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

April 4, 2024

Congressional Research Service

<https://crsreports.congress.gov>

R48004



R48004

April 4, 2024

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

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,¹ including on the part of Congress.² 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 states³ 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.⁴

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.⁵ States parties established the ICJ to, first and foremost, provide them with a *judicial* method for the pacific settlement of international disputes

¹ See, e.g., Mike Corder, *5 European Nations and Canada Seek to Join Genocide Case Against Myanmar at Top UN Court*, AP NEWS (Nov. 16, 2023, 2:31 PM), <https://apnews.com/article/myanmar-rohingya-britain-gambia-genocide-0ec2ce873669c8ada585e10dde91d284>; Michael Rios, *Five Countries Ask International Criminal Court to Investigate the Situation in Palestinian Territories*, CNN (Nov. 17, 2023, 6:18 PM), <https://www.cnn.com/2023/11/17/middleeast/israel-gaza-war-crimes-icc-referral/index.html>; *UN Court Gets Request for Advisory Opinion on Climate Change*, U.S. NEWS (Apr. 19, 2023, 2:24 PM), <https://www.usnews.com/news/us/articles/2023-04-19/un-court-gets-request-for-advisory-opinion-on-climate-change>.

² See, e.g., Press Release, Senator Chris Coons, U.S. Senate, *Senators Coons and Portman Statement on Congressional Delegation to The Hague* (Nov. 5, 2022), <https://www.coons.senate.gov/news/press-releases/senators-coons-and-portman-statement-on-congressional-delegation-to-the-hague>; Press Release, Rep. Kathy Manning & Rep. Chris Smith, U.S. House of Reps., *Manning, Smith Lead 210 Members in Bipartisan Letter Denouncing South Africa’s Claims Against Israel at International Court of Justice* (Jan. 23, 2024), <https://manning.house.gov/media/press-releases/manning-smith-lead-210-members-bipartisan-letter-denouncing-south-africas>.

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).⁶ Because the ICJ is a permanent court,⁷ it is able to produce a body of caselaw that contributes to the clarification and development of international law over time.⁸

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.”⁹ The ICJ was modeled on the Permanent Court of International Justice (PCIJ),¹⁰ which states established at the end of World War I in the Covenant of the League of Nations.¹¹ 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.¹² The ICJ began its work in 1946. Although the PCIJ dissolved that same year, its decisions continue to be of persuasive value.¹³ Like all members of the United Nations, the United States is a party to the ICJ Statute.¹⁴

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 2002.¹⁵ 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 ICC¹⁶ and direct the ICC to defer an investigation for up to a year.¹⁷ The ICC and the United Nations may also cooperate in various ways provided for in an agreement between them.¹⁸

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

⁶ See *History*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/history> (last visited Apr. 1, 2024) [hereinafter *ICJ History*].

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 countries 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”).

¹¹ See *ICJ History*, *supra* note 6. The Covenant of the League of Nations was part of the Treaty of Versailles and other peace treaties signed in Paris after World War I. See United Nations Office at Geneva, *The Covenant of the League of Nations*, <https://www.un Geneva.org/en/about/league-of-nations/covenant> (last visited Apr. 1, 2024).

¹² See *ICJ History*, *supra* note 6.

¹³ *Permanent Court of International Justice*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/pcij> (last visited Apr. 1, 2024).

¹⁴ See U.N. Charter art. 93, ¶ 1.

¹⁵ Rome Statute of the International Criminal Court (Rome Statute), July 17, 1998, 2187 U.N.T.S. 90.

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.”

¹⁸ See Rome Statute, *supra* note 15, art. 2; Relationship Agreement Between the United Nations and the International Criminal Court, Oct. 4, 2004, 2283 U.N.T.S. 195.

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

¹⁹ See *Ad Hoc Tribunals*, INT’L COMM. OF THE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/en/document/ad-hoc-tribunals>.

