RECENT DEVELOPMENTS

THE POLITICS OF JUSTICE: WHY ISRAEL SIGNED THE INTERNATIONAL CRIMINAL COURT STATUTE AND WHAT THE SIGNATURE MEANS

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I. INTRODUCTION

On December 31, 2000, Israel followed the United States’ lead and signed the Statute of the International Criminal Court (ICC).¹ This was materially the same statute that Israel had refused to sign for more than two years, despite having been one of the most vocal and ardent supporters of the creation of the ICC.² There were several reasons for Israel’s change in position. On August 21, 2000, Alan Baker, Israel’s Chief Foreign Ministry Legal Advisor, announced that Israel was considering signing the Statute of the proposed ICC.³ Up to that point, the Palestinian Authority, a logical proponent of the provision in the Statute that caused Israel’s initial opposition,⁴ had voiced support for the creation of the ICC⁵ implying a desire for Israel to become a party to the Court.

This note will provide brief summaries of the development of the ICC and the background of the Israeli-Palestinian situation and will then examine Israel’s potential motives for signing the treaty and predict the consequences of the signature on the State of Israel, the Israeli people, the Palestinian National Authority, and the peace process itself.

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³ See id.


II. INTERNATIONAL CRIMINAL COURT AND ISRAEL—BACKGROUND

In October 1946, an international congress met in Paris on the heels of the first Nuremberg Trials for the purpose of beginning the process of adopting an international criminal code and establishing an international criminal court. The modern state of Israel, created with the support of the United Nations after the atrocities of World War II, was among the most fervent supporters of the International Criminal Court’s (ICC) creation. However, despite its initial efforts and support for the ICC, Israel was not among the 120 nations (of 148 in attendance) that voted in favor of the adoption of the ICC Statute as the ICC’s governing document at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome on July 17, 1998.

The idea for the ICC came in the wake of the momentum against international war crimes created by the international war crime tribunals in Nuremberg and Tokyo at the end of World War II. The United Nations (U.N.) mandated that its Commission of International Jurists begin work on a set of statutes for a permanent international criminal court. Despite its efforts, no statutes were agreed upon before the onset of the Cold War, which effectively ended efforts towards the court’s inception. In 1989 Trinidad and Tobago revived the idea of the ICC in the U.N. The U.N. assigned the duty to draft the ICC Statute to the International Law Commission, which produced a final draft in 1994. From June 15 to July 17, 1998, 160 countries participated in the Rome Conference on the establishment of an International Criminal Court, with 120 voting to adopt the Statute of the ICC. Israel was one of seven countries (including the United States) that voted against the

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10 WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 8-9 (2001).
11 See Gallarotti & Preis, supra note 9.
13 Id. at 5.
14 See Bar-Yaacov, supra note 2.
Statute. As this note will show, almost all of Israel’s reasons for initially refusing to sign stemmed from politics and international conflicts.

III. THE ISRAELI-PALESTINIAN CONFLICT AND NEGOTIATIONS

Both the Israelis and the Palestinians claim very long-enduring historical ties to Jerusalem and areas in the West Bank region, as well as the rest of the modern State of Israel. The resulting dispute has produced decades of violence, terrorism and hatred. Remarkably, in the 1990’s there were landmark negotiations between the two parties while violence subsided, with a few notable exceptions. Both sides made significant concessions in the process, but there was still a long way to go towards a lasting peace.

On November 29, 1947, the U.N. General Assembly approved “the partition plan” to divide the British-occupied area in the Middle East among Jews and Arabs. Following Israel’s declaration of independence and its victory in the subsequent war waged by the armies of Arab states to prevent the establishment of Israel, Israel controlled part of what was allocated under the partition plan to be the projected Arab state of Palestine. The remaining portion of the land allocated to Palestine was divided between Jordan and Egypt, following the Arab refusal to establish a Palestinian state in anything less than all of British Palestine, which included the land allocated to Israel.

In 1967, Israel’s preemptive strike against Egypt, Syria and Jordan as those three prepared to attack Israel resulted in Israeli occupation of the Sinai Peninsula and the Gaza Strip from Egypt, the Golan Heights from Syria, and the West Bank from Jordan. The Israelis withdrew from the Sinai Peninsula in exchange for full peace with Egypt in 1979. Today, Israel maintains its occupation of the West Bank, Gaza Strip, and Golan Heights.

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15 See Peter J. Richards & Michael N. Schmitt, Into Uncharted Water: The International Criminal Court, 53 NAVAL WAR C. REV. 1 (Jan. 1, 2000), available in 2000 WL 21071578. The other five nations that voted against the Statute were China, Iraq, Libya, Qatar, and Yemen. Twenty-one countries abstained in the vote. See id.
17 See generally id.
18 Id.
19 See id. at 45-46.
20 See id.
21 THOMAS L. FRIEDMAN, FROM BEIRUT TO JERUSALEM xii (1995).
22 See id. at xiii.
IV. WHY ISRAEL INITIALLY REJECTED THE ICC STATUTE

Several factors weighed in Israel’s initial decision not to endorse the ICC Statute, including objections to the scope of the ICC’s jurisdiction, the right of member states to withhold information and documents from the Court that could prejudice national security interests, and the selection process for judges to serve on the court. Israel’s primary objection, however, was that the relocation of Israelis to settlements in the West Bank (possibly including parts of Jerusalem), Gaza, and the Golan Heights, areas captured by Israel in the process of defending itself against attacks from its Arab neighbors, would be deemed a war crime under the ICC Statute.

