

What is the ICC?

WHO CAN BE TRIED AND FOR WHAT CRIMES BY THE ICC?

The International Criminal Court (ICC or Court) is the world's first permanent court with jurisdiction to try individuals accused of the some of the most serious international crimes:

- **Crimes against humanity** -- a course of conduct involving the multiple commission of one or more acts such as, for example, murder, extermination, enslavement, the forcible transfer of a population, torture, or rape. This course of conduct must be part of a) a widespread or systematic attack against any civilian population *and* b) a State or organizational policy to commit such attack (for example, the ethnic cleansing of Bosnia and Herzegovina and of Kosovo in the 1990's included crimes against humanity).
- **Genocide** -- intentionally committing an "act of genocide" in order to destroy, in whole or in part, a national, ethnical, racial or religious group. Acts of genocide include killing members of the group, seriously wounding members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures to prevent births, and forcibly transferring children of the group to another group (for example, the mass murder of Jews during the Holocaust and of Tutsis in Rwanda in 1994).
- **Serious war crimes** -- crimes in violation of well-accepted laws of war, in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes (for example, the targeting of civilians in Sarajevo by snipers during the Bosnian conflict).

ARE THERE ANY LIMITS ON ICC JURISDICTION?

- The ICC can only exercise jurisdiction over crimes occurring after July 1, 2002, the official start-up date of the Court.
- The Court does not have universal jurisdiction. The precondition to the exercise of ICC jurisdiction over a crime is that the crime must have been committed on the territory or by a citizen of a state that has either ratified the Court's Statute or has specially consented to its jurisdiction over the situation in which the crime occurred.

If that precondition is satisfied, then a state party to the ICC Statute or the ICC Prosecutor (with the approval of the judges) can refer to the ICC for investigation a situation in which ICC crimes are suspected of having been committed.

If the U.N. Security Council refers a situation to the ICC using the Council's enforcement authority under the UN Charter, then that precondition would not need to be fulfilled.

- The ICC can only look into situations that are "the most serious crimes of concern to the international community as a whole." In general, this means that the ICC will only take a case if a state or organization deliberately plans multiple or very massive atrocities.
- The ICC is designed as a court of last resort. The Court will defer to national proceedings -- whether or not they lead to prosecution -- except if it concludes that the state in question is incapable of acting because, for example, it has no functioning judicial system, or is unwilling to act because, for example, it has acted in bad faith.

WHO CREATED THE ICC?

- The ICC Statute was adopted in Rome in 1998 by 120 countries after several years of negotiations at the United Nations. 139 countries ultimately signed the ICC Statute, and 92 states had ratified or acceded to it by September 2003. The ICC Statute came into force on July 1, 2002, following the required 60th ratification.

- Support for the ICC has been led by a coalition of America's friends and allies, including all members of the European Union and all members of NATO except the US and Turkey.
- The ICC is supported by many states that have recently experienced severe crises as a result of ongoing impunity or attempts to try human rights violators within their domestic systems, including Argentina, Cambodia, Colombia, Croatia, the Democratic Republic of the Congo, Nigeria, Paraguay, Peru, Sierra Leone, South Africa, and Uganda.
- The US was involved with the ICC negotiations until early 2002 and made extensive contributions to the ICC Statute and its indispensable supplemental documents. These include provisions giving strong deference to national courts, an important role for the Security Council, due process rights drawn from the US Bill of Rights, and the definitions and elements of the ICC crimes.

IS THE ICC PART OF THE UNITED NATIONS?

- The ICC is *not* a UN body; it is not under the jurisdiction of the General Assembly or of the Secretary-General. It is an independent international court with its own legal capacity, created and governed by its own treaty. It will not be administered or paid for through the UN. It is financed by, and accountable to, only those states that have chosen to ratify the ICC Statute. It is not located at UN headquarters, but at The Hague, the capital of the Netherlands.

The Court is linked to the UN in at least one crucial respect: the Security Council has the authority to refer investigations to it, or to temporarily suspend them. If the UN Security Council refers a situation to the ICC, then the UN membership as a whole may be assessed some portion of the Court's expenses relating to that specific investigation.

