# The International Criminal Court Revisited

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**Introduction**

The International Criminal Court (ICC) came into being on July 1, 2002, after 60 states became parties to the 1998 Rome Statute that had established the Court. To date, 123 states from all parts of the world have ratified the treaty.[1] None of the largest states with the largest standing armed forces — China, India, Russia, or the United States — is a party to the treaty. While the ICC is not universal in its membership, in some circumstances it may decide to exercise jurisdiction even with respect to citizens of non-state parties. In this respect, it differs from inter-state judicial bodies such as the International Court of Justice that derive jurisdiction from consent. Therein lies the drama for Israel, the United States, and other states, a subject addressed in the second section of this article. The first part of this article briefly recalls some history, including the evolution of the idea that perpetrators of heinous violations of the laws of war, the prohibition on genocide, and the international law prohibition on aggression should be held accountable as a matter of criminal law. The second part addresses the all-important question of jurisdiction. The third part presents some reflections on the ICC and minimum world public order. First, some history.

**I. Justice and Politics/Politics and Justice**

Holding individuals legally accountable for war crimes, genocide, and aggression has always been a political issue. It also contains important moral elements, matters of law and legal procedure, and questions of how to obtain justice for victims. In March 1815, three months before the Battle of Waterloo and a month after Napoleon's escape from Elba, the allies (principally, Britain, Russia, Prussia, and Austria) that had defeated Napoleon, formally determined that he was an "Enemy and Disturber of the tranquility of the world." [2] This determination was political and strategic, not the result of any judicial process. The allies wanted to make it impossible for any state to support or contemplate compromise with Napoleon. This action was a milestone on the road to holding states and individuals accountable for violations. The decision to outlaw Napoleon contained a message implicit in every indictment of an international wrong- or evil-doer: "no deals, please."

The prosecution of war crimes is central to the ICC's *raison d'être*. One of the most important steps in the development of the written law of armed conflict and

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1. ICC, "The States Parties to the Rome Statute," ICC, available *at* https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. This website of the Assembly of States Parties is somewhat misleading. It has a category of signers that have yet to ratify the Statute. That group includes the United States, which on May 6, 2002 advised the UN Secretary General, the official depository, that it did not intend to become a party to the Rome Statute and therefore did not consider itself under any legal obligation with respect to the Statute; Richard Boucher, "International Criminal Court: Letter to UN Secretary General Kofi Annan," U.S. Department of State (May 6, 2002), available *at* https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm. The letter meant that the U.S. did not consider itself bound by Article 6 of the Vienna Convention on the Law of Treaties: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when (a) It has signed the treaty… until it shall have made its intention clear not to become a party to the treaty"; Vienna Convention on the Law of Treaties (with annex), May 23, 1969, U.N.T.S., vol. 1155, available *at* https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf. The U.S. is not a party to the Vienna Convention because its definition of a treaty does not comport with the language of the U.S. Constitution, but it regards "many of the provisions" as accurate statements of the customary international law of treaties and therefore is binding; "Vienna Convention on the Law of Treaties," U.S. Department of State, available *at* https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm#:~:text=Is%20the%20United%20States%20a,and%20consent%20to%20the%20treaty

holding violators liable was Abraham Lincoln's General Order No. 100, "Instructions for the Government of the Armies of the United States in the Field." This Order governed Union Army conduct of operations and treatment of prisoners.[3] Lincoln's code reflected the development of practices that, over centuries, had come to constitute laws of war: notions of chivalry and, above all, comity — what one army might do to another. Rules regarding surrender, quarter, pillage, and duplicity had emerged as practical answers to practical questions. General Order No. 100 became the foundation for international treaties on the subject from the end of the 19th century to the present day. Collectively, those treaties have been the basis for holding violators legally responsible and accountable. The first attempts at holding violators accountable in courts were made after World War I: the victorious Allies required that German courts hold trials of a few German war criminals, and the British encouraged the Turkish government to try some persons involved in the Armenian genocide.[4] However, nothing was done to hold soldiers of imperial powers accountable for what today would be called crimes against humanity, in Africa and elsewhere outside of Europe. Europe's colonial wars operated by different rules or even without rules at all.[5]

