

Popular Sovereignty and the International Criminal Court

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Paul W. Kahn

United States' opposition to the International Criminal Court appears as either a puzzle or an embarrassment to many of the nation's traditional supporters. A puzzle because it is not at all obvious why the United States should feel so threatened by this new court. Supporters of the Court point out that there are ample provisions in the Rome Statute designed to protect a mature democracy's capacity to engage in legal self-regulation and self-policing. To raise the specter of an irresponsible prosecutor before the ICC or of other nations manipulating the Court's jurisdiction for anti-American political purposes is to create a strawman. An embarrassment because the United States appears to be exempting itself from rules of the game that it believes should apply to others. This is singularly inappropriate when the game involves allegations of crimes against humanity, genocide and war crimes. The US claim for special status undermines the very idea of the rule of law as a single, principled normative order to which all are bound. Even worse, it may undermine the great international effort of the last century to subject the use of force to the rule of law. For the United States to take this position is particularly embarrassing, since it, more than any other modern nation-state, has held itself out as committed to and constituted by the rule of law.

Stuck between the puzzle and the embarrassment, friends and allies have few arguments with which to respond when critics offer easy political explanations for the US position. Easiest of all is the claim that US opposition to the Court is based upon a kind of "bad man" view of the new regime of international criminal law. Expecting to violate the rules, the United States wants

to exempt itself from their institutional enforcement. After all, no other nation pours comparable resources into a defense establishment. These resources are not being spent for no purpose. The United States pays for its military because it intends to use it as an instrument of national policy: witness Kosovo, Afghanistan, Iraq, and who knows where next. With the deployment of armies come charges of aggression as well as alleged violations of humanitarian law.

Another easy explanation is to point to political psychology. The United States allegedly suffers from a kind of political paranoia, a latent tendency toward xenophobia. Sometimes this is expressed in the claim that the opposition is “ideological,” usually meaning that it is a product of right-wing fantasies. Sometimes, an historical element is added: US exceptionalism rests on a combination of Protestant faith in a messianic mission and a tradition of isolationism. The United States was founded by those fleeing the religious and political corruption of the Old World. Solutions to old world problems are seen as irrelevant to American life. Worse, those solutions are tainted with the corruption of old world politics. The United States, to its critics, has a fantasy of purity.

There is just enough truth in each of these explanations to give them some traction. The United States is a militarized, imperial power; it does maintain a political culture deeply informed by Protestant faith; it does believe that its history has been providential. But the negative twist put on each explanation calls forth the question: As opposed to what? Of course, American politics is self-interested. Whose is not? Of course, American politics rests upon certain ideological beliefs? Since when is politics not ideological? Of course, contemporary political beliefs reflect historical experience and the larger frame of religious beliefs held by the community? How could they not? All politics arises out of this mix of self-interest, ideology,

history and faith. If this produces a particularly dangerous form of politics in the United States, then it should be opposed. But too often supporters of the International Criminal Court seem to think that the invocation of law is a kind of trump to politics, that it is enough to appeal to law to win this argument. The problem with the American attitude, they believe, is that it is a political position – an anachronism in the emerging global order of law. The American perception tends to be just the opposite: invocation of international law is seen as just another form of politics to be assessed like any other political claim.

The conflict over the Court today is so intense not because the practical stakes are high, but because the jurisdiction of the Court has become the site for a symbolic battle between law and politics. Supporters of the Court tend to believe that twentieth century politics led to the devastating violence of that century. On their view, politics itself is dangerous; indeed, it is the source of the problem for which the Court is to be the answer. In this new century, the politics of vital national interests should be replaced by the managerial and technocratic sciences of the welfare state, on the one hand, and a regime of universal law, on the other. Both constrict the space that remains open for the traditional politics of nation-states. That space should extend no further than the health and well-being of populations. The triumph of the West in 1989 is read not as a triumph for one political view over another, but for managerial and administrative science. The new western democracies are to be depoliticized spaces in which government's role is to apply diverse forms of expertise to manage the market and to deal with those problems resistant to market solutions. A state that tends to the well-being of its population domestically – increasing GDP and decreasing morbidity rates – and deals with the rest of the world through transnational institutions and international legal regimes has nothing to fear from this Court. The

real sin of the United States is to believe in itself as a political entity, when the new world order is to be an order of law.

There is nothing new in this conflict. Cosmopolitan lawyers have long sought to impose a regime of international law on the use of force; they have long believed that politics should be displaced by bureaucratic management. The 20th century began in much the same way as the 21st – with dreams of law displacing the politics of vital, sovereign interests in a new age of reason.¹ International law and international institutions were produced in abundance, including the Hague Conventions and the International Court of Arbitration. After the First World War, the dream took the form of the League of Nations, the Kellogg Briand Pact, and the Permanent Court of International Justice. The same dream briefly flourished between the end the Second World War and the start of the Cold War, producing yet another set of international institutions. Of course, the end of the Cold War reawakens the dream of the end of politics and the age of international law.

