Worlds Apart on International Justice

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Abstract. Differing strategic priorities are only the beginning of the dispute over the International Criminal Court. Americans will not abandon their traditional constitution, as submission to the ICC would require. European states have already subordinated their national constitutions to a German-dominated federation. Americans do not accept international monitors in fighting against evil. Europeans are drawn to relativizing abstractions. For Germans, the ICC promises to "overcome the past," by licensing German judges to try Americans and Israelis for war crimes. Europeans may feel obliged to fall in step with this latest German project. The US still has the moral self-confidence to resist it.

1. Introduction

The United States has often been at odds with its European allies. Now there is dispute over the International Criminal Court ('ICC'). The European Union is the ICC's strongest champion. The United States has rejected the ICC and now seeks to constrain its authority. For many reasons, this dispute is much less likely to be compromised or smoothed over in the manner of previous disagreements over North Atlantic Treaty Organization ('NATO') policy.

Communism, the Cold War, the Iron Curtain and the Berlin Wall – these are becoming distant memories in Europe. So Europeans no longer feel as much in need of US protection as they once did. An expanded and expanding European Union ('EU') can pursue its own international ambitions. The ICC claims the authority to make leaders around the world answer to European notions of justice in a European courtroom. It is the single most dramatic expression of Europe's new ambitions.

The United States, on the other hand, especially since the attacks of 11 September remains alert to serious dangers in the world and still sees the need for US military responses. One need not embrace the deeply pessimistic analysis of Samuel Huntington's Clash of Civilizations to see the

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US point.[1] But Europe and the United States have many differences on the proper response to Islamist terror.

These differences are a reminder that on one point Huntington, himself, was quite optimistic. He assumed, in the spirit of Cold War polemics, that Europe and the United States were part of a common "western civilization." Whether that is true – or true in any sense that now matters – is one of the issues in the dispute over the ICC.

2. Divergent Strategic Postures

At one level, the basis for the dispute is quite obvious. The United States has troops around the world and the capacity to move them quite rapidly. It has a sizable navy, including aircraft carriers and destroyers armed with cruise missiles, able to project substantial military force anywhere in the world. A tribunal empowered to launch indictments against "aggression" or "war crimes" is a tribunal that would judge the legality of US military actions.[2]

Naturally, then, Americans are concerned about this institution which threatens to impose some higher law on US military decision making. The concern is all the greater because the prosecutors and judges for this tribunal will be chosen by majority vote of the ratifying states. There is no assurance (and scarcely any prospect) that this majority will always see the world in quite the same ways as the United States.

Europeans, on the other hand, are no longer equipped for serious military actions. France and Britain are partial exceptions but they are now obliged to coordinate their foreign policy with their EU partners. Germany, which has gained preeminence in the EU, has been the most enthused about the ICC and boasts that its disproportionate financing will bring it disproportionate influence over staffing and appointments at the ICC.[3] Modern Germany has renounced military action – except, perhaps, when autho-

1. S. Huntington, The Clash of Civilizations and the Remaking of World Order (1996). Though Huntington sketched a world divided into as many as eight civilizations and gave attention to tensions with China and the Russian-led states of eastern Europe, his main theme is the simmering conflict between Islamic nations and the West (as at 109–119, 174–182, 209–217, 254–258). He notes that as late as 1988, references to "the Free World" far out-numbered references to "the West" in both the New York Times and the Washington Post. As early as 1993, references to "the West" far out-numbered references to "the Free World" in both papers – though not in the Congressional Record (where speeches in the US Congress are reported).
2. The Rome Conference could not agree on definitions for "aggression," so this crime remains to be defined by the conference of parties in the future.
3. *Gegen Völkermord und Diktatur*, Berliner Zeitung, 12 April 2002. The German Ministry of Foreign Affairs has posted this notice: "Germany is expected to be the largest contributor to the ICC budget. Accordingly, it will also be able to fill a considerable proportion (around 20%) of the positions [on the court]." Merkblatt: "Berufschancen und Bedarf, deutsches Personal am Internationalen Strafgerichtshof," Auswärtiges Amt (available at http://www.auswaertiges-amt.de//www/de/infoservice/download/pdf/vn/job/istgh.pdf).

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rized by the reliably paralyzed UN Security Council.[4] Germany has gained preeminence over its European neighbors through the peaceful legal machinery of the EU. Many Europeans now seem persuaded that supranational legal mechanisms are a proven means for resolving conflict. Does not Germany now cooperate readily with all its neighbors?

Even in today's world, however, international machinery is not always sufficient. Over the past decade, people who depended on international mandates for their protection – like the Muslims of Srebrenica or the Tutsis of Rwanda – have ended up slaughtered. Perhaps because European peace keepers were the ones on the ground during these terrible episodes, Europeans now seem all the more determined to emphasize the role of international lawyers over international peace keepers. That was the immediate issue in wrangling before the Security Council in July, when the United States urged the Council to exempt all UN peacekeeping forces from ICC jurisdiction and Europeans successfully resisted this proposal as a danger to the ICC's authority.

Since 11 September, of course, the United States is focused on offensive uses of force. And here again there are very different priorities. Europe was not attacked on 11 September. Europeans have a history of trying to appease or redirect Arab terrorism – as when Germany arranged for the release of Palestinian terrorists, held for the murder of Israeli athletes at the Munich Olympics, in hopes that Palestinians would henceforth kill Israelis on some other territory.[5]

Now Europeans worry that American initiatives may actually make Europe more of a target. The United States is eager to use its own force

4. In fact, Germany did participate in the NATO war against the Government of Yugoslavia in 1999, after removing constitutional restrictions previously thought to bar such military action. And that war was not authorized by the Security Council. But at present, the German Government has emphasized the importance of a Security Council authorization for military action against Iraq. A future German government may decide that, after all, there is reason to send German troops into action in Europe, without the Security Council. If it does so, it may claim to be enforcing some implicit judgments of the ICC. In the meantime, the characterizations offered here follow those recently set out by a American observer of current or public discussion of strategic issues in Europe: R. Kagan, *Power and Weakness*, Policy Review, number 113, June–July 2002.
5. At the time, the German Government could not openly admit that it was releasing the perpetrators of the Olympic massacre as part of a wider deal. The Government claimed that it had been "forced" to make the release to secure the release of German civilians held by hijackers of a Lufthansa flight. But German officials have recently conceded that the hijacking was coordinated with the Palestine Liberation Organization to provide a cover for the release. S. Reeve, One Day in September 157–158 (2000), "Germany made secret agreements with Palestinian and other international terrorist groups in a desperate bid to keep them away from German borders." The pattern was common in other European states. After Palestine Liberation Organization terrorists killed dozens of passengers at the Athens airport, the Greek Government convicted and imprisoned the perpetrators – and then released them, when Palestinian terrorists seized a Greek ship and used its crew as "bargaining chips." (*Id.*, at 200). When one of the masterminds of the Olympic massacre was caught by French police in 1977, French authorities arranged for him to be released and hustled out of the country: "The French authorities had been bribing and blackmailing terrorist groups to persuade them to avoid France during their attacks." (*Id.*, at 209).

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in its own defense – and what it conceives as the common defense. Europeans are anxious to restrain the United States. Lacking serious military resources, however, Europeans cannot threaten to withhold military cooperation to secure bargaining leverage within the "alliance." So, for example, when European governments protested that captured Taliban fighters should be treated as prisoners of war under the 1949 Third Geneva Convention, the United States ignored these protests: virtually all the captured prisoners were in American hands, since United States, rather than European forces, had captured them.[6] Again, it is not surprising that Europeans favor a court which may constrain the United States and perhaps force it to heed European views.