The Nuremberg and Tokyo trials after World War II and their progeny, not only created accessible records of German and Japanese atrocities, but also set precedents in international criminal law that continue to be relevant today. These trials created enduring controversy over victor's justice, accusations of selective prosecutions and double standards, and the application of ex post facto law.[6] They nonetheless provided impetus for the idea of establishing an impartial, permanent, international criminal court that could hold violators of the laws of war and perpetrators of crimes against humanity and genocide accountable.[7] The aim was to put an end to victor's justice.[8] The result was the Rome Statute, adopted in 1998. While a substantial number of supporters of the idea acted from motives of justice for victims, others had a more complicated, and political, agenda.[9]

Shortly before leaving office, on December 31, 2000, President Clinton authorized signature for the United States to the Rome Statute, but issued a statement that undermined the significance of the signature in legal terms. The statement read in pertinent part:

> Under the Rome Treaty, the International Criminal Court (I.C.C.) will come into being with the ratification of 60 governments, and will have jurisdiction over the most heinous abuses that result from international conflict, such as war crimes, crimes against humanity and genocide. The Treaty requires that the I.C.C. not supersede or interfere with functioning national judicial systems; that is, the I.C.C. prosecutor is authorized to take action against a suspect only if the

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2. Congress of Vienna, Declaration of March 13, 1815, quoted in Rory Muir, WELLINGTON: WATERLOO AND THE FORTUNES OF PEACE, 1814-1832, 23 (New Haven: Yale University Press, 2015).
3. *See* John Fabian Witt, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (New York: Free Press, 2012).
4. *See* Gary Bass, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS (Princeton: Princeton University Press, 2000).
5. *See e.g.* Isabel V. Hull, ABSOLUTE DESTRUCTION: MILITARY CULTURE AND THE PRACTICES OF WAR IN IMPERIAL GERMANY (Ithaca: Cornell University Press, 2005).
6. *See* Philippe Kirsch, "From Nuremberg to The Hague," ICC (Nov. 19, 2005), available *at* https://www.icc-cpi.int/NR/rdonlyres/08AB9F8F-53A2-4533-BCE0-887419726332/143894/PK_20051119_En.pdf
7. The U.S. was a leader in this international effort. *See e.g.* Vijay Padmanabhan, "From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference," COUNCIL ON FOREIGN RELATIONS SPECIAL REPORT NO. 55 (N.Y.: Council on Foreign Relations, Apr. 2010).
8. *See* M. Cherif Bassiouni, "Establishing an International Criminal Court: Historical Survey," 149 MIL. L. REV. 49 (1964).
9. *See* M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: the Need to Establish a Permanent International Criminal Court," 10 HARV. HUM. RTS. J. 11 (1997). Bassiouni, a tireless advocate of the International Criminal Court and a participant in the negotiations of the Rome Statute, said at the closing of the Rome conference: "The ICC reminds governments that realpolitik, which sacrifices justice at the altar of political settlements, is no longer accepted." *See* M. Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court," 32 CORNELL INT'L L.J. 443, 468 (1999). Such a statement begs questions such as what is justice? What is Realpolitik? Who, and by what authority, decides?

> country of nationality is unwilling or unable to investigate allegations of egregious crimes by their national.... In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise jurisdiction over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not. With signature, however, we will be in a position to influence the evolution of the court. Without signature, we will not….The United States should have the chance to observe and assess the functioning of the Court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent to ratification.[10]

This statement highlighted some of the most important concerns, apart from those having to do with due process (which were mainly American concerns), created by the Rome Statute.[11] These concerns remain today.

**II. ICC Jurisdiction**

National courts decide if they have jurisdiction. International courts are no different.[12] The Rome Statute's jurisdictional provisions contain a number of parts. Unlike, for example, the International Court of Justice, which decides cases referred by states "and all matters specially provided for in the Charter of United Nations or in treaties and conventions in force,"[13] the ICC exercises jurisdiction pursuant to complicated criteria flowing from the fact that states agree to its exercise of jurisdiction by becoming parties to the Rome Statute. Once a party, a state loses its right to withdraw consent, unless it withdraws from the Rome Statute. Even withdrawing from the Rome Statute would not insulate a state's nationals from ICC jurisdiction.

