The International Court of Justice and the International Criminal Court: A Primer

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International courts are distinctive types of international institutions. They are created by nation-states, either directly or through international organizations, to resolve disputes and to advance the development of international law through judicial decisionmaking. Two international courts—the International Court of Justice (ICJ) and the International Criminal Court (ICC)—have been particularly prominent on the global stage and have garnered considerable interest from Members of Congress.

The structure of each court and its jurisdictional authorities are specified in the court’s respective originating treaty. The ICJ was established by the U.N. Charter in 1945 as part of the United Nations, and the ICC was established almost five decades later in a treaty called the Rome Statute. The ICJ’s mandate is to resolve interstate disputes about questions of international law that the states that are parties to a case have consented to the court’s jurisdiction to address, and to answer certain questions of international law that U.N. bodies periodically ask the court to address. States may consent to the ICJ’s jurisdiction—and thus to be bound by its decisions—by submitting an instrument of acceptance with the court, becoming a party to a treaty that includes a provision allowing parties to submit disputes about the treaty to the ICJ, or by agreeing with another state or states to submit a particular dispute to the ICJ.

The ICC’s mandate, on the other hand, is to prosecute individuals on charges of one or more of four international crimes, which are considered to be of the most serious concern to the entire international community: genocide, crimes against humanity, war crimes, and aggression. The ICC’s jurisdiction to investigate and prosecute depends on a combination of factors, including the nationality of the alleged offender, the location of the alleged crime, and the way in which the case is initiated. The court may exercise jurisdiction over crimes committed by the nationals of or on the territory of Rome Statute states parties or of states that have accepted the court’s jurisdiction for that purpose. The ICC’s authority to investigate and prosecute individuals for alleged commission of one or more of the four Rome Statute crimes may be triggered through a referral either by a state party or by the U.N. Security Council or through initiation by the ICC Prosecutor.

In contrast to domestic legal systems, there are no centralized mechanisms for enforcing the decisions of international courts such as the ICJ and the ICC. Rather, international courts are dependent on the states that created them—individually and collectively—to comply with, support, and enforce their decisions.

The U.S. relationship with the ICJ and the ICC over the course of each court’s existence has been varied and often complex, and Congress has always played an important role in this relationship. When then-President Truman submitted the U.N. Charter to the Senate in 1945, the Senate approved the U.S. status as a party to the ICJ by providing its advice and consent. Congress restricted the President’s ability to ratify the Rome Statute, on the other hand, by passing legislation prohibiting the United States from becoming a party to the ICC without Senate advice and consent. Congress also impacts the courts’ work by passing legislation that authorizes and constrains the executive branch—both directly and through appropriations—in its interactions with the courts. Further, Congress makes periodical recommendations regarding the courts, including, for example, urging the Administration to bring a case before the ICJ and urging the international community to adhere to an ICJ decision.
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In recent years, cases before the International Court of Justice (ICJ) and investigations by the International Criminal Court (ICC) have sparked widespread global interest, including on the part of Congress. To support Congress’s consideration of how these courts operate and their impacts on the United States and the broader international community, this report explains (1) how and why states created each court, (2) the courts’ structures, (3) the bases on which they are authorized to exercise jurisdiction, and (4) the effects of their decisions and potential mechanisms for enforcement. Each of these discussions highlights the key differences between the two courts and the interaction of the United States with them over time. This report concludes by discussing the relevance of this information for Congress as it observes how the ICJ and ICC carry out the mandates that states established them to fulfill.

Creation

The ICJ and the ICC are both international tribunals created by states through treaties. Each tribunal’s originating treaty sets out the court’s structure and authorities. The ICJ is the older of the two courts, predating the ICC by half a century. Although the two courts are distinctive in important ways, they were both created for the general purpose of contributing to peace and security by providing a legal mechanism to resolve problems and by promoting the development of international law through judicial decisionmaking.

The ICJ: The U.N. Charter, 1945

The ICJ is a permanent international court created in 1945 by the U.N. Charter as the “principal judicial organ” of the United Nations. States parties established the ICJ to, first and foremost, provide them with a judicial method for the pacific settlement of international disputes.

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3 At the international level, countries are typically referred to as “states.” See, e.g., U.N. Charter art. 2, ¶ 4 (requiring all members of the United Nations to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”). This Report follows that convention.

4 See generally Mary Ellen O’Connell & Lenore VanderZee, The History of International Adjudication, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 41 (Cesare P.R. Romano et al., eds., 2014) (discussing the development of international courts as a means of providing an alternative to conflict and accountability for unlawful conduct considered to threaten international peace and security); see also ELBERT THOMAS, INTERNATIONAL COURT OF JUSTICE: REPORT TO ACCOMPANY S. RES. 196, S. Rep. No. 79-1835, at 3 (1946) (“[G]eneral worldwide acceptance of the jurisdiction of the International Court of Justice in legal cases . . . would, in a substantial sense, place international relations on a legal basis, in contrast to the present situation, in which states may be their own judge of the law.”).

5 U.N. Charter art. 92.
(alongside, for example, diplomacy, negotiations, mediation, and arbitration). Because the ICJ is a permanent court, it is able to produce a body of caselaw that contributes to the clarification and development of international law over time.

