

AMICC

The ICC: A Case for Conservatives Questions & Answers

When did the ICC enter into force and what crimes can it try?

The ICC came into existence on July 1, 2002, following the necessary 60th state ratification of the Court's Rome Statute. To date, nearly 100 countries have ratified the Statute. The ICC is unprecedented as a permanent tribunal to try individuals, regardless of nationality, for the most serious crimes, including genocide, crimes against humanity and war crimes. The Court has jurisdiction over crimes committed after the July 1st date.

Will the ICC prosecute Americans?

It is highly unlikely that the Court will ever prosecute Americans. It is only the tyrannical leaders of countries that repeatedly violate the most fundamental and basic human rights that will be brought before the Court and held to account. There is a very high threshold for crimes the Court can try – they must be committed in a calculated and widespread manner. In addition, the Court is limited in the kinds of crimes that the ICC can prosecute: the crime of genocide, war crimes and crimes against humanity. Only if the Security Council refers a case, or a country accepts the Court's jurisdiction, can the ICC act when the states involved are not party to the Court.

Does the ICC provide similar due process rights that Americans enjoy in the Bill of Rights?

Yes. In fact, the due process provisions of the Rome Statute are identical to those in the U.S. Bill of Rights. The Statute includes rights such as the right to a speedy trial, the right to remain silent and the right to be questioned with counsel present. The only difference is that there is no trial by jury at the ICC. However, a jury trial for the type of individual the Court has been set up to try is both impractical and extremely difficult. The ICC provides for trial by judges schooled in the highest legal principles of the Court, thus ensuring that their rulings will be rooted in them.

Is it unconstitutional for an American to be tried in a foreign court?

Supreme Court cases have made it clear that it is not unconstitutional to try Americans in foreign courts. This would not be the first time that the U.S. would subject its nationals to be tried in a judicial system other than an American one. The U.S. has entered into previous extradition treaties that allow its nationals to be brought before foreign courts. A state has absolute and exclusive jurisdiction over those who commit crimes within its territory. Americans can be extradited, and have been extradited, to countries whose judicial systems are very dissimilar to the American system. However it should be noted, especially in terms of the due process rights available to those who come before the Court, that the ICC is almost identical to American courts.

Would joining the ICC make the U.S. give up some of its sovereignty?

The fact that the ICC was created by a group of nations indicates demonstrates that rather than violate the principle of sovereignty, the ICC is its expression. It is an act of sovereignty for countries to join treaties and organizations. The countries that drafted the Rome Statute, and subsequently signed and ratified it, are exercising their right to create an international organization. The jurisdiction of the Court is also complementary to national criminal jurisdiction. A case may not be brought before the Court if it is being investigated by a concerned state. The principle of complementarity ensures that sovereignty is not lost, but rather upheld and “complemented” when a nation becomes a party to the ICC. It is only when ICC judges determine that a country cannot or will not try someone that the Court may refuse to defer to a national legal system.

Is the ICC a step toward world government?

The creation of this Court is not an attempt to check American power or a step toward world government. Moral considerations, not a desire for world government, prompted the creation of the ICC. It is a reaction to a brutal history and a refusal to accept perpetual atrocities. Furthermore, the Assembly of States Parties (ASP), the governing body of the Court, is comprised of states that have ratified the Court’s statute. It is the States Parties that choose representatives to send to the Court. These representatives will thus have the interests of their respective countries in mind and are not faceless bureaucrats.

Will the ICC pass judgment on our legal system?

If the ICC judges ever had to decide whether an American proceeding was conducted in good faith, it would apply only to the particular case involved and would not be an overall judgment of the U.S. legal system. Such a determination would only be an examination of what the U.S. did or did not do in a particular situation. Although there is a technical possibility that judges could conclude that a U.S. trial was not conducted in good faith, this is very unlikely since the international community is very aware that the U.S. judicial system has functioned with judicial rigor and independence over the last 200 years.

Are there safeguards or a system of checks and balances?

Perhaps the most significant limitation and check on the Court is that it is a court of last resort. The ICC must defer to national proceedings unless it can be shown that the state in question is unable or unwilling to act. Such a state must be notified if the Court is beginning an investigation and therefore has the ability to invoke complementarity. Moreover, the ICC has four independent organs that serve as a check for one another. The ASP has ultimate oversight authority over the Court. It is the Assembly, not the Court that is responsible for managing the administration of the Court, deciding what measures to take when a member fails to cooperate, and controlling the budget. In addition, if a judge, the Prosecutor, or the Registrar does not act independently or is biased, the Assembly can remove him or her. There are also provisions that limit the powers of the Prosecutor. For instance, the Prosecutor’s office has no authority to decide on its own to pursue a case; he or she needs the approval of the Pre-Trial Chamber to

begin a formal field investigation. Furthermore, the judges and Prosecutor are responsible for overseeing each other's impartiality whenever it might reasonably be doubted on any ground.

Will the ICC have the same shortcomings of the ad hoc tribunals?

The setbacks of the tribunals came from their improvised nature, lack of a permanent mandate, and inadequate oversight by the Security Council. As each was established, it had to start from scratch in operations, investigations, prosecutions, personnel recruitment and financing. The permanence of the Court greatly reduces these problems. The ICC has its own set of rules and standards for procedure and evidence, personnel recruitment and the election of judges, all of which are carefully discussed and reviewed before approval by the ASP. The ability of the ICC to organize itself permanently before its first indictments gives the institution a huge advantage over the ad hoc tribunals.

Will the Court inhibit the U.S. to act militaristically?

American officials should not be concerned that military operations may constitute crimes against humanity, or, once defined, the crime of aggression. The ICC was not designed to prosecute citizens of democratic countries which normally do not plan and commit atrocities. In fact, it is unthinkable that Americans would ever commit such crimes since they are calculated and strategic, not the collateral damage of warfare. The crimes under the Court's jurisdiction must be extremely serious and executed as a matter of official policy, within a repeated pattern of abuse. Therefore the U.S. need not fear prosecution from an error or combat miscalculation. Additionally, the war crimes the Statute describes can be found in the military manuals of the U.S. army and the definitions of their elements were shaped, supported and finally approved by the U.S. and Department of Defense in negotiations on the ICC.

Will Americans serving this country abroad be exposed to political abuse of the ICC?

Many protective provisions have been built into the Rome Statute. For instance, Article 98 of the Statute provides for protection of U.S. citizens serving in the military or as officials abroad. It requires the ICC to defer to Status of Forces Agreements (SOFAs), which protect U.S. soldiers, sailors, air force personnel and marines abroad, and to Status of Mission Agreements (SOMAs) for U.S. officials.