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Bush 43 Administration, 2000–2004

The incoming administration of President George W. Bush was presented with an ICC design that had been largely settled during the Clinton years and that was on the cusp of exercising far-reaching powers as the Rome Statute came into force mid-2002.[1] Bush's 2000 inauguration signalled a major shift to counteract these developments, with a track record among the president's senior legal policymakers of opposing ICC policy throughout the previous eight years. Most prominent among these was John Bolton, who served both as Under Secretary of State for Arms Control and International Security and then as UN Ambassador. Bolton had sat alongside Ambassador Scheffer in the US Senate's post-mortem of the Rome Conference to strongly condemn both ICC policy and the broader IL policy of the Clinton administration.[2] Contested views foreshadowed the hostile opposition to the ICC that would become the hallmark of the first term of the Bush 43 administration.

From a legalist perspective, the achievement of a largely settled design left the primary focus for ICC supporters on consolidating the formal and universal status of the ICC as an institution of global governance. Of particular significance was the objective of ensuring that the increasingly prominent relationship between the ICC and the UNSC did not institutionalise legal inequality, which had been fought against so hard during the 1998 negotiation phase. In contrast, the United States implemented a series of policies designed to impede the realisation of the ICC project. First, the administration 'unsigned' the Rome Statute to demonstrate that it did not intend to be bound by the regime in any form. Second, through the UNSC, the United States sought and obtained immunity from ICC prosecution for all US military personnel involved in peacekeeping operations. Third, the administration sought and obtained bilateral

[1] On 1 July when the number of states acceding to the statute reached the requisite number of 60: *Rome Statute of the International Criminal Court* (1998), Art. 126.

[2] See Chapter 4, *supra*.

agreements with its allies that overrode the jurisdiction of the court in relation to US nationals. Finally, the president signed domestic legislation authorising the recovery of US nationals should they nevertheless end up in the court's custody. Each of these policies contradicted legalist principles, which painted a picture of a US worldview opposed to the international rule of law. This chapter seeks to refine otherwise persuasive observations of the Bush 43 administration seeking a diminished role for IL by demonstrating that, in doing so, US legal policymakers adhered to well-established illiberal legal conceptions. The theorised role of foreign policy ideology thus illuminates the contradiction of legal policymakers seeking to dismantle the ICC, yet continuing to defend US actions in terms of fidelity to the rule of law.

Dominant Foreign Policy Ideology

In his memoirs, President Clinton reflected that Bush 43 and Vice President Dick Cheney 'saw the world very differently from the way I did', and in particular offered a more unilateral IL policy that opposed key international institutions.[3] Curtis Bradley, Bush 43 State Department Counsellor on International Law, sceptically described the 'standard view' of the Bush era IL policy as being that:

> The Administration did not take international law seriously and routinely disregarded it whenever it was thought to conflict with the national interests of the country. In doing so, the Administration substantially undermined the rule of law and the United States' standing in the international community.[4]

The evidence is that the administration's policies distinctly diverged from its predecessor's in the perceived value of advancing foreign policy interests through law. Although the administration maintained engagement with key international institutions, those institutions were valued primarily to the extent that 'they served immediate, concrete American interests'.[5] The 2002 Kagan thesis said to resonate so strongly with senior Bush 43 policymakers claimed that, in contrast to European conceptions of IL, Americans continued to perceive a 'Hobbesian world where

[3] William J. Clinton, *My Life* (Hutchinson, 2004), p. 951.

[4] Curtis A. Bradley, 'The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy' (2009) 4 *Duke Journal of Constitutional Law & Public Policy* 57, p. 57.

[5] Ivo H. Daalder & James M. Lindsay, *America Unbound: The Bush Revolution in Foreign Policy* (Brookings Institution Press, 2003), p. 44.

international laws and rules are unreliable and where true security and the defence and promotion of a liberal order still depend on the possession and use of military might'.[6]

In rejecting the strategic desirability of formalised or transnational development of IL, the administration was particularly influenced by a characterisation of such developments as a form of 'lawfare'. The term was popularised in a 2001 essay by Major General Charles Dunlap, as Deputy Judge Advocate General, and later defined to mean 'the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective', including through exploiting US commitment to rule of law values.[7] Specifically, Dunlap observed 'disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself'.[8] The concept became popular among the administration's legal policymakers,[9] with Secretary of Defense Donald Rumsfeld defining the concept as 'a new kind of asymmetric war' that 'uses international and domestic legal claims, regardless of their factual basis, to win public support to harass American officials – military and civilian – and to score ideological victories'.[10] Like Dunlap, Rumsfeld identified the source of power in the strategy as 'America's laudable reverence for the law', which rendered the nation especially vulnerable to accusations of illegality.[11] The lawfare moniker encapsulated the claim that legalist conceptions of IL had the capacity to contradict the very principles that underpinned true fidelity to the international rule of law.

Evidence regarding Bush's personal beliefs about the international rule of law points to the transactional conception entailed in illiberal nationalism.[12] Bush demonstrated this ideology in his more general foreign policy, through a more confrontational stance against American enemies and his preference

[6] Robert Kagan, 'Power and Weakness' (2002) June–July *Policy Review* 3, p. 3.
[7] Charles J. Dunlap Jr, 'Lawfare Today: A Perspective' (2008) 3 *Yale Journal of International Affairs* 146, p. 146.
[8] Charles J. Dunlap Jr, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts', Conference on Humanitarian Challenges in Military Intervention, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, Washington, DC, 29 November 2001, p. 6.
[9] Some of whom now contribute to a blog with the same title: Benjamin Wittes et al., 'About Lawfare: A Brief History of the Term and the Site', *Lawfare: Hard National Security Choices,* 2010, www.lawfareblog.com/about-lawfare-brief-history-term-and-site.
[10] Donald Rumsfeld, *Known and Unknown: A Memoir* (Penguin, 2011), p. 594.
[11] Ibid., p. 596.
[12] See Condoleezza Rice, *No Higher Honor: A Memoir of My Years in Washington* (Random House LLC, 2011), pp. 158–9.

for military over diplomatic pressure to promote US interests.[13] Dueck identified that, following the 11 September 2001 terrorist attacks, 'liberal humanitarian concerns would henceforth take a back seat to considerations of US self-interest'.[14] In legal terms, Bush's overriding belief was that the United States should aim to consolidate hegemonic power 'into a more durable system', but that, unlike his predecessors, his forms of governance would not be exercised through strengthened institutions of IL.[15] The administration thus challenged the internationalist consensus of the Bush 41–Clinton years, shifting along the governance dimension to a nationalist stance that emphasised sufficiency of municipal legal power to promote American interests.

One recurrent characterisation of the administration is that its general foreign policy was structured by a hawkish strand of liberal internationalism – on the basis that it remained globally committed to spreading American democratic values.[16] An example of the type of statement supporting this conclusion is Secretary of State Colin Powell identifying a 'guiding principle' of Bush's foreign policy as being that 'there is no country on earth that is not touched by America, for we have become the motive force for freedom and democracy in the world'.[17] Subsequent military action seeking democratisation in Afghanistan and Iraq does indeed appear to exemplify a form of 'Wilsonianism with boots'.[18] The characterisation does not hold up for the Bush 43 IL policy, however, since the diplomatic history of liberal internationalist thought is inextricably intertwined with multilateralism and a robust role for IL.[19] There is no evidence that the Bush administration ever adopted a strategy to

[13] See George W. Bush & Michael Herskowitz, *A Charge to Keep* (Morrow, 1999), p. 239.

[14] Colin Dueck, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006), p. 150.

[15] See Walter R. Mead, *Special Providence: American Foreign Policy and How It Changed the World* (Routledge, 2002), p. 307.