However, in a dramatic turn of events, in August of 2000, under pressure from Palestinian negotiators in the Israeli-Palestinian peace process, Israeli officials acknowledged that they were considering signing the Statute. While Israel’s subsequent signature does not signify a ratification of the statute by Israel (ratification is another process which would require a restructuring of Israeli laws to conform with the Statute), it does express support for the principles underlying it.

The main reason for Israel’s initial refusal to sign is an indirect result of the unfortunate use of the Rome Conference and ultimately the ICC as a political forum. Specifically, Israel opposed “the inclusion in the draft treaty, at the insistence of Arab countries, of a clause implying that Jewish settlement activity in ‘occupied Palestinian territory, including Jerusalem’ was a war crime comparable to the Nazi Holocaust and other atrocities.” Nonetheless, the Statute provides a new international definition of the crime of “transfer of population” including the indirect transfer of a state’s “own civilian population into the territory it occupies” within the Statute’s description of “war crimes.” Accordingly, Israeli settlers in the “occupied territories” could be

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23 Israel objected to the scope of jurisdiction because “the Statute is both too broad and too narrow. The Statute is too narrow because it fails to include several serious crimes, such as airplane hijacking and biological and chemical warfare. It is too broad because the Statute expands the scope of preexisting international law to include specific acts as war crimes that have not before been recognized as such.” Levy, supra note 7, at 209.


25 See Levy, supra note 7, at 209.

26 Bar-Yaacov, supra note 2.


charged by the ICC with war crimes. While some experts and politicians believe that Israel’s subjecting itself to the jurisdiction of the ICC and thus to this provision would not lead to any charges being brought against Jewish settlers, the provision would at least leave the door open for such claims by Arab countries. Additionally, one has to question the intention of the Arab countries fighting for the inclusion of the provision, if not to seek prosecution of Israeli settlers and government officials for establishing settlements in the West Bank.

The only prior prohibition of such settlements in international law is the Fourth Geneva Convention, created in 1949 to address the protection of civilians during international and domestic armed conflicts. The Geneva Convention, from which the Statute’s language was drawn, is arguably enforceable as customary international law, which is internationally binding, because it was an attempt to update the Hague Convention of 1907, known as the Law of War. However, the Israeli High Court has not treated the Geneva Convention as binding except for provisions specifically incorporated into

See Levy, supra note 7, at 209.

See Peter Hirschberg, Brief Encounter—Richard Goldstone, South African Judge and Ex-War Crimes Prosecutor, THE JERUSALEM REPORT, July 3, 2000, at 6 (quoting Goldstone, a Jewish ex-chief prosecutor of the U.N. war crimes tribunals for the former Yugoslavia and Rwanda, responding to the question “[If Israel joins the ICC] [y]ou don’t see West Bank settlers being tried for war crimes?” with “Absolutely not. No country will want the court to lose credibility by making political decisions.”).

See Evelyn Gordon, Real Countries Do Not Express Support for Treaties that Declare Their Entire Government to be War Criminals, JERUSALEM POST, June 20, 2000, at 8 (stating “the treaty as it stands would make every member of every Israeli government, past or present, a war criminal.”). Actually, because the statute would not be retroactive, no past government members would be “war criminals.”

It should be noted that the clashes that began in September 2000 may have a long-lasting effect on Israel’s trust of the Palestinian leadership and thus may have affected its willingness to sign the statute before an enduring full-fledged peace treaty was reached. For instance, Israel may have had legitimate concerns that even if negotiations continue and Israel were to sign the statute per Palestinian requests as an act of goodwill, the Palestinian Authority may attempt to prosecute Israel for what it alleges are war crimes if more violence breaks out in the future. The final declaration of the October 21-22, 2000 Arab Summit expressed an intention to bring charges in the ICC against Israeli officials and soldiers for alleged war crimes associated with these clashes. See The Arab Summit’s Closing Statement, MID EAST MIRROR, vol. 14-204, Oct. 23, 2000 (on file with author). Such charges however cannot be brought before the ICC since the Statute is not retroactive. REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT 6 (Herman A.M. von Hebel et al. eds., 1999).

See Levy, supra note 7, at 227, 238.

See id. at 224.
Accordingly, Israel could be considered under international law to be a "persistent objector" to the Geneva Convention provision on settlements, and as such, not subject to the law.\textsuperscript{36}

Additionally, the provision in the Geneva Convention regarding settlements was drafted "in response to what the Nazis had done to civilian populations under their control—deliberately moving vast groups of people for the purpose of destroying them."\textsuperscript{37} The applicability of the Geneva Convention thus seems inappropriate where there was no forced deportation, racial agenda, or planned extermination.

The U.N. Preparatory Commission for the International Criminal Court defined the elements of the crime as "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory."\textsuperscript{38} The Commission listed the elements as:

1. The perpetrator: (a) Transferred,\textsuperscript{39} directly or indirectly, parts of its own population into the territory it occupies; or (b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory. 2. The conduct took place in the context of and was associated with an international armed conflict. 3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.\textsuperscript{40}

\textsuperscript{35} See Behnam Dayanim, The Israeli Supreme Court and the Deportations of Palestinians: The Interaction of Law and Legitimacy, 30 STAN. J. INT'L L. 115, 153 (1994).