These differences might have been compromised, however, as so many past differences have been compromised. In the negotiations at Rome, where the ICC Statute was drafted in 1998, US representatives repeatedly urged some role for the UN Security Council. Requiring the Council to approve prosecutions would have answered many US concerns, since the US has an absolute veto on Council resolutions (as do Great Britain, France, China and Russia). But Europeans insisted this would violate some point of principle.

Still, other compromises were accepted. For example, the final text of the Rome Treaty allows signatory states to exempt themselves from ICC jurisdiction for an initial period of seven years (Article 124). France duly invoked this exemption, when it ratified the 1998 Rome Statute. The United States could not invoke this escape clause, however, without actually ratifying the Treaty. That was never likely. Amidst strong domestic criticism of the ICC, President Clinton delayed signing the Rome Treaty until the last weeks of his administration. Even then, he signed with the admonition that he did not recommend Senate ratification. In May of 2002, President Bush made a formal declaration that the US was withdrawing even its initial signature.

By then, the events of 11 September had greatly inflamed US opinion against the prospect of any international authority claiming the power to judge US responses to the terror menace. In Congress, both the House and Senate passed, by overwhelming margins, versions of a bill authorizing the President to take any means, including force, to free Americans held for trial before the ICC. A somewhat milder version of the American Service Members' Protection Act was finally adopted in August of 2002, omitting any mention of military action against the ICC but prohibiting any form of US cooperation with the tribunal and with countries that are party to it – unless special agreements are concluded

6. On the differing arguments of European and US authorities in this controversy, *see* J. Rabkin, *After Guantanamo*, 68 National Interest 15 (2002).

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with all ICC members, promising not to extradite Americans to the Hague Tribunal.[7]

Though the Rome Treaty does seem to allow for such special agreements (Article 98), the EU has tried to block the United States from protecting Americans from the reach of the ICC in this way. When Romania signed such an agreement with the US, the President of the European Commission announced that such action might preclude Romania – or any other candidate for EU membership – from ultimate accession to the EU. The EU has been determined to protect the ICC's authority, even as the United States has sought to limit its reach.

The pattern of ratifications to the Rome Treaty reflects the extent of the EU's diplomatic leverage. The 77 states that had ratified the Treaty by August of 2002 included all 15 EU members, 9 candidates for EU expansion, 3 minor statelets that are, in effect, protectorates of European states, and a long roster of former European colonies or small states that depend on European assistance. They are not an inspiring bunch. The majority of ratifying states have been cited by the US State Department (in unrelated human rights assessments) for serious deficiencies in their own judicial process.[8]

In the Western Hemisphere, Canada was eager to align itself with Europe, as it often does to display its independence of the United States. Very few other American friends in the region ratified the Rome Treaty. In the wider world, Russia did not, Japan did not, India did not, Pakistan did not, Indonesia did not, China did not. All undoubtedly had their own good reasons – as they all may be engaged in military action of their own. But clearly they are all large enough states to be relatively independent of EU pressures.

So the "World Criminal Court" will represent a minority of the world's states, a minority of the world's people, a minority even of permanent members of the Security Council. But it is, for Europe, a nucleus of a different world, where force is controlled by law while law need not be backed by force. Europeans have developed considerable confidence in supranational institutions. The Council of Europe started out with less than twenty members but expanded to encompass 41 states by the end of the 1990s. Even the states of the former communist bloc now claim to be bound by the 1950 European Convention on Human Rights ('ECHR'). So, Ukraine and Albania with other new members, having all been certified as "democracies," contribute judges to say what that Convention means for The Netherlands and the United Kingdom and other more established democracies.

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7. American Service Members Protection Act: text at http://thomas.loc.gov/cgi-bin/query/F?c107:6:/temp/~c107DHrmMe:e389581, under H.R. 4775.
8. An analysis of ratifying states, based on State Department human rights assessments, has been made by Lee Casey, a lawyer in Washington, D.C. and appears on the website of The Federalist Society for Law and Public Policy (available at http://www.fed-soc.org).

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Perhaps such arrangements are better than many alternatives. But the United States would not accept them. The United States has never subjected itself to an international human rights convention of this kind, empowered to make authoritative determinations on the legality of US actions. That is a deeper reason why the United States is not willing to join the Court and then try to steer its actions in safe or favorable channels.

3. Clashing Constitutional Cultures

The idea for an international criminal court gained momentum in the mid-1990s when the UN Security Council established *ad hoc* tribunals for war crimes in the former Yugoslavia and then for the genocide in Rwanda. The United States joined with European states on the Council in establishing these tribunals, even though the jurisdiction of the Yugoslav Tribunal gave it, in principle, authority to judge the actions of US forces in the region. If it could agree to this sort of jurisdiction in Yugoslavia, why not on a larger basis with the ICC?

Part of the answer, no doubt, is that when the Yugoslav Tribunal was established, in 1993, there were scarcely any United States forces in the region and the United States, too, was more comfortable sending lawyers than actual soldiers. Subsequently, the United States was obliged to supply most of the air power for a more assertive NATO policy, seeking to protect Bosnian Muslims and then Albanian Muslims from Serb attacks. The prosecutor for the Yugoslav Tribunal eventually required top NATO officials to submit to questioning, regarding plausible claims that NATO's 1999 air war against Serbia had wrongfully targeted civilian installations. When this happened in the spring of 2000, officials at the US Department of Defense expressed considerable concern.[9] The possibility that US officials would actually have to answer for their policy decisions before an international tribunal seems not to have been seriously considered in 1993. With the ICC, the danger no longer seems so remote.

But a larger difference is more important. As the Yugoslav Tribunal was established by the Security Council, it did not require – at least, it was not thought by authorities in the Clinton administration to require – a formal treaty. US participation in that Tribunal therefore did not have to be ratified by the Senate. The Rome Statute, since it is framed as a treaty, would require a two-thirds majority vote in the Senate for ratification. As Europeans learned from the fate of the Versailles Treaty in 1919, securing a two-thirds majority in the US Senate can be quite difficult.

At the same time, critics of the ICC have been quick to raise doubts about whether, in substance, the United States Constitution would permit the extradition of Americans to the ICC. The ICC does not provide for a

9. S.L. Myers, *Kosovo Inquiry Confirms U.S. Fears of War Crimes Court*, New York Times, 2 January 2000.

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jury trial. Nor does it provide the right to confront opposing witnesses. Nor does it provide protection against double-jeopardy, at least in the American understanding.[10]

It may be that none of these limitations would render extradition improper. The United States has, in the past, allowed extradition to other jurisdictions which were not bound, in strict detail, to every procedural guarantee in the United States Bill of Rights. But in such cases, the crimes had been committed in foreign jurisdictions. In principle, the ICC claims jurisdiction even over crimes committed in the United States – as, for example, by decision makers at the Pentagon. If Americans can be extradited to The Hague for offenses committed on US soil, the same argument would seem to authorize extradition for such crimes as narcotics trafficking. So whenever the government failed to gain a conviction in US courts, operating under the procedural safeguards of the Bill of Rights, it might extradite the defendant to a court less hobbled by US standards of due process. Most Americans would regard this approach as a terrible betrayal of fundamental guarantees. In 1776, such violations of traditional rights were regarded as outrageous enough to justify a revolution.[11]

Europeans should not find such US concerns wholly unintelligible. The European Court of Human Rights held that Britain could not extradite a murder suspect to the United States, because the American practice of capital punishment was at odds with European notions of justice.[12] Following this precedent, both France and Germany have announced that they will not extradite terrorists to the United States, even those involved in the 11 September massacres, unless the US alters its criminal justice standards to satisfy their concerns.

