

WHY DOES AMERICA FEAR THIS COURT?

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Robert Kagan may be right that "Europe should be more sensitive to American concerns" [op-ed, July 1]. I cringe when I hear Europeans attacking the United States and Americans in terms that would be condemned as outright racism if they were leveled against any other country or its people – just as I bridle at hearing Americans dismiss Europeans as a bunch of unprincipled wimps. We owe a very great deal to the United States, and I am the first to acknowledge it. But Kagan is on weak ground when he uses the International Criminal Court (ICC) to illustrate his argument.

It is hardly surprising that unjustified criticism of the United States -- often fueled by fear and envy -- has made American policymakers wary about submitting to the authority of an international court. As Kagan says, the United States is called upon more than other nations to send its troops overseas, and that makes them more vulnerable to prosecution. So the United States was right to seek safeguards to ensure that the ICC would be used only for its intended purpose: to prosecute perpetrators of genocide and other crimes against humanity -- not pursue some politically motivated vendetta against the United States.

Where Kagan is wrong -- and where, in this instance, I think the United States is making a great mistake -- is in refusing to take yes for an answer. The United States was fully engaged in the Rome Conference that prepared the ICC. It sought all sorts of assurances, and it got them. For example:

* The ICC is complementary to national courts. It would have had nothing to say, for example, about the sorry business a couple of years back involving indecent assaults by U.S. troops in Okinawa. Not only did this involve what might be called "common crime" rather than crimes against humanity but the United States itself took appropriate action.

* The ICC will not be retrospective.

* Investigations can proceed only after a pretrial chamber has determined there is a reasonable basis for action.

* Under Article 16 of the ICC Statute the U.N. Security Council can decide to block prosecutions for fixed periods.

In short, the United States demanded elaborate safeguards, and it got them. But in a pattern that has become wearily familiar in other contexts such as the Kyoto Climate Change Treaty, it then revoked its intention to sign. This technique carries serious long-

term risks. Why should people make concessions to America if the United States is going to walk away in any case?

I deeply regret the decision, because I admire the United States and know how its decision will be interpreted. The United States will be accused of putting itself above the law. It is happy enough to sit in judgment on others -- indeed it is already doing so as part of the International Criminal Tribunal for the Former Yugoslavia -- and it is ironic that it takes particularly tough positions in that context. But the United States now seems to be saying it must never itself be put in the dock.

One of the complaints leveled against the British Crown in the Declaration of Independence was that George III protected his troops "from punishment for any Murders which they should commit on the Inhabitants of these States."

As Kagan points out in his article, what makes a "rogue" a "rogue" is that it refuses to accept international rules. A couple of years back Samuel Huntington warned that in the eyes of much of the world the United States was "becoming the rogue superpower." The epithet has been heard more recently in connection with U.S. actions undermining the Nuclear Non-Proliferation Treaty. It is a bum rap which ignores America's huge contribution to international order -- and it is in nobody's interest that the United States should encourage the caricature. More immediately, U.S. opposition to the ICC threatens international stability, because it poses practical problems for the renewal of U.N. peacekeeping mandates around the world. The effects are already being felt in Bosnia.

Henry Kissinger comments at the end of his latest book on American foreign policy that "America's ultimate challenge is to transfer its power into a moral consensus, promoting its values not by imposition but by their willing acceptance." That task cannot be accomplished if the United States seems to be trying to set itself above the law.

The ICC is intended to deal with international tragedies like Rwanda. U.S. troops almost always behave in an exemplary way -- as do European ones. The United States is itself quite capable of dealing with the few cases (such as the My Lai massacre) in which its soldiers fall below their own high standards. So it should have nothing to fear from this court.

Kagan asks Europeans to consider whether "a more liberal international order can be built by hobbling the most powerful defender of that order." That is neither the purpose of the court nor will it be its effect. To see the International Criminal Court as an assault on the United States is, frankly, perverse. The court's purpose, rather, is one that the United States wholeheartedly shares: to ensure that genocide and other such crimes against humanity should no longer go unpunished.

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