[16] See Tony Smith, 'Wilsonianism after Iraq', in G. John Ikenberry, Thomas J. Knock, Anne-Marie Slaughter & Tony Smith (eds.), *The Crisis of American Foreign Policy: Wilsonianism in the Twenty-First Century* (Princeton University Press, 2009). Hoff draws a distinction between 'good' and 'bad' Wilsonianism, with the Bush 43 administration falling into the second category: Joan Hoff, *A Faustian Foreign Policy: From Woodrow Wilson to George W. Bush* (Cambridge University Press, 2008), pp. 9–12.

[17] Committee on Foreign Relations, United States Senate, *Senate Committee on Foreign Relations, Nomination of Colin L. Powell To Be Secretary of State*, 1st Session 107th Congress (2001), p. 17.

[18] Pierre Hassner & Nicole Gnesotto, 'The United States: The Empire of Force or the Force of Empire' (2002) 54 *Chaillot Papers* 5, p. 43.

[19] See Anne-Marie Slaughter, 'Wilsonianism in the Twenty-First Century', in G. John Ikenberry, Thomas J. Knock, Anne-Marie Slaughter & Tony Smith (eds.), *The*

strengthen democracy as a constitutive element of the international rule of law, or a belief that IL would in turn strengthen democratic norms. Thus, although the administration repeatedly expressed its faith in the strategic advantages of global democratisation, this did not structure key legal policymakers' conceptions of IL. Even Mead's characterisation of an attempted illiberal nationalist–liberal internationalist ideological fusion acknowledges that the former shaped policy in decisions such as the 2003 Iraq War, and it was only after the fact that justifications were made in terms of the latter.[20] Absent these beliefs, the Bush policy is distinguished from core elements of liberal internationalist IL policy: 'Clinton, not Bush, therefore was the true Wilsonian of our time.'[21]

The most well-known expression of the administration's IL policy was the 2002 *National Security Strategy* (NSS 2002), with two lone references to IL. The first was to 'rogue states', who 'display no regard for international law', thus justifying the principle of relative sovereignty that facilitated much of the administration's military policy in Afghanistan and Iraq.[22] The second reference was in the context of developing the so-called 'Bush Doctrine', which the president himself described as a new US strategic policy to 'confront the worst threats before they emerge'.[23] The NSS 2002 argued the lawfulness of the doctrine by reference to the modern threat of weapons of mass destruction, which required that the United States 'adapt the concept of imminent threat to the capabilities and objectives of today's adversaries'.[24] By removing any of the conventional constraints on self-defence requiring 'imminence',[25] the administration sought to develop law permissively, as an enabling framework rather than one capable of constraining US policy.

IL beliefs within the administration were not monolithic, however, with alternative conceptions competing for influence throughout the

Crisis of American Foreign Policy: Wilsonianism in the Twenty-First Century (Princeton University Press, 2009).

[20] Walter R. Mead, 'The Carter Syndrome', *Foreign Policy*, 4 January 2010, https://foreignpolicy.com/2010/01/04/the-carter-syndrome/.

[21] Anatol Lieven, *America Right or Wrong: An Anatomy of American Nationalism* (Oxford University Press, 2005), p. 12.

[22] The White House, *The National Security Strategy of the United States of America 2002* (2002), p. 14.

[23] George W. Bush, 'Graduation Speech at West Point', 1 June 2002, https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html; The White House, *The National Security Strategy of the United States of America 2002*, p. ii.

[24] The White House, *NSS 2002*, p. 15.

[25] See James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012), pp. 750–2.

first term. Mead characterises Colin Powell as the leading proponent of liberal nationalism, which he expressed through rejecting the Clinton administration's liberal 'overreaching' and a preference for conserving the status quo of US global exposure.[26] Contrarily, Dueck classifies Powell's beliefs as more in line with illiberal internationalism – accepting the desirability of multilateralism but according to a pragmatic worldview consistent with that of Bush 41.[27] Powell's beliefs about IL arguably straddled both these ideologies, in seeking to balance both advantages and dangers in global engagement. Powell accepted the strategic desirability of working through international institutions to advance US national security, including convincing the cabinet in 2002 of the diplomatic advantages of disarming Saddam Hussein through UN processes rather than proceeding immediately to overthrow him militarily.[28] At the same time, he expressed wariness that closer engagement with IL could erode liberal values at home, including rights guaranteed by the American constitution. That combination of beliefs provided a basis for Powell to support the principle of the international rule of law, but within constrained bounds. Powell explicitly distinguished his cautious approach from Senator Helms' opposition to even basic principles of international legal doctrine, including the status of customary IL as law. In the course of Powell's confirmation hearings, Helms posed the question:

> Clinton administration legal scholars have cultivated the notion at home and abroad that murky 'obligations' divined from so-called customary international 'law' and the unratified Vienna Convention on treaties effectively supersede Article II of our Constitution ... Will your State Department continue to perpetuate this unconstitutional myth?[29]

In response, Powell fully accepted that the VCLT codified the US obligation to 'refrain from acts which would defeat the object and purpose of a treaty'.[30] For Powell, this 'logical' position had been accepted as declaratory of customary IL by every administration from President Johnson onward and was therefore binding on the United States.[31]

Powell's beliefs were reinforced by his Legal Adviser William Taft IV, who has cited his attraction to Powell's 'commitment to the rule of

[26] In the form of his equivalent 'Jeffersonian' tradition: Mead, *Special Providence*, pp. 307–8.
[27] In the form of his equivalent 'realist' tradition: Dueck, *Reluctant Crusaders*, pp. 150 & 152.
[28] Bob Woodward, *Bush at War* (Simon & Schuster, 2003), pp. 332–6.
[29] United States Senate, *Nomination of Colin L. Powell*, p. 104.
[30] See *Vienna Convention on the Law of Treaties* (1969), Art. 18.
[31] United States Senate, *Nomination of Colin L. Powell*, p. 104.

law'.[32] Taft explicitly identified American interests in a strategy 'to promote and strengthen international law and international institutions'. Motives included that this represented 'a morally attractive position and that the rule of law in international as well as national affairs is a desirable thing … A stable world where international obligations are undertaken and relied upon is in the interest of the United States as a matter of its own security and prosperity.'[33] At the same time, Taft emphasised that IL remains primarily a consent-based order so that 'a state is not subject to international law unless it agrees to be, and even then it can withdraw its consent as a rule and go back to other remedies for dealing with whatever problems it confronts'.[34]

The figure representing the most dominant approach to US ICC policy during the first term was, however, then Under Secretary of State John Bolton, who wielded an influence beyond his designated office.[35] Taft explains his own more limited role in ICC policy as the consequence of Bolton's decisive opposition, such that 'there was little point in discussing the subject in the abstract'.[36] Then National Security Adviser Condoleezza Rice described a deep ideological 'schism' in the State Department, with Powell representing a more conciliatory approach to international engagement and Bolton representing the 'neocons' and a hawkish uncompromising global stance.[37] In academic writings predating his appointment, Bolton attacked not only the ICC but also the '"agenda" of constraining the US through international law'.[38] Evaluating the previous administration, Bolton charged that Clinton 'forgot that the UN was an instrument to be used to advance

[32] Michael P. Scharf & Paul R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge University Press, 2010), p. 32.

[33] William H. Taft IV, Interview with Author (22 November 2011).

[34] Ibid. For a report on US ICC policy that Taft cites as closely expressing his own views, see William H. Taft IV & Patricia M. Wald, *U.S. Policy toward the International Criminal Court: Furthering Positive Engagement* (The American Society of International Law, 2009).