\textsuperscript{36} As a persistent objector, Israel would not be bound by the custom otherwise binding on non-objectors. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1986).


\textsuperscript{38} Rome Statute, supra note 4, at art. 8(2)(b)(viii).

\textsuperscript{39} Footnote 44 of the Report of the Preparatory Commission for the International Criminal Court Addendum Final Draft Text of the Elements of Crimes states: "The term 'transfer' needs to be interpreted in accordance with the relevant provisions of international humanitarian law."

The phrase “directly or indirectly”[^41] was not a part of the provision lifted from the Geneva Convention by the drafters of the Statute, but was specifically added in the ICC statute. This phrase presents a stronger possibility for interpretation, and perhaps even an intention, to include Jewish settlements in the occupied territories.

According to the Coalition for an International Criminal Court,[^42] “[t]he inclusion of settlement activity as a ‘war crime,’ according to Israel, has no basis in international law. The inclusion of this provision (Article 8, Paragraph 2(b), sub-para viii), Israel’s most significant concern, was largely resolved through the negotiations [sic] on the Elements of Crimes at the U.N. Preparatory Committee.”[^43] Despite the Coalition’s assertion that the issue was largely resolved, the result of the Preparatory Committee’s negotiations on that provision do not seem to indicate any substantial change in Israel’s vulnerability or its likelihood of being prosecuted under the Statute.

Contrary to the report of the Coalition for an International Criminal Court, this definition of the elements of the crime of settlement activity does not resolve Israel’s concern. In fact, by this definition of the war crime of settlement activity, Israel’s settlements in the areas it occupied from Syria and Jordan after the 1967 war[^44] would put its settlers and government officials within the scope of the International Criminal Court’s prosecution. Element two is easily satisfied because the settlements in the West Bank, Gaza Strip, and Golan Heights are associated with an international armed conflict, namely the 1967 war in which Israel occupied those regions.[^45] The third element is also obviously satisfied because Israel was aware of the factual circumstances that established the existence of an armed conflict, as such circumstances included six nations declaring war on Israel. Because the term “transfer” needs to be interpreted in accordance with the relevant provisions of international humanitarian law (as stated in footnote 44 of the Finalized Draft Text of the Elements of Crimes), the first element of the crime of transfer of

[^41]: Rome Statute, supra note 4, at art. 12(3).
[^42]: Coalition for an International Criminal Court is a nongovernmental organization whose main purpose is “to advocate for the creation of an effective, just and independent International Criminal Court.” The NGO Coalition for an ICC, About the CICC (visited Nov. 15, 2000) http://www.iccnow.org/html/coalition.htm.
[^45]: See id.
population cannot yet be definitively analyzed. However, the "directly or indirectly" language suggests that there is not a definition of "transfer" that could exclude Israeli settlement activity.

The politics that dominated the Rome Conference, and that initially prevented Israel from supporting the Statute that it felt was desperately needed, prevailed again at the six meetings of the Committees of the Preparatory Commission of the International Criminal Court, despite urging from the Indonesian representative at the Sixth Committee meeting to "make sure that the ICC does not become a mechanism established simply to be used for interfering in the internal affairs of a State." The politics that dominated the Rome Conference, and that initially prevented Israel from supporting the Statute that it felt was desperately needed, prevailed again at the six meetings of the Committees of the Preparatory Commission of the International Criminal Court, despite urging from the Indonesian representative at the Sixth Committee meeting to "make sure that the ICC does not become a mechanism established simply to be used for interfering in the internal affairs of a State." The Israeli representative at the Sixth Committee, Esther Efrat-Smilg, questioned whether the "'crime of transfer' [of population] really ranked among the most heinous and serious of war crimes," stating that the Statute's "key elements should be defined on the basis of the established framework of international law and not the political wishes of specific States." Responses to Efrat-Smilg alluding to specific claims of Israeli war crimes in the establishment of settlements ensued from the Syrian representative and the Lebanese representative. According to one despondent U.S. journalist, "the ICC will soon be a forum for the airing of conflicting national and political agendas, and, not to forget, historical grievances."

46 See Finalized Draft Text of the Elements of Crimes, supra note 40.
47 Resolution F of the Final Act of the Rome Conference, which established the Preparatory Commission, listed the duties to be carried out by the Commission:

The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of: (a) Rules of Procedure and Evidence; (b) Elements of Crimes; (c) A relationship agreement between the Court and the United Nations; (d) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country; (e) Financial regulations and rules . . .

