

8 Reasons the U.S.A. Should Not Participate in the International Criminal Court

by Thomas W. Jacobson (2003)

The International Criminal Court (ICC) is the first court in history to claim jurisdiction over every person in the world, as well as over the governments, laws and legal affairs of every nation that ratifies its Statute (the Rome Statute). The ICC has some of the legal safeguards that Americans are accustomed to, but lacks many essential safeguards that can put our lives, liberty and property in jeopardy.

Although ICC proponents claim that the Court was created only for the purpose of punishing the worst war criminals, the Court has jurisdiction over “crimes against humanity” (Art. 7), and the obligation to uphold “internationally recognized human rights” and “norms and standards” (Art. 21). For reasons stated in this brief, the ICC could become the greatest suppressor of freedom around the globe, enforcing radical social policies incorporated into United Nations international documents. Within a few years, we may lose our ability to speak openly about our faith and our convictions regarding abortion, homosexuality, and other social issues. Proselytizing and free speech, if they offend “any identifiable group,” may well be interpreted by the ICC judges as “persecution” under the “Crimes Against Humanity” provisions (Art. 7).

Are we as Americans safe from the reach of the Court and its prosecutor? Only if we stay within the United States—provided the U.S. does not ratify the Rome Statute—or nations that are not a part of the ICC. To protect U.S. officials and military personnel serving or traveling abroad, the Bush Administration has been establishing bilateral agreements with nations so they will turn over to the U.S., not the ICC, any American accused of an “international crime.” Also, Congress passed the Armed Servicemembers’ Protection Act, authorizing the President to take whatever action is necessary to protect or retrieve U.S. officials or military personnel from arrest, trial or imprisonment by the ICC. Yet, to our dismay private Americans were not included in this protective legislation.

Former President Bill Clinton made an unwise decision on December 31, 2000, to sign the Rome Statute. Even though the U.S. Senate did not ratify the Statute, according to international law, as a signatory the U.S. was formally obligated to uphold the principles and purposes of the ICC. However, President George W. Bush reversed this action by withdrawing the U.S. signature on May 6, 2002. Bush’s withdrawal thus removes any obligations on the part of the U.S., and prevents the Statute from being transmitted to the Senate for approval.¹

On July 1, 2002, the ICC came into existence after the 60th nation ratified the Statute. As of the publication of this brief, 87 nations have ratified and 25 more are in the process of doing so.²

Mr. Jacobson originally wrote this paper in 2003 when he was serving as Representative to the United Nations for Focus on the Family (U.S.A.), from 2001 to 2010.

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Here are eight reasons why the United States should not ratify the Rome Statute or participate in the ICC. This analysis largely contrasts U.S. founding documents with the Rome Statute, and reveals the dangerous flaws in the ICC.