The ICJ’s functions are governed by the Statute of the International Court of Justice (ICJ Statute)—an annex to and “an integral part of the [U.N.] Charter.” The ICJ was modeled on the Permanent Court of International Justice (PCIJ), which states established at the end of World War I in the Covenant of the League of Nations. During World War II, the United States played a central role in advocating both for the establishment of a new international court to replace the PCIJ and in developing the court’s structure and mandates. The ICJ began its work in 1946. Although the PCIJ dissolved that same year, its decisions continue to be of persuasive value.

Like all members of the United Nations, the United States is a party to the ICJ Statute.

The ICC: The Rome Statute, 2002

More than half a century after the ICJ was established, the ICC began its work after its originating treaty—the Rome Statute of the International Criminal Court (Rome Statute)—entered into force in 2002. Unlike the ICJ, the ICC is not a part of the United Nations. The ICC does, however, have a relationship with the United Nations in several respects. The U.N. Security Council may both refer a case to the ICC and direct the ICC to defer an investigation for up to a year. The ICC and the United Nations may also cooperate in various ways provided for in an agreement between them.

Unlike the ICJ, the ICC is a criminal court authorized to try individuals for certain serious crimes rather than a court of general jurisdiction authorized to resolve legal disputes between states. Before establishing the ICC, states had created a number of ad hoc tribunals to try individuals for

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7 See Statute of the International Court of Justice art. 23, ¶ 1.

8 See ICJ History, supra note 6. The decisions of arbitration panels and ad hoc courts are often cited and thus also can support the development and clarification of international law, but they are more limited in this regard because they are temporary institutions created solely to resolve a particular dispute or hear a specific set of cases. Consequently, these bodies do not have the ability to develop a body of caselaw over time in the way permanent courts do. It was in part because of this capacity that the United States and other states justified their advocacy for the establishment of a permanent international court after World War II. See ICJ History, supra note 6; infra text accompanying notes 11–12.

9 U.N. Charter art. 92.

10 See id.; see also Grant Gilmore, The International Court of Justice, 55 YALE L.J. 1049, 1049 (1946) (stating that the ICJ “has replaced the League of Nations’ Permanent Court of International Justice with little change in the Court’s constitution . . ., in the extent of its jurisdiction, or in the procedure prescribed under its Statute”).


12 See ICJ History, supra note 6.


14 See U.N. Charter art. 93, ¶ 1.


16 See id., art. 13. The triggering of ICC jurisdiction by the Security Council is discussed further infra, “Case Initiation by Security Council Referral.”

17 See Rome Statute, supra note 15, art. 16; infra “Case Initiation by Security Council Referral.”

serious international crimes committed in various conflicts, including the Nuremberg and Tokyo war crimes trials after World War II and, more recently, the International Criminal Tribunals for Yugoslavia and Rwanda.19 Recognizing the utility of having a permanent international criminal court available to investigate and prosecute “the most serious crimes of concern to the international community as a whole,” however, states parties “establish[ed] an independent permanent International Criminal Court . . . with jurisdiction over” crimes of such gravity that they “threaten the peace, security and well-being of the world.”20

As discussed below, the Rome Statute recognizes four such crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.21 The ICC is not designed to replace national jurisdiction but rather to “be complementary to” it.22 This principle of complementarity prevents the ICC from investigating or prosecuting accused individuals when a national judiciary system is already effectively doing so,23 thus making the ICC a forum “of last resort.”24

The United States is not a party to the Rome Statute.25 The United States did, however, actively participate in the negotiations on the treaty, and the Clinton Administration signed it in December 2000.26 Before the negotiations, the Senate supported the creation of an international criminal court, expressing its sense that such a court “would greatly strengthen the international rule of law” and “thereby serve the interest of the United States and the world community.”27

This support was not unconditional. The Senate indicated that it would not support ratification of a treaty allowing “representatives of any terrorist organization, including but not limited to the Palestine Liberation Organization” or nationals of states supporting international terrorism to “sit in judgement [sic] of American citizens.”28 The Senate also indicated its support for ratification of a treaty creating an international criminal court was contingent upon U.S. “citizens [being] guaranteed . . . that the court will take no action infringing upon or diminishing their rights under the First and Fourth Amendments of the Constitution of the United States.”29

The Rome Statute was made open for signature in 1998, and shortly thereafter Congress passed legislation prohibiting the United States from “becom[ing] a party to the International Criminal Court except pursuant to a treaty under Article II of . . . the Constitution” and prohibiting the use

20 Rome Statute, supra note 15, pmbl.
21 See id. arts. 5–8 bis; infra “Jurisdiction” / “The ICC.”
22 Rome Statute, supra note 15, art. 1.
23 The Rome Statute requires the ICC to deem a case inadmissible whenever it “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.” Id. art. 17, ¶ 1(a). Other aspects of the ICC’s jurisdiction are discussed further infra “Jurisdiction” / “The ICC.”
28 Id. § 518.
29 Id. § 519.
of funds to support the court unless the United States becomes a party through a treaty. When President Clinton signed the Rome Statute in 2000, he acknowledged that it lacked binding legal force upon the United States until it was ratified with Senate approval, and he further stated that he would not submit the treaty for Senate approval immediately because “[t]he United States should have the chance to observe and assess the functioning of the Court” before doing so.

