



# International Criminal Court Bringing World Promised Justice?

*Court seeks justice for world's most atrocious crimes*

by **T. Markus Funk**

Established by the United Nations' Rome Statute, the International Criminal Court was meant to prosecute the world's worst crimes. As of 2011, however, the Court has yet to obtain a conviction. The United States is not a member of the Court, but played a role in its creation. Here, T. Markus Funk explores why the court was created and considers its mandate of promised justice to the world.

Since the earliest days of modern man, war and its accompanying atrocities have in many ways fundamentally characterized the human experience. The last 70 years have certainly not witnessed any abatement of this regrettable reality. Consider that even since World War II there have been come 250 conflicts around the world, leaving between 70-170 million casualties. Indeed, comparing combatant to noncombatant deaths, some four times the number of civilians fell to the scourges of genocide, crimes against humanity, and war crimes (collectively known as "atrocious crimes") at the bloody hands of military leaders and warlords than the sum total of soldiers killed in all international conflicts during the same time span. And, unlike the other killers of humankind, such as natural disasters and diseases, the suffering caused by war is in the main self-inflicted. So what impact has the creation of the International Criminal Court, located in the leafy outskirts of The Hague, Netherlands, had on this dynamic?

## The World's History of Condemning Atrocious Crimes

Throughout recent history, the indiscriminate killing of innocent civilians has been roundly denounced. In 1873, Swiss lawyer, cofounder of the International Committee of the Red Cross, and Nobel Prize nominee Louis Gabriel Gustave Moynier called for the creation of a permanent international court to deal with such human rights violations, arguing that "[t]he prospect for those concerned of being arraigned before the tribunal of public conscience if they do not keep to their commitments and of being ostracized by civilized nations, constitutes a powerful enough deterrent for us to believe ourselves correct in thinking [the creation of a permanent court] better than any other." Though well-intentioned, Moynier's deterrence-based approach clearly had not accounted for the appearance on the international stage of barbaric despots such as Hitler, Stalin, Pol Pot, and, more recently, Gadhafi—individuals who, for good reason, lose more hours of sleep worrying about assassination than they do at the prospect of being expelled from the "club of civilized nations."

It was not until after World War II, with the work of the U.S.-led Nuremberg and Tokyo Tribunals, that the international community got serious about putting some

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muscle behind the soothing diplomatic—and largely consequence-free—words of international denunciation. The 1940s–80s were, indeed, long on anti-atrocity crime conventions, declarations, and commissions, but, in the end, failed to produce a permanent international criminal court.

### Good Will Becomes Concrete Action—and the International Criminal Court Is Born

In the end, it took the open and notorious outrages in places such as Rwanda and the Balkans, and the various purpose-built (“ad hoc”) international tribunals

that followed them, to spur the international community into meaningful action. In the late 1990s, the world’s nations finally joined together to set up the world’s first permanent judicial body with the explicit purpose of bringing to justice the world’s most notorious mass-criminals.

After the International Law Commission in 1994 presented to the United Nations General Assembly a draft statute establishing the International Criminal Court (“ICC”), the General Assembly’s Ad Hoc Committee on the Establishment of the ICC met twice, and the General Assembly organized

the U.N. Preparatory Committee on the Establishment of the ICC. The Preparatory Committee in January 1998 finally gathered in Zutphen, Holland, to consolidate the various articles into a final omnibus draft.

The United Nations, seeing promise in these developments, convened the landmark “Rome Conference,” held from June 15 to July 17, 1998. Representatives of some 160 countries, as well as innumerable nongovernment organizations (“NGOs”), traveled to Italy to see their vision of the ICC take form.

After countless hours of negotiation, compromise, and old-fashioned “horse

## International Court at Nuremberg

During World War II, the world witnessed the most destructive war it had ever seen. Millions of European Jews, civilians, prisoners of war, political opponents, disabled individuals, homosexuals, and others died in death camps run by the Nazi regime. Before the end of the war, in 1943, Allied leaders issued the Moscow Declaration. In it, U.S. President Franklin D. Roosevelt, United Kingdom Prime Minister Winston Churchill, and Soviet Premier Joseph Stalin vowed that German officers and members of the Nazi Party who had participated in atrocities, massacres, and mass executions would be “pursue[d] ... to the uttermost ends of the earth” and brought to justice by joint decision of the Allied governments.