49 Id.
50 See id. (stating that "crimes were being committed daily in the occupied Syrian Golan and in the Palestinian lands," but insisting that "there was no connection between the discussions in this Committee and the negotiations between Israel and the Palestinians, which had been delayed because of the stubbornness of Israel.").
51 See id. (stating that "Israeli occupation had created countless victims" and stressing "the importance of having a legally acceptable definition of the crime of aggression and of the elements of the crime of transfer of population.").
52 Helle Bering, International Criminal Circus; Political Correctness Runs Amok Again,
In addition to Israel’s objections to certain crimes included in the Statute, Israel objected to the exclusion of certain crimes from the Statute.\(^{53}\) This objection was particularly powerful considering the omitted crimes that are far more heinous than Israel’s alleged “transfer of population” crimes, including airplane hijacking and biological and chemical warfare.\(^{54}\) According to Law Professor Leila Sadat Wexler of Washington University, who was present at the Rome Conference, many crimes were not included because of “trade-offs” made by negotiating countries.\(^{55}\)

However, the trade-off offered to Israel would criminalize many of its citizens while far more heinous crimes including some acts of terrorism that have previously been aimed at Israel would not be subject to prosecution. Additionally, because of a provision of the Statute that prevents countries from accepting the Statute while maintaining reservations,\(^{56}\) Israel may not, by the strict letter of the Statute, show its support for the balance of the Statute while excepting to the “transfer of population” provision.\(^{57}\) Despite the restriction in the Rome Statute, Israel’s signature of the Statute includes a writing which resembles a reservation:

the government of the State of Israel signs the statue [sic] while rejecting any attempt to interpret provisions thereof in a politically motivated manner against Israel and its citizens. The government of Israel hopes that Israel’s expressions of concern over any such attempt would be recorded in history as warning against the risk of politicization, that might undermine the objectives of what is intended to become a central impartial body, benefiting mankind as a whole.\(^{58}\)

This reservation, however, may not be given full legal weight because of the anti-reservation provision in the Rome Statute and because of international law regarding reservations. The legal effect of this purported reservation will be discussed later in this note.

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\(^{53}\) See Levy, supra note 7, at 209.

\(^{54}\) See id.


\(^{56}\) Rome Statute, supra note 4, at art. 120.

\(^{57}\) See id. at arts. 5(1)(d), 5(2).

Another aspect of the ICC that works against Israel is the process for the selection of judges.\(^{59}\) One of the criteria for selection of judges is "equitable geographic representation."\(^{60}\) Previous international judicial elections have proven that this type of system does not bode well for the possibility of an Israeli judge being elected.\(^{61}\)

V. U.S. REJECTION OF THE STATUTE

The United States also initially refused to endorse the Statute\(^{62}\) before President Bill Clinton finally decided to sign on the deadline date of December 31, 2000.\(^{63}\) Before signing, the United States was concerned that the treaty may render American military personnel vulnerable to politically-motivated criminal charges by countries that wish to "settle scores" with America in cases where U.S. peace-keeping or policing forces were used.\(^{64}\) U.S. reluctance to join may have been moot, because the primary subject of U.S. criticism of the Statute is its subjecting nationals of non-party states to the ICC's jurisdiction where the state in whose territory the alleged crime occurred is a member-state.\(^{65}\) Under this provision, Americans who may be charged with crimes under the ICC Statute would be subject to the jurisdiction of the ICC anytime they were on the soil of a party country.

This provision is seen by many in Washington as a serious threat to state sovereignty, and ratification by the Senate appears unlikely to come anytime soon.\(^{66}\) The signing was criticized by Clinton's Defense Secretary Bill Cohen,\(^{67}\) then President-elect George W. Bush, Bush's Defense Secretary-Designate Donald Rumsfeld, and Senator Jesse Helms.\(^{68}\) Helms went on to say that he will never allow the treaty to be ratified.\(^{69}\)

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59 See Levy, supra note 7, at 247.
60 Rome Statute, supra note 4, at art. 36(8)(a)(ii).
61 See Levy, supra note 7, at 247.
62 See Levy, supra note 7, at 247.
67 See Myers, supra note 66; Holger Jensen, Don't Expect to See Court on War Crimes Very Soon, DESERET NEWS, Jan. 7, 2001, at AA08.
68 See id.
President Clinton, however, defended his decision to sign the treaty stating, "...we are not abandoning our concerns about significant flaws in the Treaty...[w]ith signature, however, we will be in position to influence the evolution of the Court. Without signature, we will not." The point made by Clinton is very valid. According to Clinton, the Statute is flawed because it gives the court the power to exercise jurisdiction over personnel of non-signatory nations. Therefore, it is logical to sign the treaty since it will likely affect Americans anyway, and by signing, the U.S. will be involved in the early development of the court and may be able to influence the court in a way that will work out its flaws. Obviously, this rationale is logical to Israel's position as well.

VI. ISRAEL'S POSSIBLE MOTIVES IN JOINING THE COURT

It should be pointed out that for the people of Israel, who have a deeply rooted interest in punishing human rights violations, rejecting the court was an unnatural and undesirable position. As noted above, Israel was instrumental in the initial stages of the formation of the ICC. Additionally, the Israeli Supreme Court was the first to invoke and apply another international human rights treaty, the Genocide Convention, in its trial of Nazi war criminal Adolph Eichmann. That case was the first instance where a national court supported the principle of universal jurisdiction to prosecute war criminals. As one senior Israeli government source said, "[f]or Israel, as the country of the Jewish people, to refrain from signing a treaty against war crimes, cannot be understood in the world and is even perceived as a moral deficiency." The Jewish people have been victims of human rights violations many times in recorded history, the most recent and atrocious being the Holocaust, which arguably prompted the initial idea of the ICC itself. This close tie between the Jewish state and international human rights law is the factor that made it so difficult for Israel to refuse to sign the Statute from the beginning.