²⁰ Rome Statute, *supra* note 15, pmb1.

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.”

²⁴ Sang-Hyun Song, *The Role of the International Court in Ending Impunity and Establishing the Rule of Law*, U.N. (December 2012), <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>.

²⁵ See *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, <https://asp.icc-cpi.int/states-parties> (last visited Feb. 23, 2024) [hereinafter *States Parties to the Rome Statute*].

²⁶ Press Release, President Bill Clinton, Statement on Signature of the International Criminal Treaty (Dec. 31, 2000), https://1997-2001.state.gov/global/swci/001231_clinton_icc.html [hereinafter Clinton ICC Signing Statement].

²⁷ Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. 103-236, § 517(b)(1)-(2), 108 Stat. 382, 468-70 (1994). The Senate also called on the administration to “make every effort to advance” the proposed court. *Id.* § 517(b)(3).

²⁸ *Id.* § 518.

²⁹ *Id.* § 519.

of funds to support the court unless the United States becomes a party through a treaty.³⁰ 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.³¹

More specifically, Clinton expressed concern in large part about the possibility of ICC prosecutions of U.S. nationals.³² 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.³³ Similar concerns led Congress to pass and President George W. Bush to sign the American Servicemembers Protection Act of 2002 (ASPA),³⁴ which provides for measures to prevent the ICC from exercising jurisdiction over U.S. armed forces members, officials, and government personnel;³⁵ bars U.S. service members from participating in U.N. peacekeeping operations that could put them in jeopardy of ICC prosecution;³⁶ and prohibits multiple types of U.S. assistance to and interactions with the court.³⁷

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.”³⁸ 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.³⁹ 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.”⁴⁰

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.⁴¹ During the Obama Administration, the United States began participating in the Rome Statute parties’ meetings as a non-state party observer.⁴² The Trump Administration

³⁰ See Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001, Pub. L. No. 106-113, § 705(a)-(b), 113 Stat. 1501, 1501A-460 (1999) (codified at 22 U.S.C. § 7401(a)-(b)).

³¹ Clinton ICC Signing Statement, *supra* note 26.

³² See *id.*; David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 18 (1999).

³³ See Scheffer, *supra* note 32, at 19–20. The authority of the Security Council to refer cases to the court and the United States’ and other permanent Security Council members’ veto power is discussed *infra*, “Case Initiation by Security Council Referral.”

³⁴ Pub. L. No. 107-206, 116 Stat. 899 (codified at 22 U.S.C. §§ 7421-33).

³⁵ See 22 U.S.C. § 7427(a)-(c).

³⁶ See *id.* § 7424(b)-(c).

³⁷ See *id.* §§ 7423–25.

³⁸ *Id.* § 7433(a) (emphasis added).

³⁹ *Id.* § 7422.

⁴⁰ Department of State, Foreign Operations, and Related Programs Appropriations Act, 2023, Pub. L. No. 117-328, § 7073, 136 Stat. 5092 (2022) (codified at 22 U.S.C. § 7433(a)).

⁴¹ Letter from the United States to the Secretary-General, U.N. (May 6, 2002) (on file with U.N., Ref. C.N.434.2002.TREATIES-21).

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.⁴³ The Biden Administration rescinded that executive order in 2021⁴⁴ and again began participating as a non-party observer in the meetings of the ICC states parties.⁴⁵

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.⁴⁶ They are elected by the U.N. member states for nine-year terms⁴⁷ in parallel votes held in the Security Council and the General Assembly,⁴⁸ 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.⁴⁹ Non-U.N. member states may also nominate candidates pursuant to rules established by the General Assembly or by special agreement.⁵⁰ 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.”⁵¹ 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.⁵²

A U.S. national has always been among the elected judges on the court.⁵³ 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.⁵⁴ Another U.S. national—Sarah Cleveland—was elected to the court upon Donoghue’s completion of her final term.⁵⁵ (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>.

⁴³ See Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).