After the surrender of Germany in 1945, Allied leaders met to determine the fate of Nazi leaders. Some, including Churchill and U.S. Treasury Secretary Henry Morgenthau, advocated summary execution (execution without trial) of captured leaders. Others urged public trials. The Allies ultimately agreed upon trial, and issued a charter establishing an International Military Tribunal for the trial and punishment of major Nazi German war criminals. The charter for the tribunal established three categories of crimes:

**Crimes against peace**, which included waging or conspiring to wage a war of aggression or a war in violation of international treaties.

**War crimes**, which included violations of “the laws or customs of war.” Examples included murdering civilians,

slave labor, murder or ill-treatment of prisoners of war, and acts of destruction not justified by military necessity.

**Crimes against humanity**, which included murder, extermination, deportation, and enslavement of civilian populations, and persecutions on political, religious, or racial grounds. The charter expressly stated that these crimes would be tried and punished regardless of whether they had violated the domestic law of the country where they were perpetrated.

In his opening statement before the International Military Tribunal in Nuremberg, Germany, U.S. Supreme Court Justice Robert Jackson of the United States (serving as the U.S. Chief Counsel for the tribunal) acknowledged that he was opening “the first trial in history for crimes against the peace of the world.” The accused were “the first war leaders of a defeated nation to be prosecuted in the name of the law.” But they were also, Justice Jackson noted, the first to be given a chance “to plead for their lives in the name of the law.”

Twenty-two accused German war criminals were tried before the International Military Tribunal in Nuremberg. Nineteen were convicted and three were acquitted. Of the convicted criminals, twelve were sentenced to death—including Herman Goring, Alfred Jodl, and Ernest Kaltenbrunner, three to life imprisonment, and four to prison terms of ten to twenty years.

trading,” the negotiating countries, amid great applause and jubilation, voted in favor of the founding Rome Statute of the ICC. In the end, 120 nations approved the Rome Statute. The United States and six other countries voted against it, and 21 states simply abstained. Although the United States voted against the final draft of the Rome Statute, it, as it often does, played a key role in drafting and negotiating the principle provisions. On December 31, 2000, President Bill Clinton signed the Statute, but did not submit it to the U.S. Senate for ratification. On May 6, 2002, President George W. Bush formally rescinded the United States’ signature.

### **The United States Is Not a “State Party” to the ICC—but Is This a Problem?**

One of the primary reasons that President George W. Bush effectively undid President Clinton’s signing of the Rome Statute was the specter of U.S. soldiers or political and military leaders standing trial at the ICC. Given the hostility many members of the international community have expressed toward the United States, and the furor among certain human rights organizations and socialist heads of state such as Venezuela’s Hugo Chavez generated by President Obama’s escalated use of Predator drone strikes in Pakistan and the killing of Osama bin Laden (both of which have been labeled crimes against international law by certain international law figures), President Bush’s concerns were not unreasonable.

Under the ICC’s rules, an unelected, and unaccountable, chief prosecutor has the power to refer cases of his or her choosing to the Court for prosecution. To understand why this may be problematic, remember that the ICC’s explicit jurisdictional mandate is to handle only those cases that the countries in which the alleged crimes took place are (1) unable

## **First Person:**

## **The Work of the United Nations**



### **Mark Simonoff, Legal Adviser to the U.S. Mission to the United Nations, U.S. Department of State**

I serve as the Legal Adviser to the U.S. Mission to the United Nations. In that capacity, I provide legal advice and guidance to Ambassador Susan Rice, the United States permanent representative to the United Nations, as well as the other ambassadors at the U.S. Mission. I also provide legal advice and guidance to the political officers and other staff at the U.S. Mission.