WHY DO WE NEED AN INTERNATIONAL CRIMINAL COURT?

- There is no existing court like the ICC.
 - Unlike the International Court of Justice or "World Court," which is a UN organ and can only decide disputes between states, the ICC is a treaty-based criminal court that can only try individuals for designated atrocity crimes.
 - Unlike the two ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, which were created by the UN Security Council to deal with atrocity crimes in those regions during specific conflicts, the ICC is a permanent court that could, depending on the circumstances, investigate and prosecute any individual accused of committing an atrocity crime within the ICC's jurisdiction after July 1, 2002.
- Most of history's worst killers have gone unpunished. Josef Stalin said that, "[a] single death is a tragedy, a million deaths is a statistic." The ICC represents a strong and growing commitment by the international community to end impunity for atrocity crimes in the 21st Century.
- After violent armed conflicts or other massive assaults on civilian populations, many states remain mired in cycles of violence and retribution. Prosecuting individuals for atrocity crimes can:
 - Achieve justice for the victims and for society and help create respect for the rule of law;
 - Counter attempts to blame nations or ethnic, religious, or other groups as a whole for the crimes of individuals;
 - Isolate and incapacitate criminal leaders so that they can be removed from active political participation;
 - Acknowledge and condemn the suffering of victims and survivors;
 - Establish an accurate historical record; and

- Act as a deterrent to future arch criminals.
- These benefits can be advanced by the mere existence of the ICC. States will be encouraged to investigate and prosecute atrocity crimes because, if they do not, the ICC may find it necessary to pursue its own investigations and prosecutions.

WHY HASN'T THE UNITED STATES RATIFIED THE ICC STATUTE?

Although the US Government signed the ICC Statute in December 2000, it now is opposed to and unwilling to join the ICC because:

- **The US claims that the ICC potentially could investigate and try US citizens without US consent even though the US is not a party to the ICC Statute.** Because the ICC Statute has jurisdiction to investigate and prosecute only individuals, not governments, long standing principles of criminal law influence how the Court will work. One of those principles is that an individual of any nationality who commits a crime on a state's territory can be prosecuted by that state -- without the consent of his or her respective government.

American citizens are frequently prosecuted in the courts of foreign countries for crimes they are alleged to have committed on foreign territory, without any requirement to obtain US consent for those prosecutions. US courts likewise prosecute foreign nationals who allegedly commit crimes on US territory without seeking the consent of their home state.

By ratifying the ICC Statute or signing a declaration for ICC jurisdiction in a particular situation, a state delegates to the ICC its existing and continuing right under international law, and its own domestic law, to investigate, and if warranted, prosecute, any individual of any nationality who is alleged to have committed an atrocity crime on its territory. This legal power over the foreign national exists regardless of the consent or interests of his or her government. Legal arguments disputing this application of international criminal law have not proven convincing to most governments.

- **The US says that the Court has too much unchecked power and fears that its prosecutor will be uncontrollable.** However, the ICC has many checks and balances in its Statute that limit the authority of the prosecutor and judges. For example:
 - The Prosecutor cannot pursue an investigation without the approval of at least two judges.
 - The judges, the Prosecutor, or an accused can ask that either a judge or the prosecutor be disqualified if there are doubts about his or her impartiality.
 - An independent defense unit will be a watchdog against prosecutorial and judicial abuse.
 - No two judges may be from the same state, and, given the pattern of ratification, most of the 18 judges will be from countries that are America's allies and friends.
 - The Prosecutor must immediately notify a suspect's state of nationality about an impending investigation.
 - A state can decide to conduct its own investigation of a citizen suspected of ICC crimes and thus stop the Prosecutor from acting.
 - The Assembly of States Parties, made up of member states, has ultimate oversight authority over the Court. For example, if a judge or the Prosecutor acts inappropriately, the Assembly can remove him or her.