These European concerns, however, carried the sanction of a supranational authority. Europeans do not seem to take their own constitutions quite so seriously. Germany, France and Portugal all acknowledged that particular provisions of the Rome Statute were at odds with guarantees in their national constitutions. The constitutional problems were identified, with much precision, when the Rome Treaty was submitted for advance

10. L.A. Casey, *The Case Against the International Criminal Court*, 25 Fordham International Law Journal 840 (2002) reviews US constitutional objections in detail.
11. After the famous opening lines, the American Declaration of Independence offers a long list of "injuries and usurpations" to establish "the necessity" of revolution. Among these grievances are new British laws "for depriving us in many cases of the benefits of trial by jury" and "for transporting us beyond Seas to be tried for pretended offenses." The most insistent protest of the American rebels – against taxation by Parliament – also relates, of course, to legal principles of jurisdiction: taxes imposed by Britain in the 1770s were not greater than those which Americans soon accepted from their own legislatures.
12. Soering *v.* United Kingdom, 7 July 1989, 11 EHRR (No. 161) 439 (1989). The Court acknowledged that capital punishment (for which Soering would be liable, if extradited to the US) was not inherently "inhuman" in the sense of Art. 3 of the ECHR, but still ruled that extradition would violate the ECHR because of the long procedural delays required for the application of the sentence in the United States.

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review by domestic constitutional courts. Governments in each of these countries then responded by the simple expedient of amending their constitutions.

Resolving constitutional disputes is much more difficult for the United States. The United States Supreme Court has always claimed to be constitutionally disabled from offering legal rulings except in an actual case. There cannot be an actual case regarding extradition to the ICC until such extradition is actually attempted.[13] Speculative concerns might be laid to rest by a constitutional amendment. But the process for securing constitutional amendments was designed to be extremely onerous, requiring two-thirds majorities in each house of Congress and then ratification by three-quarters of the state legislatures (where approval must again be secured in both houses of these bicameral bodies). In 210 years since the adoption of the first ten amendments (as the Bill of Rights) in 1791, there have been only 17 subsequent amendments, many of them providing technical adjustments rather than settling some great public controversy.

Since the Constitution is difficult to amend, it is often "revised" by interpretation. But this is a tendency that cuts both ways. Constitutional arguments that seem to have been lost in the past can be revived at a later time. In the 1950s, critics of the Truman administration protested that it was constitutionally improper to commit United States troops to war in Korea without a formal declaration of war by Congress. The critics did not prevail at the time, nor in subsequent protests against the undeclared war in Vietnam. By 1990, however, the Bush administration did feel constrained to seek a separate congressional authorization for war in the Persian Gulf, despite having secured prior authorization from the Security Council.[14] The argument remains alive today – all the more so as courts have steered clear of constitutional disputes over presidential war powers.[15]

There is, in the same way, an impassioned debate in the United States about whether the Second Amendment guarantees citizens a personal right to own guns. Those arguing that it does – a position recently endorsed

13. The doctrine requiring an actual "case or controversy," before federal courts can pronounce on the law dates to 1793 and has been repeatedly reaffirmed, even in modern times. *See* L. Tribe, American Constitutional Law, 3rd Ed., 328–330 (2000). The requirement that challengers demonstrate "concrete injury" to gain standing before the courts was re-emphasized in Lujan *v.* Defenders of Wildlife, 504 U.S. 555 (1992), holding that even an act of Congress could not confer standing in the absence of some showing of a "concrete" personal injury. Tribe's treatise (at 392–396) criticizes the doctrine as overly restrictive but does not predict its relaxation any time soon.
14. Tribe, *supra* note 13, at 658–660, reviews academic debates on the issue while acknowledging that "legal history is almost barren of judicial pronouncements regarding the legitimacy of […] uses of military force abroad in the absence of prior congressional approval" (at 658).
15. *Compare* D. Rivkin & L. Casey, *No Declaration of War Needed*, Wall Street Journal, 26 July 2002, at 10, with B. Ackerman, *But What's the Legal Case for Preemption?*, Washington Post, 18 August 2002, at B2.

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by the Bush administration – have not been at all discouraged by the absence of any clear Supreme Court rulings in their favor over the past century.[16]

So the US Constitution is, in important ways, the common possession of the American people, engaging the energies of many sectors of American society – and not simply a technical instrument for legal experts or a set of readily revised ground-rules for political insiders. The Constitution has been passed down, in an unbroken chain, through all the generations since the Founding. Even at the Founding, the Constitution embraced various notions of due process – idiosyncratic, perhaps, by European standards – which had been developed over many earlier centuries in the English common law.[17] So the Constitution remains the central symbol of American identity and the basic safeguard of American rights.[18]

Almost every European state has gone through many constitutions and regimes in the past two centuries. What has remained constant – if anything has – is a very abstract idea of legality. Abstract enough to transcend so many differences, across so many regimes, European ideas of legality seem to be readily adjusted to the abstract ideas of other experts on legality, in other countries.[19]

So, the European Court of Justice has instructed Europeans that a treaty may have higher authority than a national constitution and the interpretations of that treaty, by a supranational court, have higher authority than the constitutional decisions of national constitutional courts.[20] US authorities are agreed on the opposite view: a treaty in conflict with the Constitu-

16. Tribe, *supra* note 13, at 895–903, reviews the debate, with sympathetic attention to the claimed right to own guns, which the author had rejected in previous editions of this treatise. A turning point in the debate was the article by S. Levinson, *The Embarrassing Second Amendment*, 98 Yale L. J. 637 (1989), acknowledging that champions of the personal right theory had made very strong arguments, even if the policy implications might remain (in the author's view) "embarrassing."
17. J. Stoner, Common Law and Liberal Theory (1922) offers much detail on the common law roots of the US Constitution.
18. Immigrants, on becoming naturalized citizens, swear an oath of allegiance – not to the government but to the Constitution (8 USC, Sec. 1448). Military officers, on taking their commissions, are required to make a similar oath of allegiance to the Constitution (5 USC, Sec. 331), as are judges and legislators at the state level (4 USC, Sec. 101).
19. The case law of the European Court of Justice on "general principles of law," starting with Stauder *v.* City of Elm (Case 29/69, 1969 ECR, at 419), has no counterpart in US law. Black's Law Dictionary (subtitled, "Definition of Terms and Phrases of American and English Jurisprudence, Ancient and Modern") has been a standard reference work for American lawyers since it first appeared in 1891. As late as the sixth edition, published in 1990, it had no entry for the term "general principles of law." The term appeared only in the seventh edition (1999) with a vague reference to practice in international law.
20. Internationale Handelssgesellschaft, Case 11/70, 1970 ECR, at 1125.

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tion cannot have legal validity for the United States.[21] In the United States, therefore, when critics raise constitutional arguments against the ICC, they are not raising concerns that can be readily swept aside by technical assurances from technical experts – or by arguments about what other experts think in other countries.[22]

Still, in the past the United States has supported many ventures for others, which it was not willing to impose on itself. Certainly, successive US presidents, who retain general control over US diplomacy, have encouraged other states to support treaties and organizations which the United States Senate would not endorse. To take the most obvious example, the United States participated in international human rights forums for several decades, even while presidents conceded that the Senate was not likely to ratify relevant conventions.[23] Eventually, in the early 1990s, the Senate did actually ratify several human rights conventions (though with crippling reservations in each case).[24]

Why can the United States not take this position toward the ICC? Why can it not cooperate and in that way build long-term support even within the United States? To grasp the answer, it is necessary to look behind legal arguments to the broader currents of political culture on which they draw.