My job at the U.S. Mission is one of the most exciting public international law positions in the United States government, covering a vast array of cutting edge legal issues. For example, I played a key role in providing legal advice to Ambassador Rice on the recently adopted resolutions referring the Libyan situation to the International Criminal Court and authorizing the use of force to protect civilians in Libya. I also serve as the U.S. representative on several important bodies governing international criminal tribunals, such as the Management Committee for the Special Court for Sierra Leone, the Management Committee for the Special Tribunal for Lebanon, the Steering Committee for the Khmer Rouge Tribunal, and the Security Council’s informal working group on the Rwanda Tribunal and the Tribunal for the Former Yugoslavia.

I also serve as the U.S. representative to the Sixth Committee, which is one of the main committees of the U.N. General Assembly. At the Sixth Committee, we cover a broad range of international legal issues, including international terrorism, universal jurisdiction over certain crimes, and the promotion of the rule of law at the national and international levels. Attorneys from every country in the world gather together to debate these and other legal issues and to negotiate U.N. General Assembly resolutions. We are a very collegial, thoughtful group of experts in international law. It is fascinating to learn the different perspectives and views of my colleagues, who come from many different legal systems. Despite our different perspectives and viewpoints, we are all proud of the fact that we adopt the draft resolutions by consensus as a matter of practice. It would be good for teachers to understand that the U.N. General Assembly is the one forum where every country in the world can come together to debate issues of international importance.

In my role as legal adviser, I also work on more obscure, but still very important international legal issues, such as the obligations of the United States as host country to the United Nations. These issues include the tax status of other member states’ missions, the privileges and immunities of other member states’ diplomats and the inviolability of the premises of the United Nations.

In sum, I feel privileged to work as the legal adviser to the U.S. Mission to the United Nations. It is a wonderful feeling to know that often, when I wake up in the morning and look at the headlines, I will be working on many of these issues when I arrive to work that day. And I am happy to do my own small part in helping to make the world a better place.

or (2) unwilling to investigate and prosecute. The U.S. justice system is clearly “able” to investigate and prosecute alleged violations of international law. It is the “unwilling” part of the analysis, however, that causes ICC skeptics most concern. After all, if the U.S. Department of Justice does not, say, prosecute its military leaders for Predator drone strikes, or similar claimed “violations” of international law, is there any guarantee that a current or future ICC prosecutor will not claim that this lack of action demonstrates that the United States, if an ICC State Party, is “unwilling” to investigate and prosecute those in its country that may have committed atrocity crimes? The short answer is no, there is not such a guarantee.

Those in favor of the United States joining the ICC will say that the chances of this happening, given the country’s global power, are virtually nil. Those opposing U.S. membership in the ICC, such as former U.S. Ambassador to the United Nations John R. Bolton, are far less sanguine about the possibility of such a politically motivated outcome:

## What’s the Difference? ICC vs. ICJ

The International Criminal Court should not be confused with the International Court of Justice (ICJ), also called the World Court. The ICJ is the primary judicial organ of the United Nations, established under Article 93 of the U.N. Charter. It began work in 1946, replacing the Permanent Court of International Justice, which had been part of the League of Nations. Unlike the ICC, which hears cases involving individuals, the ICJ hears cases involving disputes between national governments—member states of the United Nations. Such cases include boundary, maritime, trade, and natural resource disputes as well as treaty enforcement issues. The ICJ also provides advisory opinions to the United Nations and other international agencies. Fifteen judges are elected to nine-year terms by the U.N. General Assembly and the U.N. Security Council. Elections take place every three years, with one-third of the judges retiring (and possibly standing for reelection) each time, in order to ensure continuity within the court. The ICJ is based in the Peace Palace, in The Hague, Netherlands.

I think the International Criminal Court could be a threat to American security interests, because the prosecutor of the court has enormous discretion in going after war crimes. And the way the Statute of Rome is written, responsibility for war crimes can be taken all the way up the chain of command. This is the sort of

investigation that some people who live in Fairyland might like to undertake but which bears no relationship at all to conditions in the real world.

