic or foreign forces commit grave international crimes, those accused of such crimes should face justice and have the right to a fair trial.

4.1. The weakness of the international rule of law in the Ukraine war

Since the onset of the Russian war against Ukraine in 2022, Ukrainian cities like Mariupol, Kharkiv, and Kyiv, along with numerous other strategic cities and villages, have endured severe bombardment that has resulted in extensive civilian casualties. The total number of civilian casualties has surpassed 28,711.[79] The conflict has also caused significant destruction to vital key infrastructure and places of historical and cultural significance.

Investigations have revealed that the torture inflicted by the Russian military and its attacks on the critical energy infrastructure amount to crimes against humanity.[80] Allegedly, the Russian authorities have been executing and torturing prisoners of war. A UN Special Rapporteur concluded that torture is "orchestrated" and "part of a state policy to intimidate, instil fear, punish, or extract information and confessions".[81]

Besides that, there have been ongoing attacks on residential buildings, hospitals, and schools. Human Rights Watch has called for a war crime investigation following the Russian forces' deployment of a guided munition with a high-explosive payload on an apartment complex in a civilian.[82] Another investigation revealed that Russian soldiers raped and sexually assaulted women, ages 19 to 83, in the same area.[83]

79 Amnesty International, 'Ukraine 2023: Report' (*Amnesty International*, 2024) <https://www.amnesty.org/en/location/europe-and-central-asia/eastern-europe-and-central-asia/ukraine/report-ukraine/> accessed 15 June 2024.

80 OHCHR, 'Report of the Independent International Commission of Inquiry on Ukraine' (25 September 2023) A/HRC/52/62 <https://undocs.org/A/HRC/52/62> accessed 19 June 2024.

81 UN Special Rapporteur on Torture and other Cruel, 'Inhuman or Degrading Treatment or Punishmen, Statement of Preliminary Findings and Recommendations: Official Visit to Ukraine, Kyiv, 4-10 September 2023' (10 September 2023) 2 <https://www.ohchr.org/sites/default/files/documents/issues/srtorture/statements/20230908-eom-visit-ukraine-sr-torture.pdf> accessed 19 June 2024.

82 Human Rights Watch, 'Ukraine: Events of 2023: World Report 2024' (*Human Rights Watch*, 2024) <https://www.hrw.org/world-report/2024/country-chapters/ukraine> accessed 19 June 2024.

83 OHCHR, 'UN Commission of Inquiry on Ukraine Finds Continued Systematic and Widespread Use of Torture and Indiscriminate Attacks Harming Civilians: Press-Releases' (*Office of the High Commissioner for Human Rights (United Nations Human Rights)*, 25 September 2023) <https://www.ohchr.org/en/press-releases/2023/09/un-commission-inquiry-ukraine-finds-continued-systematic-and-widespread-use> accessed 19 June 2024.

These acts by Russia constitute grave international crimes. To hold the responsible accountable, there have been many attempts at the international level. In March 2023, the judges of the ICC issued arrest warrants for Russia's children's rights commissioner and Putin in connection with the illegitimate expulsion and transfer of Ukrainian children from seized territories into Russia.[84] With the lack of rule of law, it remains unlikely that persons accused of committing grave international crimes, including genocide and war crimes in Ukraine, may ever face a fair trial.

It is important to mention that one of the main reasons why unifying the approaches to trying international criminals is needed is that countries such as Russia may resort to trying perpetrators of international crimes locally. Without ensuring integrity and a fair trial, the trial may end with light sentences or even an acquittal for one reason or another. This does not encourage the rule of international law to maintain global security.

5 CHALLENGES AND THE SOLUTION TO UNIFY THE RULES GOVERNING THE TRIAL OF GRAVE INTERNATIONAL CRIMES

Unifying the trial of war criminals presents numerous challenges. Judicial challenges arise due to the involvement of multiple countries and their diverse legal systems, each with its own legal framework, definitions, procedures, and penalties for grave international crimes.[85] These variations in standards of evidence and legal procedures complicate the establishment of a uniform judicial approach. Political factors, such as conflicting geopolitical interests, power dynamics, and diplomatic ties, further hinder efforts to create a unified system.[86] Furthermore, logistic challenges such as locating and apprehending war criminals and ensuring the safety of witnesses can impede the process. The lack of resources and security risks in places affected by conflicts pose a serious danger to the unification of serious international crime proceedings.[87] Finally, the legal practices and cultural norms challenge the establishment of a single judicial system for war offenders.[88] However, these challenges could be mitigated if countries agree to refer the cases of grave international crimes, including genocide, to the ICC instead of relying on domestic courts. Such an approach could help standardise legal proceedings and ensure a more consistent application of justice across jurisdictions.