Reasonable men everywhere want to believe that institutions and legal rules can control the tendency of politics to turn violent – both internally and externally. That dream of reason has, for 100 years, taken the form of international law and international courts. Opposition to this aspiration must be based on misunderstanding or self-interest, for that is the only way in which reason can view opposition. But there is another word for this opposition: politics. The United States stands out in the West today because of its insistence that politics has priority over law. It remains attached to the belief that it is a self-determining political entity; it will not

¹ See M. Koskenniemi, Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 (2002).

subordinate the national will to the universal rule of reason. Politics, on this view, is the self-expression of the sovereign nation-state.

The character of the controversy over the Court is particularly difficult to understand because the central term of the debate – the rule of law – is itself deeply contested. American political culture does not accept the cosmopolitan view of an opposition between law and politics, with law cast as the expression of reason and politics as self-interest. In the American constitutional frame, popular sovereignty and the rule of law are a single phenomenon constitutive of the national, political identity. The rule of law, which begins and ends in American life with the Constitution, is the self-expression of the popular sovereign. The Constitution is the source of all law-making power, and every assertion of a legal rule can be tested against the Constitution. No question more quickly or easily comes forward in our political culture than “Is it constitutional?”

Americans believe they created themselves as a “nation under law.” That law is not a set of moral constraints imposed on the political process from outside, whether from natural law, jus cogens, or customary international law. Rather, the law expresses the substantive decisions of a self-governing community. The American Constitution expresses the will of “we the People.” The rule of law is binding on the American political community not because it is reasonable or morally correct. It is binding because it arise out of the constitutive act of self-creation by that community. Thus, the rule of law is not a moral norm; rather, it is an existential condition signifying the continuing existence of the popular sovereign.

No one should underestimate the claim that the American Constitution makes upon the American citizen: it defines him as a political being; it is the object of his patriotism and the

subject of a profound reverence. Despite the charges of rampant consumerism in modern America, the political culture maintains a cult of sacrifice – amply demonstrated in the post 9/11 events. The Constitution is at the very heart of this cult: in its name, Americans, for 200 years, have willingly taken up the burden of killing and being killed.

Of course, this does not mean that Americans are indifferent to the moral content of their law. They want their law to be reasonable and morally correct, but that means only that they want the community to bind itself by laws that satisfy these standards. They want their law to be morally satisfying in the same way that a parent wants his or her child to be morally good: we want them to be good because we love them; we do not love them because they are good. It is the same with the community that is the United States: citizens have a deep bond to the popular sovereign; because of that, they care deeply about how it behaves. They will not easily abandon this bond, even when they judge that behavior harshly.

The behavior of the popular sovereign is what Americans mean by the rule of law: the rule of law is rule by the popular sovereign. This union of the rule of law and popular sovereignty is the great American political achievement. Of course, all of this is true not as a matter of fact, but as a matter of political faith. It is the American civic religion or our national myth. Belief in the popular sovereign as a single, transhistorical subject is at the core of the American democratic project. That project is not about assessing the will of a contemporary majority, but about maintaining the faith in a single, self-governing, plural subject: the People. Not elections, but courts claiming to speak in the voice of the People express this core American belief. There was, in this respect, nothing puzzling about President Bush's ascension to office

through the Supreme Court's decision.²

We cannot really understand the character of this sovereign subject without appealing to the religious language that it has coopted, beginning with the very conception of sovereignty itself. Americans believe that they killed the king in a revolutionary act. In place of the mystical corpus of the King's body, they substituted the mystical corpus of the popular sovereign. Like the God in whose place he stands, the only access to the popular sovereign is through the text that it produced. Our civic Bible is the Constitution – the locus of the showing forth of the sacred people. Thus, we know the popular sovereign by reading the product of this single, creative act. Maintenance of the meaning of that revelatory act of the Sovereign People is the rule of law. We are not far from the heart of Judeo-Christian belief in this linkage of divinity to the production of law. America, unlike Europe, remains a place of vibrant religious faith not just in its denominational churches but in its politics as well.

American courts may be the most powerful in the world; American citizens may be the most litigious. Yet, American constitutional practice is quite out of step with that of other mature democracies. Our interpretive practice shares more with biblical hermeneutics than with the proportionality review of other constitutional courts. Every constitutional argument in the United States begins with the text itself. It then advances to consider the historical intent of the framers, and finally takes up the history of judicial interpretation of the controverted text. These are all ways of expressing the bounded character of our rule of law; they all point to the rule of law as a practice of interpreting the action of the popular sovereign. We do not think that either

² Doctrinally, there was much that was puzzling about the decision, but as an assertion of power, it was not controversial. Even Al Gore acknowledged the legitimacy of this power.

the text or the framers' intent is anachronistic because we believe both are elements of a transhistorical popular sovereign. Our rule of law gives symbolic expression to the continuous participation of the citizen in this single, plural subject: We the People. Like the Passover Seder that reminds the contemporary Jew that he was with Moses in the escape from Egypt, the American citizen is continually reminded through law that he was there at the Founding.