The ICC has jurisdiction over nationals of a state party to the Rome Statute who are accused of genocide, crimes against humanity, war crimes, and (under different conditions) the crime of aggression. Second, the ICC has jurisdiction over persons of whatever nationality committing such crimes on the territory, vessel, or aircraft of a state party. A state that is not a party to the Rome Statute may accept ICC jurisdiction by declaration "lodged with the Registrar."[14] Third, a state party to the Rome Statute (or a non-state party lodging a special declaration) may refer one of the enumerated crimes to the ICC. So may the UN Security Council. Finally, the ICC may decide to exercise jurisdiction with respect to, but not as a result of, an investigation independently initiated by the prosecutor.[15] Therefore, the fact that a state is not a party to the Rome Statute is no guarantee that its nationals will not appear before it as defendants. For example, the United States has been conducting military operations in Afghanistan, a state party to the Rome Statute. Thus, Afghanistan was able to ask the ICC to investigate allegations of war crimes by U.S. personnel in Afghanistan.[16]

The Rome Statute preamble emphasizes "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdiction."[17] Article 17 provides in its first paragraph that

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10. Associated Press, "Clinton's Words: 'The Right Action'," N.Y. Times, Jan. 1, 2001, available *at* https://www.nytimes.com/2001/01/01/world/clinton-s-words-the-right-action.html. It is difficult to reconcile President Clinton's action with respect to signature and the requirements of international law. *See supra* note 1.
11. U.S. concerns also involved double jeopardy, the right to jury trial, and the integrated character of all the parts of the ICC. In addition, American representatives in diplomatic meetings highlighted the lack of real accountability of the ICC.
12. For example, the International Court of Justice decides disputes as to whether it has jurisdiction: ICJ Statute, 33 UNTS 993, Art. 36, para. 6 (1945).
13. *Supra* note 12, ICJ Statute, Art. 36, para. 1.
14. UNGA, Rome Statute of the International Criminal Court (last amended 2010), July 17, 1998, ISBN No. 92-9227-227-6, available *at*: https://www.refworld.org/docid/3ae6b3a84.html, Art. 12, para. 3
15. *Supra* note 14, Rome Statute, Art. 15, para. 1. "Proprio motu," a term imported from Canon Law.
16. *E.g.* Saphora Smith and Abigail Williams, "U.S. Personnel to be Investigated for Alleged War Crimes in Afghanistan," NBC News, Mar. 5, 2020, available *at* https://www.nbcnews.com/news/world/icc-approves-probe-u-s-personnel-alleged-war-crimes-afghanistan-n1150276
17. *Supra* note 14, Rome Statute Preamble, para. 10.
18. *Supra* note 14, Rome Statute Art. 17, para. 1.

> The Court shall determine that a case is inadmissible where:
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, a trial is not permitted under Article 20, paragraph 3 [no double jeopardy unless prior trial was to shield the person from individual criminal responsibility for crimes or otherwise not independently or impartially conducted in accordance with due process norms recognized by international law];
> (d) The case is not of sufficient gravity to justify further action by the Court.[18]

These provisions also provide no guarantee. At a minimum, a state must make an investigation, and the ICC decides if that investigation was adequate and conducted in good faith.

The complexity of the ICC jurisdictional provisions provides ample opportunity for the Court to decide if it does or does not have jurisdiction. In the event of objections to the exercise of jurisdiction, the Court may have to decide whether the ICC prosecutor exceeded discretion, and further, whether the state of the accused nationality has the capacity to conduct investigations and prosecutions in the area of genocide, crimes against humanity, war crimes, and aggression, investigated and prosecuted (or not) in good faith, and generally conducted in a way such that the ICC has no complementary role.

Jurisdictional decisions may give rise to more than purely technical questions. The United States and Israel face investigations and potential ICC jurisdiction for individuals' conduct. In the case of Israel, individuals may face criminal charges for what has been the state's national policy since June 1967 with respect to construction of towns (settlements) in "territories occupied in the recent conflict."[19] There is hardly space here to revisit the origins and course of the June 1967 war, much less the efforts to achieve Arab-Israeli peace since 1948.[20] It is sufficient for our purposes to recall that on June 4, 1967, Israel did not wake up and decide to occupy the Sinai Peninsula, the Golan Heights, the Gaza Strip, and the West Bank of the Jordan River. These territories fell under Israeli control as a result of a war of self-defense.[21] The international community expected peace to be concluded and adjustments to the 1949 Armistice Lines to be made in Israel's favor in order to fulfill the UN Security Council requirement of "acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force."[22] The Security Council reiterated these points when in 2002, it "Affirm[ed] a vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders."[23] Among the issues before the ICC is whether that vision has been realized for purposes of a positive response to the Palestinian Authority's request that the ICC take jurisdiction over alleged Israeli war crimes.