84 'What Is a War Crime and Could Putin Be Prosecuted over Ukraine?' (*BBC*, 20 July 2023) <https://www.bbc.com/news/world-60690688> accessed 17 June 2024.

85 Charles Anthony Smith, *The Rise and Fall of War Crimes Trials: From Charles I to Bush II* (CUP 2012) 111, doi:10.1017/CBO9781139151733.

86 Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crimes Trials* (Stanford UP 2008) 98.

87 ibid 93.

88 Smith (n 85) 54.

5.1. The ICC Statute and its challenges

The ICC was created on 17 July 1998 and did not come into force until 1 July 2002.[89] It has jurisdiction over cases committed after this date.[90] The ICC is "an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes."[91] The creation of the ICC represents a significant step forward in the international enforcement of the rule of law.[92] Its primary objective is to remain the prosecution of those accused of committing the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression.[93]

According to Paragraph 3, Article 17 of the Rome Statute, the ICC does not have the authority to replace domestic prosecutions unless the domestic state is unwilling to handle the cases within its jurisdiction.[94] It develops the criteria to determine whether a case can be admissible before the court. The aim of designing this provision is to grant the primary jurisdiction of states to prosecute crimes committed within their territories. The ICC admits that the states are responsible for addressing crimes committed within their borders and ensures that the ICC does not undermine the domestic legal system unless they fail to meet certain standards. For instance, if an unjustified delay challenges the intention to ensure the person accused faces justice, or if the proceedings lack impartiality and independence or are carried out in a way inconsistent with the objective of prosecuting the accused, then it may indicate unwillingness of incapacity. The ICC, in addition, considers the principles of due process to be in line with international law.[95]

Though the ICC is an important step in achieving justice and maintaining international peace and security, its system is not binding on all countries as the ICC Statute only applies to states that have ratified or acceded to the Rome Statute.[96] In addition, the ICC Statute grants member states the right to prosecute their own criminals, which sometimes can limit access to justice. For instance, it is essential to consider the challenges associated with domestic prosecutions, especially in post-conflict states. In this regard, one major concern is political impartiality and lack of fairness, especially when the accused holds significant political power or influence. Such cases risk being used for political persecution or revenge

89 Rome Statute of the International Criminal Court (adopted 17 July 1998) 2187 UNTS 3 <https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court> accessed 11 August 2024.

90 Adam Gearey, *Globalization and Law: Trade, Rights, War* (Rowman & Littlefield Publ 2005) 143.

91 ibid.

92 W Wesley Pue, *Pepper in Our Eyes: The APEC Affair* (UBC Press 2011) 61.

93 Dawn Rothe and Christopher W Mullins, *Symbolic Gestures and the Generation of Global Social Control: The International Criminal Court* (Lexington Books 2006) 89.

94 Rome Statute (n 89) art 17.

95 ibid, art 20.

96 Toshio Suzuki, *Soul Federation* (Xlibris Corporation 2010) 43.

rather than delivering genuine justice.[97] The capacity of domestic courts to handle complex international crimes is also adding to the problem because prosecution and investigation of crimes such as genocide, war crimes, and crimes against humanity require special knowledge and resources.[98] Limitations in resources, knowledge, and infrastructure limitations often lead to inadequate investigations, flawed prosecution, and difficulties in securing necessary evidence and testimony. Therefore, to guarantee a fair trial for grave international crimes, it is important to refer such cases to the ICC. This independent court has the capacity to conduct a fair trial.

It can be argued that the main challenge to obligating all countries to refer international criminals to the ICC is that states have sovereignty over all crimes committed within their territories. This argument is accurate, but it should not be an absolute sovereignty. The sovereignty of each state presents a significant challenge to the unified prosecution of war criminals. It is predicated on the non-interference concept, which upholds each state's autonomy in running its own affairs,[99] including the trial of war criminals. A major challenge with state sovereignty lies in its potential infringement by external factions.[100] Each state has its own legal framework, which is enacted under its specific cultural values and legal traditions.[101] The non-intervention concept is commonly applied in this context to protect these distinctive legal systems and avoid outside influence on their functioning. The state may contend that the prosecution of war criminals ought to be conducted in accordance with their domestic legal system.[102] However, such prosecution may not be held fairly, especially in post-conflict states.