⁴⁴ See Exec. Order No. 14022, 86 Fed. Reg. 17895 (Apr. 7, 2021).

⁴⁵ See Beth Van Schaak, Ambassador-at-Large for Global Criminal Justice, Statement of the United States at the 22nd Session of the Assembly of States Parties of the International Criminal Court (Dec. 8, 2023), https://asp.icc-cpi.int/sites/default/files/asp_docs/ASP22.GD_USA_07.12.-ENG.pdf.

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 ¶ 1 & 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.

⁵³ *All Members*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/all-members> (last visited Feb. 23, 2024).

⁵⁴ *Biography of Joan Donoghue*, INTERNATIONAL COURT OF JUSTICE (Feb. 8, 2021), https://www.icj-cij.org/sites/default/files/donoghue_en.pdf.

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.⁵⁶)

The ICC

The ICC has 18 judges who are nominated and elected by the states parties to the Rome Statute for nine-year terms.⁵⁷ 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.⁵⁸ Additionally, the Rome Statute established the ICC’s Office of the Prosecutor, which “act[s] independently as a separate organ of the Court.”⁵⁹ 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.⁶⁰ (Because the United States is not a party to the Rome Statute,⁶¹ 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,⁶² 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.⁶³

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.

International Court of Justice (Nov. 9, 2023), <https://www.state.gov/election-of-professor-sarah-h-cleveland-to-the-international-court-of-justice/>. See also Press Release, United Nations, Security Council Elects Five Judges to International Court of Justice After Five Rounds of Voting (Nov. 9, 2023), <https://press.un.org/en/2023/sc15485.doc.htm>.

⁵⁶ *Presidency*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/presidency> (last visited Mar. 6, 2024).

⁵⁷ Rome Statute, *supra* note 15, art. 36; see also International Criminal Court, *Current Judges*, <https://www.icc-cpi.int/judges/judges-who-s-who> (last visited Feb. 23, 2024).

⁵⁸ Rome Statute, *supra* note 15, art. 39. The number of judges assigned to each chamber and the way in which they are assigned is also governed by the Rome Statute. See *id.*

⁵⁹ *Id.* art. 42.

⁶⁰ *Karim A.A. Khan KC: Prosecutor*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/about/otp/who-s-who/karim-khan> (last visited Mar. 6, 2024).

⁶¹ See *States Parties to the Rome Statute*, *supra* note 25.

⁶² Statute of the International Court of Justice art. 36, ¶ 2. Specifically, the ICJ has jurisdiction to decide matters involving the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; and the nature or extent of the reparation to be made for the breach of an international obligation. *Id.*

⁶³ Rome Statute, *supra* note 15, art. 5.

The ICJ's Case Jurisdiction

Since it began its work in 1946, the ICJ has decided numerous cases raising diverse issues of international law⁶⁴—from maritime and land boundary disputes⁶⁵ to the legality of the use of force and of certain weapons⁶⁶—and has addressed many questions regarding the meaning of various treaty provisions.⁶⁷ The court's docket has become increasingly busy over time;⁶⁸ it currently has 22 pending cases.⁶⁹ The three most recently filed cases as of this writing are *Ukraine v. Russian Federation* (filed in 2022),⁷⁰ *South Africa v. Israel* (filed in 2023),⁷¹ and *Nicaragua v. Germany* (filed in 2024).⁷² All three involve allegations that the defendant states violated provisions of the Convention on the Prevention and Punishment of the Crime of Genocide,⁷³ 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”).⁷⁴

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.⁷⁵ The ICJ may decide any question of international law that is properly submitted for its resolution, which

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).

⁶⁷ See, e.g., Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia), Judgment, 2007 I.C.J. 42 (Feb. 26); Whaling in the Antarctic (Australia v. Japan), Judgment, 2014 I.C.J. 228 (Mar. 31).

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.”).

⁶⁹ See *Pending Cases*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/pending-cases> (last visited Apr. 1, 2024).