More specifically, Clinton expressed concern in large part about the possibility of ICC prosecutions of U.S. nationals. For this reason, the United States attempted to persuade other states that the Security Council—in which the United States has veto power as a permanent member—should have greater control over referral of cases to the ICC than the Rome Statute ultimately provided. Similar concerns led Congress to pass and President George W. Bush to sign the American Servicemembers Protection Act of 2002 (ASPA), which provides for measures to prevent the ICC from exercising jurisdiction over U.S. armed forces members, officials, and government personnel; bars U.S. service members from participating in U.N. peacekeeping operations that could put them in jeopardy of ICC prosecution; and prohibits multiple types of U.S. assistance to and interactions with the court.

ASPA does not preclude all U.S. engagement with the ICC: It does not “prohibit the United States from rendering assistance to international efforts to bring to justice . . . foreign nationals accused of genocide, war crimes or crimes against humanity.” Further, ASPA authorizes the President to waive the statute’s prohibitions conditioned upon the Administration entering into an agreement that would prohibit the ICC from exercising jurisdiction over U.S. armed forces members, officials, and government personnel. After Russia’s 2022 invasion of Ukraine, Congress amended ASPA to provide the executive branch with more authority to provide support to the ICC in certain circumstances—specifically, “to assist with investigations and prosecutions of foreign nationals related to the Situation in Ukraine, including to support victims and witnesses.”

Since the ICC was established, the U.S. stance toward the court has shifted with administrations. In 2002, President George W. Bush formally announced that the United States neither intended to become a party nor recognized any legal obligations arising from the United States’ signature of the Rome Statute. During the Obama Administration, the United States began participating in the Rome Statute parties’ meetings as a non-state party observer. The Trump Administration

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36 See id. § 7424(b)-(c).
37 See id. §§ 7423–25.
38 Id. § 7433(a) (emphasis added).
39 Id. § 7422.
42 See Harold Hongju Koh, Legal Adviser, Dep’t of State, Address at the Annual Meeting of the American Society of (continued...)
subsequently expressed strong disapproval of the ICC’s investigation of whether U.S. military and intelligence personnel committed war crimes in Afghanistan, issuing an executive order in 2020 that declared a national emergency and authorized sanctions against certain ICC officials involved in the investigation. The Biden Administration rescinded that executive order in 2021 and again began participating as a non-party observer in the meetings of the ICC states parties.

Structure

Each court’s respective originating treaty sets out the court’s structure and specifies how it is governed by the states parties to the treaty.

The ICJ

Fifteen judges sit on the ICJ. They are elected by the U.N. member states for nine-year terms in parallel votes held in the Security Council and the General Assembly, from a list of persons nominated by the national groups in the Permanent Court of Arbitration or national groups appointed by governments that are not party to that body. Non-U.N. member states may also nominate candidates pursuant to rules established by the General Assembly or by special agreement. The ICJ Statute provides that the judges are to be “independent,” “of high moral character,” and have “the qualifications required in their respective countries for appointment to the highest judicial offices” or “recognized competence in international law.” In cases in which one or more parties to a dispute do not have a judge of their same nationality on the bench of elected judges, the ICJ Statute provides that the party may choose a qualified individual, preferably from the list of nominees, to sit as a judge for that specific case.

A U.S. national has always been among the elected judges on the court. Joan Donoghue, a U.S. national who served on the court from 2010 to 2024, served as the ICJ’s president for her last three years. Another U.S. national—Sarah Cleveland—was elected to the court upon Donoghue’s completion of her final term. (Another sitting judge—Judge Nawaf Salam of International Law, The Obama Administration and International Law (Mar. 25, 2010), https://2009-2017.state.gov/s/l/releases/remarks/139119.htm.

46 Statute of the International Court of Justice art. 3, ¶ 1. The number of judges that hear and decide a particular case is determined by the Court in accordance with the ICJ Statute. See id. arts. 24–29.
47 Id. art. 13, ¶ 1.
48 See id. arts. 4, 5 & 8. Candidates must get an absolute majority in each body to be elected to the court. See id. art. 10, ¶ 1.
49 Id. art. 4.
50 See id. arts. 4–6.
51 Id. art. 2.
52 Id. art. 31, ¶ 2.
55 Press Release, Antony J. Blinken, Sec’y of State, U.S. Dep’t of State, Election of Professor Sarah H. Cleveland to the (continued...
Lebanon—was elected by the ICJ judges to serve as president of the ICJ after Donoghue’s departure.  

The ICC

The ICC has 18 judges who are nominated and elected by the states parties to the Rome Statute for nine-year terms. Once elected, judges are assigned to sit on one of the ICC’s three divisions: the Pre-Trial Chamber, the Trial Chamber, and the Appeals Chamber. Additionally, the Rome Statute established the ICC’s Office of the Prosecutor, which “act[s] independently as a separate organ of the Court.” The Prosecutor and deputy prosecutors are also elected by the states parties for nine-year terms. The court’s current Prosecutor is Karim Khan, a United Kingdom national. (Because the United States is not a party to the Rome Statute, it does not vote in the elections of the judges and prosecutors or in other matters related to the parties’ ongoing management of the court.)

Jurisdiction

The jurisdiction of the ICJ and the ICC is specified in each court’s respective originating treaty. The contours of each court’s jurisdiction reflect the distinct purposes states created the court to serve in the international system.