However, the principle of non-intervention or the state's sovereignty should not contradict the concept of international criminal jurisdiction. The ICC has been founded to address the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression. All states are members of the UN, and the jurisdiction of the ICC can be legally justified by the referral of the UNSC according to the UN Charter.[103] Therefore, the intervention cannot violate the principle of non-interference or state sovereignty if it is legally justified under international law.

Until the remaining states become members of the ICC, the UNSC should take all possible actions to refer all criminal cases that fall within the jurisdiction of the ICC to the ICC. In addition, the Rome Statue needs to be amended to limit the right of the state to try international criminals domestically. Such changes would guarantee a fair trial and uphold

97 Eric A Posner, 'Political Trials in Domestic and International Law' (2005) 55 Duke Law Journal 81-8.
98 Mark S Ellis, 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building' (2002) 15(2) Florida Journal of International Law 237-40.
99 Carl Q Christol, *International Law and US Foreign Policy* (2nd rev edn, UP of America 2007) 92.
100 Hafetz (n 3).
101 Samuel (n 78).
102 ibid.
103 ibid.

the principle that no one is above the law. Though such suggestions may face challenges, these challenges need to be addressed as the suggestions aim to help achieve the UN's main goal of maintaining international peace and security.

6 CONCLUSIONS

It can be stated that the comparison of the al-Anfal and Srebrenica genocide trials reveals significant disparities in the prosecution of these cases, underscoring the challenges of achieving consistent justice on an international scale. One effort to defend international law was performed by developing the ICTY in 1993, initiated by the UNSC and led by the US under Chapter VII of the UN Charter.[104] This demonstrated a commitment to international justice under Western legal tradition with a focus on international standards of justice. The ICTY's adherence to procedural norms, such as the right to a fair trial and impartiality, led to comprehensive and lengthy proceedings, which resulted in a life sentence. This approach reflects Western principles of justice, emphasising detailed procedural fairness and extensive legal scrutiny.

On the other hand, during the Iraq war from 2003 to 2011, the domestic trial of Ali al-Majid for the al-Anfal genocide, conducted under the IHT, raised concerns about fairness, impartiality, and political influence. Unlike the ICTY, which was established to try cases of genocide in the former Yugoslavia, no international tribunal was established for the al-Anfal genocide. The IHT, influenced by local and Islamic legal principles, operated under a different legal tradition. The trial of al-Majid was completed in less than two years, while the trial of Mladic by the ICTY spanned a much longer period. Moreover, for similar crimes, the trial by the ICTY resulted in the life imprisonment of Mladic,[105] but the accused of al-Anfal Campaign, Ali al-Majid, was given capital punishment.[106] The dissimilar sentencing raises great concerns about equal treatment, a fair trial and the rule of international law. These variations draw attention to the unequal administration of justice. They also highlight the possibility that national legal systems may fail to fulfil global standards of fair trials. The procedural and substantive differences between the Western, local and Islamic legal frameworks highlight tensions between international and domestic legal standards. In fact, this opens questions not only about the possibility of trying war criminals who have committed and are still committing crimes in Ukraine but also about the extent of the integrity and justice of the trials if they were held locally in Russia.

One solution to address this issue is to bring all international offenders for trial before the ICC. This solution aims to establish a single international court system where uniform prosecution can be conducted. This will meet the criteria of equality before the law and help

104 UN Security Council Resolution 827 (1993) (n 51).

105 Neier (n 57).

106 Bassiouni (n 72).

to respect the rule of law. However, several challenges arise. The doctrine of state sovereignty, which provides the states with the exclusive authority to assert ultimate control over domestic affairs, is one of the main challenges. This includes a state's authority to prosecute its own war criminals. Therefore, many countries are reluctant to relinquish their sovereignty to the ICC. To overcome these challenges, states should collaborate globally, join the Rome Statute, and refer all international offenders for trial before the ICC. This would ultimately help to establish a criminal justice system that is just, fair, and uniform. These efforts can uphold the rule of law in the modern world.