[35] John P. Cerone, 'Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals' (2007) 18 *European Journal of International Law* 277, p. 293.

[36] Taft, Interview with Author.

[37] Rice, *No Higher Honor*, p. 158. Bolton plays down this distinction but agrees that he and Powell held different 'philosophies': John R. Bolton, *Surrender Is Not an Option: Defending America at the United Nations* (Simon & Schuster, 2007), p. 47.

[38] John R. Bolton, 'Is There Really "Law" in International Affairs?' (2000) 10 *Transnational Law & Contemporary Problems* 1, p. 48.

America's foreign policy interests, not to engage in international social work and ivory-tower chattering'.[39] Bolton often adopted legal positions consistent with illiberal internationalism, but his views consistently gravitated back towards the same illiberal nationalist beliefs as Senator Helms. Helms himself described Bolton as 'the kind of man with whom I would want to stand at Armageddon, or what the Bible describes as the final battle between good and evil'.[40] Significantly, Bolton's legal conception ultimately prevailed in key ICC decisions central to establishing the international rule of law.

Developing Non-arbitrary Global Governance

Following the 1998 Rome Conference, states and NGOs who advocated a legalist ICC design continued to emphasise the necessity of formalised global governance for the rule of law. Tensions inevitably followed as US policy conspicuously reversed from the Clinton years, by opposing further ICC development and any obligations created by its founding statute. At his Senate confirmation, Colin Powell bluntly stated that, as far as Bush's own views on the ICC went: 'The new administration will be opposed.'[41] Most notoriously, Bolton unsigned the Rome Statute in May 2002, describing it as 'the happiest moment of my government service'.[42] No legal policymakers within the Bush administration demonstrated any commitment to the liberal internationalist belief that American interests were advanced through strengthening transnational international criminal law processes. With this being the closest of the American conceptions to legalism, a perception emerged that the rule of law itself had been rejected. Yet, through this period, American legal policymakers continued to emphasise US compliance with international legal obligations, thereby stoking accusations of hypocrisy. The immediate question that arises is thus whether US legal policymakers really recognised the international rule of law in the terms articulated by global counterparts.

[39] John R. Bolton, 'The Creation, Fall, Rise, and Fall of the United Nations', in Ted Galen Carpenter (ed.), *Delusions of Grandeur: The United Nations and Global Intervention* (Cato Institute, 1997), p. 51.
[40] Cited in Sidney Blumenthal, *How Bush Rules: Chronicles of a Radical Regime* (Princeton University Press, 2006), p. 151.
[41] United States Senate, *Nomination of Colin L. Powell*, p. 89.
[42] Bolton, *Surrender Is Not an Option*, p. 85.

Legalist Policy

The ideal of formalising the governance of international criminal law was expressed in a 2003 EU common position and a subsequent 2005 cooperation treaty with the ICC, each confirming the goal of 'consolidation of the rule of law and respect for human rights'.[43] To this end, the EU reaffirmed that 'principles of the Rome Statute of the International Criminal Court, as well as those governing its functioning, are fully in line with the principles and objectives of the Union'. Among the principles for realising the rule of law were that 'universal accession to the Rome Statute is essential for the full effectiveness of the International Criminal Court'.[44] Article 2(1) of the common position sets out the obligation on EU states 'to further this process by raising the issue of the widest possible ratification, acceptance, approval or accession to the Statute and the implementation of the Statute in negotiations or political dialogues with third States, groups of States or relevant regional organisations, whenever appropriate'.[45] This conception of an international rule of law, focused on institutionalised and universal obligations, provides the context for understanding the significance of EU 'disappointment and regret' at the US unsigning decision.[46] The action was characterised as having 'undesirable consequences on multilateral treaty-making and generally on the rule of law in international relations'.[47] Of particular note were perceptions of contradiction, where US policy inflicted a 'potentially negative effect' on a cause to 'which the United States shows itself strongly committed'.[48] The statements revealed a principled commitment to progressively extending global governance, which narrowed states' rights to take discretionary actions in lieu of formalised rules and authority.

[43] EU Commission, 'Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court' (2003) 5 *Official Journal of the European Union* 67, p. 67; Council of the European Union, *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance* (6 December 2005), see preamble.

[44] EU Commission, 'Council Common Position', p. 67.

[45] Ibid., p. 68.

[46] EU, *Statement of the European Union on the Position of the United States towards the International Criminal Court*, P 64/02 Brussels 8864/02 (Presse 141), (14 May 2002), p. 1.

[47] Ibid., p. 2.

[48] Ibid., p. 4.

Beliefs of American Legal Policymakers

Shift from Internationalism

A 2002 report for the US Congress identified the 'main issue' for policymakers as 'the level of cooperation to allow between the United States and the ICC'. Options presented were: 'to withhold all cooperation from the ICC and its member nations in order to prevent the ICC from becoming effective, to continue contributing to the development of the ICC in order to improve it, or to adopt a pragmatic approach based solely on U.S. interests'.[49] These effectively encompassed the competing policies drawn from foreign policy ideology: nationalist opposition to the court, a continuation of liberal internationalist support without acceding to the Rome Statute, and pragmatic illiberal internationalist development of the ICC relationship. Legalist policies, however, remained outside the range of options.

The illiberal nationalist preference of the Bush 43 administration highlighted a growing distinction from the illiberal *internationalism* that had characterised the Bush 41 ICC policy.[50] In Michael Scharf's *Recommendation for the Bush Administration*, the primary architect of the former policy posed a choice between being an 'influential insider or [a] hostile outsider'. Figures such as Senator Helms epitomised the 'hostile outsider' strategy, which would 'transform American exceptionalism into unilateralism and/or isolationism'. So doing threatened to 'erode the moral legitimacy' of the United States, which otherwise facilitated concrete military and economic interests.[51] Because the ICC was already a confirmed reality of the international system, Scharf concluded that the United States could only really sustain illiberal nationalist opposition through hostility toward the international order itself. That possibility sharply divided internationalist and nationalist forms of illiberalism, with Scharf framing his intervention as a 'detached' analysis 'based on *realpolitik* considerations'.[52] Despite apparently similar policy scepticism across the two Bush presidencies, decision-making processes were structured by categorically distinct ideologies.

[49] Jennifer Elsea, *U.S. Policy Regarding the International Criminal Court* (Congressional Research Service, 9 July 2002), p. 3.
[50] See Chapter 4, pp. 125–8, *supra*.
[51] Michael P. Scharf, 'The United States and the International Criminal Court: A Recommendation for the Bush Administration' (2000) 7 *ILSA Journal of International & Comparative Law* 385, pp. 386–7.
[52] Ibid., p. 388.

Hostility toward liberal internationalism was already evident in the weeks leading up to Clinton's decision to sign the Rome Statute, with Helms objecting that 'the President has effectively given his approval to this unprecedented assault on American sovereignty'.[53] During his 1998 appearance alongside David Scheffer before the US Senate Committee on Foreign Relations, John Bolton expressed his view that IL was mere 'sentimentality' and the ICC motivated by an 'unstated agenda of creating ever more comprehensive international structures to bind nation states in general and one nation state in particular'.[54] Rather than interpreting IL in terms of universal values recognised by liberalism, Bolton adopted the prism of particularistic American cultural values, dismissing overwhelming support of European allies by saying 'that is a major reason why they are Europeans and we are not'.[55] The attitude was shared by Bolton's former professor and colleague Robert Bork,[56] for whom the ICC illustrated the 'futility and danger of pretending that there is law' when there remained 'pervasive anti-Americanism in much of the world'. Allowing the ICC to stand would have costs for American soldiers and officials through 'propaganda defeats that may carry weight in both international and domestic politics'.[57] These statements signalled the trend away from the internationalist worldview prevailing since the end of the Cold War toward beliefs that only permissive development of IL could secure American foreign policy interests.