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71 See id.
73 See id.
75 See Gallarotti & Preis, supra note 9.
Unfortunately, political considerations complicated Israel’s support for the ICC.

VII. EFFECT OF THE SEPTEMBER, 2000 OUTBREAK OF VIOLENCE ON ISRAEL’S DECISION

The current armed conflict between Israel and the Palestinian people has also complicated Israel’s position in regard to the ICC. Before current conflict began, Israel and the Palestinians were making unprecedented progress towards peace. Such peace would eventually have made moot the issue of the territories that are allegedly illegally occupied in areas that Palestinians claim should be under sovereign Palestinian rule. Considering the situation at the time that Israel signed, which was at best cessation and at worst abandonment of the peace process, there seemed to be little or no reason to make joining the ICC a priority for the Israeli government unless and until the Statute is redrafted to remove the possibility that their settlement activity could be prosecuted. However, because the deadline for signing the Statute without ratification was December 31, 2000, Israel was forced to make a decision to either alienate itself from the international community or to sign a treaty that could potentially leave Israeli leaders indictable before the court that the treaty created.

The pressure of the decision faced by the Israeli Cabinet as the deadline approached was increased by the tremendous amount of scrutiny on Israel by the international community concerning the Al-Aqsa Intifadah and Israel’s response. Some members of the international community might have questioned Israel’s dedication to human rights in the wake of media reports depicting alleged atrocities by Israeli forces against Palestinian civilians. Thus the international press put added pressure on Israel to sign the Statute.

VIII. ISRAELI POLITICS AND THE DECISION TO SIGN

Another factor Israeli leaders had to consider was the domestic political reaction to a signature of the Statute. A June 2000 editorial in the Jerusalem

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76 Footage played on television news broadcasts worldwide showing the Israeli army allegedly using tear gas, rubber bullets, and even live ammunition against Palestinian civilians and children, most of whom were armed only with rocks. One clip even showed a 12-year-old Palestinian boy and his father cowering in fear behind a metal barrier as a gun battle between Israeli forces and Palestinians ensued above and around them. 12-year-old boy among dead in Israeli-Palestinian crossfire, http://www.cnn.com/2000/WORLD/meast/09/30/israel.palestinian.victims.ap/ (visited Oct. 1, 2000).
Post proclaimed that “[n]ational self-respect... [hit] a new low last week with [Israeli Justice Minister Yossi Beilin’s] proposal that Israel sign” the Statute. 77 Due to the violent clashes with Palestinians, public support for the peace process itself was wavering. 78 Accordingly, it was very difficult politically for an Israeli government to have the support of the nation in signing the Statute before the end of the current violence. This political pressure was heightened by the election for prime-minister between the Dovish Barak and the hawkish Sharon only months after the December 31 deadline. 79

Israel’s signing of the Statute still leaves speculation concerning Israel’s intentions. As is apparent from the retreat from the negotiating tables by both sides, questions still abound as to the dedication of both parties to a lasting peace considering the sacrifices that each side would be forced to make. Either Israel intends to be bound by the Statute in a manner consistent with what the Arab states intended at the Rome Conference, or it may see a way around its actions being indictable under the Statute.

The Israeli signature could mean, as the concession would appear on its face, that Israel is agreeing to stop building settlements in the occupied areas of the West Bank region, Gaza Strip, and Golan Heights, and to stop all growth of the current settlements. However, the included areas would still be in dispute as there is not agreement as to whether Jerusalem is included in these areas. Jerusalem would likely be included in the Palestinian view but certainly not in the Israeli view. The Palestinian Authority “consider[s] Jerusalem the capital of [their] prospective Palestinian state, the center of [their] society and the heart of [their] history and culture” and considers Israel “a belligerent occupant.” 80 Israel has considered Jerusalem its official capital since the Knesset passed a “Basic Law” on Jerusalem on July 30, 1980, which stated that “Jerusalem, complete and united, is the capital of Israel.” 81 It is unwilling to negotiate any withdrawal from any part of Jerusalem as part of the peace

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77 Gordon, supra note 31.
78 See Hugh Dellios, Israelis Disillusioned With Barak, Treaty; Many are no Longer Certain They Want a Peace Deal, CHI. TRIB., Dec. 31, 2000, at 4.
79 See id.
It is this direct conflict of views on which neither side seems willing to budge that may make any other negotiations moot.

Even if the two sides somehow reach an agreement, another region in Israel, the Golan Heights in the North along the Syrian border, is considered “occupied” under the Statute and thus, may render Israeli officials and nationals prosecutable under the Statute. The Golan region is vital to Israeli security and negotiations with Syria are not as advanced as those with the Palestinians. In fact, while Israel might hope that the settlement dispute with the Palestinians will be solved before it ever reaches the ICC, it is very unlikely that peace will be achieved with Syria before the ratification of the Statute by sixty nations, which would activate the court.