A fair trial cannot undo the devastation of mass atrocities, but it plays a crucial role in international justice. It upholds human rights, ensures accountability, and reinforces the rule of law, which is essential for preventing impunity. While fair trials cannot restore lost lives, they are vital for holding perpetrators accountable, serving justice to victims and deterring future crimes. The cases of al-Anfal and Srebrenica illustrate that while fair trials are critical, they must be part of a broader strategy that includes prevention, suppression, and international cooperation to address and mitigate the impact of such atrocities effectively.

Finaly, the historical context, indeed, reveals that both the Yugoslav and Iraqi conflicts were addressed through substantial military intervention and the application of force. The use of powerful weapons and military capabilities by international actors was instrumental in halting severe crimes such as genocide and capturing perpetrators. This emphasises a critical reality: the ability to enforce international law effectively often depends on the availability and strategic use of military and financial resources.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПЕРЕШКОДИ НА ШЛЯХУ ДО СПРАВЕДЛИВОГО СУДОВОГО РОЗГЛЯДУ ЗГІДНО З МІЖНАРОДНИМ ПРАВОМ: НА ПРИКЛАДІ СУДОВИХ ПРОЦЕСІВ ЩОДО ГЕНОЦИДУ В АЛЬ-АНФАЛІ ТА СРЕБРЕНИЦІ

Могамад Альмогавес

АНОТАЦІЯ

Вступ. *Право на справедливий судовий розгляд є важливою частиною національних і міжнародних правозахисних систем. Для захисту цього права є необхідним впровадження верховенства права. Наразі підхід до судового переслідування осіб, звинувачених у серйозних міжнародних злочинах, зокрема у геноциді, є різним, що створює враження нерівності. Наприклад, особу, звинувачену у геноциді в Аль-Анфалі, судили в національному суді та засудили до смертної кари, тоді як особу, звинувачену у геноциді в Сребрениці, засудили до довічного ув'язнення міжнародним трибуналом. Не кажучи вже про недотримання прав обвинувачених під час судового процесу у справі про геноцид в Аль-Анфалі, включно з принципом належної правової процедури та правом на справедливий суд. Основна причина різних рішень у цих двох однотипних випадках геноциду полягає в тому, що вони розглядалися в різних судах і в різних правових межах. Шляхом дослідження цих прикладів у статті розглядається значення таких викликів для рівності згідно з міжнародним правом і наголошується на труднощах у забезпеченні справедливого судового розгляду.*

Методи. *У цій статті аналізується застосування права на справедливий судовий розгляд для міжнародних злочинців за допомогою доктринальних методів. Зокрема, використовується якісний підхід для вивчення відповідних міжнародних статутів. Для ілюстрації дослідження було вирішено проаналізувати і порівняти два приклади: судовий процес над Алі Аль-Маджидом, лідером геноциду в Аль-Анфалі, та Ратко Младичем, лідером геноциду в Сребрениці. Це порівняння зосереджується на таких аспектах, як незалежність судової влади та загальна справедливість у судових процесах над воєнними злочинцями. Дослідження було здійснене на основі аналізу відповідної літератури з*

першоджерел, таких як інструменти міжнародного права, та вторинних джерел, зокрема з книг та академічних статей, щодо непослідовності стандартів справедливого судового розгляду в різних судових контекстах.

Результати та висновки. *Різні підходи до судових процесів за однотипні злочини глобально загрожують правосуддю та захисту прав і свобод людини. Одним із практичних способів вирішення цієї проблеми є притягнення всіх воєнних злочинців до Міжнародного кримінального суду (МКС), що забезпечить справедливий судовий рогляд і покарання. Однак у статті показано, що доктрина державного суверенітету може спричинити перешкоди для створення єдиної основи для судового переслідування воєнних злочинців. Додаткові труднощі виникають через існування різних правових і політичних систем у всьому світі. У статті зазначено, що для забезпечення справедливого судового розгляду та підтримання міжнародного миру та безпеки необхідно подолати ці виклики та прийняти єдину основу для судового переслідування воєнних злочинців. МКС може стати рішенням. Міжнародна спільнота може подолати ці труднощі, якщо спонукатиме всі країни приєднатися до Римського статуту та надати йому виняткову юрисдикцію щодо серйозних міжнародних злочинів, таких як геноцид, воєнні злочини чи злочини проти людства.*

Ключові слова: *геноцид, злочин проти людства, воєнні злочини, верховенство права, право на справедливий судовий розгляд, міжнародний мир, державний суверенітет, Міжнародний кримінальний суд (МКС).*