Once appointed as under secretary, Bolton redoubled his opposition, describing the ICC as 'an organization that runs contrary to fundamental American precepts and basic Constitutional principles of popular sovereignty, checks and balances, and national independence'.[58] Consistent with the administration's 'lawfare' concerns, Bolton identified the threat in a strategy of external forces using IL to constrain US power. The EU

[53] Jesse Helms, 'Helms Opposes Clinton's Approval of the ICC Treaty', *Washington File,* 1 February 2001, https://wfile.ait.org.tw/wf-archive/2001/010102/epf206.htm.

[54] Committee on Foreign Relations, United States Senate, *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations United States Senate*, 2nd Session 105th Congress (1998), p. 28.

[55] Ibid., p. 31.

[56] John R. Bolton, 'In Memoriam: Robert H. Bork', American Enterprise Institute, 19 December 2012, www.aei.org/research-products/report/in-memoriam-robert-h-bork/.

[57] Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003), pp. 20–1.

[58] John R. Bolton, 'American Justice and the International Criminal Court', Remarks at the American Enterprise Institute, Washington, DC, 3 November 2003, https://2001-2009.state.gov/t/us/rm/25818.htm.

was singled out to make the case that increasing secularism in the continent had contributed to a new 'theology' centred on 'the pursuit of global governance, and in particular the International Criminal Court'. More particularly, this objective was 'repeatedly and cynically designed to put the United States in an impossible position, with only unpleasant and inconsistent alternatives, in the hope and expectation that we would acquiesce in progress for the ICC in order not to frustrate other important American objectives'.[59] Where the United States was compelled to formulate policy responses to the subject matter of international criminal law, Bolton expressed a preference for transferring cases to domestic courts 'grounded in sovereign consent'.[60] This went beyond mere criticism of the ICC's particular design, instead opposing the very principle of developing global governance to address international crimes. Bork again concurred, attributing 'great credit' to Bush for withdrawing from the treaty regime. He fortified his claim of a court interwoven with anti-American sentiment by recounting the 'cheers and rhythmic stomping' that accompanied US defeat in the final vote of the Rome Conference.[61]

Compatibility of US Policy with the International Rule of Law

Rejection of ICC constraints on US foreign policy did not, however, constitute a denial of IL as an institutional structure with which the United States must engage. Despite campaigning against the ICC, Bolton carefully emphasised US compliance with existing legal obligations. The legal ambiguity of the Bush administration removing any possibility of ICC support, yet leaving its signature on the founding treaty, left Bolton 'determined to establish the precedent, and to remove any vestigial argument that America's signature had any continuing effect',[62] In liberal internationalist terms, signing and creating an obligation 'not to defeat the object and purpose of a treaty' progressed transnational development of IL, even in the absence of ratification.[63] However, as Daalder and Lindsay argue, the Bush administration rejected the idea popular in the Clinton years that 'committing good words to paper would create international norms capable of shaping state behaviour'. Rather, for the Bush administration, 'the benefits of flexibility far outweigh the diplomatic costs of declining to participate in international agreements

[59] Bolton, *Surrender Is Not an Option*, p. 349.
[60] Bolton, 'Remarks at the AEI'.
[61] Bork, *Coercing Virtue*, p. 35.
[62] Bolton, *Surrender Is Not an Option*, p. 85.
[63] See *Vienna Convention on the Law of Treaties*, Art. 18.

that are popular with friends and allies'.[64] In illiberal nationalist terms, IL should be developed solely as a permissive framework, rejecting treaty commitments entailing any constraints.

The unsigning of the Rome Statute was achieved against the wishes of the State Department, but with the urging of the secretary of defense[65] and the support of the president.[66] At his confirmation hearings, Powell noted that the effect of Ambassador Scheffer's signature was that 'in legal terms you sort of bind yourself not to defeat the purpose and objectives of the treaty. But we have no plans to ask for ratification of this treaty.' Helms responded not by denying the obligation, but, rather, by quipping: 'We are going to send somebody down there to strike the signature of that ambassador.'[67] By May 2002, Bolton had relevantly communicated to the UN Secretary General that the United States had no intention to become a party to the treaty and therefore had 'no legal obligations arising from its signature'.[68] This act renounced the legal obligation not to engage in actions inconsistent with the Rome Statute, which had arisen from Clinton's 2000 signature, 'until it shall have made its intention clear not to become a party to the treaty'.[69] In following this procedure, Bolton emphasised US compliance with 'legitimate mechanisms provided for in the *Rome Statute* itself'.[70]

On the day of the unsigning, Under Secretary of State for Political Affairs Marc Grossman articulated the beliefs structuring the Bush ICC policy, beginning with a commitment to 'justice and the rule of law'. Equally identified, however, were beliefs that 'states, not international institutions' upheld this principle, with the ICC itself lacking the 'checks and balances' present in US domestic law. The United States was thus compelled to unsign the statute precisely to uphold its 'leadership role in the promotion of international justice and the rule of law'.[71] Here, Grossman's reasoning followed elements of liberal nationalist beliefs – about the sufficiency of municipal law for upholding democratic rights

[64] Daalder & Lindsay, *America Unbound*, p. 45.
[65] Rumsfeld, *Known and Unknown*, p. 598.
[66] Bolton, *Surrender Is Not an Option*, p. 95.
[67] United States Senate, *Nomination of Colin L. Powell*, p. 61.
[68] John R. Bolton, 'International Criminal Court: Letter to UN Secretary General Kofi Annan', 6 May 2002, https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm.
[69] *Vienna Convention on the Law of Treaties*, Art. 18.
[70] Bolton, 'Remarks at the AEI'. The correctness of this legal claim is generally agreed: see Edward T. Swaine, 'Unsigning' (2003) 55 *Stanford Law Review* 2061.
[71] Marc Grossman, 'American Foreign Policy and the International Criminal Court', Remarks to the Center for Strategic and International Studies, 6 May 2002, https://2001-2009.state.gov/p/us/rm/9949.htm.

and the corrosive effect of IL on these rights. Such a position does not amount to 'isolationism' per se, which would entail structuring IL to achieve a complete separation between the United States and global affairs. It does nevertheless reflect elements of what has often been labelled isolationism, in interpreting the United States' legal interests by reference to its self-sufficient character. Grossman defined US commitment to 'promotion of the rule of law' as protecting independent states that accept 'the challenges and responsibilities associated with enforcing the rule of law'. Grossman's argument shared the liberal preference for 'self-governing democracies' to facilitate the rule of law, but remained distinct from liberal internationalism through primary emphasis on the protective development of IL rather than its role in *strengthening* transnational connections.[72]

Curtis Bradley retrospectively defended compatibility of the policy with the rule of law, which never amounted to 'repudiations of international law'.[73] In relation to Article 18 of the VCLT, the administration 'did not contravene or disregard international law; rather it carefully followed international law governing "unsigning"'.[74] However, this line of argument is effective only to confirm US fidelity to Bradley's own conception of the international rule of law. His commitment is to pragmatically develop IL based on consent as the normative foundation for global governance, while challenging worldviews 'that having more, and more expansive, international rules is always better for the world'.[75] For the actual legalist critics cited by Bradley, these commitments fall short of demonstrating any affinity for the international rule of law. The act of unsigning directly repudiated the formal development of global governance – not just the particular design of the ICC.