The ICJ’s subject matter jurisdiction (often referred to in international law as “jurisdiction ratione materiae”) is much broader than that of the ICC. While the ICJ Statute provides the ICJ with the authority to decide any question of international law when states have consented to its jurisdiction, the Rome Statute authorizes the ICC to investigate, prosecute, and try individuals for four international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.

Each court’s originating treaty provides that the ICJ and the ICC may decide questions within their subject matter jurisdiction only if they also have jurisdiction over the particular case that presents those questions, discussed in the following two sections.
The ICJ's Case Jurisdiction

Since it began its work in 1946, the ICJ has decided numerous cases raising diverse issues of international law—such as maritime and land boundary disputes to the legality of the use of force and of certain weapons—and has addressed many questions regarding the meaning of various treaty provisions. The court’s docket has become increasingly busy over time, it currently has 22 pending cases. The three most recently filed cases as of this writing are Ukraine v. Russian Federation (filed in 2022), South Africa v. Israel (filed in 2023), and Nicaragua v. Germany (filed in 2024). All three involve allegations that the defendant states violated provisions of the Convention on the Prevention and Punishment of the Crime of Genocide, and Nicaragua v. Germany also includes allegations of violations of international humanitarian law (also referred to as the “law of war” or “law of armed conflict”).

Only states—either individually or collectively in their capacity as members of the Security Council, General Assembly, or other U.N. body—have standing before the ICJ. The ICJ may decide any question of international law that is properly submitted for its resolution, which

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64 See List of All Cases, INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/list-of-all-cases (last visited Apr. 1, 2024).
65 See, e.g., Case Concerning Maritime Dispute (Peru v. Chile), Judgment, 2014 I.C.J. 4 (Jan. 27); Case Concerning the Frontier Dispute (Benin v. Niger), Judgment, 2005 I.C.J. 90 (July 12).
66 See, e.g., Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgment, 1984 I.C.J. 392 (Nov. 26); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).
68 Cf., e.g., Robert P. Alford, The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance, 162 AM. SOC. INT’L. L. PROC. 160, 160 (2000) (“The past two decades have seen an explosion of new international courts and tribunals. . . . Moreover, international courts and tribunals are being utilized with greater and greater frequency.”).
74 See What Is International Humanitarian Law?, INT’L. COMM. OF THE RED CROSS (Apr. 6, 2022), https://www.icrc.org/en/document/what-international-humanitarian-law (explaining that international humanitarian law “protects persons who are not, or are no longer, directly or actively participating in hostilities, and imposes limits on the means and methods of warfare” and “is made up primarily of treaties, customary international law and general principles of law”).
75 See Statute of the International Court of Justice art. 34, ¶ 1.
requires that states manifest their consent to its jurisdiction over a given case in one of the ways provided for in the ICJ Statute. The ICJ has two types of case jurisdiction: contentious and advisory.

Contentious Jurisdiction

The ICJ’s jurisdiction to decide disputes between states, known as its contentious jurisdiction, is based on the consent of all states that are parties to the case. Any member state of the United Nations (which is automatically a party to the ICJ Statute\(^\text{76}\)) may consent to the court’s jurisdiction to decide disputes between it and other member states, in one of several ways described below.\(^\text{77}\) (A non-party state’s ability to bring cases before the court is dictated by the Security Council.\(^\text{78}\))

Over the court’s history, the United States has brought nine cases against other states and has had sixteen cases filed against it by other states.\(^\text{79}\) Congress has urged the executive branch to bring a contentious case before the ICJ in at least one instance. In 1996, Congress made various findings regarding allegations of terrorism committed by the Cuban government and “urge[d] the President to seek, in the International Court of Justice, indictment for this act of terrorism.”\(^\text{80}\) (The United States never filed such a case.\(^\text{81}\))

States may provide their consent to the court’s contentious jurisdiction in one of three ways: consent to the ICJ’s compulsory jurisdiction, consent to its jurisdiction to resolve disputes about a treaty, and consent to its jurisdiction to resolve a specific dispute.

Consent to Compulsory Jurisdiction

First, states may recognize the ICJ’s “compulsory” jurisdiction by depositing an instrument with the court accepting its jurisdiction over any legal disputes with another state that has also accepted the court’s compulsory jurisdiction.\(^\text{82}\) The United States was among the first states to accept the court’s compulsory jurisdiction: On August 14, 1946, after securing Senate advice and

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\(^{76}\) See U.N. Charter art. 93, § 1.

\(^{77}\) See Statute of the International Court of Justice arts. 35, ¶ 1 & 36 ¶ 1–2.

\(^{78}\) See id. art. 4, ¶ 3.


\(^{81}\) See U.S. ICJ Contentious Cases, supra note 79.

\(^{82}\) See Statute of the International Court of Justice art. 36, ¶ 2.
consent. President Truman deposited the U.S. instrument of acceptance. Four decades later, the United States withdrew its declaration after the ICJ determined that it had jurisdiction over a case that Nicaragua brought against the United States alleging that it had violated various international legal prohibitions regarding the use of force against another state. In announcing the U.S. withdrawal, the Reagan Administration maintained that the court did not have jurisdiction and that the case was “a misuse of the Court for political purposes.” As of March 2024, there are 74 countries that currently consent to the ICJ’s compulsory jurisdiction.

