

## **Myths about United States Sovereignty and the International Criminal Court**

It is frequently argued by those opposed to the International Criminal Court (ICC) that its very existence is an attack on US sovereignty. To the contrary, the Court grew out of efforts, led by the United States for the last fifty years, to bring justice to those who commit crimes so atrocious that they are universally abhorred. The Court is an outgrowth of the hard work and strength of purpose of approximately 150 negotiating sovereign states, including the United States, to build an institution that could try persons accused of the most serious crimes imaginable when states lack the ability or will to do so themselves. Due in significant part to the expert US team that helped draft the Court's Statute, the crimes over which it is competent and the ways it can obtain jurisdiction over individuals are all firmly rooted in traditional international law and practice that the United States has long recognized and followed.

### ***Myth 1: The ICC is merely another attempt by the UN to gain control over the US and create a world government.***

Neither the Court, nor the Assembly of State Parties, which together make up the ICC, is a UN body. Although the ICC was negotiated at UN forums, it will be entirely independent of the UN. It will be governed and funded only by those states that choose to ratify the ICC Statute.

Furthermore, the ICC is a Court with the jurisdiction to try only those accused of systematically planning the most heinous crimes imaginable. Such a court is hardly an incipient world government. The Court is a product of grave necessity, not the result of a desire to create yet another supranational institution. The US already participates in a number of international adjudicatory bodies that have a far greater impact on US economic—and therefore political—interests, including those of the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO).

### ***Myth 2: The ICC will be made up of countries hostile to the US that will use the Court for politically motivated attacks on US foreign policy.***

In addition to the US, countries that voted against the ICC Statute at the Rome Conference include China, Libya, Iraq, Israel, Qatar, and Yemen. On the other hand, parties to the ICC are disproportionately made up of our EU and NATO allies, including the United Kingdom. No enemies of the US have joined, and it is extremely unlikely that they will in the future. Rogue nations are extremely unlikely to become a party to the Court because the crimes they commit against their own people in their own countries could then be heard by the Court. For example, Saddam Hussein would not want to join the ICC, which could then examine Iraq's genocidal Kurdish policies.

Furthermore, even if countries that are opposed to US policy goals join the Court, they would not have the power to use it to attack the US because each state has only one representative and one vote in the governing body, the Assembly of State Parties.<sup>1</sup> The Assembly's decisions, depending on the topic, require at least a simple majority<sup>2</sup>—many more than the number of our ardent foes.

Court officials would also be unable to target the US because of the many checks and balances built into the Court's Statute. For example, there is little likelihood that the judges

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<sup>1</sup> Art. 112(7).

<sup>2</sup> Art. 112(7). Decisions on substantive matters require a two-thirds majority.

themselves would band together to influence proceedings on a political basis since they must be elected by a two-thirds majority of the Assembly and no two judges may be nationals of the same state.<sup>3</sup> Even if a trial chamber (made up of three judges from three different countries) acted inappropriately, its decision could be overturned by the appeals chamber (made of four judges from four additional countries). Similarly, the Prosecutor and Deputy Prosecutor must be elected by an absolute majority of Assembly members and must be of different nationalities from one another.<sup>4</sup> Additionally, the Pre-Trial Chamber must authorize all formal investigations initiated by the Prosecutor.<sup>5</sup>

**Myth 3: *The ICC rests on the premise that its Statute is a higher legal authority than all other law, including the US Constitution.***

The ICC Statute is a treaty, which can only become national law in accordance with each state's domestic ratification procedure. The US Constitution gives this power to the President, with the advice and consent of two-thirds of the Senate.<sup>6</sup> The US Constitution also determines the precedence among laws from different sources in the United States. It provides that itself, federal, and treaty law are the supreme Law of the Land.<sup>7</sup> In accordance with US constitutional law, if the US ratified the ICC Statute, it would become part of the federal law of the US, and thus superior to state laws, but not to the Constitution. If the US does not ratify the Statute, it will not become US law and will therefore have no authority whatsoever in this country.