Bradley's argument is less persuasive in claiming that the administration 'was not antagonistic to international criminal law, but simply had particular concerns about the structure of the International Criminal Court, concerns that also had been expressed by the Clinton Administration'.[76] This conclusion flows from analysis at the level of IL policy outcomes – according to which there were broad similarities between successive administrations. But disaggregating the beliefs of legal policymakers reveals a crucial distinction between the previous

[72] Ibid.
[73] Bradley, 'The Bush Administration and International Law', p. 59.
[74] Ibid., p. 62.
[75] Ibid., p. 72.
[76] Ibid., p. 62.

liberal–illiberal internationalist contest and the shift to a contest between forms of nationalism–illiberal internationalism. Bradley readily conceded that Bolton was 'openly hostile' toward the UN, but without identifying the degree to which that ideological hostility was constitutive of IL.

Conclusion

The meaning of non-arbitrary global governance remained deeply contested throughout this period. Legalist policy reaffirmed a commitment to the formalised development of ICC obligations, through progressive institutionalisation of the court's judicial supremacy and universal acceptance of its authority. In contrast, US policy sought to curtail the aspirations of the court so far as they placed constraints on US autonomy considered arbitrary. Sands observed critically that the general approach of the administration was inconsistent with the rule of law for insisting that IL 'be enforceable only selectively, and not across the board'.[77] Such selective development did indeed reflect the view of key US legal policymakers, but this does not support the further conclusion that the international rule of law was being consciously rejected. US policymakers maintained the methods and framework of IL while actively opposing the displacement of municipal governance. In this approach, American policymakers maintained fidelity to long-established nationalist conceptions of IL as necessary to uphold not merely US interests but legal principle, too.

Defining Equality under International Law

Fundamental elements of the relationship between states parties and the ICC were largely settled in the Rome Statute itself, finalised prior to the Bush administration entering office. What did receive parties' ongoing attention was the increasingly prominent, but largely undefined, relationship between the ICC and the UNSC and the legal privileges of the P5 therein. From the outset, the legalist position insisted on equality before the law in the form of equal rights and duties of all signatories to the Rome Statute. In particular, limits were established on the power of the P5 to approve ICC investigations and prosecutions. The United States resisted these arguments from the time of the Clinton administration

[77] Philippe Sands, *Lawless World: Making and Breaking Global Rules* (Viking, 2006), p. 60.

onward, consistently pushing for forms of UNSC control over the court. During the Bush 43 administration, this translated into demands that all US military personnel involved in peacekeeping operations be granted formal immunity from prosecution. That was achieved through the passing of UNSC Resolution 1422 of 2002, renewed as Resolution 1487 in 2003.[78] As such, the issue arises of whether and how US legal policy-makers squared legal privileges with equality as a core rule of law principle.

Legalist Policy

For legalist advocates, the guiding principle remained that of upholding equality in the rights and duties of all sovereign states before the court. On the eve of resolution 1422 being passed, EU representative Javier Solana argued that, although the United States was 'quite right to point to its special global responsibilities', equally, 'European nations also have peace-keeping responsibilities, but see no threat to these from the Court'. Solana appealed for the United States to honour the fact that it had 'probably done more than any other country to strengthen the rule of international law in the post-war era . . . So I hope that the United States will think again and let the Court prove its worth.'[79] Bassiouni described the eventual capitulation to US demands for absolute immunity as 'shocking':

> Only those governments who have a disregard for the international rule of law coupled with the arrogance of power, and more particularly for international humanitarian law, could have led these governments to impose these two resolutions.[80]

Similarly, Sands described preclusion of ICC jurisdiction through the UNSC as a question of: 'When can brute political power override the rule of law and legal processes?'[81] Although the resolutions did not single out named states, the intent and effect were clearly to establish distinctive legal rights for the United States. The critiques make clear that the

[78] SC Res 1422, UN Doc S/RES/1422 (12 July 2002); SC Res 1487, UN Doc S/RES/1487 (12 June 2003).

[79] Javier Solana, 'The Intertwining of Security and Economics in Transatlantic Politics', Speech at the Bertelsmann Foundation Transatlantic Strategy Group, Berlin, 11 July 2002, www.cap.lmu.de/download/2002/2002_tsg_solana.pdf.

[80] M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text of the Statute, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2005), p. 144.

[81] Sands, *Lawless World*, p. 58.

primary charge against the United States was of pitting political interest against legal principle, with the triumph of the former.

Beliefs of American Legal Policymakers

Hegemonic Privileges through UNSC Control

Exemptions from ICC prosecution for US peacekeepers made tangible American beliefs 'that it is the exceptional, indeed "indispensable," nation entitled to the benefit of special rules'.[82] In this period the meaning of 'equality' under IL took on the particularistic meanings correlated with prevailing influences of illiberal internationalism and nationalist ideologies. The only meaningful support for the court among these ideological approaches came from illiberal internationalist policymakers, with the exemplar being Jack Goldsmith as Legal Adviser in the Department of Defense and later head of the Office of Legal Counsel in the Department of Justice. His contemporaneous and subsequent writings demonstrate the process by which the administration sought to carve out forms of hegemonic privilege, contrary to the principle of sovereign equality, and yet in furtherance of a coherent conception of the international rule of law.

Goldsmith perceived a conflict at the heart of ICC disagreement between demands for sovereign equality and a countervailing belief in hegemonic privilege as the necessary guarantor for the rule of law. Noting that the outcome of the Rome Conference was 'dominated by weak and middle powers' as well as NGOs,[83] he adopted Kagan's 2002 reasoning that transatlantic divisions in ICC policy reflected 'a broader pattern of middle power (and especially European) efforts to use international law to limit the power of militarily superior nations'.[84] Although this statement was made critically, it would likely be agreed to by the states in question, who did indeed view formal equality as a proper legal constraint on military might. Goldsmith acknowledged that states taking a principled stand was one plausible explanation for opposition to US policy, with legalist 'commitment to the equality of all nations before

[82] John F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004), p. 191.
[83] Jack Goldsmith, 'The Self-Defeating International Criminal Court' (2003) 70 *The University of Chicago Law Review* 89, p. 90.
[84] Ibid., p. 101, n. 50. Citing Kagan, 'Power and Weakness', p. 11.

international criminal law' viewed by other states as necessary for the 'rule of law'.[85]

To this claim, Goldsmith responded that a court designed in such terms was 'unrealistic', above all else, because its design as of 2002 'is, and will remain, unacceptable to the United States'. By way of explanation:

> [T]he ICC depends on U.S. political, military, and economic support for its success. An ICC without U.S. support – and indeed, with probable U.S. opposition – will not only fail to live up to its expectations. It may well do actual harm by discouraging the United States from engaging in various human rights–protecting activities. And this, in turn, may increase rather than decrease the impunity of those who violate human rights.[86]

These observations fitted within a broader conception of IL requiring a foundation not in high-minded aspirations, but in effective political power. To illustrate, the appearance of former Serbian and Yugoslavian president Slobodan Milošević before the ICTY was not achieved through the 'gravitational pull' of properly constituted judicial power, but, rather, through 'U.S. military, diplomatic, and financial might'.[87] This is equally a rebuttal to liberal internationalist arguments that transnational processes create a sense of legal obligation capable of imbuing a 'compliance pull' in IL, independent from enforcement mechanisms.[88] For Goldsmith, there was a 'perversity' in the ICC design in its potential 'chilling effect' on America's 'unique international policing responsibilities' to uphold human rights.[89] In circumstances where the United States was uniquely exposed while fulfilling this global role, the court 'appears to expose the only nation practically able to intervene to protect human rights to the greatest potential liability for human rights violations'.[90] Contrastingly, states that breached international criminal law but were not globally engaged escaped the reach of the court.