Provisions in the ICC / Rome Statute	Constitutional / Other Violations
<p>1. The ICC claims jurisdiction over every person—not every nation—whether or not his or her nation has ratified the Statute.</p> <ul style="list-style-type: none"> • Individuals. The Statute does <i>not</i> restrict the Court’s jurisdiction to citizens of nations (Parties) that have ratified the Statute. <ul style="list-style-type: none"> ⇒ The ICC “shall have the power to exercise its jurisdiction over persons” (Art. 1). ⇒ “The Court shall have jurisdiction over natural persons” (Art. 25.1). ⇒ “A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment” (Art. 25.2). • Presidents, kings, prime ministers, elected legislators, government officials. <ul style="list-style-type: none"> ⇒ “The Statute shall apply equally to all persons without any distinction based on official capacity ... as Head of State or Government, a member of Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility” (Art. 27.1). ⇒ “Immunities ... shall not bar the Court from exercising its jurisdiction” (Art. 27.2). • Military commanders or “superiors” (military, government or private) may be held accountable for the actions of their subordinates, whether they knew or “should have known” what their subordinates did (Art. 28.a-b). 	<p>The ICC violates these principles of law:</p> <ul style="list-style-type: none"> • The powers of government are derived from “the consent of the governed” (<i>Declaration of Independence</i>).³ Diplomats representing their governments created and approved the ICC. The Statute has never been submitted to us, the people, or our elected representatives, even though it claims jurisdiction over us. • Americans are guaranteed protection against unlawful searches, seizures or arrests; and deprivation of their “liberty, or property, without due process of law,” by the 4th and 5th Amendments (<i>U.S. Constitution [USC]</i>). Even so, the ICC puts Americans at risk who travel, work or are on military duty abroad. • <i>Our</i> government—not the ICC—has been entrusted with “the sole Power” to try or impeach accused U.S. officials (Art. I, Sec. 2, Par. 5; Sec. 3, Par. 6-7; Sec. 6, Par. 1; Art. II, Sec. 4; Art. III, Sec. 2, Par. 3, <i>USC</i>). • The U.S. government and military, and their courts—not the ICC—have the authority to prosecute U.S. citizens and military personnel for alleged crimes committed here or aboard, including “Offenses against the Laws of Nations” (Art. I, Sec. 8, Par. 10; Art. II, Sec. 2, Par. 1; Art. III; Art. IV, Sec. 2, Par. 2, <i>USC</i>). • A person should only be prosecuted for his own actions, not for the actions of others about which he “should have known”—an extraordinarily dangerous legal standard.⁴
<p>2. ICC lacks vital legal safeguards:</p> <p>The Statute does declare that an accused person is “innocent until proved guilty” (Art. 66), cannot “be compelled to incriminate himself” (Art. 55.1.a), and has a right to “have legal assistance of the person’s choosing” (Art. 55.2.c). Yet, it lacks these essential legal safeguards:</p> <ul style="list-style-type: none"> • No guarantee of due process; • No jury, or right to a public and speedy trial by an impartial jury; and 	<p>Our Constitution guarantees Americans all these legal protections, some of which we would be denied if brought before the ICC.</p> <p>“The Trial of all Crimes... shall be by Jury; and... be held in the State (in U.S.) where the said crime shall have been committed” (Art. III, Sec. 2, Par. 3, <i>USC</i>).</p> <p>“No person shall be ... subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law” (5th Amendment, <i>USC</i>).</p>

<ul style="list-style-type: none"> • No protection from double jeopardy. <ul style="list-style-type: none"> ⇒ The ICC can try a person if the prosecutor and Pre-Trial Court are not satisfied with a nation’s court ruling (Art. 20.3). ⇒ The prosecutor can repeatedly ask for a trial if he/she finds new evidence (Art. 15.5; 19.10; 61.8). 	<p>“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed” (6th Amendment, <i>USC</i>).</p> <p>⇒ This guarantees that Americans will not be tried in a foreign court for crimes committed in the U.S.</p>
<p>3. ICC prosecutor is granted unprecedented and extraordinary powers to:</p> <ul style="list-style-type: none"> • Conduct independent investigations, and charge and arrest any person within any nation under its jurisdiction (Art. 15; 42.1; 53; 54); • Demand the full cooperation of ratifying nations or nations with ICC agreements, including permission to conduct investigations within the country, and the power to require the surrender of accused persons to the ICC (Art. 18; 86; 87; 89); • Conceal from a nation information discovered in investigations (Art. 18.1); and • Repeatedly appeal to the Pre-Trial Chamber for permission to prosecute as long as new evidence of alleged guilt can be provided (Art. 15.5; 19.10; 61.8). 	<p>The 4th Amendment to the U.S. Constitution guarantees to Americans that only lawful American authorities—not the ICC—may conduct searches and seizures, or issue warrants for arrest:</p> <p>“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.”</p> <p>If the U.S. were to ratify the ICC Statute:</p> <ul style="list-style-type: none"> • Our local, state and national governments, including our courts, police, national guard and military, would be subject to oversight by the ICC and its prosecutor; • The ICC prosecutor could conduct investigations anywhere in our country; • Our government would have to turn over accused persons to the ICC, and the accused could be repeatedly charged; and • The President’s legal power to “grant Reprieves and Pardons for Offenses” would be compromised (Art. II, Sec. 2, Par. 1, <i>USC</i>).
<p>4. ICC is a foreign court in a foreign land, with foreign judges (Art. 36.1,4,7; 39.1):</p> <ul style="list-style-type: none"> • The ICC is located in the Hague, in the Netherlands (Art. 3). • The ICC will have 18 judges serving in the Pre-Trial, Trial and Appeals chambers (Art. 34; 36.1; 39). • Each Party nation (87 now) can nominate only one judge, who must “be a national of a State Party,” but “no two judges may be” from the same nation. The 18 with the most votes will become the ICC judges (Art. 36). 	<p>The U.S. Constitution guarantees Americans that if they are accused of a crime—here or abroad—including violations of treaties, they will be tried in an American court, with full constitutional rights.</p> <p>“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Law of the United States, and Treaties made ... to all Cases affecting ... Citizens ... and foreign States, Citizens or Subjects” (Art. III, Sec. 2, <i>USC</i>).</p> <p>As long as the U.S. is not part of the ICC, no judge of American citizenship will sit on the Court. Even if we were a Party, we could only nominate 1 judge, who may or may not be chosen.</p>