This puts Israel in a situation similar to the one President Clinton described. The Israeli situation is complicated by the two clauses in the Statute—one that may criminalize the settlement activities and the other that allows nationals of non-signatory nations to be prosecuted if they commit a violation of the Statute on the ground of a signatory nation. If the settlements in the Golan are illegal under the Statute, then they are technically on Syrian ground. Because Syria is a signatory of the Statute, Israeli nationals who live there may be subject to prosecution whether or not Israel signs the Statute. Therefore, like Clinton’s analysis, it was arguably in Israel’s best interest to sign the Statute and try to change it as a signatory member of the ICC, instead of waiting for sixty countries to ratify it and then having no say in the development of the court.

IX. POSSIBLE SAFEGUARDS AGAINST PROSECUTION

There are reasons for Israel to believe that there will not be any ICC prosecution of supposed war crimes for a number of years. Israel may be assuming that by the time the Statute is ratified, there will be a permanent peace in place with the Palestinians and there will be no more “occupied” lands or new settlements (or that if there is not such a peace, the issue will have been settled by conflict).

Another concern of the Israeli delegation to the Rome Conference was that the crime of “aggression” might be defined according to political desires of the

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83 See Reich & Kieval, supra note 16, at 146.
Arab nations voting together in the interests of the PLO. Several accusations have been made by Arab countries and the PLO to suggest that Israel has violated other international laws that would fall under “aggression.” However, there was not an agreement at the Rome Conference on the definition of the crime “aggression.” It was suggested that the Statute use the same definition that the Organization of American States adopted in 1975 in connection with the Inter-American Treaty of Reciprocal Assistance, which it took from the definition adopted by the U.N. General Assembly in 1974. Ironically, that definition was later rejected at the Rome Conference for being too political. Therefore, that crime will not be under the court’s jurisdiction until a provision is adopted defining the crime and setting out the rules of the court’s jurisdiction.

The Israeli signature could mean that Israel simply does not believe that its construction and development of settlements are criminal, even under the ICC Statute’s language on “transfer of population.” This could only lead to further disputes. While it is unlikely that the officials that were behind Israel’s signing the treaty have this in mind, the officials that may be in office when the issue is next raised may have different ideas.

It is also possible that, like the Rome Conference, the ICC may be operated primarily by political motives and that Israel believes that these politics will protect it from being charged with war crimes or will determine the verdict. The U.N. Security Council has considerable control over who is prosecuted. Accordingly, even if allegations were made by an Arab (or non-Arab) member country against Israeli settlers or government officials in connection with settlement activity, Israel might be able to rely on the United States to protect

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86 See Teitelbaum, supra note 8, at 107.

87 See Id.

88 See id.

89 Article 16 of the Statute, entitled “Deferral of investigation or prosecution” establishes that: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council . . . has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” Rome Statute, supra note 4, at art. 16.
it politically. Pursuant to the above provision, the United States, as a member of the Security Council, could request that any prosecution or investigation of any alleged crime be delayed for twelve months. Such a delay could last indefinitely should the United States chose to renew such a request every twelve months.

X. CONNECTION BETWEEN AMERICAN AND ISRAELI SIGNATURES

Israel's decision to sign the treaty was clearly a result of the U.S. decision to sign earlier in the day on December 31, 2000. On the same day that the United States signed the treaty, the Israeli cabinet voted seven to four against joining the treaty. However, the cabinet left an escape route for signing the treaty, deciding that should the United States sign at the last minute, Israel would re-assess its position and align with the U.S. This scenario came to fruition as Clinton decided to sign earlier on December 31, and Israel signed later that day. The office of Prime Minister Barak said Israel had changed its stance following "contacts at the highest level with the United States to assure the protection of Israeli interests" which provided "clarity that... such signature will not harm its interests." An Arabic newspaper in the United Kingdom suggested that Israel may be relying on its allies, and specifically the United States, to ensure that it is not prosecuted for settlement activity. The article suggests that

[i]t may therefore be right to ask whether Israel's signing of the treaty was accompanied by hidden 'guarantees' that the court would not address many of its practices that violate human rights along the lines of the alleged 'solemn guarantees' demanded by the US Department of Defense to the effect that no US soldier or government employee will be convicted by the court.

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91 See id.
92 See id.
93 See id.
94 Israel Signs onto International Criminal Court, supra note 1.
96 Id.
The article goes on to say that "those Arabs who support the treaty will also be hoping that the court will be dispensing the justice in a way that there are no 'exceptions.'"97

Concerns about politicization of the court on the part of those who would like to see the Israelis prosecuted are likely justified. It would be hypocritical, but not inconceivable, for Israel to use politics as a shield in the very court where it complained that politics were allowing the court to be used as a sword. In fact, the statement from Prime Minister Barak's office indicates just such a political maneuver, as does a statement from Israeli Cabinet Secretary Isaac Herzog stating that Israel signed the treaty after coordinating its position with the United States, and ensured that Israel's interests will not be damaged by its becoming a member of the court.98

There is also another reason that the Israeli signature might not mean as much as it seems. Article 124 of the Statute provides that:

> a state, on becoming a party to this statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to Article 8 [war crimes] when a crime is alleged to have been committed by its nationals or on its territory.99

Accordingly, if Israel does ratify the Statute, it could request a seven year immunity from prosecution from the time of ratification. This would buy even more time to establish a lasting peace with a provision on the part of the Palestinian Authority to agree not to pursue a prosecution of Israeli nationals for the crime of "transfer of population." It would also give the Israelis seven more years to populate settlements before anyone would be subject to prosecution because of the non-retroactivity clause in the Statute. Article 123 provides that seven years after ratification and entry into force of the statute, a review of the Statute may be conducted and the Statute may be amended.100 Therefore, it is also possible that the "transfer of population" law in the Statute could be amended before Israeli nationals could even be prosecuted.