It has been claimed that the Statute gives the ICC legal superiority over national law because it is an international court with the authority to investigate and try crimes that would otherwise be prosecuted domestically. However, this does not mean that the ICC has primacy over national courts. In fact, the ICC is complementary to national criminal jurisdiction, meaning that it cannot hear a case that is being investigated or prosecuted genuinely by an affected state.<sup>8</sup> The ICC will not act except when a state is unable or does not wish to exercise its sovereignty. In fact its Statute encourages states to take the lead. The Court does not even have the authority even to initiate an investigation until the Prosecutor notifies the state of the accused, including a non-party state such as the US, which then can prevent an investigation merely by deciding in good faith that one is not necessary and so notifying the Court.<sup>9</sup>

Not only are the judgments of national prosecutors and judges generally binding on the ICC, some treaties between states take precedence over the ICC Statute. Thus, bilateral treaties governing the legal rights of US armed forces abroad (known as Status of Forces Agreements), extradition agreements, and international diplomatic obligations could have precedence in some situations over state party obligations to cooperate with the ICC. Similarly, both parties and non-parties have the final determination over whether national security information should be made available to the Court.<sup>10</sup> Therefore, the ICC may not ask a state to surrender a suspect or for assistance with an investigation that would require that state to act inconsistently with its obligations to the US.<sup>11</sup>

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<sup>3</sup> Art. 36(7).

<sup>4</sup> Art. 42(2).

<sup>5</sup> Article 15(3).

<sup>6</sup> US Const. art. II(2) para. 2.

<sup>7</sup> US Const. art. VI para. 2.

<sup>8</sup> ICC Art. 17.

<sup>9</sup> Art. 17.

<sup>10</sup> Arts. 72, 93[4].

<sup>11</sup> Art. 98.

**Myth 4: *The ICC Statute purports to bind the US government before it has agreed to join the Court.***

The Statute, like any treaty, does not claim to bind non-parties in any way, nor does it have that effect. The Court only has jurisdiction over individuals, not governments, so state sovereignty is in no way infringed.<sup>12</sup> The US has no obligation to cooperate with the Court until it has chosen to exercise its sovereignty by ratifying the Court's Statute or by accepting its jurisdiction over a particular situation. Until the US chooses to ratify the Statute, the Court will not be able to gain custody of or prosecute US citizens who remain in the US, and the US will have no obligation to make them available to the Court.

**Myth 5: *Contrary to treaty law, the ICC claims the right to indict, seize, try, and imprison US citizens even though the US is not a party to the Court.***

States that become a party to the ICC Statute already have the right to legislate and enforce the law within their own borders. It is universally accepted, including by the US, that all states have the jurisdiction to try foreigners who commit crimes within their territory, or to extradite accused criminals found in their territory who are wanted by another. This is an inherent right of sovereign states long recognized to be in conformity with the US constitution, and which the US has never questioned. In fact, US law enforcement officials regularly rely on this right. For example, Zacarias Moussaoui, a French citizen, has been accused of conspiring with Osama bin Laden to plan the September 11<sup>th</sup> attacks. He is now awaiting trial in Virginia. The crime of which he is accused occurred in the US, so France has not questioned the right of the US to try him even though he is a French national. ICC jurisdiction over US citizens is based entirely on this time-honored right of the nations that become parties to the Statute. The Court will have no more or less authority to try US citizens than these states do currently.