If a prosecutor in The Hague decides that the U[nited] S[tates] has not followed through effectively on an investigation—is unwilling or unable to carry it through—then that person, that prosecutor, in an unreviewable fashion gets to second-guess the United States? That is unacceptable. That is an assertion of authority over and above the U.S. Constitution.

## Is the ICC “Outperforming” Its Predecessor Ad Hoc Tribunals?

Moving from the political to the practical, many have also pointed to the ICC’s arguable lackluster performance of international tribunals when it comes to actually charging, prosecuting, and convicting those involved in atrocity crimes. But such results-based criticisms have also been directed at those

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*The International Criminal Court in The Hague, Netherlands. Photo courtesy of the author.*

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“purpose-built” international tribunals that preceded the ICC.

Consider, for example, that the International Tribunal for the Former Yugoslavia (the “ICTY”) had jurisdiction over four separate conflicts with hundreds of thousands of innocent civilian victims. As of 2010, the ICTY employed more than 1,100 judges, prosecutors, investigators, and other staff. Since it became functional some 17 years ago, moreover, the ICTY has spent well over \$1.5 billion in pursuit of Balkan war criminals. Nevertheless, the ICTY to date has only achieved final sentences for some 61 individuals (60 men, one woman), which translates into roughly \$25 million per final sentence. Although these convicted atrocity crime perpetrators with completed cases were involved in some of the most unimaginable barbarity and mass slaughter, only ten of them received sentences of more than 20 years, and a third of them received sentences of *10 years or less*. These statistics feed skeptics who wonder whether the ICTY has, in fact, lived up to its self-proclaimed motto of “[b]ringing war criminals to justice, bringing justice to victims.”

But back to the ICC. Has it done better than the ICTY and other similarly efficiency-plagued ad hoc tribunals?

The best answer, perhaps, is “not yet.” Despite being officially “open” for almost a decade, an annual budget of well over \$150 million, a total staff of more than 700, and its operation in a world thick with worthy targets (the ICC has reportedly received formal complaints about alleged atrocity crimes occurring in more than 140 countries), the ICC, to date, has not achieved a *single* conviction, or imposed a single sentence.

It, indeed, was not until 2009 that the ICC even convened its first trial. And that case, involving charges of conscripting child soldiers brought against former Democratic Republic of Congo rebel leader, Thomas Lubanga Dyilo, has, unfortunately, been marred by a series of embarrassing prosecutorial missteps. The Dyilo case now lingers on with an uncertain future or outcome.

So why this performance deficit? For one, the ICC’s judges and prosecutors often have limited, or no, practical experience. Many of the ICC’s judges, for example, never were judges prior to using the ICC’s diplomatic process to garner positions on one of the world’s most high-profile judicial stages (not to mention a \$240,000 tax-free salary). In one particularly notable case, for instance, the ICC put on the bench a judge who never even practiced law or even attended law school prior to donning the black judicial robe of an ICC jurist.

That the ICC accords itself more than 60 business days of court-ordered holidays, while at the same time pointing out that it is entrusted with the solemn duty of bringing to justice the world’s most heinous criminals, simply reinforces the critics’ charge that the Court today is not run in a manner consistent with the seriousness of its mandate.

### But There Is Reason to Hope

Despite some of the systemic and practical problems we have traced, the answer is not to simply throw one’s hands in the air and abandon the entire endeavor. Instead, what is needed is clearheaded, practical thinking and a renewed focus on turning optimistic words into concrete actions. Once the Court and its proponents take an honest look at some of the ICC’s shortfalls, and consider the best way forward, the world will have renewed reasons to expect that the ICC will live up to its noble mission to deliver justice to those conditioned to abuse and most deserving of meaningful redress. ■

### FOR DISCUSSION

1. Do you think there is a need for an international criminal court? What message about the rule of law does having an international court send to countries around the world?
2. Has the ICC lived up to its promise? If yes, how so? If not, what would be needed to accomplish this?
3. Why do you think the United States is reluctant to ratify the Rome Statute? Do you think U.S. concerns are justified?

### For Further Reading

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