<p>5. <i>The ICC claims jurisdiction over vaguely defined crimes.</i></p> <ul style="list-style-type: none"> • The ICC claims jurisdiction over crimes of genocide, crimes against humanity, and war crimes, but defines such crimes so broadly that it is difficult to discern what constitutes so-called “international crimes” (Art. 5-8). • The ICC will prosecute for the “crime of aggression,” but has not defined it (Art. 5). 	<ul style="list-style-type: none"> • Crimes normally within the jurisdiction of our local, state and national governments could be classified by the ICC as “international crimes.” • A crime can only be a crime if the law says it is a crime, and the particular government or court has legitimate jurisdiction over the accused person. • The UN has been unable to reach consensus on the “crime of aggression,” and distinguish it from the right of self-defense, the necessity of launching a pre-emptive strike to prevent an attack, or the right to retaliate after an attack. Civil and military leaders may become reluctant to defend their own people due to fear of prosecution.
<p>6. <i>The ICC will enforce international and United Nations’ laws and policies that go well beyond the crimes listed in the Rome Statute.</i></p> <p>In addition to the Rome Statute, the Court will enforce:</p> <ul style="list-style-type: none"> ▪ “treaties and the principles and rules of international law”; ▪ “internationally recognized norms and standards”; and ▪ “internationally recognized human rights” (Article 21). 	<ul style="list-style-type: none"> ▪ In the coming years, the ICC will likely be used as a global court to impose on nations socialistic policies and broadly defined “human rights.” ▪ Although the United Nations Charter authorizes it to make policy “recommendations,” it prohibits the UN from intervening “in matters which are essentially within the domestic (internal) jurisdiction of any” nation (Art. II, Par. 7). Even so, the UN has been making and seeking to enforce domestic policies upon nations. In more recent years, the UN has defined human needs (e.g., food, shelter, education, health care) as “human rights” and required governments to provide them, and has defined human wants (e.g., premarital sex) as “human rights” to be guaranteed by governments. ▪ Specifically, the ICC may soon be used to enforce such ideas contained in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Conference on Population and Development (Cairo/ICPD), the Fourth World Conference on Women (Beijing), the Convention on the Rights of the Child (CRC), and other dangerous UN documents.
<p>7. <i>The ICC may be used to stifle religious and civil freedom, under the guise of eliminating “persecution.”</i></p> <ul style="list-style-type: none"> ▪ The Statute defines a “crime against humanity” as “a widespread or systematic attack directed 	<ul style="list-style-type: none"> ▪ We stand totally against <i>true</i> persecution (e.g., the persecution and killing of 2 million Christians in Sudan in recent years, or the Holocaust of 6 million Jews during WWII). ▪ In many nations today, it is <i>not</i> viewed as a crime to harass Christians or Jews. They will