Consent to Jurisdiction over Disputes About a Treaty

Second, states may consent to the ICJ’s jurisdiction through treaty provisions. The ICJ Statute provides the court with jurisdiction over disputes between states where a treaty provides that the ICJ may resolve disputes about the meaning or application of the treaty (often referred to as “compromissory clauses”). Numerous treaties include such clauses and most of the ICJ’s contentious-case jurisdiction to date has been treaty-based, including most of those cases to which the United States has been a party.

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83 S. Res. 196, 79th Cong. (1946). In its report accompanying the resolution, the Senate Committee on Foreign Relations explained its reasoning for choosing to use the treaty approval process rather than another method such as majority votes by both houses even though the U.S. acceptance of the ICJ’s compulsory jurisdiction was not a formal treaty like the U.N. Charter:

> Inasmuch as the declaration would involve important new obligations for the United States, the committee was of the opinion that it should be approved by the treaty process, with two-thirds of the Senators present concurring. The force and effect of the declaration is that of a treaty, binding the United States with respect to those states which have or which may in the future deposit similar declarations. . . . While the declaration can hardly be considered a treaty in the strict sense of that term, the nature of the obligations assumed by the contracting parties are such that no action less solemn or less formal than that required for treaties should be contemplated.


84 Declaration Recognizing as Compulsory the Jurisdiction of the Court, Aug. 14, 1946, 61 Stat. 1218, 1 U.N.T.S. 9. States may and often do, however, qualify their acceptance of the ICJ’s jurisdiction by attaching what are known as “reservations, declarations, and understandings” to their instruments of acceptance. See CRS In Focus IF12208, Reservations, Understandings, Declarations, and Other Conditions to Treaties, by Steve P. Mulligan (2022). The Senate attached three such qualifications to its approval of the U.S. acceptance of the ICJ’s compulsory jurisdiction, including that the United States did not accept the ICJ’s jurisdiction over “disputes with regard to matters which are essentially within the domestic jurisdiction of the United States.” S. Res. 96, supra note 83.

85 Termination of Declaration Recognizing as Compulsory the Jurisdiction of the Court, Apr. 7, 1986, 1408 U.N.T.S. 270.


89 Statute of the International Court of Justice art. 36, ¶ 1.


92 See id.
Although much of the ICJ’s treaty-based jurisdiction to date has been based on compromissory clauses in bilateral treaties, a number have also been brought under multilateral treaties. Among the multilateral treaties that have provided the basis for the court’s jurisdiction are the Vienna Convention on Consular Relations, the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Convention for the Suppression of the Financing of Terrorism. Five of the court’s pending cases are based on the compromissory clauses of multilateral treaties to which the United States is a party. Four of those cases were brought pursuant to the compromissory clause of the Convention on the Prevention and Punishment of the Crime of Genocide: The Gambia v. Myanmar, Ukraine v. Russian Federation, South Africa v. Israel, and Nicaragua v. Germany. The fifth, Canada and the Netherlands v. Syrian Arab Republic, was brought pursuant to the compromissory clause of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Consent to Jurisdiction over a Specific Dispute

Third, states may consent to the ICJ’s jurisdiction over a particular dispute by—in the words of the ICJ Statute, “special agreement.” For example, in 1981, the United States and Canada invoked this type of ICJ jurisdiction by entering into an agreement referring to the court a dispute.

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93 See id.
100 See supra note 70.
101 See supra note 71.
102 See supra note 72.
103 See Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic), Joint Application Instituting Proceedings, 2023 I.C.J. (June 8, 2023).
104 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 30, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85.
105 Statute of the International Court of Justice art. 36, ¶ 1.
106 Id. art. 40, ¶ 1.
between the countries regarding a maritime boundary; the court issued its decision on the proper delimitation of the boundary under the governing international law in 1984.\footnote{Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States), Judgment, 1984 I.C.J. 246 (Oct. 12).}

**Advisory Jurisdiction**

In addition to contentious jurisdiction, the ICJ Statute provides the court with advisory jurisdiction to decide certain questions of international law that are not raised by a dispute between states, but rather that are submitted to the court by the Security Council, General Assembly, or other U.N. body.\footnote{See U.N. Charter art. 96; Statute of the International Court of Justice art. 65.} The Security Council and the General Assembly may ask the court to provide an advisory opinion “on any legal question,”\footnote{U.N. Charter art. 96, ¶ 1.} and other U.N. bodies may, if authorized by the General Assembly, request an advisory opinion “on legal questions arising within the scope of their activities.”\footnote{U.N. Charter art. 96, ¶ 2.}

The Security Council has invoked the ICJ’s advisory jurisdiction once: In 1970, the Council asked the court to decide whether the continued presence of the South African government in Namibia was illegal under international law.\footnote{See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16 (June 21).} (The court determined that it was.\footnote{See id. at 46.}) The General Assembly has submitted 18 requests for advisory opinions.\footnote{See Organs and Agencies Authorized to Request Advisory Opinions, INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/organ-agencies-authorized (last visited Mar. 7, 2024) [hereinafter ICJ Advisory Opinion Requests].} In April 2023, for example, the General Assembly asked the court to determine states’ obligations under international law related to climate change.\footnote{Obligations of States in Respect of Climate Change, Request for Advisory Opinion, 2023 I.C.J. No. 187 (Apr. 12).} Five other U.N. bodies have requested advisory opinions.\footnote{See ICJ Advisory Opinion Requests, supra note 113.} For example, in November 2023, the International Labor Organization (ILO) asked the court to determine whether the right to strike is protected by one of the ILO Conventions.\footnote{Right to Strike Under ILO Convention No. 87, Request for Advisory Opinion, 2023 I.C.J. (Nov. 10).}