It is important to note that Israel's signature of the Statute does not legally bind Israel under the court's jurisdiction when the court becomes

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97 Id.
98 See BBC MONITORING, supra note 90.
99 Rome Statute, supra note 4, at art. 124.
100 See id. at art. 123.
The signature, as pointed out by Israeli Foreign Ministry legal advisor Alan Baker, is only an authorization of the content of its text. According to Baker, "from a domestic legal point of view in Israel, such an important agreement, especially if it involves transfer of territories, has to receive approval by the Knesset, and in some cases—though the legislation has not been completed yet—also has to go to a referendum.

XI. DECISION TO SIGN WAS THE BEST POSSIBLE FOR ISRAEL

Considering all of the factors that Israel faced in its decision and despite all of the political problems and possible repercussions, signing the ICC Statute was the best decision for Israel. The December 31, 2000, deadline forced Israel to make a decision that would affect several aspects of its internal politics, international image, regional relations, and even its territorial integrity. Prime Minister Barak likely saw the December 31 deadline, as did President Clinton, as an opportunity to establish a legacy and to point his nation towards peace.

The move was logically and strategically sound for the State of Israel as well. The provision in the Statute that may render Israeli settlements on occupied land illegal affects not only government officials who made policy decisions to establish and develop these settlements, but also the 200,000 Israelis living on the 145 settlements in the West Bank and Gaza Strip. However, Israel's signing of the Statute may not have any effect on whether those Israeli nationals will be charged.

One of the bases of jurisdiction that the court is allowed under the Statute is jurisdiction where a crime is committed on the territory of a state party. Accordingly, had Israel not signed the Statute and whether or not Israel ratifies the Statute, Israeli nationals may be subject to prosecution because the settlements are alleged to be on Syrian or Palestinian land. Since Syria is a signatory state of the ICC, and the alleged crimes occurred on what may be considered Syrian land, the crimes are subject to prosecution under the ICC Statute. This is so even if Israel were not a signatory state or if Israel does not

101 See Keinon, supra note 58, at 2.
102 See id. at 1.
103 Id.
105 See Schabas, supra note 10, at 62.
ratify the Statute. The same is true of the Palestinian Authority, which is likely to ratify the Statute if and when it gains statehood. Further, even without the ICC Statute, some Israeli nationals could still be indictable under the “Pinochet Doctrine,” which makes former heads of state and other senior officials accountable for international crimes, based on the principle of universal jurisdiction.

XII. POSSIBILITY OF ISRAELI RATIFICATION OF THE ICC STATUTE

Israel’s Basic Law provides that “there shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.” This provision is contrary to the ICC Statute and thus would have to be amended or repealed before the Knesset could vote to ratify the Statute. The Israeli Basic Law also provides the President immunity from prosecution by any court or tribunal in connection with any act connected with his functions or powers. In addition, the Israeli Basic Law protects members of Israel’s Knesset from some prosecutions.

The Knesset will have to determine whether or not these provisions can remain in harmony with the ICC Statute before it can ratify the Statute. Because ICC member states will have to sacrifice an element of sovereignty, it is likely that these provisions will have to be amended to exclude ICC Proceedings. This is different from the temporary international courts created by the United Nations. These courts are currently in operation to deal with specific situations because the member states are voluntary members and thus submit voluntarily to the jurisdiction of the court. When the time comes for the Knesset to seriously evaluate ratification, it will likely have to amend

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107 See Statement by Yasser Arafat before the 53rd Session of the United Nations General Assembly, Agenda Item: General Debate, September 28, 1998, http://www.palestine-un.org/mission/3a_53.html (stating “we welcome the creation of the International Criminal Court, which is considered to be an important step towards the enhancement of the law and towards bringing an end to the atrocities and crimes being committed against humanity.”).

108 See Cotler, supra note 72, at 6.

109 ISRAELI BASIC LAW, art. 5.

110 ISRAELI BASIC LAW, art. 13-14.

111 A provision of the Basic Law provides members of the Knesset immunity that ensures that a Knesset Member cannot bear criminal responsibilities for any act which he or she performed while fulfilling his or her duty or in order to fulfill his or her duty. ISRAELI BASIC LAW art. 5.

112 The United Nations currently has two temporary war crimes courts in operation. Peek, supra note 63. One was created to charge those suspected of war crimes in connection with the Bosnia-Herzegovina civil war of the early 1990s, and the other deals with officials implicated in atrocities committed during unrest in Rwanda in 1994. Id.
these provisions. Israel supports the idea of the ICC and in order to do so must acknowledge the sacrifice of sovereignty that comes with member status. Therefore, will likely make those amendments and changes to laws as are necessary to comply with the Statute and ratify it so long as the settlement activity is not prosecutable.