<p>against any civilian population.”</p> <ul style="list-style-type: none"> ▪ Under this provision, “persecution” is defined as a “crime against humanity” when “any identifiable group” claims they are facing “severe deprivation of fundamental rights,” or someone has said or done something that offends them and that is “universally recognized as impermissible” (Art. 7.1; 7.1.h; 7.2.g). 	<p>not likely be included as an “identifiable group” with standing before the ICC, and the ICC may be used as an instrument to oppress them under the guise of eliminating “persecution” because of their strong religious views that are interpreted as intolerance.</p> <ul style="list-style-type: none"> ▪ At the 2000 World Summit for Religious and Spiritual Leaders, many spoke strongly against Christians and Catholics, calling for a global stop to proselytizing. In January 2003, Sweden may outlaw speech against homosexuality. Before sending our radio broadcasts to Canada, Focus on the Family USA must purge references to homosexuality because of Canada’s laws. In view of these trends, it is entirely feasible that the widespread sharing of the hope, forgiveness and eternal life available through Jesus Christ alone, or speaking against homosexuality or abortion, could be classified as international crimes when an “identifiable group” is offended and files a complaint.
<p>8. ICC officials enjoy high diplomatic status and lifetime immunity:</p> <ul style="list-style-type: none"> • ICC judges, prosecutor, deputy prosecutor and registrar shall “enjoy the same privileges and immunities as ... heads of diplomatic missions”; and after their term, lifetime immunity for anything they did “in their official capacity” (Art. 48). 	<ul style="list-style-type: none"> • The ICC prosecutor, judges and personnel would be able to go into any Party nation and do anything without accountability or impunity, if acting “in their official capacity.” By contrast, U.S. presidents and officials can be held accountable for their actions while holding office, and even after leaving office (Art. I, Sec. 2, 3, <i>USC</i>).

Conclusion

For any nation that becomes a party to the ICC, religious freedom, freedom of speech, freedom of the press and the right to peaceful assembly could be undermined—even if these rights are currently protected in their national laws. In the United States, our Founding Fathers valued these rights so highly that they guaranteed them to us in the 1st Amendment to the Constitution. More than two centuries later, we have obviously forgotten our heritage, and are ignorant of what it takes to preserve liberty. Soon the ICC may become the greatest global threat to freedom, and its judges the world’s thought police.

Why should Americans discard their great heritage? It was because of oppression and injustice in the 17th century that Pilgrims, Puritans and millions of others came to America in search of an asylum for religious and civil liberty. They and their descendants created a system of government that could preserve liberty and justice. From the War for Independence to the present war against terrorism, hundreds of thousands of Americans have died in order that we may be free. If the U.S. joins the ICC, we will throw away much of the treasures for which our forefathers risked their “Lives ... Fortunes, and ... sacred Honor.”⁵

Notes

NOTICE: This brief is based on a paper titled, "10 Reasons to Reject the International Criminal Court," written by Mr. Jacobson and published on January 22, 2001, by Freedom Alliance.

¹ See note 6 on the last page of "Rome Statute of the International Criminal Court." Go to www.un.org web site, click on "International Law," then "International Criminal Court," then "Ratification Status of the Rome Statute."

² This research was compiled in another brief by Mr. Jacobson, titled, "First International Criminal Court Created with Global Jurisdiction: A Regional Analysis of the Nations which have Ratified the ICC Statute," produced for Focus on the Family USA (United Nations Brief 2003-02).

³ Moses instructed ancient Israel to choose their rulers and judges from among themselves (not from among foreigners), which is what every nation does. "You shall appoint for yourself judges and officers ... according to your tribes" (Deuteronomy 16:18). Even Saul and David, though chosen by God, were not called "king" or granted civil power until the people chose them, and they swore to keep the civil covenant or constitution (I Samuel 9:15-16; 10:1, 17-25; 12:13; 16:1, 12; II Samuel 2:4; 5:1-3).

⁴ Beginning with Adam and Eve, it is clear in the Bible that each person is held accountable for their own actions. The principle of individual responsibility, and of not being held responsible for crimes committed by others, also applies to human laws. The Lord said, "all souls are Mine; the soul of the father as well as the soul of the son is Mine. ... (A son) will not die for his father's iniquity, he will surely live" (Ezekiel 18:4, 17).

⁵ This is the closing pledge of the U.S. Founding Fathers in the 1776 Declaration of Independence.