So far, the ICC is proceeding as if the Palestinian Authority is a state able to lodge a declaration submitting to ICC jurisdiction and that Israeli individuals, nationals of a state that is not a party to the Rome Statute, have been operating in the territory of a state that has accepted ICC jurisdiction. Palestinian statehood and territory are among the most important, undecided questions to be determined by agreement between Israel and the Palestinian Authority. If the ICC concludes that it has jurisdiction over Israeli actions, then the ICC would find itself embroiled in one of today's longest running and most difficult conflicts. The consequences are not

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19. UNSC Res. 242, Nov. 22, 1967, UN Doc. S/RES/242.
20. A good place to begin would be Michael Oren, Six Days of War (Oxford: Oxford University Press, 2002), and Dennis Ross, The Missing Peace: The Inside Story of the Fight for Middle East Peace (N.Y: Farrar, Straus & Giroux, 2004).
21. Substantial literature exists, not only on the conduct of military operations, but also on whether Israel acted in self-defense.
22. *Supra* note 21, S/RES/242.
23. Res. 1397, March 12, 2002, S/RES/1397.
24. *See* Legal Consequences of the Construction of a Wall in

foreseeable, except to say that they will be serious and severe. If the ICC takes up the question of whether or not aggression has occurred, it will be looking at high-level government decisions, not simply troops engaged in combat (although getting to the bottom of what exactly happens in battle is no easy task). It also will be making a determination of where Israel's boundaries lie, something even the International Court of Justice failed to do in its advisory opinion on the Israeli security 'wall'."[24]

The United States has been involved in armed conflict since the terrorist attacks of September 11, 2001. Israel has been involved in armed conflict or threatened conflict since its recognition as an independent state in 1948 and admission to the United Nations in 1949. For countries such as the United State and Israel, which have judicial systems that have jurisdiction over the kind of crimes for which the ICC also has jurisdiction, there ought not to be issues before the ICC.[25] This conclusion flows from the fact that the United States and Israel have long, robust records of investigating and prosecuting members of their armed forces accused of war crimes and their political leadership accused of wrongdoing.[26] That the ICC Prosecutor and Pre-trial Chamber favor ICC jurisdiction over national jurisdiction (notwithstanding the Rome Statute provision that the ICC should be a complement to, not a replacement of, competent national processes), is the best evidence, if any were needed, that decisions by courts with respect to jurisdiction, inescapably involve more than purely technical questions. The United States is certainly powerful enough to protect its own soldiers and officials from ICC prosecution, and indeed has already warned of severe consequences for those individuals pursuing such prosecution.[27] Israel is in another posture altogether.

**III. The ICC and Minimum World Public Order**

Courts are governmental institutions. There is no world government. As a result, a permanent international criminal court puts the proverbial cart before the horse. The world is organized into states that have joined to form international organizations to which they have delegated power for certain purposes. The structure reflects centuries of historical experience.

The reason for this conclusion is not difficult to ascertain. Unlike Nuremberg, or the trials conducted with respect to genocide in Tokyo, Rwanda and Yugoslavia, and other *ad hoc* international criminal courts or domestic courts assisted by the United Nations, the ICC does not just look backward. It therefore inevitably plays a role in the give and take of politics. To indict a soldier for war crimes or a political decision-maker for aggression, not to mention genocide, is to damage irreparably an individual's character – even if the individual is later acquitted.[28] Even more important, judicial process introduces rigidity into a politically fluid

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the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), available *at* https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf. The Rome Statute, as amended to allow jurisdiction over aggression, provides in part: "In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory." *Supra* note 14, Rome Statute, Art. 15*bis*, para. 5. The ICC ought not to be able to try Israel for aggression. The language suggests the provision is no real barrier to exercising jurisdiction because "aggression" involves actions on or against foreign territory. Art. 15*bis*, paras. 6-9, deny the UN Security Council exclusive jurisdiction with respect to determinations that aggression has taken place.