In 1962, Congress expressed its support of one of ICJ’s early advisory opinions addressing a question submitted by the General Assembly.\footnote{Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151 (July 20).} The court determined that costs incurred in undertaking U.N. operations in the Congo qualified as expenses that could be assessed to U.N. members under the U.N. Charter.\footnote{United Nations Loan Authorization Act, Pub. L. No. 87-731, 76 Stat. 695 (1962).} Specifically, Congress stated its sense that the ICJ’s decision “provid[es] a sound basis for obtaining prompt payment of assessments for such expenditures”\footnote{22 U.S.C. § 287k.} and that “the United Nations should take immediate steps to give effect to the advisory opinion of the International Court of Justice on the financial obligations of members of the United Nations in order to assure prompt payment of all assessments, including assessments to cover the cost of operations to maintain or restore international peace and security.”\footnote{Id. § 287l.} 110
The ICC

The extent of the ICC’s subject matter jurisdiction—that is, which crimes it may investigate and prosecute—depends on the way in which the ICC Prosecutor’s investigation of the case was initiated. The ICC’s jurisdiction over allegations of one or more of the four Rome Statute crimes depends on the event that prompts an investigation.122

Case Initiation by State Party Referral or by the ICC Prosecutor

First, a state party “may refer to the Prosecutor a situation in which one or more [of those] crimes appear to have been committed requesting the Prosecutor to investigate the situation.”123 The ICC’s jurisdiction over crimes committed by Russian nationals in Ukrainian territory was triggered in this manner: During the month following Russia’s February 2022 invasion of Ukraine, 43 parties to the Rome Statute referred the situation to the ICC Prosecutor.124 On the basis of these referrals, the Prosecutor opened the investigation in March 2022.125 That investigation led the ICC Pre-Trial Chamber to issue arrest warrants for Russian President Vladimir Putin and another official in his administration in March 2023, and a year later for two Russian military commanders.127

Second, a case investigation can be initiated by the ICC Prosecutor proprio motu—that is, on the Prosecutor’s own initiation rather than a referral—on the basis of information received regarding allegations of the commission of Rome Statute crimes.128

When the ICC’s jurisdiction is triggered in one of these two ways—that is, either by state party referral or by the ICC Prosecutor proprio motu—the reach of the court’s jurisdiction depends on the crime alleged.

Genocide, Crimes Against Humanity, and War Crimes

For genocide, crimes against humanity, and war crimes, the ICC has jurisdiction if the crimes were allegedly committed by a national of or on the territory of a state party to the Rome Statute or a non-state party that has accepted the court’s jurisdiction.129 This means that there may be cases in which the Rome Statute provides the ICC with jurisdiction over the nationals of non-state parties that have not accepted the court’s jurisdiction in a given case. More specifically, the court

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121 As noted, the ICC has subject matter jurisdiction for four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. See Rome Statute, supra note 15, arts. 5–8 bis.
123 See id. arts. 13(a) & 14.
128 See Rome Statute, supra note 15, arts. 13(c) & 15.
129 See id. arts. 12, ¶ 2 & 3.
would have jurisdiction over cases in which the alleged crimes were committed by a non-state party’s nationals in the territory of a state party or a non-state party that has accepted the court’s jurisdiction. For example, the ICC has jurisdiction to investigate the alleged commission of genocide, crimes against humanity, or war crimes by any country’s nationals in Ukraine and in Gaza because, respectively, Ukraine, although not a state party, has accepted the court’s jurisdiction for that purpose, and Palestine is a party to the Rome Statute. As a result, despite the fact that neither Russia nor Israel is a party to the Rome Statute, their nationals are subject to prosecution by the ICC in these investigations based on the consent of the states where the alleged crimes were committed.

**Crime of Aggression**

The ICC’s jurisdiction is more limited for the crime of aggression when the investigation is initiated by state party referral or by the ICC Prosecutor *propio motu*. In such cases, in contrast to genocide, crimes against humanity, and war crimes, the Rome Statute (1) permits state parties to opt out of the ICC’s jurisdiction over the crime of aggression committed by the party’s nationals, and (2) prohibits the court from exercising jurisdiction over the national of a non-state party or over crimes committed in the territory of a non-state party. The ICC’s jurisdiction over the crime of aggression was not activated in the Rome Statute, but rather later by an amendment that entered into force in 2013. The United States participated in those negotiations as a non-state party observer.

**Case Initiation by Security Council Referral**

The third and final way an ICC investigation can be triggered is by referral from the Security Council. Specifically, the Council may issue a resolution referring a situation in which one or more of the Rome Statute crimes appear to have been committed to the ICC Prosecutor pursuant to the Council’s authority under Chapter VII of the U.N. Charter to take measures in response to what the Council determines is a “threat to the peace, breach of the peace, or act of aggression.”