Additional safeguards include:

- The UN Security Council can prevent the Court from proceeding with specified investigations or prosecutions for a 12-month period, and can renew that request indefinitely.
 - A state can withhold, or choose to negotiate protected disclosure of, any information that it feels would prejudice its national security interests.
- **The US says that the ICC could investigate and prosecute US leaders for the "crime of aggression"** (that is, the unlawful use of force by one state against another, for example, Iraq's invasion of Kuwait in 1990). However, until the Assembly of States Parties can agree on an actionable definition for this crime (which under the terms of the ICC Statute cannot occur for at least seven years) and the Statute is amended by seven-eighths of the states parties to include this definition, the Court has no authority to charge any individual with this crime. If the US were to join the Court, it could permanently "opt out" of the crime of aggression and thus shield its leaders and indeed all of its citizens from being charged with aggression.

[Click here](#) to read the Bush Administration's last statement in the ICC negotiations, providing its views on the crime of aggression.

- **The US argues that the Court's very existence threatens US sovereignty.** However, the Court will not judge the actions of states or governments, but only persons. Moreover, like any other treaty, the ICC Statute does not obligate or impose duties on any state that is not a party to the treaty. States have no obligation to cooperate with the Court unless they have chosen to exercise their sovereign right to ratify the Court's Statute. Thus, until the US chooses to ratify the ICC Statute, the Court will not be able to gain custody of US citizens who remain in the United States, and the US will have no obligation to transfer them to the Court.
- **The US fears that the Court will be politically motivated against US leaders and soldiers.** The Court can only investigate the designated types of very serious crimes of high magnitude that fall within the Court's jurisdiction -- crimes that would never conceivably be authorized as part of any military strategy by the U.S. armed forces.

Nonetheless, Washington argues that there is always the possibility of politically motivated charges being lodged against US leaders and soldiers. However, the ICC Statute has many safeguards, most introduced by US negotiators, to thwart politically motivated charges and thus maintain the integrity of the Court. One of the primary safeguards is the power of the US, even as a non-party to the Court, to pre-empt the Court with its own national investigation of any such charges.

In spite of the safeguards, if the Court were to succumb to politically motivated charges lacking any legal merit, its own future, particularly its financial future, would be at great jeopardy as states that are members of the Court realize that they too could be subjected to such unwarranted actions.

Further, states that have joined the ICC are in large part America's allies and friends. Aggressive and rogue regimes would be at high risk of their leaders being prosecuted if they were to join the ICC. For example, if Iraq were to join the ICC, the Court then would be able to prosecute Saddam Hussein if his forces continued to commit crimes against humanity in the southern marshes of Iraq.

Finally, the ICC does not have a police force. Its power will depend entirely on the willingness of its members and the Security Council to enforce its decisions. The ICC will quickly lose credibility if it acts illegitimately.

- **The US says that it prefers to support trials in the country where the atrocity took place.** The founders of the ICC support this view, which is why they made it a court of last resort. Significantly, in joining the Court, many countries are adopting laws that strengthen their ability to prosecute war criminals themselves. The existence of the ICC also will help to strengthen states' will to act domestically, because if they do not, the ICC may have jurisdiction in a case and act on it.

History shows that national courts are frequently unable or unwilling to prosecute these types of crimes. Often atrocities arise out of the disintegration of states and the institutions of law and order. And even states that are capable of trying the accused themselves might occasionally prefer to avoid domestic turmoil by delegating such high-profile cases to an international court. For instance, Sierra Leone has said that:

"The result of this request [for a Special Court for Sierra Leone] is Resolution 1315 of the Security Council. The point here is that if the International Criminal Court had begun to function, Sierra Leone would not have requested the setting up of a Special Court. The perpetrators of those heinous crimes committed in my country, would have been handed to the Jurisdiction of the Court. [Read the full text.](#)

- **The US has constitutional concerns about the ICC Statute, particularly with the due process rights accorded defendants.** However, the ICC Statute contains the due process rights found in the US Constitution and now well recognized in international standards of due process, with the exception of the American right to jury trial.