⁷⁰ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Application Instituting Proceedings, 2022 I.C.J. (Feb. 26, 2022), <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220227-APP-01-00-EN.pdf>. For a list of all of the filings, orders, and press releases for the case, see International Court of Justice, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, <https://www.icj-cij.org/case/182> (last visited Apr. 1, 2024).

⁷¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Application Instituting Proceedings, 2023 I.C.J. (Dec. 28, 2023), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>. For a list of all of the filings, orders, and press releases for the case, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/case/192> (last visited Apr. 1, 2024).

⁷² Republic of Nicaragua v. Federal Republic of Germany, Application Instituting Proceedings, 2024 I.C.J. (Mar. 1, 2024), <https://www.icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf>.

⁷³ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

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 Statute⁷⁶) may consent to the court's jurisdiction to decide disputes between it and other member states, in one of several ways described below.⁷⁷ (A non-party state's ability to bring cases before the court is dictated by the Security Council.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.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."⁸⁰ (The United States never filed such a case.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.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

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.

⁷⁹ See *Contentious Cases Organized by State: United States*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/cases-by-country/us> (last visited Feb. 23, 2024) [hereinafter *U.S. ICJ Contentious Cases*].

⁸⁰ Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785.

⁸¹ See *U.S. ICJ Contentious Cases*, *supra* note 79.

⁸² See Statute of the International Court of Justice art. 36, ¶ 2.

consent,⁸³ President Truman deposited the U.S. instrument of acceptance.⁸⁴ Four decades later, the United States withdrew its declaration⁸⁵ 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.⁸⁶ 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.”⁸⁷ As of March 2024, there are 74 countries that currently consent to the ICJ’s compulsory jurisdiction.⁸⁸

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”).⁸⁹ Numerous treaties include such clauses⁹⁰ and most of the ICJ’s contentious-case jurisdiction to date has been treaty-based,⁹¹ including most of those cases to which the United States has been a party.⁹²

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.

ELBERT THOMAS, INTERNATIONAL COURT OF JUSTICE: REPORT TO ACCOMPANY S. RES. 196, S. Rep. No. 79-1835, at 10 (1946).

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 as determined by 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.

⁸⁶ See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgment, 1984 I.C.J. 392, 442, ¶ 113 (Nov. 26).

⁸⁷ *Text of U.S. Statement on Withdrawal from Case Before the World Court*, N.Y. TIMES (Jan. 19, 1985), <https://timesmachine.nytimes.com/timesmachine/1985/01/19/225996.html?pageNumber=4>.

⁸⁸ *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/declarations> (last visited Apr. 1, 2024).

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

⁹⁰ See *Treaties*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/treaties> (last visited Apr. 1, 2024).

⁹¹ See *Contentious Cases*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/contentious-cases> (last visited Apr. 1, 2024).

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.⁹³ Among the multilateral treaties that have provided the basis for the court's jurisdiction are the Vienna Convention on Consular Relations,⁹⁴ the International Convention on the Elimination of All Forms of Racial Discrimination,⁹⁵ and the International Convention for the Suppression of the Financing of Terrorism.⁹⁶ Five of the court's pending cases are based on the compromissory clauses of multilateral treaties to which the United States is a party.⁹⁷ Four of those cases were brought pursuant to the compromissory clause of the Convention on the Prevention and Punishment of the Crime of Genocide:⁹⁸ *The Gambia v. Myanmar*,⁹⁹ *Ukraine v. Russian Federation*,¹⁰⁰ *South Africa v. Israel*,¹⁰¹ and *Nicaragua v. Germany*.¹⁰² The fifth, *Canada and the Netherlands v. Syrian Arab Republic*,¹⁰³ was brought pursuant to the compromissory clause of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁰⁴

Consent to Jurisdiction over a Specific Dispute

Third, states may consent to the ICJ's jurisdiction over a particular dispute by¹⁰⁵—in the words of the ICJ Statute, “special agreement.”¹⁰⁶ 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

⁹³ *See id.*

⁹⁴ *See* Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), Judgment, 2004 I.C.J. 12 (Mar. 31).