The American myth of self-creation drew simultaneously on the Enlightenment tradition of reason and the religious tradition of the sacred quality of the sovereign will. This combination was able to bind together a nation of immigrants by offering all the opportunity to participate equally in the democratic project. Again, this is not equality in fact – the United States has been plagued by inequalities. It is that faith in equality of all before a creator God. Americans easily transferred this structure of faith to an ultimate concern with a political project of popular sovereignty. This American political faith is already clear by 1803, with Chief Justice John Marshall's assertion of judicial supremacy – a supremacy based on the Court's claim to speak in the name of the popular sovereign.³ It is secured in the mass political sacrifice of the Civil War and marked for the nation by that secular Christ figure: Lincoln. Finally, it is wildly triumphant in the 20th century: the American century.

This set of beliefs fuels the dispute over the ICC. Opposition to the Court has little to do with the substantive threat it represents to particular American goals and little to do with a fear of political misuse. Making reassuring arguments on these points is not going to change the general political sentiment of opposition. After all, the Court can never be stronger than the political commitment to abide by the treaty. If the United States were to judge the Court a

³ Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

substantial interference with vital national interests, if it were to believe that the Court had been politically “hijacked,” it could simply withdraw its consent. It could do this formally under the treaty or it could simply pull out in violation of the treaty. By agreeing to the Court, a state hardly gives up the capacity or the need to exercise political judgment in the future. The threat to the United States is not practical, it is symbolic. The symbolism of the Court would displace the connection of the rule of law to popular sovereignty. It would put in its place an idea of law founded on the universal claims of reason. Symbolically, it would suggest an end to the unique, American political project.

By the end of the 20th century, much of the world saw the modernist project of founding national identity on popular sovereignty as quite disastrous. Everyone, from fascists, to ethnic nationalists or authoritarian generals had claimed the right to rule in the name of the people. The politics of popular sovereignty had led to repression at home and violence abroad. Claims of sovereignty had been invoked to ward off the intrusive eye of the international community; such claims were the last refuge of abusive regimes. Arguments were now made that the traditional concept of sovereignty was empty. In its place, the “new sovereignty” would be located in the capacity to engage in international institutions.⁴ In the age of globalization, there was no longer to be a distinction between the domestic and the transnational. Thus, national politics would be replaced by transnational networks – networks of capital, trade, information, culture, productive capacities and even population flows.

Where ever there is exhaustion with the politics of popular sovereignty, there is appeal to

⁴ See, e.g., A. Chayes and A. Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1995).

an idea of a universal rule of law based on reason. Is this not the lesson of the wars of Europe? The European Union embodies this idea that the rule of law must be founded on reason rather than on a faith in a transhistorical myth of the People. Reason will produce a rule of law framed by an understanding of justice, on the one hand, and administrative expertise on the other. The International Criminal Court is just one more example of this ideal. So is the incorporation of international human rights norms into domestic constitutions. All of these developments express the same rightful weariness of much of the world with the politics of sovereignty.

Belief in reason, however, is not an alternative to political ideology: it is another political position. Reason's truths may be self-evident to many in the West, but they are not universally self-evident. For those who believe that the task of reason is the interpretation of divine revelation – whether in the Koran or the Bible – the displacement of politics by administration is not an appealing model at all. Even in the West, there is not of a single view about the nature of the political community. Claims for ethnicity compete with claims of cosmopolitanism; claims for republican virtues compete with those of liberalism. It is not an accident that the charge raised against both the EU and the WTO is that of a democracy deficit. One might vigorously disagree with the American opposition to the Court, but one cannot argue that this position is out of step with American popular sentiment. There is little popular support for the idea that American political decisions can or should be subject to legal evaluation by noncitizens. There is no support because the idea conflicts with the vibrant character of belief in a rule of law that is a function of, not a measure of, popular sovereignty.

Thus, behind the formal dispute over the Rome Statute is a deeper dispute over the character of law, and behind that is an even deeper dispute over the place of sovereignty in the

contemporary moment. Post 9/11, these opposing political cultures have been forced into the open, because, in response to a security crisis, nations fall back on to their most ingrained patterns of belief. The United States has responded to the attack in the pattern of the powerful, modern nation-state that it is, while our European allies have, for the most part, responded as post-modern transnational communities. Americans went to war, while Europeans generally appealed to the mechanisms of international law enforcement. The very idea of law operates quite differently in these opposed perspectives. For Americans, the constitutional order was to be defended by the use of force and an ethic of sacrifice; for Europeans, law was the means of dealing with the threat.

The United States is, in its own view, the most successful political project in history. Apart from a cosmopolitan elite, Americans see no reason to give up the faith that has fueled this triumph. There is, however, no reason whatsoever to believe that others will share this faith. There is every reason to doubt that this faith offers a ground for the contemporary exercise of American power abroad with which others will agree. But before anyone can hope to shift American policy, they need to understand the political faith upon which it rests. At the center of that faith is belief in the rule of law as rule by the popular sovereign.