

Europe, America, and the International Criminal Court

Wayne Sandholtz
University of California, Irvine

Of the 25 member states of the European Union, 24 are parties to the Rome Statute establishing the International Criminal Court (ICC). Thirty-eight of 46 members of the Council of Europe have joined the ICC. The United States, in contrast, has refused to participate in the new tribunal. Not content merely to sit on the sidelines, the United States has actively sought to weaken and undermine the ICC. For the first two years after the Court came into existence, the United States obtained from the Security Council an exemption for troops serving in U.N. operations – after threatening to veto all peacekeeping missions. The U.S. Congress passed, and President Bush signed, the American Servicemembers' Protection Act, which forbids any U.S. cooperation with the ICC and authorizes the President to use armed force to secure the release of an American citizen detained in connection with an ICC proceeding. The United States has signed "bilateral immunity agreements" (BIAs) with nearly 100 countries. At every stage, from the pre-Rome negotiations through the BIAs, European governments have sharply disagreed with American positions.

International relations theories may not be capable of explaining individual outcomes, like the US-European divergence over the ICC. Most events in international relations are products of multiple causes, which in turn interact with situation-specific contingencies. Furthermore, IR theories generate, at best, expectations regarding general tendencies, not highly deterministic predictions. And, of course, a single case can hardly refute or decisively confirm any particular theory-based proposition. This analysis thus focuses initially on identifying broad regularities in national responses to the ICC. It begins by deriving hypotheses from realist, "second-image" (domestic politics), and institutional theoretical perspectives:

1. Major military powers will be less favorable to the ICC, preferring to avoid any potential interference with the use of force internationally (realism).
2. Democracies will be more favorable to participation in the ICC, accepting the international application of rule-of-law and human rights values they embrace at home.
3. States already embedded in regional systems with functioning supranational courts (the EU, the ECHR, possibly the ACHR) will be more likely to join the ICC because they have already made and adapted to similar grants of supranational authority.
4. An additional hypothesis suggests that states that provide large numbers of troops for U.N. operations will not be enthusiastic about the ICC because their personnel would offer more potential targets for prosecution.

The paper will offer an initial assessment of these propositions by examining the positions of the United States and European governments on specific issues that arose

during the drafting of the Rome Statute and after it came into effect. It will then expand the analysis to a more systematic evaluation of the hypotheses with respect to the global pattern of ICC participation. Finally, the paper will discuss the extent to which the global results shed light on the more specific cases of the United States and Europe.