21. In Reid *v.* Covert, 354 U.S. 1 (1957), the US Supreme Court insisted that the guarantees in the Bill of Rights must take priority over an international agreement (here, an agreement allowing dependents of US servicemen, on overseas bases, to be tried by US military courts rather than by civilian jury trials). The Restatement (Third) of the Foreign Relations Law of the United States (1987), a respected academic reference work which is generally quite sympathetic to international law claims, acknowledges "the proposition that treaties and other international agreements are subject to constitutional prohibitions in the first eight amendments [to the Constitution – that is, the Bill of Rights] […] is now firmly established." (Sec. 302, Rep. No. 1, at 155).
22. In a recent ruling of the Supreme Court, Atkins *v.* Virginia, 122 S.Ct. 2242 (2002), the majority ruled that capital punishment of convicted murderers would be "cruel and unusual" punishment when applied to mentally retarded offenders. The opinion rested principally on the evidence from legislative enactments to this effect by American state legislatures. A mere footnote reference to an amicus brief from the European Union (arguing against capital punishment) provoked extensive protests from three dissenting justices as to the relevance of "foreign laws." Justice Scalia protested that the standards of "the 'world community' […] are not (thankfully) always those of our people."
23. So, for example, the United States still participates in the Inter-American Commission on Human Rights of the Organization of American States. But the Senate has never ratified the Inter-American Convention on Human Rights, which would subject the United States to legal challenges before the Inter-American Court of Human Rights.
24. The prototype for subsequent Senate reservations were those attached to the 1948 Genocide Convention, reprinted *in* 28 ILM 782 (1989). For an overview of legal disputes about similar reservations on the International Covenant on Civil and Political Rights and the conventions on torture and race discrimination, *see* D.P. Stewart, *The Significance of Reservations, Understandings and Declarations*, 42 DePaul Law Review 1183 (1993).

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4. Liberal Political Culture and the Post-Modern Alternative

The short answer to why the United States has shown more patience for human rights forums than for the ICC is that the former have much less significance. The human rights forums of the United Nations simply exercise the power to criticize. Even more substantive international legal commitments have a different character. In an ordinary legal dispute with another state, the United States can refuse to accept the judgment of an international arbitration body, such as the International Court of Justice ('ICJ'). It suffers no ill consequence for doing so – as the United States has demonstrated in past acts of defiance against the ICJ.[25] Even so, the Senate was concerned enough about legal commitments to reject US participation in the Permanent Court of International Justice (under the League of Nations) and adhered to the ICJ in 1945 only with restrictive stipulations, designed to guard US domestic sovereignty.[26]

The ICC appears much more threatening. It would be much harder to shrug off an indictment by the ICC, since the indicted individual would then be vulnerable to arrest in any country cooperating with the Court. The specificity and gravity of a criminal indictment would also give powerful moral force to the implied condemnation of US policy.

At least since the sixteenth century, the power to impose criminal punishment has been seen as the central prerogative of sovereignty.[27] The point should not be lost on Europeans. With all the powers that have been delegated by national governments to the EU, the EU still has no power to enforce criminal law itself. The plausibility of the ICC turns on whether

25. When, for example, the ICJ ordered US courts to stay the execution of a German national (for a murder in Arizona), the US Supreme Court simply ignored this directive and rejected the German Government's effort to challenge the sentence. Federal Republic of Germany *v.* U.S., 526 U.S. 111 (1999). The United States had ignored previous pleas from German lawyers to spare the execution of German murderers and did not regard the ICJ as adding any extra weight to such appeals.
26. Concerns about international arbitration were, if anything, more insistent in earlier times. The Senate rejected an arbitration treaty with Great Britain in 1895 on the grounds that too wide a range of subjects might be submitted to the determination of arbitrators. Subsequent plans for an international prize court – to determine the legality of seizures in naval warfare – were also rejected by the Senate in 1911 as a threat to the independence of US courts. On early resistance to open-ended arbitration, *see* C. DeArmond David, The United States and the First Hague Peace Conference 29–35 (1962). D.F. Fleming, The United States and the World Court, rev. ed. (1968) describes the historic pattern: Senate concerns about interference in domestic affairs prevented the United States from joining the Permanent Court of International Justice in the 1920s, despite support from Presidents Harding and Coolidge (at 52–67), even President Roosevelt was rebuffed by the Senate when he tried to bring the US into the Permanent Court of International Justice in 1935 (at 117–137). When the United States finally did adhere to the International Court of Justice in 1945, the Senate insisted on including a reservation, excluding the Court from interfering in domestic US concerns, as defined by the United States, itself (at 195).
27. J. Bodin, Six Livres de la République (at I, 10) (1576); S. Pufendorf, De Jure Naturae et Gentium, at VIII, v, 18 (1688).

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one thinks the world at large – or some arbitrary subset of nations – should actually be more trusted than the institutions of the EU.

The premise of the ICC is that international standards of justice must take precedence over domestic justice. That is literally what the Rome Treaty provides: if the ICC is not satisfied that national authorities have pursued a proper prosecution, then the ICC retains authority to make a separate (or if need be, second) prosecution of its own. ICC advocates insist that there is a moral duty to ensure that terrible wrong-doing is punished.

Everyone knows that this will not be ensured, of course. At the same time that European states were campaigning for ratification of the Rome Statute, they repeatedly voted at the UN Human Rights Commission against United States efforts to question human rights abuses in China – because China threatened to cancel contracts for European aircraft if such inquires were not shelved.[28] It is quite unlikely that European governments would allow the ICC to take action against states that would retaliate on Europeans for such interventions: states which would retaliate – either by commercial retaliation or by terrorism – would not be appeased by the explanation that European governments cannot control the ICC. When it comes to policies of appeasement, both European governments and terror states are content to have deals done in secret and almost certainly a deal of this sort would be made to restrain the ICC.

Even as a matter of principle, however, the premise is highly questionable. The notion that there is a general duty to punish wrongdoing – a duty owed to no one in particular – has been described as Kantian and rightly so. Kant insisted that to act morally, one must disregard the practical consequences of a particular action and simply focus on the abstract rule of morality. On this basis, Kant argued that there should never be pardons for criminal wrong-doing.[29] The classic arguments for a pardon power, as one finds them, for example, in The Federalist, urged that in certain situations it will better serve the common good of the community to withhold punishment.[30]

28. The European refusal to confront China at the Commission on Human Rights is such a well-established pattern that it has a special section to itself in a leading text: H.J. Steiner & P. Alston, International Human Rights in Context, 2nd Ed., 624–641 (2000).

29.
> The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it.

I. Kant, The Metaphysical Elements of Justice, at 100 (trans. by J. Ladd, 1965) ("General Theory of Justice, Public Law, Municipal Law, The Right to Punish").

30. Among other arguments, The Federalist No. 74, notes:

> In seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.

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So, indeed, the ICC makes no provision for a pardon power. It is not from pedantic adherence to German philosophy, of course. But if there were a pardon power, who would exercise it? No one could take seriously the notion that, when it comes to exercising political discretion for the common good, functionaries at the Hague know what is best for – well, for whom, actually? For the country directly involved in the crimes? For humanity at large? For European bystanders? Better to cover these awkward questions by insisting, as the Rome Statute does, that there is simply a general duty to punish, which can be implemented in accord with abstract legal standards, applicable everywhere.