⁹⁵ *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Order, 2021 I.C.J. 362 (Dec. 7).

⁹⁶ *See* Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia), Order, 2017 I.C.J. 106 (April 19).

⁹⁷ The United States is also party to the Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261 (VCCR), a treaty that does not contain a compromissory clause but instead allows states parties to agree to the ICJ's jurisdiction over disputes about the Convention by becoming parties to a separate treaty known as the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 596 U.N.T.S. 487. Although the United States ratified the Optional Protocol in 1969, President George W. Bush withdrew the United States from the Optional Protocol in 2005. *See* U.N. Treaty Collection Depository, Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3. The United States remains a party to the VCCR, however. *See* U.N. Treaty Collection Depository, Vienna Convention on Consular Relations, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-6&chapter=3&clang=_en.

⁹⁸ Convention on the Prevention and Punishment of the Crime of Genocide, art. IX, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

⁹⁹ *See* Application Instituting Proceedings and Request for Provisional Measures (Gambia v. Myanmar), 2019 I.C.J. No. 178 (Nov. 11).

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 1984.¹⁰⁷

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.¹⁰⁸ The Security Council and the General Assembly may ask the court to provide an advisory opinion “on any legal question,”¹⁰⁹ 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.”¹¹⁰

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.¹¹¹ (The court determined that it was.¹¹²) The General Assembly has submitted 18 requests for advisory opinions.¹¹³ In April 2023, for example, the General Assembly asked the court to determine states’ obligations under international law related to climate change.¹¹⁴ Five other U.N. bodies have requested advisory opinions.¹¹⁵ 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.¹¹⁶

In 1962, Congress expressed its support of one of ICJ’s early advisory opinions addressing a question submitted by the General Assembly.¹¹⁷ 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.¹¹⁸ Specifically, Congress stated its sense that the ICJ’s decision “provid[es] a sound basis for obtaining prompt payment of assessments for such expenditures”¹¹⁹ 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.”¹²⁰

¹⁰⁷ Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States), Judgment, 1984 I.C.J. 246 (Oct. 12).

¹⁰⁸ See U.N. Charter art. 96; Statute of the International Court of Justice art. 65.

¹⁰⁹ U.N. Charter art. 96, ¶ 1.

¹¹⁰ U.N. Charter art. 96, ¶ 2.

¹¹¹ 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).

¹¹² See *id.* at 46.

¹¹³ See *Organs and Agencies Authorized to Request Advisory Opinions*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/organs-agencies-authorized> (last visited Mar. 7, 2024) [hereinafter *ICJ Advisory Opinion Requests*].

¹¹⁴ Obligations of States in Respect of Climate Change, Request for Advisory Opinion, 2023 I.C.J. No. 187 (Apr. 12).

¹¹⁵ See *ICJ Advisory Opinion Requests*, *supra* note 113.

¹¹⁶ Right to Strike Under ILO Convention No. 87, Request for Advisory Opinion, 2023 I.C.J. (Nov. 10).

¹¹⁷ United Nations Loan Authorization Act, Pub. L. No. 87-731, 76 Stat. 695 (1962).

¹¹⁸ Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151 (July 20).

¹¹⁹ 22 U.S.C. § 287k.

¹²⁰ *Id.* § 287l.

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 crimes¹²¹ 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 2023,¹²⁶ 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

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*.

¹²² See Rome Statute, *supra* note 15, art. 13.

¹²³ See *id.* arts. 13(a) & 14.

¹²⁴ See *Ukraine: Situation in Ukraine*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/situations/ukraine> (last visited Feb. 28, 2024).