Additionally, at a meeting of the Preparatory Commission of the ICC in June 2000, a footnote was inserted to the effect that the definition of transfer in the "occupied territories provision" would be that which is in accordance with international humanitarian law. Even though the Statute was not directly amended to exclude the "directly or indirectly" language, this footnote would seem to imply that the Statute does not purport to modify existing international law, only to enforce it. While this does not definitively exclude Israel's settlement activity in the occupied territories from offenses subject to prosecution, it certainly shifts the law in Israel's favor.

XIII. EFFECT OF ISRAEL'S SIGNING ON THE ISRAELI SETTLERS, OFFICIALS, AND THE STATE'S TERRITORIAL INTEGRITY

The Israeli signing of the Statute probably had little to no effect on the prospects of possible criminal allegations being charged in connection with the Israeli settlements in the occupied territories. As noted above, a provision of the Statute may grant the court jurisdiction over settlement activity because it may be argued that the settlements are actually on Syrian, Jordanian, or Palestinian land. Thus, they are subject to ICC jurisdiction because Syria and Jordan are signatory states, and the future Palestinian state, if and when it becomes a state, will be likely to join the ICC as well.

If anything, Israel's signing of the Statute will decrease the chances of any charges being filed. As a signatory state, Israel will be able to participate in the development of the ICC process. This may include proposing and supporting amendments to the Statute over the course of the seven years immediately following the ratification of the Statute, during which Israel may opt out of the court's jurisdiction, as noted above. Additionally, Israel may take advantage of its ability to participate in other aspects of ICC procedure, including the choice of prosecutors and composition of the court, in a manner that will best serve its interests. Further, as noted previously in this note, Israel's signing provided it an opportunity to include a writing with

113 See Cotler, supra note 72, at 6.
114 See Why Israel Initially Rejected the ICC statute, supra at 596.
reservation-like language prior to ratification of the Rome Statute. The legal weight of this writing, however, is not certain.

According to the International Court of Justice, a general proposition of international law provides that “no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.”

Clearly, Israel’s purported reservation would not have been, and in fact was not, accepted by all contracting parties at the Rome Conference. Therefore, by this tenet of international law, the reservation is invalid.

However, in the same case in which the International Court of Justice articulated the acceptance principle above, it also noted that in some cases involving international conventions, “it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle.”

Specifically, the Court was grappling with reservations made by several states to the Convention on the Prevention and Punishment of the Crime of Genocide. The Court determined that among the factors that should be considered in determining whether to accept reservations of states to multilateral conventions are the object and purpose of the convention itself.

In its subsequent analysis, the Court stated:

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation

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116 Id. at 22.

with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.118


Since the Convention is an overall 'package deal' reflecting different priorities of different states, to permit reservations would inevitably permit one State to eliminate the "quid" of another State's "quo". Thus there was general agreement in the Conference that in principle reservations could not be permitted.119

Similarly, the International Criminal Court is a "package deal." The Rome Statute reflects different priorities of different states in a manner that could render some reservations unfair to the rest of the member States and contrary to the nature of the court, which requires equal treatment for all member States. This would indicate that reservations would be contrary to the spirit of the Statute and should be forbidden. However, the Israeli statement is arguably more of a warning against the misuse of the Court for political purposes rather than an explicit reservation such as one proscribing prosecution of Israeli nationals under the settlement provision of the Statute.

Finally, it is unlikely that Israel will still have an occupying presence in the West Bank and Gaza Strip at the end of Israel's seven years of immunity, despite Yasser Arafat's rejection of Prime Minister Barak's July 2000 offer at Camp David that would have given the Palestinians about 95% of the West Bank and all of the Gaza Strip for a Palestinian state.120

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118 Reservations on the Genocide Convention, supra note 115, at 24.
120 See Uri Dan, Israelis Blame Arafat as Hopes for Peace Deal Dim, N.Y. POST, July 18, 2000, at 2.
XIV. Final Analysis: The Outlook for Israel

A final analysis suggests that there are various mechanisms that would at least postpone a prosecution of Israeli nationals for settlement activities. These mechanisms include the Statute's seven-year immunity provision following notification, and the U.N. Security Council's postponement power over the investigation and prosecution of crimes. Additionally, it is likely that Israeli officials and liaisons to the court will try to amend the Statute's provision on settlement activity or seek to gain support for the removal of the provision. However, barring a resolution to the settlement issue before the end of such postponements, the outlook is not very positive for Israeli nationals who may be brought to trial before the International Criminal Court.

However, this is not to say that Israel's leadership made a bad decision in signing the Statute. The December 31, 2000 deadline posed for Israel's government a dilemma with many pros and cons to both signing and rejecting the Statute. Internal political pressure raged from both sides, and international pressure was present as well, most of which encouraged Israel to sign. The Al-Aqsa Intifada and the situation it created between the Israeli and Palestinian people and governments brought about additional international pressure and image problems for Israel. The international press coverage of the ongoing violence created an arguably unjustified image of Israel as the aggressor in violation of humanitarian values, all of which would have been aggravated further had Israel rejected the Statute. The signing of the Statute by the United States, despite political pressure not to do so, further encouraged Israel's endorsement. History will eventually portray Israel's decision as a good one, a bad one, or even a rather meaningless one. The only safe predictions are that the volatility of the Middle East, the quest for peace, the ICC party states, and the ICC itself will all figure prominently in how the issues unfold, and that political factors will probably prove as influential as any statutory language or treaty provision in the court's future actions concerning Israel.