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133 See Rome Statute, supra note 15, art. 15 bis, ¶ 1.
134 See id. art. 15 bis, ¶ 4.
135 See id. art. 15 bis, ¶ 5.
138 See Rome Statute, supra note 15, art. 13(b).
139 See id.
140 U.N. Charter art. 39. Chapter VII of the U.N. Charter provides that the Security Council “shall determine the (continued...)
None of the limitations on the ICC’s subject matter jurisdiction in cases that are initiated by state party referral or by the ICC Prosecutor apply in cases initiated by Security Council referral.141 Instead, the ICC has jurisdiction over all the Rome Statute crimes when a Security Council referral is made, including the crime of aggression, regardless of where they occurred or the nationality of the alleged offender. To date the Security Council has issued two resolutions referring situations to the ICC for investigation: the conflicts in Darfur, Sudan, in March 2005142 and in Libya in February 2011.143 Conversely, the Security Council may also require that the ICC defer an investigation or prosecution for 12 months under the Council’s Chapter VII authority.144

As a permanent member of the Security Council, the United States has the power to prevent any Council resolution from passing.145 Thus, as a practical matter, no ICC investigation will be initiated through Security Council referral if the United States or one of the other four permanent members of the Council (China, France, Russia, and the United Kingdom146) chooses to cast a negative vote—known as the permanent members’ “veto” power—with respect to a resolution of referral.147 Permanent members may also allow a resolution that otherwise has sufficient support to pass without casting an affirmative vote by abstaining.148 The United States chose this abstention option, for example, in the case of the Council’s resolution referring the situation in Darfur to the ICC.149 On the other hand, the United States cast an affirmative vote in favor of the Security Council resolution referring the situation in Libya to the ICC.150 To date there has been one instance in which a proposed Security Council ICC referral resolution has failed to pass due

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141 See Rome Statute, supra note 15, art. 15 ter.
144 Rome Statute, supra note 15, art. 16.
146 See id. art. 23, ¶ 1.
147 See id. arts. 23, ¶ 1 & 27, ¶ 3; Security Council, Voting System, U.N., https://www.un.org/securitycouncil/content/voting-system (last visited Mar. 7, 2024) [hereinafter Security Council Voting]. The Security Council has a total of fifteen members. Id. art. 23, ¶ 1. In addition to the five permanent members, ten members are elected by the General Assembly to serve on the Council for two-year terms. See U.N. Charter art. 23, ¶¶ 1–2.
to a permanent member veto. In 2014, China and Russia used their veto power to prevent passage of a Council resolution referring the situation in Syria to the ICC.  

The ICC Jurisdiction in Practice: Investigation of Crimes Committed in Ukraine

The ICC’s jurisdiction in its ongoing investigation of Rome Statute crimes alleged to have been committed in Ukrainian territory is illustrative of the differences in the reach of the ICC’s jurisdiction that depend on the way the case is initiated and what the crime alleged is. The ICC has jurisdiction to investigate the commission of crimes against humanity and war crimes on Ukrainian territory (including by Russian nationals, even though Russia is not an ICC party) because (1) Ukraine, although not a state party to the Rome Statute, has accepted the ICC’s jurisdiction for those crimes committed in its territory from 2014 on; and (2) several states parties referred the Ukraine situation to the ICC Prosecutor.

Because the Rome Statute prohibits the ICC from exercising jurisdiction over the alleged commission of the crime of aggression by non-state party nationals absent Security Council referral, the ICC’s investigation may not include the crime of aggression unless it receives a referral from the Security Council. Russia’s veto power as a permanent Security Council member, however, effectively precludes that jurisdictional avenue.

Effect of Decisions & Enforcement Mechanisms

In contrast to domestic legal systems, there are no centralized mechanisms for enforcing the decisions of international courts such as the ICJ and the ICC. Rather, international courts are dependent on the states that created them—individually and collectively—to comply with, support, and enforce their decisions.

The ICJ

Contentious Cases

The ICJ’s decisions in contentious cases are binding solely on the parties to the dispute in a given case. The U.N. Charter obligates member states to comply with any ICJ decision to which they are a party. In the event that a state refuses to comply with an ICJ judgment that is binding on it, the other state that is a party to the case may seek recourse with the Security Council, which is authorized to take measures to enforce the court’s judgment. As with a Security Council ICC referral or any other Council action, however, such enforcement measures are possible only if all five permanent members agree to vote in their favor or to abstain. The Security Council has

152 See Ukraine Acceptance of ICC Jurisdiction, supra note 130.
153 See supra notes 124 & 125 and accompanying text.
154 See U.N. Charter art. 23 ¶ 1; supra note 147 and accompanying text.
155 Statute of the International Court of Justice art. 59.
156 U.N. Charter art. 94, ¶ 1.
157 See id. art. 94, ¶ 2.
158 See supra notes 145-148 and accompanying text.
never taken action to enforce an ICJ judgment, and there has been only one instance in which a state asked the Security Council to do so. In 1986, Nicaragua requested that the Council enforce the ICJ’s judgment against the United States in Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States). The United States vetoed the subsequent proposed Security Council resolution “call[ing] for full and immediate compliance” with the ICJ’s judgment in the case.

In the absence of Security Council enforcement measures, states may individually and collectively attempt to induce compliance with ICJ judgments by taking various actions, including calling on a state to comply with the judgment against it in diplomatic channels or issuing economic sanctions or other countermeasures. The United States was among several countries that took such action, for example, with respect to the ICJ’s provisional measures order (akin to a preliminary injunction at the domestic level) in the 2022 case brought by Ukraine against Russia, which directed Russia to “immediately suspend” its military operations in Ukraine.