¹²⁵ See Press Release, Karim A.A. Khan QC, ICC Prosecutor, ICC, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

¹²⁶ See Press Release, Piotr Hofmanski, President, ICC, Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

¹²⁷ See Press Release, Karim A.A. Khan QC, ICC Prosecutor, ICC, Statement by Prosecutor Karim A.A. Khan KC on the Issuance of Arrest Warrants in the Situation in Ukraine (Mar. 5, 2024), <https://www.icc-cpi.int/news/statement-prosecutor-karim-aa-khan-kc-issuance-arrest-warrants-situation-ukraine>.

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,¹³⁰ and Palestine is a party to the Rome Statute.¹³¹ 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.¹³²

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 *proprio motu*.¹³³ 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,¹³⁴ 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.¹³⁵ 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 2013.¹³⁶ The United States participated in those negotiations as a non-state party observer.¹³⁷

Case Initiation by Security Council Referral

The third and final way an ICC investigation can be triggered is by referral from the Security Council.¹³⁸ 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. Charter¹³⁹ to take measures in response to what the Council determines is a "threat to the peace, breach of the peace, or act of aggression."¹⁴⁰

¹³⁰ See Letter from Pavlo Klimkin, Minister for Foreign Affairs of Ukraine, to Herman von Hebel, Registrar, International Criminal Court (Sept. 8, 2015), https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine [hereinafter Ukraine Acceptance of ICC Jurisdiction].

¹³¹ See *State of Palestine*, INTERNATIONAL CRIMINAL COURT (updated July 23, 2019), <https://asp.icc-cpi.int/states-parties/asian-states/Palestine>.

¹³² See *States Parties to the Rome Statute*, *supra* note 25.

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.

¹³⁶ See ICC, Assembly of State Parties to the Rome Statute, Review Conference, The Crime of Aggression, ICC Doc. RC/Res.6 (June 11, 2010); *Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en (last visited Mar. 7, 2024).

¹³⁷ Press Release, Dep't of State, U.S. Delegation to Attend the Rome Statute Review Conference in Kampala (May 28, 2010), <https://2009-2017.state.gov/r/pa/prs/ps/2010/05/142358.htm>.

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

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 Chapter VII] to maintain or restore international peace and security"). *Id.*

¹⁴¹ See Rome Statute, *supra* note 15, art. 15 *ter*.

¹⁴² S.C. Res 1593 (Mar. 31, 2005).

¹⁴³ S.C. Res 1970 (Feb. 26, 2011).

¹⁴⁴ Rome Statute, *supra* note 15, art. 16.

¹⁴⁵ See U.N. Charter arts. 23, ¶ 1 & 27, ¶ 3.

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.

¹⁴⁸ See *Security Council Voting*, *supra* note 147.

¹⁴⁹ See Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court (Mar. 31, 2005), <https://press.un.org/en/2005/sc8351.doc.htm>. The United States agreed to abstain rather than cast a negative vote after Council members agreed to add language to the resolution limiting the ICC's jurisdiction over non-state parties' nationals in the case. See Nicholas Burns, Under Sec'y for Political Affairs, U.S. Dep't of State, Remarks to the Press on Sudan (Apr. 1, 2005), <https://2001-2009.state.gov/p/us/rm/2005/44138.htm>. In the wake of the vote, the George W. Bush Administration explained its decision to abstain resulted from a balancing of its strong support for accountability for atrocity crimes in Sudan on the one hand, and its concerns about the ICC on the other. See *id.*

¹⁵⁰ The Security Council unanimously voted in favor of the resolution referring the situation in Libya. See Press Release, Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters (Feb. 26, 2011), <https://press.un.org/en/2011/sc10187.doc.htm>. In May of 2023, the Legal Adviser for the U.S. Mission to the United Nations commended the ICC's work after ICC Prosecutor Karim Khan briefed the Security Council on the Libya case. See Mark Simonoff, Legal Adviser, U.S. Mission to the United Nations, Remarks at a UN Security Council Briefing on Libya (May 11, 2023), <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-libya-14/> ("The International Criminal Court has an important role to play in the international system of justice, and the work of the ICC in Libya plays a critical role in support of our collective pursuit of accountability, peace, and security.").