In the real world, though, actual governments have often provided amnesties to secure national reconciliation, as, for example, to coax past adherents of a defeated tyranny to accept a new democracy. So there were amnesties throughout Eastern Europe after the fall of communism, and in Latin America after the end of military governments, and in South Africa after the end of apartheid. But the ICC has the power to override amnesties on the premise that nothing can be more important than the abstract duty to punish – as interpreted by international functionaries.

The pardon power is, in this respect, only the most vivid example of a wider problem. Different countries have different notions of justice. Part of the point of justice is to satisfy the relevant community that justice has been done and to bring home to the perpetrator that the community does condemn his crime. Take away the relevant community and one could as well say justice is secured by assassination – or anything that delivers a penalty one way or the other. The American view was at one time the general view: imposing criminal justice is the prerogative of a sovereign state.[31] In liberal theory, it is a doctrine which ensures that punishment follows, at least in some general way, from standards to which the perpetrator or his own community has consented. All that is swept away in the project of international justice.

Europeans may see this as simply one more step in the sharing or "pooling" of sovereign powers. Europeans have already delegated large powers to bureaucrats in Brussels, to judges in Luxembourg, even to judges in Strasbourg. Perhaps Europeans regard The Hague as simply one more center for Euro-governance. But for Americans it would seem a betrayal of their nation to delegate such basic sovereign powers to an international court – even if the court promised advantages for international policy. The historic American view was well stated by President Eisenhower, at just

31. H. Rommen, The State in Catholic Thought (1945) associates the older view with natural law: "[…] the object of political authority is […] the common good" and "the right of pardon and amnesty therefore belongs to political authority." He goes on to observe that it "is an unmistakable token […] of true statehood [even among 'the members of a confederation'] that their highest executives retain the right of pardon." Rommen speaks of justice within a state. Targeted assassination of terrorists may be a justifiable military policy, but it does not claim to be legal justice.

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the time when Europeans were launching their supranational construction: "Sovereignty is never bartered among free men."[32]

But as it happens, the court looks to Americans like a rather bad deal, even viewed in terms of international policy. That perspective also draws on US experience and the way Americans have come to understand their responsibilities to the wider world.

5. United States Power and World Affairs

Constitutional constraints operate on government at home. A sovereign state is much less constrained in its dealings with other states. The Constitution may be rooted in national history and the ongoing consent of the people. In dealing with outsiders, however, there can be plenty of coercion without law and due process. War, the ultimate exercise of sovereign power, is not a consensual activity – not, at least, as regards the enemy.

War cannot be very much constrained by law. Winning is too important for legal niceties. Of course, there is much to be said for mutual restraint, even in war. The United States has always been willing to embrace the Geneva Conventions and their predecessors, going back to the Hague Convention of 1907 – but on the understanding, spelled out in these Conventions, that the obligation to respect their constraints is contingent on reciprocal adherence by the other "contracting parties" (as the signatory states are described in the Conventions).[33]

The Rome Treaty no longer speaks of contracting parties and does not acknowledge that respect for its prohibitions is in any way contingent on the behavior of others. Rather than a contract between contending armies, it sets out a general public law of humanity – which can be enforced by the ICC, without reference to the conduct of other states.

But if the ICC cannot impose justice on one side, it is hard to understand why the other side should submit to its judgments. If the ICC cannot, for example, ensure that a tyrant like Saddam Hussein comes within its reach – and, of course, it cannot – why should a state fighting Saddam Hussein accept the ICC's authority over its own soldiers and officials?

32. Second Inaugural Address, 1957. Public Papers of the Presidents (published by the US Government, National Archives and Records Service), "Eisenhower" series, Vol. 5, 64 (1957).

33. On the Hague Convention, *see* C. DeArmond Davis, The United States and the Second Hague Peace Conference (1975): the US delegation declined to enter into wider agreements on arms control, on the assumption that these agreements would not actually be honored but regarded the Regulation on Land Warfare as a scheme that might be sustained even in the stress of war. In World War II, the US Supreme Court endorsed the execution of German saboteurs, since, in failing to conform to the requirements of the Geneva Convention, they had forfeited any claim to be treated as prisoners of war. *Ex Parte* Quirin, 317 U.S. 1 (1942).

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Internationally, the ICC stands for the proposition that the power to judge has no necessary connection with the power to protect. So it implements the law of Kantian bystanders – of whom there have been many examples in German history.[34]

All of this is particularly irksome to Americans who believe that, in the main, US power has been a great force for good in the world. Would US power be better exercised if decisions about US tactics and strategy were shared with two dozen African countries and a ragtag assortment of other European clients? Why is their judgment more reliable than the judgment of American leaders, accountable to the American people? Americans will be too swayed by self-interest? Probably that is so. What country would actually fight a war if it did not conceive it to be in its self-interest? Well-meaning bystanders do not take many risks for abstract causes (as the history of UN peacekeeping illustrates).

When the US does fight a war, it does indeed give itself the benefit of the doubt regarding its methods. So in the course of fighting its way to victory in World War II, the United States (along with its British ally) killed hundreds of thousands of enemy civilians in bombing raids. Americans did not want to hear moral quibbling about such tactics at the time. After the war, the United States took the lead in organizing war crimes trials at Nuremberg and Tokyo – and the jurisdiction of these tribunals carefully excluded any inquiries into abuses committed by the Allied side. No one would have tolerated the suggestion that Germans – or their wartime collaborators among, for example, the Belgians or the Dutch – should have some say in judging their liberators.

The same attitude still informs American thinking. In the 1980s, the United States Government established a Holocaust Museum, just a few blocks from the great mall in Washington. It gives attention to other genocides in modern history but raises no questions about US bombing. The entry hall of the museum contains a display of flags from US divisions which liberated concentration camps in Europe. It has turned out to be one of the most visited sites in Washington. And it makes very clear to visitors

34. The bystander, of course, does not have to worry about consequences. Kantian doctrine, insofar as it emphasizes adherence to abstract rules, allows even a participant to regard himself as, in moral terms, no more than a bystander. So German judges duly implemented the murderous policies of the Third Reich. Only one judge in all of Germany is known to have resisted implementing National Socialist law. Allied occupation authorities tried to purge judges compromised by their wartime conduct. Virtually all were subsequently reinstated by the Government of West Germany – with accrued seniority claims from before 1945 and full pensions on retirement. The judges did their duty by following the rules and could not, in the view of postwar German officials, be blamed for doing so. They were, according to prevailing German views, mere bystanders. I. Muller, Hitler's Justice: The Courts of the Third Reich (English trans. by D.L. Scheider, 1991) offers much instructive detail on the general pattern. Even Eichmann pleaded that he acted from a Kantian sense of duty, since he was not following his own preferences. He had indeed read Kant's Critique of Practical Reason and gave a reasonably accurate summary of the categorical imperative at his trial – one which impressed a German-trained philosopher, observing the trial, with its aptness and cogency. *See* H. Arendt, Eichmann in Jerusalem, Rev. Ed., 135–138 (1977).

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that Europeans perpetrated extreme horrors which Americans helped to end. That is not all there is to learn, but that particular lesson also happens to be true.