In the negotiations, the US accepted the absence of jury trial because civil law systems, which formed the large majority of states negotiating the ICC Statute, do not have jury trials and because it actually is extremely impractical to empanel a jury of peers from the international community to pass judgment on the crimes and defendants of the ICC. Indeed, just as the ad hoc tribunals for the former Yugoslavia and for Rwanda rely on panels of experienced judges, so too would the ICC require the expertise and integrity of judges to examine these complex crimes. Any potential American defendant, as unlikely as that might be, would doubtless prefer expert judges to rule on his or her conduct than a cross-section of foreign nationals drawn from around the world. There is a real difference between an international trial and a domestic trial for these purposes.

In any event, US service members do not enjoy a constitutional right to jury trial under US law. Also, pursuant to the many extradition treaties to which the US is a party, the US may, and occasionally does, extradite a US citizen to foreign courts that lack the right to jury trial and other due process rights. The ICC's procedures are more analogous to US law than perhaps any other state's legal system, so it would be more advantageous for an American citizen to be tried before the ICC, if that unlikely event ever were to occur, than in most foreign courts.

HOW DID THE US "UNSIGN" THE ICC STATUTE?

- On May 6, 2002, the Bush Administration announced that the US does not intend to join the Court and does not recognize any obligations arising from the December 31, 2000, US signature on the ICC Statute. The US did not physically remove its signature from the list; it essentially nullified its signature by sending a letter to that effect to the treaty depository, the UN Secretary General.

As a mere signatory to the ICC Statute, the US had no obligation to cooperate with the ICC. The signature only required the US not to actively defeat the object and purpose of the ICC. Because the US has always supported the basic principle that those who commit atrocity crimes should be held accountable internationally, its signature did not create a conflict with the US decision not to join the Court. However, if the Bush Administration's intention is to actively oppose the ICC and seek to undermine its operations, then the US signature on the ICC Statute arguably would thwart such an intended policy.

WHY SHOULD THE US SUPPORT THE ICC?

- The ICC is the legacy of more than 50 years of work, from the Nuremberg and Tokyo trials after World War II to the current Hague, Arusha, and Freetown international criminal tribunals, spearheaded by the US to promote justice through law.
- By turning its back on the ICC, the US has forfeited to others a critical opportunity for international leadership and influence in shaping the evolution of the laws of war and international humanitarian law -- a development that potentially puts US servicemembers at grave risk of being held accountable to legal standards the US has not participated in creating.
- US contributions to the drafting of the ICC Statute ensure the fair and effective operation of the Court. Continued US involvement and cooperation with the Court would greatly enhance the prospects that remaining US concerns about the Court would be addressed with careful consideration as the Court begins operations.

- If the US decided to cooperate with the Court it would be in a better position to protect itself against political attacks than if the US undermines its influence and credibility through active hostility or arbitrary refusals to cooperate with the ICC.
- The US can better protect its interests by continuing to help shape the ICC as a strong and fair institution than by attacking it or complaining about it from the sidelines. Anti-ICC legislation and policies can prevent US cooperation with the Court and indeed create a sanctuary for war criminals in the United States, but they cannot prevent action by the ICC. By being hostile to the Court, the United States forfeits credibility, an opportunity for leadership, and respect as a champion of human rights and the rule of law.
- The Court protects American service members by pressing foreign military powers to uphold the same standard of conduct the US has always imposed on itself -- standards that protect American service members in battle.
- By joining the Court, the US would be able to take advantage of the many benefits for member states. For example, the US could choose not to accept the Court's authority to try Americans for war crimes for seven years. During that period, the US could observe whether the Court acts inappropriately, and, if it does, the US could withdraw from the Court. US membership also would permit the US to "opt out" of being subject to any future actionable crime of aggression -- an opportunity that profoundly affects US national security -- and would enable the US to place a judge on the Court and deeply influence the Court's overall administration.
- The ICC could help promote US foreign policy interests. For example, if the Court indicted Saddam Hussein and issued an arrest warrant against him the US could more easily build a coalition to act against the Iraqi regime. The ICC also could greatly support and promote future US efforts to arrest and prosecute international terrorists charged with heinous large-scale attacks against US targets.