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.¹⁵¹

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;¹⁵² and (2) several states parties referred the Ukraine situation to the ICC Prosecutor.¹⁵³

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.¹⁵⁴

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.¹⁵⁵ The U.N. Charter obligates member states to comply with any ICJ decision to which they are a party.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ The Security Council has

¹⁵¹ See Press Release, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution (May 22, 2014), <https://press.un.org/en/2014/sc11407.doc.htm>.

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.¹⁵⁹ 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)*.¹⁶⁰ 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.¹⁶¹

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 level¹⁶²) in the 2022 case brought by Ukraine against Russia, which directed Russia to “immediately suspend” its military operations in Ukraine.¹⁶³

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.¹⁶⁴ 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.¹⁶⁵

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>.

¹⁶⁰ *See* Letter from Nora Astorga, Nicaragua U.N. Ambassador, to President, Security Council, U.N. Doc. S/185414 (Oct. 20, 1986), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_18415.pdf.

¹⁶¹ Congo, Ghana, Madagascar, Trinidad and Tobago and United Arab Emirates: Draft Resolution, U.N. Doc. S/18428 (Oct. 28, 1986), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_18428.pdf; *see also The Security Council and the ICJ*, *supra* note 159.

¹⁶² *See generally* Rüdiger Wolfrum, *Interim (Provisional) Measures of Protection*, in OXFORD PUBLIC INTERNATIONAL LAW (2006), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e32> (explaining the use of provisional measures by international courts).

¹⁶³ *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, 2022 I.C.J. 211, 213 (Mar. 16), <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-00-en.pdf>; *see, e.g.*, Press Release, Ned Price, Dept. Spokesman, U.S. Dep't of State, Welcoming the International Court of Justice's Order Directing the Russian Federation to Immediately Suspend Military Operations in Ukraine (Mar. 16, 2022), <https://www.state.gov/welcoming-the-international-court-of-justices-order-directing-the-russian-federation-to-immediately-suspend-military-operations-in-ukraine/> (“We welcome the Court's order and call on the Russian Federation to comply with the order, immediately cease its military operations in Ukraine, and to establish unhindered humanitarian access in Ukraine.”)

¹⁶⁴ *See* Press Release, U.N., International Court of Justice Docket Reflects Legal Questions Concerning All Humanity in Every Region, President Says, as General Assembly Takes Up Report (Oct. 26, 2023), <https://press.un.org/en/2023/ga12547.doc.htm>.

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,¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸

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.¹⁶⁹ States parties to the Rome Statute are obligated to provide such assistance,¹⁷⁰ 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.¹⁷¹ Additionally, ICC judgments that contain legal reasoning and conclusions can contribute to the clarification and development of international criminal law.¹⁷²

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 power¹⁷³ and the Senate's treaty advice-and-consent power.¹⁷⁴ 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.

¹⁶⁶ *See* *Advisory Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/advisory-jurisdiction> (last visited Mar. 11, 2024).

¹⁶⁷ *See id.*

¹⁶⁸ *See supra* text accompanying notes 118–120.

¹⁶⁹ *See* *How the Court Works*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/about/how-the-court-works> (last visited Mar. 11, 2024).

¹⁷⁰ *See* Rome Statute, *supra* note 15, arts. 86–89, 91, 103, 105, & 109.

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).

¹⁷⁴ *See supra* text accompanying notes 30–31; *supra* notes 83–85 and accompanying text. For a broader discussion of Congress's ability to influence international agreements, see CRS Legal Sidebar LSB11049, *International Agreements (Part II): Examining Tools for Congressional Influence Over International Instruments*, by Steve P. Mulligan (2023).

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.¹⁷⁵ 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.¹⁷⁶

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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