Not surprisingly, perhaps, contemporary Europeans seem to prefer a more nuanced view. In the early-1990s, Germans were genuinely shocked when Britain erected a statue to Air Marshal Arthur Harris of Bomber Command, who had directed the bombing of German cities during the war. Germans were quite ready to acknowledge that atrocities had been committed on both sides, but could not understand how the British could honor a perpetrator of war crimes against Germans.[35]

The ICC, of course, promises to correct such inequities. It will have jurisdiction over genocide and crimes against humanity – just like the Nuremberg Tribunal. Unlike the Nuremberg Tribunal, it will also have jurisdiction over those who fight such evils. To many Europeans, that seems only proper. Perhaps it seems especially fair to those who do no fighting. There is, for example, no "crime" in the ICC Statute which corresponds to what Dutch troops did when they abandoned Muslim refugees to slaughter at Srebrenica. The theory seems to be that the threat of prosecution will deter would-be mass killers to such an extent that it will not matter whether it also inhibits those who would fight them. Perhaps "the trustful Dutch," as Churchill called them, still believe this, just as their fathers clung to the shield of the Hague Peace Palace to guard their neutrality in 1940.[36]

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35. *See*, for example, I. Murray, *Bomber Harris Still Flying Into German Flak*, The Times, 28 September 1991, at 4, reporting protest of German officials that a statue to the commander of RAF Bomber Command was "particularly inappropriate in the border-free Europe of 1992," along with acknowledgment from the deputy mayor of Dresden that "Germany had to be sensitive about the way it makes the protest because so many British cities suffered from Luftwaffe raids." Others in Germany were more explicit about the equivalence of misdeeds on each side: Jurgen Möllemann, then serving as Economics Minister, criticized a ceremony in Germany marking the anniversary of the first V-2 rocket launches (celebrated by German participants as the first step toward exploration of outer space) and remarked that this ceremony was "just as tasteless as the erection of a statue to Sir Arthur Harris." The Times protested that "an equivocating, self-exculpating doctrine seems to underlie this statement, echoed by the German media." Moral distinction fudged (Leader), The Times, 3 October 1992, at 13. Herr Möllemann does not seem to have taken the point. In the spring of 2002 he described Israeli troops as engaged in a "Vernichtungskrieg" – that is, a war of annihilation, a term forever associated with German genocide in the Second World War. Human rights groups subsequently confirmed that fewer than two dozen Palestinian civilians had died, when terror fighters chose to battle Israeli army forces in a heavily populated civilian neighborhood in Jenin. Still, Germans of conscience could not tolerate a selective morality which would condemn SS crimes and then allow similar crimes – or at least, crimes which Germans could recognize as essentially similar – to pass without comparable condemnation.
36. "War of the Unknown Warrior," broadcast from London, 14 July 1940: Hitler "had his plans for Poland and his plans for Norway. He had his plans for Denmark. He had his plans for the doom of the peaceful, trustful Dutch; and of course, for the Belgians." R.R. James (Ed.), Winston Churchill, His Complete Speeches, Vol. VI, at 6249 (1935–1942). The Dutch seem to have been singled out for their pathetic "trustfulness" because, as Churchill had protested a few weeks earlier, they were most scrupulous in adhering to the dictates of neutrality:

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The American view is that, by constraining the good, without hobbling the wicked, the ICC will leave the world in a much nastier condition. Thinking this way may violate the Kantian duty to think abstractly and not get distracted by distinctions between the powers that provoke wars and the powers that fight wars in just causes.[37] But Americans remember their past wars – fought without benefit of international monitors – as just wars. Precisely because the United States still exercises great power in the world and tries to do so with some seriousness, it is not attracted to a scheme which hands sovereign powers to a group of international functionaries – chosen in turn by a motley collection of states, which remain electors whether they are serious or frivolous or wicked.

These are relevant categories in international affairs as in other spheres of life. They are not captured in abstractions about law. Perhaps by the nature of what the EU is, Europeans are addicted to abstract reasoning. Clearly, many of their client states, which have dutifully ratified the ICC, are addicted to altogether fantastical thinking (or total cynicism about legal commitments).[38]

"Why only yesterday, […] Dutch aviators in Holland, in the name of strict and impartial neutrality, were shooting down a British aircraft which had lost its way." "Hideous State of Alarm and Menace," speech of 30 March 1940, *in* James, *id.*, at 6200.

37. A public statement, published by 103 German professors and intellectuals in the Frankfurter Allgemeine Zeitung on 2 May 2002 ("Eine Welt der Gerechtigkeit und des Friedens sieht anders aus") well illustrates the alternate view: it condemned the

> mass murder of the Afghan civilian population resulting from the [US] bombing campaign […] which has cost the lives of more than 4,000 innocent bystanders to date, including many women and children.

The statement insists that, in the name of "moral values which are universally valid in our eyes," its signatories must condemn this US

> mass murder […] with the same rigorousness with which we condemn the mass murder of innocent bystanders by the terrorist attack. There are no universally valid values that allow one to justify one mass murder by another.

No reputable human rights group has counted anything like 4,000 civilian casualties of the US action in Afghanistan, but the logic is clear: it was "mass murder" to fly jet aircrafts into the World Trade Center and equally "mass murder" deliberately to make war on a terrorist state, if civilians were *inadvertently* killed. Lest anyone miss the point, the German statement also condemns the "growing influence of fundamentalism in the United States" – one fundamentalism, apparently, being as bad as another. The statement refrains from saying anything about US bombing practices during World War II – that would beself-regarding and the statement is about universal principles. But one can see the point: Four thousand bombing casualties here, four thousand there and soon it may add up to 6 million casualties of "mass murder" and Germans must insist that such tactics are simply wrong, regardless of who may perpetrate them, regardless of the ostensible cause. (English translation by T. Slater, posted at http://www.propositionsonline.com/html/german_statement.html.)

38. In mid-July, only two weeks after the ICC Statute was supposed to go into effect, African partners in the project announced the formation of an "African Union," ('AU') which was said to be inspired by the European Union. Member states of the African Union pledged to "renounce corruption, conflict and autocracy" and to enforce "common election standards" along with "human rights." But an African newspaper found "worrying" that "some of the leaders who will commit themselves to the A.U.'s objectives are themselves dicta-

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To see the point less abstractly, one need only think about a conflict where the United States has become even more entangled since 11 September and where Europeans have been eager to offer easy judgments from the sidelines.

6. Predestined target

Once it is in place, the ICC is very likely to be turned against Israel. The ICC is an international body and international bodies are altogether obsessed with Israeli wrongdoing. No doubt Israel has committed some questionable or even deplorable acts. It has been subject to relentless hostility since its creation and any country surrounded by murderous enemies may sometimes respond with harsh measures. To judge by international authorities, however, Israel is not just a country with some faults but is the world's most odious regime. The UN Human Rights Commission, for example, voted six condemnations of Israel in 2001 and eight condemnations in 2002, though no other state has ever received more than one condemnation in the same year and some of the world's most brutal regimes have escaped any criticism at all. Europeans know all about this. They vote with the majority, going so far in 2002 as to vote for a resolution implicitly endorsing Palestinian suicide bombing.[39]

So, even if the ICC is actually controlled by Europeans – rather than the larger constituency of ratifying states – it is very likely to indict an Israeli. The EU has now taken the place of the Soviet Union as the principal partner of Islamic states in organizing international denunciations

tors, murderers and thieves." Libyan dictator Muammar Qaddafi was a welcome participant, along with Robert Mugabe, dictator of Zimbabwe. R. Swarns, *Ideas & Trends; A Hint of the Coming Battle for Africa's Future*, New York Times, 14 July 2002, at 3. Three weeks later, it was reported that Zimbabwe "increasingly resembles Cambodia under Pol Pot," as a "catastrophic human rights situation is now complicated by a famine that is mainly the result of the Mugabe regime's ruinous policies." The AU did not offer "so much as a whimper" of protest. D. Coltart, *Zimbabwe's Man-Made Famine*, New York Times, 7 August 2002, at 17. The EU also declined to act.