In jurisprudential terms, this is a case for institutionalising American hegemonic privilege as a core element of the international rule of law. The unstated belief squaring the account with equality under IL was that rights are defined equal to the *unequal* duties performed by each state in

[85] Goldsmith, 'The Self-Defeating ICC', p. 99.
[86] Ibid., p. 89.
[87] Ibid., p. 93.
[88] See Harold H. Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599, p. 2634.
[89] Goldsmith, 'The Self-Defeating ICC', p. 95.
[90] Ibid., pp. 98–9.

upholding the global system. Goldsmith certainly did not characterise his position in this way, and in fact framed his argument as 'benign hypocrisy that appears to reconcile rule-of-law values with the enforcement asymmetries of international politics'.[91] In other words, he stated his position in terms of the null hypothesis of this book: that the international rule of law had a unified meaning, but that US policy erodes the ideal according to political necessity. The power of ideology as defined here, however, is in structuring the worldview of adherents without any necessary consciousness of shared sets of interrelated beliefs. The structure of Goldsmith's beliefs remains congruent with ideas about IL long established by illiberal internationalist ideology. The argument thus corroborates legal conceptions in which sovereign equality was problematic not merely because it diminished American political influence but also because it diminished the international rule of law itself.

Exceptionalist beliefs were realised in the substantive content of resolutions 1422 and 1487. The resolutions noted that states had different legal obligations depending on whether they were parties to the Rome Statute while emphasising that 'it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council'.[92] That understanding became the basis for tailoring special immunity rights within the law to facilitate the policy objective of ongoing US contributions to international peace and security. The influence of these legal beliefs was further evident in the way the resolutions determined international judicial powers in relation to the ICC. The resolutions made a clear distinction between the obligations of states parties who 'have chosen to accept' ICC jurisdiction and those who have not. The latter were explicitly excluded from the reach of the Rome Statute, but nevertheless undertook to 'continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes'.[93] The influence of illiberal internationalism remained coherent in dividing international legal powers according foremost to state consent.

The internationalist policies advocated by Goldsmith and others frequently melded with more nationalist legal conceptions in this period, but they remained distinct from them through a commitment to

[91] Ibid., p. 104.
[92] SC Res 1422.
[93] Ibid.

maintaining America's global legal presence. From an illiberal nationalist perspective, states should possess a relative sovereignty equal to their alignment with American values and national security. Jesse Helms warned of 'a court run amok', which should be resisted for being controlled equally by states that included 'dictatorships'. That problem was acute where the ICC remained 'immune to a U.S. veto' through the UNSC.[94]

Conclusion

Defining the relationship between states under the ICC regime proved one of the most difficult issues for the first term of the Bush 43 administration. The position of legalist advocates articulated an absolute commitment to sovereign equality as a necessary requirement for upholding the international rule of law. A later UNSC debate about the ICC and the rule of law described resolutions 1422 and 1487 as 'the most controversial and questionable resolutions to come out of the Council . . . [and] contrary to both the Charter of the United Nations and the Rome Statute'.[95] In contrast, the strength of illiberal internationalist conceptions within the administration translated into institutional recognition of American hegemonic privilege as a necessary element of an effective international rule of law. Goldsmith unapologetically asserted:

> The price for a more plausible enforcement mechanism in the ICC context is to make the United States functionally immune, at least in the ICC (as opposed to domestic and other fora), from the enforcement of international criminal law.[96]

In these circumstances, ideology set hard limits to reaching a common position on the definition of 'equality' as an element otherwise agreed as foundational to the rule of law.

Determining International Judicial Power

Through the early years of the court's operation, advocates of a legalist design continued to determine the integrity of ICC judicial power by its separation from executive and legislative powers of

[94] Jesse Helms, *Congressional Record, 107th Congress* (2 October 2001), p. S10042.
[95] UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October 2012), p. 2 per the Liechtenstein delegate.
[96] Goldsmith, 'The Self-Defeating ICC', p. 103.

states. That policy assumed the feasibility of ICC independence, and therefore legitimacy, through supremacy of its judicial power. In contrast, the Bush administration supported domestic legislation intended to reverse that institutional design and subordinate the court's powers to US municipal legal authority. The *American Service-Members' Protection Act* (2002) (ASPA) – colloquially known as the 'Hague Invasion Act' – represented a clear shift from the Clinton administration that had opposed the bill in 2000.[97] The effect of the ASPA was to penalise countries that declined to sign bilateral 'Article 98 agreements' granting ICC immunity for American citizens, while also authorising the recovery of US nationals 'by all means necessary and appropriate' should they nevertheless end up in the court's custody.[98] Through these actions, the ICC's judicial power would be divided and reserved to the US government insofar as it purported to apply to US citizens. The administration went so far as to write to EU governments expressing 'dismay' at what it saw as a campaign 'actively undermining' US initiatives to establish immunities for its peacekeeping forces.[99] These policies contradicted legalist principles of a separation of powers, which therefore cast US policy as contradicting the international rule of law itself.

Legalist Policy

Donald Rumsfeld had rejected the ICC because the court, among other things, lacked adequate checks and balances on its power; diluted the authority of the UNSC; and opened the door to politicised prosecutions of American nationals.[100] Sands responded that what Rumsfeld really objected to was 'that the rules will not allow the United States or other countries to use political power to control the proceedings'.[101] Underlying this argument was an opposition between a legalist conception of law and the contaminating influence of other forms of control over the court's judicial power. Sands reasoned by analogy with

[97] William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2011), p. 31.
[98] *American Service Members' Protection Act* 2002 Pub L 107–206, 116 Stat 82, sec.2008(a).
[99] Gary Younge & Ian Black, 'War Crime Vote Fuels US Anger at Europe', *The Guardian*, 11 June 2003, www.theguardian.com/world/2003/jun/11/usa.eu.
[100] Rumsfeld, *Known and Unknown*, p. 599.
[101] Sands, *Lawless World*, p. 48.

municipal law that, in relation to the court's prosecutorial powers, they 'have to be independent if there is to be any semblance of a rule of law'.[102]

Following the passage of the ASPA, the European Parliament declared that the Act 'goes well beyond the exercise of the United States' sovereign right not to participate in the Court, since it contains provisions which could obstruct and undermine the Court and threatens to penalise countries which have chosen to support the Court'.[103] In legalist terms, this was a criticism of US intent to reclaim elements of the court's judicial power that purported to exclude US municipal legal authority. In a July 2002 European Parliament debate, Europe Minister Bertel Haarder noted the contradictory nature of the ASPA when both the United States and the EU 'uphold freedom, democracy, human rights and the principles of the rule of law'.[104] Then German Foreign Minister Joschka Fischer corresponded personally with Secretary Powell to warn against the 'rift' that the ASPA would cause with the EU. Fischer's primary argument was that, in the joint fight against global terrorism, US obstruction would deny 'an opportunity to fight with judicial means'.[105] This is ultimately the core of the legalist case for demanding separation of powers in the ICC: that a multilateral global institution exercising judicial power independently of political interests is both feasible and desirable.

The Council of the EU responded to the Article 98 campaign with a set of guiding principles stipulating that only persons sent by the US government in an official capacity were to be covered. The effect of the guideline was to accept the exemption of military personnel and diplomatic officials from ICC jurisdiction but to entirely exclude US citizens acting in a non-governmental capacity.[106] That compromise, spearheaded by British diplomats, was criticised by Amnesty International for allowing

[102] Ibid., p. 61.

[103] European Parliament, 'Consequences for Transatlantic Relations of Law on the Protection of US Personnel; European Parliament Resolution on the Draft American Servicemembers' Protection Act', 4 July 2002, www.amicc.org/antiicclegislation.