25. Israeli courts have heard cases brought with respect to most of the issues raised by Israel's position in the West Bank. While it is doubtful that the ICC would recognize that fact and defer on the basis of its complementary role, it is worth noting that it should do so. On the entire question, including summaries of Israeli judicial decisions, *see* Yoram Dinstein, The International Law of Belligerent Occupation (Cambridge: Cambridge University Press, 2nd ed. 2019), esp. pp. 257-67.
26. *E.g.* Dave Philipps, "Navy SEAL Chief Accused of War Crimes if Found Not Guilty of Murder," N.Y. Times, July 2, 2019, available *at* https://www.nytimes.com/2019/07/02/us/navy-seal-trial-verdict.html; Isabel Kershner, "Israeli Government Watchdog Investigates Military's Conduct in Gaza War," N.Y. Times, Jan. 20, 2015, available *at* https://www.nytimes.com/2015/01/21/world/middleeast/israel-hamas-gaza-strip-war-investigation.html
27. Lara Jakes & Michael Crowley, "U.S. to Penalize War Crimes Investigators Looking into American Troops," N.Y. Times, June 11, 2020, available *at* https://www.nytimes.com/2020/06/11/us/politics/international-criminal-court-troops-trump.html. At the 2020 Annual Meeting of the American Society of International Law, a panelist opined that the ICC should take jurisdiction because the U.S. had not prosecuted persons for torturing alleged terrorists involved in the attacks of September 11, 2001.
28. U.S. Secretary of Labor (1981-1985) Raymond Donovan was indicted in the mid-1980s for fraud and larceny. He and other defendants were acquitted. Donovan said:

situation. Options are foreclosed. Feeling boxed in, individuals may believe they have nothing to lose by continuing to engage in criminal behavior or by taking a stand that leads to general ruin. Even if, for example, compromise with Muammar al-Gaddafi or Omar al-Bashir were possible, ICC indictment removed this possibility, just as the U.S. indictment in 1988 of *de facto* leader of the Panamanian government, General Noriega, made it impossible to negotiate his departure from power.

In 2004, UN Secretary General Kofi Annan made the point at a Security Council discussion on justice, the rule of law, and the role of the United Nations. He noted the absolute requirement to take local political conditions into account. One size, so to speak, does not fit all situations.[29] He might have quoted Theodore Roosevelt, to measure how far the world has come in a century:

> [I]n international law we have not advanced by any means as far as we have advanced in municipal law. There is as yet no judicial way of enforcing a right in international law. When one nation wrongs another or wrongs many others, there is no tribunal before which the wrongdoer can be brought. Either it is necessary supinely to acquiesce in the wrong, and thus put a premium upon brutality and aggression, or else it is necessary for the aggrieved nation valiantly to stand up for its rights.[30]

Roosevelt's insight in 1904 did not leave room for a court to stand in place of an aggrieved nation. So far, the ICC has not proved capable of doing so. The most powerful members of the international community have not indicated a willingness to let it do so.

**Conclusion**

In the nearly twenty years of its existence, the ICC has not persuaded the world's most powerful states to join the Rome Statute. Their position has little to do with their view of accountability or ending cultures of "impunity," a favorite term in UN circles.[31] Their concern has to do with the inescapable political character of decisions about jurisdiction and desire to protect themselves from unwanted intrusions into their national affairs. For much the same reason, they are reluctant to submit disputes to the International Court of Justice. In this connection, it is worth recalling Article 2, paragraph 7, of the UN Charter, which specifically prohibits UN intervention in the internal affairs of other states except in order to discharge its responsibilities with respect to maintaining or restoring international peace.[32] Few issues are more central to a state's domestic affairs than the administration of justice. It is not an accident that the authors of the Rome Statute wanted to distance the ICC from the United Nations, its organs, and its limitations. They succeeded when they created a non-UN body.

We must anticipate that the ICC will decide to exercise jurisdiction over actions by Israel and the United States as requested by the Palestinians and the Afghan government, respectively. It is unlikely that Americans will suffer as a result. It is entirely likely, however, that Israel, already subject to constant questioning of its legitimacy as a state, will face even greater difficulty than it does presently to reach peace with the Palestinian Authority. The ICC cannot contribute to the achievement of that goal. It should consider that fact when deciding what to do. After all, even the International Court of Justice could not assist Israel-Palestinian peace negotiations, although at least one judge thought its advisory opinion on the legal consequences of Israel's security wall would do so. ■

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"Which office do I go to to get my reputation back?" Selwyn Raab, "Donovan Cleared of Fraud Charges by Jury in Bronx," N.Y. Times, May 26, 1987, A1.

29. S/PV.5052, Oct. 6, 2004, p. 3.
30. Theodore Roosevelt, "Fourth Annual Message to Congress," The American Presidency Project (Dec. 6, 1904), available *at* https://www.presidency.ucsb.edu/documents/fourth-annual-message-15
31. *See e.g.* Kofi Annan's statement, *supra* note 29.
32. UN Charter, June 26, 1945, 1 UNTS XVI, Art. 2, para. 7: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII ['Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression']."