39. Res. 2002/8 of the Human Rights Commission affirmed "the legitimate right of the Palestinian people to resist Israeli occupation in order to free its land and be able to exercise its right of self-determination" and in support of this affirmation, invoked a 1982 UN General Assembly resolution on "the legitimacy of the struggle of peoples against foreign occupation" which endorsed all means of "armed struggle." Since there was no word of condemnation against murder bombings of civilians – and virtually all the bombings had been directed at civilians – the inevitable implication was that the Commission endorsed murder bombings of Israeli civilians. This vote occurred more than a year after Palestinians had been offered nearly complete Israeli withdrawal from the West Bank and Gaza and responded by reverting to terror bombings. Britain and Germany voted against this resolution, but France, Belgium, Portugal and Austria voted for it.

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of Israel.[40] At the Rome Conference itself, Arab delegates demanded that construction of Jewish settlements in the disputed territories be included in the list of "crimes" punishable by the ICC. The Israeli representative – himself a survivor of the Nazi Holocaust – pleaded that a policy which might be mistaken should still not be classified as a "crime against humanity." His plea was ignored. It is quite unlikely that a provision inserted to justify prosecution of Israelis will not be used for that purpose.

There are jurisdictional obstacles in the way, since Israel has refused to ratify the Rome Statute. But these hurdles will be easy enough to clear. The ICC retains jurisdiction over crimes committed against nationals of ratifying states. Jordan is a ratifying state and can supply jurisdiction for West Bank Palestinians, as UNESCO has reasoned in denouncing Israeli actions in Jerusalem – under the World Heritage Convention to which Israel, itself, is not a party.[41] Or perhaps the Palestine Authority will be allowed to ratify the ICC, even if it is not in control of any territory and remains simply a terror organization, as it was before the Oslo Accords. It would not even be necessary for Palestinian authorities to accept ICC jurisdiction over their own activities. Article 12(3) allows special jurisdiction over special crimes on a non-reciprocal basis. Presumably, it was inserted for this reason – to extend jurisdiction as widely as possible, even on behalf of regimes too murderous to risk direct ratification.

What do Europeans hope to gain by further demonizing Israel? Prominent analysts in the United States chalk it up to the resurgence of historic European attitudes. One of the US's most respected newspapers recently published an article by a former United States army intelligence officer which explains, matter of factly, that "Europe's incurable nostalgia for the Wannsee Conference makes their hatred of Israel understandable

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40. In 1975, all European states stood with the United States in opposing the Soviet backed resolution of the UN General Assembly that proclaimed "Zionism is a form of racism." By 1997, with the Soviet Union gone, the EU took the lead in organizing a special conference to denounce Israeli violations of the Geneva Convention on the treatment of civilians in occupied territory. No such special conference, aimed at a specific country, had ever been held in the whole history of the Geneva Conventions. But the EU was quite prepared to accept the premise that Israel was so uniquely brutal that – more than China in Tibet, for example or the Soviet Union in Eastern Europe – that it required a unique international response. The United States opposed the conference and it was finally called off, when Yasir Arafat declared that it would be a distraction to peace negotiations.
41. In 1982, the World Heritage Committee condemned Israel for failing to maintain historic sites in the Old City of Jerusalem – though Israel was not a party to the World Heritage Convention. The "Old City" was treated as property under the jurisdiction of the Committee because Jordan, which was a party to the treaty, sponsored the resolution – though Jordan did not at that time claim authority over Jerusalem. The United States voted against this twisting of the rules – which provide that World Heritage sites can only be sponsored by states on whose territory they exist. No European state joined the United States in its opposition, though several abstained from endorsing the resolution.

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on some level."[42] It is more charitable to say that Europeans are motivated by a Kantian determination not to be distracted by their own history. As Germans say, criticizing Israel is a way of demonstrating that Germany is again a normal country – that is, a country now free to follow the general law of humanity, the good old general law, as their grandfathers knew it.[43]

Whatever the motives, Europe has taken its stand. In April 2002, the European Parliament voted to impose trade sanctions on Israel for its efforts to defend itself against terrorism. At the same time, the EU refused to suspend funding to the Palestinian Authority, even when Israel documented that Palestinian Authority funding had been used to finance terrorism. External Affairs Commissioner Chris Patten was so fierce in his condemnations of Israel and so apologetic in his statements about the Palestinian Authority that a European newspaper described him as "viscerally anti-Israel."[44]

Europeans say they want peace in the Middle East. So, while not denying Yasir Arafat's long history of terrorist activity, EU officials insist that Israel must negotiate with Arafat to find an ultimate path to peace. EU officials insist that peace requires forgetting – at least when it comes to past murders of Israeli civilians.

But when it comes to dealing with Israeli "crimes," the prevalent view

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42. R. Peters, *Civilian Casualties*, The Wall Street Journal, 25 July 2002, at 10. Less extreme statements, decrying resurgent anti-semitism in Europe, were published by American commentators earlier in the year. EU External Affairs Commissioner Chris Patten protested such accusations as "obscene rubbish." *Stop Blaming Europe*, Washington Post, 7 May 2002, at A21. But a British journalist, after an extensive round of interviews in Washington, subsequently reported that "The US, at least at the elite level, and perhaps more widely, has become seized by the idea that we Europeans are […] anti-Semitic. Especially antisemitic." The author rejects this perception as "horrifying" and "unfair." His explanation for the misperception is that it is promoted by "American Jews" who are "numerous" among "intellectuals and commentators." J. Lloyd, *The US is increasingly dismissive of Europe*, Financial Times, 3 August 2002, at 1. A wave of arson attacks on synagogues in Western Europe in the spring of 2002 might also have influenced American perceptions, since nothing of the sort has ever been seen in North America (though there are millions of immigrants from Islamic countries in North America and presumably they are also upset about events in the Middle East). But recent violence against Jews in Europe does not figure in this commentator's very long analysis of American perceptions. Instead, the author explains: "Many Europeans do ascribe the pro-Israel bias of US administrations to the power and wealth of the Jewish lobby." It seems beyond the imagining of contemporary Europeans that Americans might have their own reasons to react against murder bombings of civilians in Israel – that is, reasons apart from what Europeans see as the "power and wealth" of American Jews.
43. H.M. Broder, *Ende der Schönzeit*, Der Spiegel, 3 June 2002, at 28, describes the eagerness of many Germans to be rid of moral inhibitions, rooted in the past: "Doch während die einen es schicker finden, sich zum Holocaust zu bekennen, statt ihn zu leugnen, sehnen sich die anderen nach einer 'Normalität,' von der sie nur eines wissen: dass es die Juden sind, die sie verhinderin." (So, while they find it proper to acknowledge and not to deny the Holocaust, they yearn for a change to "normality," of which they only know: it is the Jews who prevent it.) He reports the diagnosis of a psychoanalyst: "Die Deutschen werden den Juden Auschwitz nie verzeihen." (The Germans will never forgive the Jews for Auschwitz.)
44. *Israel's Fair-weather Friend*, (Leader), Daily Telegraph, 20 June 2002, at 23.