This myth has developed from a misunderstanding of the fact that the crimes the Court can try (genocide, crimes against humanity and serious war crimes) are universally condemned and that some states have enacted laws of "universal jurisdiction," which authorize domestic prosecution no matter what the suspect's or victim's nationality or where the crime occurred. Also, many treaties create an obligation of prosecution or extradition for these crimes. For example, the US is a party to treaties obligating it to prosecute all persons accused of genocide,<sup>13</sup> certain crimes against humanity,<sup>14</sup> and serious war crimes.<sup>15</sup> Although the crimes over which the ICC will have jurisdiction are by definition the most serious crimes, and therefore unquestionably within the accepted scope of universal jurisdiction, ICC jurisdiction is not based on this principle: it is not universal. The Court cannot try a US citizen who commits a crime anywhere in the world. When the state of nationality is not a party, the Court only has jurisdiction over a crime when the state on whose territory the conduct occurred is a party to the Statute or has accepted the jurisdiction of the Court.<sup>16</sup> Nationality and territoriality are the two traditional bases for international jurisdiction accepted by all nations.

Therefore, until the US becomes a party to the Statute, the Court will only be able to try US citizens who commit a crime in the territory of a state that accepts its jurisdiction. Only if the Security Council refers a matter to the Court could the ICC try a US citizen whether or not the state in which the crime occurred has agreed to be bound by the Statute. This kind of referral, however, could only occur with the consent of the United States, since it has a veto in the Security Council.

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<sup>12</sup> See Article 25(1).

<sup>13</sup> See Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>14</sup> See Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>15</sup> See, e.g., IV Geneva Convention Art. 146 governing grave breaches.

<sup>16</sup> Art. 12(2).

**Myth 6: *Even if foreign states have the right to try US citizens, they have no right to transfer that right to the ICC without US approval.***

The US not only recognizes the right of states to transfer their jurisdiction to international courts, but also it has been instrumental in creating such courts and in encouraging states to cede jurisdiction to them. For example, the US has participated in the international criminal tribunals for Yugoslavia and Rwanda (ICTY and ICTR), and urged others to participate without sovereignty concerns arising.<sup>17</sup> Furthermore, the US raised no objection to (and in fact provided incentives for) the indictment and surrender of Serbian officials to the ICTY over the protests of the Federal Republic of Yugoslavia at a time when that country was not an internationally recognized party to the UN Charter, which authorized the Security Council to create the ICTY in the first place. This is the same situation that would arise if a warrant were to be issued for a US citizen by the ICC without US consent.

**Myth 7: *The US can better protect its sovereignty by not joining the ICC and by enacting legislation prohibiting all cooperation with and support for the Court.***

Contrary to ICC detractors, the US can better protect its sovereignty by joining the Court than by ignoring or taking hostile action against it. The reality is that the Court will come into existence in a matter of months, probably during the first half of 2002. There is no question that the Court will have the right to try US citizens in certain circumstances, even though they are extremely unlikely to occur. US legislation can prevent US cooperation with the Court, but it cannot prevent action by the ICC.

The only way the US can protect its interests in the Court is by continuing to actively participate in preparatory negotiations for it and to influence its development so as to shape a strong and fair institution that will strengthen US interests. That the US can have this kind of positive influence is shown by its past work on the Court. Throughout the years of ICC negotiations, the US was intimately involved and made extensive contributions to the Court's present form. This led to the adoption of provisions giving strong deference to national courts (as discussed above) and to the inclusion of a majority of the US Bill of Rights. If the US continues to work actively with the Court as a player and referee, it will have the position and authority to guard itself against perceived threats – a role unattainable if it merely complains on the sidelines.

By joining the Court, the US would also be able to take advantage of the many safeguards written into the treaty for state parties. For example, parties to the Court can choose not to accept the Court's jurisdiction over war crimes for seven years.<sup>18</sup> By invoking this provision, the US could see how the Court handles such cases from the beginning and repudiate the treaty if the Court exceeds its authority by engaging in political prosecutions. As a party, the US could also protect its nationals from prosecution for the crime of aggression or any other new crimes added to the Statute if it found their definitions unacceptable.<sup>19</sup>

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<sup>17</sup> See, e.g., *Ntakirutimana v. Reno*, 184 F.3d 419 (1999), in which extradition of a Rwandan citizen to the ICTR was allowed even in the absence of an extradition treaty.

<sup>18</sup> Art. 124.

<sup>19</sup> See Art. 121(5).