[104] Bertel Haarder, 'Consequences for Transatlantic Relations of the Law on the Protection of US Personnel: Debate in European Parliament', 3 July 2002, www.amicc.org/antiicclegislation.

[105] Joschka Fischer, 'Text of Letter from German Foreign Minister to Secretary of State Colin Powell Dated October 24, 2001, Delivered on October 31', 24 October 2001, www.amicc.org/antiicclegislation.

[106] The guidelines maintain that the agreements as then drafted remained 'inconsistent with ICC States Parties' obligations with regard to the ICC statute': see Council of the European Union, 'Council Conclusions on the International Criminal Court', 30 September 2002, https://europa.eu/rapid/press-release_PRES-02-279_en.htm.

'the US to shift the terms of the debate from legal principle to political opportunism'.[107] Nevertheless, the Council continued to defend supremacy of the court's judicial power in relation to US nationals not acting as government representatives. The EU's offer was ultimately that it would continue to work with the United States where the objective was 'developing effective and *impartial* international criminal justice'.[108] Underlying commitment to a separation of powers and an independent court remained unchanged as a defining element of the international rule of law.

Beliefs of American Legal Policymakers

The Threat of an Independent Court

The US position on the ICC's legal powers was set out in the NSS 2002, which sought to 'reaffirm the essential role of American military strength. We must build and maintain our defenses beyond challenge.'[109] The relevant section continued:

> We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept.[110]

These sentiments replicated statements that the president delivered earlier that year where he gave an assurance that no member of the American military would appear before an 'unaccountable' ICC or any such 'international courts and committees with agendas of their own'.[111] These jurisdictional interpretations directly addressed proper institutional arrangements for determining the integrity of global judicial powers, which came to be defined by opposition both to legalist arguments for a fully independent court and to liberal internationalist policy that supported a court with independent powers subject to democratic checks and balances.

[107] Ian Black, 'Britain Accused of Sacrificing New Court', *The Guardian*, 1 October 2002, www.theguardian.com/world/2002/oct/01/usa.ianblack.
[108] EU, *Statement of the EU on the Position of the US towards the ICC*, p. 6, emphasis added.
[109] The White House, *NSS 2002*, p. 29.
[110] Ibid., p. 31.
[111] George W. Bush, 'President Salutes Troops of the 10th Mountain Division', Fort Drum, New York, 19 July 2002, https://georgewbush-whitehouse.archives.gov/news/releases/2002/07/20020719.html.

The underlying contention with the ICC's structure of legal power was the implausibility of separating purely judicial power, with the court seen to exercise a form of political power by definition. Bolton characterised the ICC as 'an unaccountable prosecutor, possibly politically motivated, posing grave risks for the United States and its political and military leaders'.[112] For Rumsfeld, the ICC constituted 'a potential lawfare weapon against the United States'.[113] Guided by the principle of protecting 'America's sovereignty', Rumsfeld rejected any legal arrangement that granted legal powers to courts not held accountable by the consent of Americans themselves. He concluded that such 'growing international judicial encroachments on our sovereignty' will erode 'America's willingness to use our military as a force for good around the world'.[114]

During this period, John Yoo wrote to Alberto Gonzales, then legal counsel to the president, to argue that ICC independence could threaten the administration's use of decidedly illiberal 'enhanced interrogation' techniques.[115] Yoo argued that these possible acts of torture 'cannot fall within the jurisdiction of the ICC, although it would be impossible to control the actions of a rogue prosecutor or judge'.[116] The chief mischief lay in the fact that 'the ICC is not checked by any other international body, not to mention any democratically-elected or accountable one'. Citing various scenarios, including that of the rogue prosecutor, Yoo concluded that the Office of Legal Counsel 'can only provide the best reading of international law on the merits. We cannot predict the political actions of international institutions.'[117] Yoo later maintained with Posner that the ICC would 'not be an effective tribunal' for reasons that could be 'traced directly to the independence of the court'.[118] Sands described these as 'extreme views on the ICC' and Yoo's memorandum of advice as 'error-ridden'.[119] Yet the arguments from both Rumsfeld and

[112] Bolton, *Surrender Is Not an Option*, p. 85.
[113] Rumsfeld, *Known and Unknown*, p. 598.
[114] Ibid., pp. 599–600.
[115] Widely agreed to constitute torture: see M. Katherine B. Darmer, 'Waterboarding and the Legacy of the Bybeeyoo Torture and Power Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist' (2008) 12 *Chapman Law Review* 639.
[116] John C. Yoo, 'Letter from the Office of the Deputy Assistant Attorney General to Alberto R. Gonzales, Counsel to the President', 1 August 2002, www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf, p. 1.
[117] Ibid., p. 6.
[118] Eric A. Posner & John C. Yoo, 'Judicial Independence in International Tribunals' (2005) 93 *California Law Review* 1, p. 69.
[119] Sands, *Lawless World*, p. 248.

Yoo were consistent with standard illiberal interpretations of IL drawn from the administration's foreign policy ideology, which rejected the necessity or even compatibility of independent judicial powers with the international rule of law.

The administration's preferred policy was not to consign the subject matter of international criminal law to a legal black hole, but to assert the merits of the supremacy of municipal legal powers. In 2001 David Scheffer was succeeded as Ambassador-at-Large for War Crimes Issues by Pierre-Richard Prosper, who proceeded to advocate hybrid courts constituted at the municipal level as an alternative to the ICC.[120] Prosper testified that the administration remained a committed leader in 'efforts to end impunity by holding perpetrators of war crimes accountable'. He rejected a central ICC role, however, in favour of 'lasting initiatives, especially securing the rule of law'. The United States would not abdicate its responsibilities to this task as part of the 'international community', but nor 'should that responsibility be taken away' from states by international courts.[121] Elsewhere Prosper elaborated that a strengthened ICC would 'undermine the legitimate efforts of member states to achieve national reconciliation and domestic accountability by democratic means'. This returned to previous calls for limiting the reach of formal international rules in order to resolve conflicts through non-binding measures, such as truth and reconciliation commissions. Such were ultimately more likely to create 'a lasting benefit to the rule of law'.[122] It is notable that in a subsequent public address on the topic 'War Crimes in the 21st Century', Prosper failed to even acknowledge the existence of the ICC, let alone US objections, even as he reiterated commitment to accountability for atrocities in Sudan and the rule of law more generally.[123]

Reordering International Judicial Power through the ASPA

The legislative intent of the ASPA can be conceived as a bridge between the Rome Statute and prevailing US ideological preferences. The

[120] See David Bosco, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014), p. 111.

[121] Pierre-Richard Prosper, 'Confronting, Ending, and Preventing War Crimes in Africa', Testimony before the House International Relations Committee, Subcommittee on Africa, 24 June 2004, https://2001-2009.state.gov/s/wci/us_releases/rm/33934.htm.

[122] Office of the Legal Adviser, Department of State, *Digest of United States Practice in International Law: 2004* (International Law Institute, 2006), pp. 180–1.