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in Europe seems to be that there is a moral duty to punish that supersedes the requirements of peace. When Belgian authorities, for example, allowed their courts to pursue an indictment of the Israeli Prime Minister for command negligence in Lebanon twenty years earlier, the predictable effect was to make it impossible for the Israeli leader to attend any meeting in the EU capital. That awkward consequence was less important than standing up for what Belgian jurists imagined to be justice. Americans found it hard to understand the logic of this approach.[45]

The United States, especially now that it is engaged in its own battles with terror, has much more sympathy for Israel's predicament. The United States Congress voted a strong statement of support for Israel, shortly after the EU Parliament voted to impose trade sanctions on Israel.[46] There are many reasons for these differing attitudes. But the ICC will give special weight to the European attitude.

ICC indictments of Israeli officials are not likely to change Israel's conduct. A country fighting for its life is not likely to be impressed by the moral authority of a tribunal situated in The Netherlands. The indictments are not likely to change US policy toward Israel, either. The United States has learned to discount the moral authority of Europeans, particularly on this subject: the United States simply walked out of the World Conference Against Racism at Durban, South Africa in September 2001, when it degenerated into an anti-Israel hate-fest. European delegations, of course, remained in place to show their solidarity with "the World." The United States has no such compunctions about displaying its dissenting views in public. It has been quite prepared to exercise its veto in the Security Council against one-sided denunciations of Israel and has time and again cast its vote in a minority of one (or two, with Israel) against resolutions of the General Assembly, even when Europeans joined with

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45. As an example of critical commentary in the American press, *see The Belgian Delusion*, editorial, The Boston Globe, 22 July 2002, at A10 (from a newspaper which often criticizes Israel but could still denounce the attempted Belgian prosecution of Sharon as "perverse" and efforts by Belgian legislators to enact new legislation to resume the prosecution as "variations on a theme of narcissism").

46. H. Res. 392, May 2002, notes that "Palestinian organizations are engaging in an organized, systematic, and deliberate campaign of terror aimed at inflicting as many casualties as possible on the Israeli population" and that

> the number of Israelis killed by suicide terrorist attacks alone, on a basis proportional to the United States population, is approximately 9,000, three times the number killed in the terrorist attacks on New York and Washington on September 11, 2001

and concludes by expressing "solidarity with Israel as it takes the necessary steps to provide security to its people by dismantling the terrorist infrastructure in the Palestinian areas" and by condemning "the ongoing support of terror by Yasir Arafat" whose "actions are not those of a viable partner for peace." Months before the 11 September attacks, the House of Representatives endorsed a similar resolution which denounced Arafat's terror campaign and affirmed that the House "congratulates Ariel Sharon on his election as Prime Minister" while affirming "the Governments of the United States and Israel are close allies and share a deep and abiding friendship based on a shared commitment to democratic values." (H. Res. 34, 13 February 2002.)

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the UN majority in depicting the Jewish state as a uniquely brutal entity.[47] Americans have simply disregarded Europe's "moral leadership" on these matters.

But of course, Americans will notice the indictment of an Israeli by the ICC. Americans will notice when the indictment is cheered by terrorists as new justification for terror attacks. They will notice when the indictment spurs a new wave of arson against synagogues in Europe, following the pattern in the spring of 2002. And Americans will recognize that a prosecutorial power aimed at Israel can next be turned against the United States, which is fighting similar battles against terrorist forces and has most of the same enemies as Israel.

Diplomats, it is true, whisper assurances that none of this will come to pass because Europeans will restrain the ICC. Imposing such restraint would be a remarkable departure from recent European policy in the Middle East, but it is not impossible that Europeans would actually pursue a different policy in this new forum. If European pressures do restrain the ICC, however, that will simply confirm that the ICC is, after all, not the voice of humanity, not the expression of international consensus – which remains quite hostile to the Jewish state – but merely the tool of European diplomacy. Americans will still say, "No thank you. We will make up our own minds."

7. Conclusion

It should not be surprising that the United States and the European Union have such different reactions to the notion of international justice, presided over by a free-floating criminal court, entirely disconnected from any authority actually empowered to exercise force on its behalf. Nothing of the sort has existed in modern history, perhaps not in all history. And Americans take their history seriously. In ordinary political rhetoric, as in arguments before the Supreme Court, one can still score points in the United States by citing the opinions of North America's eighteenth century founders. More recent history, as of World War II, also remains fresh in US consciousness. By contrast, the EU is founded in a flight from history on many different levels. When Americans decry a return to historic patterns of anti-Semitism or anti-Americanism in Europe, Europeans are genuinely incensed: what has the past to do with the glittering new Europe

47. In 2002, the United States was not represented on the UN Human Rights Commission, because European states elected Austria in its place the previous year. In 2001, there were five resolutions on Israel before the UN Human Rights Commission, which consists of 52 states. The United States was the only state to vote against all five. In the General Assembly, the United States voted in a minority of two or three (that is, with Israel and sometimes Guatemala) in eleven resolutions in 2001.

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of today.[48] When Europeans complain that the United States is becoming "isolated" because acting "unilaterally," they forget that the United States has often been that way – as in an earlier era when most states of Europe had aligned themselves with German ambitions for the continent.

It would be nice to think all sides could pull back before the ICC adds a new level of bitterness to what is already a very strained trans-Atlantic relationship. It ought to be possible to sustain a common western resolve in the face of barbarism. But the ICC was pressed forward by Europeans, against United States objections, in the face of US efforts to mobilize military responses to the 11 September attacks. The very existence of the ICC is testimony to the absence of shared resolve. To Americans, Europeans seem to be proposing to send lawyers to battle barbarism. So Americans are reminded that they do not trust the political judgment of Europeans.[49]

Europeans, for their part, resist any role in a world-wide mobilization against "evil" – a word that President Bush has used repeatedly and European leaders find jarring. Today's Europeans seem to feel that evil is something altogether remote from their experience and not something to be distracted by, when there is such a promising project underway in the name of "law."

Americans may be simplistic and moralistic but they have somewhat longer memories. Perhaps that is, in some ways, the heart of the dispute.

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48. An Anglo-French journalist sees

> contemporary anti-Semitism [in Europe] as a subset of contemporary anti-Americanism rather than as a resurgence of prewar attitudes. The Arab-Israel struggle is a proxy war in the real European-American struggle.

N. Fraser, *Le Divorce, Do Europe and America have irreconcilable differences?*, Harper's Magazine, September 2000, at 58. External Affairs Commissioner Patten regards anti-Americanism as the emotional glue of European unity, noting that while few Europeans now have "an emotional commitment to their European identity," there are "already […] stirrings" of such feelings "in shared indignation at US steel protectionism." *Let's Get Emotional; Democracy in Europe*, The Spectator, 18 May 2002, at 22. Presumably he regards "shared indignation" against Israel as another spur to European identity, since it figures so prominently in Patten's statements on the Middle East. Perhaps it was another contribution to European unity to remind Europeans, as Mrs. Wim Duisenberg did in June 2002, that America is actually controlled by "an elite club of rich Jews." The least one can say is that many impulses are tangled together in contemporary disputes – and to many Americans, the pattern seems painfully reminiscent of an earlier era, when Germany had a different sort of leadership role in Europe.

49. W.R. Mead of the American Council on Foreign Relations sums up the prevailing view:

> Americans just don't trust Europe's political judgment. Appeasement is [Europe's] second nature. Europeans have never met a leader – Hitler, Mussolini, Stalin, Qaddafi, Khomeini, Saddam Hussein – they didn't think could be softened up by concessions.

W.R. Mead, *The Case Against Europe*, 289(4) The Atlantic Monthly, April 2002, The Case Against Europe, at 26.

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