Regardless of whether a state that is bound by an ICJ judgment complies with it, the court’s analyses of and conclusions regarding international law in its opinions—including the meaning of various treaty provisions that it is called upon to interpret—are considered to be highly persuasive and authoritative by many states and the international community more broadly. In this respect, ICJ decisions can have impacts beyond the actions of states in response to a particular judgment by clarifying and contributing to the development of international law.

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159 In Hindsight: The Security Council and the International Court of Justice, SECURITY COUNCIL REPORT (Dec. 28, 2016), https://www.securitycouncilreport.org/monthly-forecast/2017-01/in_hindsight_the_security_council_and_the_international-court-of-justice.php [hereinafter The Security Council and the ICJ]. The ICJ determined that the United States was obligated to immediately cease its support of paramilitary forces in their campaign against the Nicaraguan government and to make reparations to Nicaragua for the injuries it suffered as a result of what the ICJ found to be multiple breaches of U.S. obligations under international law. See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Merits Judgment, 1986 I.C.J. 14, 149 (June 27), https://www.icj-cij.org/sites/default/files/case-related/70/070-19860627-JUD-01-00-EN.pdf.


165 See id.; cf. also ICJ Statute, art. 56, ¶ 1 (requiring the ICJ “to state the reasons on which [its judgments are] based”). ICJ decisions can contribute to the development of international law even though the impact they have within domestic (continued...)
Advisory Opinions

The ICJ’s advisory opinions are nonbinding, and thus cannot be directly enforced in the way its judgments in contentious cases might be. However, like the ICJ’s contentious-case opinions, ICJ advisory opinions are considered highly authoritative and thus influence the understanding and development of international law. Further, state actors may still call for adherence to the court’s advisory opinions, as Congress did in its resolution in support of the ICJ’s advisory opinion about the contribution obligations of U.N. member states.

The ICC

The ICC is similarly dependent on states to enforce its orders and judgments by, for example, making arrests and transferring defendants to the ICC’s detention center, freezing alleged offenders’ assets for potential use in damages awards, and carrying out sentences. States parties to the Rome Statute are obligated to provide such assistance, but non-state parties may also choose to provide various forms of assistance to the court. As noted, the United States has done this periodically over time, including pursuant to statutory directives. Additionally, ICC judgments that contain legal reasoning and conclusions can contribute to the clarification and development of international criminal law.

Conclusion

Although the U.S. relationship with the ICJ and the ICC over the course of each court’s existence has been varied and often complex, the United States has often made efforts to engage with the courts and to influence their operations. Congress has always played a role in the U.S. relationship with these courts. In the case of both the ICJ and the ICC, Congress has done so through its appropriations power and the Senate’s treaty advice-and-consent power. For legal systems varies. The U.S. Supreme Court, for example, has held that an ICJ decision requiring the United States to comply with its obligations under the Vienna Convention on Consular Relations was not enforceable in U.S. law because no implementing legislation had been enacted. See Medellin v. Texas, 552 U.S. 491, 504-05, 510-11 (2008).

For a more in-depth discussion of the effect of international law on U.S. law, see CRS Report RL32528, International Law and Agreements: Their Effect upon U.S. Law, by Steve P. Mulligan.


167 See id.

168 See supra text accompanying notes 118–120.


171 See supra text accompanying notes 38–40.

172 Cf. Rome Statute, supra note 15, arts. 74, ¶ 5 & 83, ¶ 4 (requiring the Trial and Appeals Chambers to issue decisions that state the reasons on which they are based).

173 See CRS In Focus IF10354, United Nations Issues: U.S. Funding to the U.N. System, by Luisa Blanchfield (2023) (noting that “[t]he United States is the single largest financial contributor to the United Nations,” and that “[t]he U.N. regular budget funds the core administrative costs of the organization, including the . . . International Court of Justice”); 22 U.S.C. § 7401(b) (prohibiting use of funds to support the ICC); supra note 40 and accompanying text (discussing statutory authorization for State Department to provide certain forms of assistance to the ICC in a State Department funding statute).

example, the Senate approved the U.S. status as a party to the ICJ by providing its advice and consent to the U.N. Charter, and Congress constrained the executive branch from using funds to provide assistance to the ICC on some matters and authorized the use of funds to help the ICC in others. In the case of the ICJ, it has made recommendations to the Administration and to the international community more broadly regarding the court’s cases. In the case of the ICC, Congress has passed legislation that structures the U.S. relationship with the court in ways that could assist or hinder its work.

The roles that the ICJ and the ICC play in the international system, their structure, their respective jurisdictional authorities, the mechanisms for enforcing their judgments, and the various U.S. interactions with them over time may all provide Congress with useful lenses as it carries out its legislative and oversight mandates related to the courts. More specifically, such considerations support Congress’s continued evaluation of how the courts’ actions may impact the international legal system in which the United States operates and pursues its various interests. As Congress observes how the courts carry out their jurisdictional mandates, their impact on the development of international law, and the Administration’s interactions with them, Congress may, as it has in the past, accordingly constrain, authorize, or make recommendations to the executive branch in its interactions with the ICJ and the ICC.

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175 See supra text accompanying notes 117–120.
176 See supra text accompanying notes 34–40.
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