[123] Pierre-Richard Prosper, 'War Crimes in the 21st Century', Remarks at Pepperdine University, 26 October 2004, https://2001-2009.state.gov/s/wci/us_releases/rm/38309.htm.

preamble warned against exposing American citizens to international judicial power in terms consistent with liberal nationalism and the vertical separation of powers. This included 'procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, such as the right to trial by jury'.[124] The preamble also drew upon illiberal conceptions of law in structuring the ICC regime to ensure that American armed forces and senior government officials remain unimpeded in protecting the 'vital national interests' and 'national security decisions' of the United States.[125] The legislation warned in these terms that the ICC itself threatened to breach IL – either by usurping the role of the UNSC through defining the crime of aggression or by purporting to override US consent as a non-treaty member.[126]

Liberal–illiberal nationalist legal conceptions converged in many respects, with distinct sets of beliefs equally supporting domestic legislation to constrain ICC jurisdiction. Illiberal nationalist conceptions remained dominant in shaping policy, especially as they opposed legalist and liberal internationalist policy. Introducing the ASPA, and its prohibition against US authorities cooperating with the court, was one of Helms' final victories over the ICC.[127] The senator presented the ASPA as a corrective for US failures to secure UNSC control and thus an 'insurance policy for our troops and our officials – such as Secretary of State Powell – to protect them from a U.N. Kangaroo Court where the United States has no veto'.[128] Such illiberal nationalist responses were recognised not as a call for the impunity of American citizens but as a measure to reassert the supremacy of American judicial power.

The influence of liberal nationalist beliefs remained important nonetheless, evident in Powell's support for legislation preventing the external prosecution of American military personnel. Although accepting the principle of an international court, he remained cognisant of threats to constitutional liberties:

> [I]t seems to me to be a very difficult thing to say to an American family, oh, by the way, that youngster may not have the constitutional rights that were given to him at birth or her at birth. So I have always been troubled by that aspect of the court. I could not quite square it with my

[124] *ASPA*, sec. 2002(7).
[125] Ibid., sec. 2002(8)–(9).
[126] Ibid., sec. 2002(10)–(11).
[127] See ibid., sec. 2004.
[128] Jesse Helms, *Congressional Record, 107th Congress*, p. S10042.

understanding of the obligations we had to those youngsters and to their families.[129]

This returned to the principle of a vertical separation of powers whereby an international court could legitimately exercise judicial power, but only where clearly separated from judicial protection of liberal values under the US Constitution. A more hardline liberal nationalist approach was espoused by then Congressman Ron Paul, who argued that the ICC was 'inherently incompatible with national sovereignty'. Specifically, the potential for competing judicial authority presented a 'conflict between adhering to the rule of law and obeying globalist planners' so that 'America must either remain a constitutional republic or submit to international law, because it cannot do both'.[130] Paul presented a resolution to Congress in February 2001 calling on the president to 'declare to all nations that the United States does not intend to assent to or ratify the treaty and the signature of former President Clinton to the treaty should not be construed otherwise'.[131] The resolution focused centrally on the impermissibility of 'a supranational court that would exercise the judicial power constitutionally reserved only to the United States'. This offended the liberal nationalist principle that international and municipal law should govern separate spheres, with the ICC encroaching on 'the legislative and judicial authority of the United States'. The resolution never engaged in bare denials of international legal authority, however, emphasising consent requirements under the VCLT to argue the illegality of the court.[132] For sponsors of the congressional resolution, the international rule of law meant upholding the thin framework of rules facilitating coexistence between domestic jurisdictions, while protecting municipal judicial powers over the subject matter of international criminal law.

The contours of these illiberal and nationalist approaches become clearest when contrasted with the persistence of liberal internationalist beliefs as a minority position during the Bush 43 administration. Senator Dodd remained a leading champion of the ICC cause, arguing that, since the time of the Founding Fathers, the 'long-term security needs of the

[129] United States Senate, *Nomination of Colin L. Powell*, p. 88.
[130] Ron Paul, 'A Court of No Authority', *Texas Straight Talk,* 8 April 2002, http://ronpaulquotes.com/Texas_Straight_Talk/tst040802.htm.
[131] Ron Paul et al., *Expressing the Sense of the Congress that President George W. Bush Should Declare to all Nations that the United States Does Not Intend to Assent to or Ratify the International Criminal Court*, H.CON.RES.23 (8 February 2001).
[132] Ibid.

Nation' were strengthened by globally extending 'inalienable rights' established by the US Constitution. That principle, when combined with unrivalled power, created leadership responsibilities in the United States to establish a system of international criminal justice. Dodd recognised the inconsistency of his worldview with nationalist attempts to 'become a gated community and retreat from international agreements'.[133] With the establishment of the ICC appearing to be politically inevitable, the ASPA would have the effect only of placing US military personnel 'in greater jeopardy than they would be if we were to participate in trying to develop the structures of this court to minimize problems'. Dodd thus advocated sustained US commitment to stay 'at the table to try to work it out so that it becomes a viable product which we can support and gather behind'. The policy of minimising IL in the immediate aftermath of the September 11 terrorist attacks was 'stunning', with the United States traversing from once leading the creation of the UN system to now 'shirking its international duty'.[134] More acutely, in Dodd's worldview it was contradictory for the United States to call for greater international solidarity against terrorism yet, at the same time, signal an intention to act unilaterally through the ASPA.[135] Liberal internationalist preferences were ultimately legislated in the 'Dodd Amendment', which made an exception to prohibitions against US ICC cooperation in cases where the United States could provide 'Assistance to International Efforts' advancing criminal justice.[136]

Swings between competing definitions of US interests certainly confirm a form of political incoherence in US policy outcomes. However, the shifts as identified by Dodd also reveal that each distinct policy was coherent within the terms of an identifiable ideological structure. The complexity of Dodd's own position emphasises the value of ideological context since, as the Rome Statute stood in 2001, he 'would vote against it because it is a flawed agreement'.[137] That appears equally contradictory from a legalist standpoint, which his sentiments otherwise coincide with, but is consistent with his scepticism about the judicial integrity of a court lacking democratic checks and balances. Even this most forceful

[133] Christopher Dodd, *Congressional Record, 107th Congress* (26 September 2001), pp. S9861–2.
[134] Ibid., p. S9860.
[135] Ibid., p. S9861.
[136] *ASPA*, sec. 2015.
[137] Dodd, *Congressional Record*, p. S9860.

American advocate contradicted legalist rule of law principles through remaining faithful to ideological beliefs.

Article 98 Agreements and the Supremacy of American Judicial Power

From the time of the Rome negotiations, Scheffer recalled that the Joint Chiefs of Staff made clear their preparedness to give, in principle, support for the ICC – provided that it was designed as 'subordinate' to and 'strictly an adjunct to national prosecutions'.[138] This was significant evidence that defence officials were prepared to support some form of the court and were not categorically opposed. A specific stipulation was that the ICC could not eclipse a Status of Force Agreement (SOFA) with any country on whose territory US soldiers were based. These agreements upheld the 'sacrosanct' principle that the criminal investigation and prosecution of US military personnel would remain the sole province of US military or federal courts.[139] The Department of Justice joined the calls for a design allowing municipal legal processes to prevail over those of an international court, with relevant legal advisers in both cases expressing commitment to IL, yet in terms of rejecting the separation and privileging of the ICC's international judicial power. Through US insistence, the principle of a consent-based division of powers was ultimately enshrined in Article 98(2) of the Rome Statute, which prevented the ICC from requesting surrender of an accused person if the state having custody had pre-existing obligations not to do so – such as those established under a SOFA.

The United States concluded over 100 Article 98 agreements with global allies pledging to honour this form of ICC immunity. The strategy was fortified by congressional support through the ASPA and its provisions for cutting off military assistance to states who failed to sign agreements. Scheffer considered these agreements inconsistent with interpretative principles under IL, since the original intent of the provision had been to cover US military personnel and diplomatic staff from ICC jurisdiction but not individuals acting in a private capacity.[140] This avoided the appearance of asking for blanket immunity for all Americans, while still addressing internationalist concerns to preserve

[138] Scheffer, *All the Missing Souls*, p. 169.
[139] Ibid., pp. 171 & 175.
[140] David J. Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent' (2005) 3 *Journal of International Criminal Justice* 333, pp. 334 & 338–9; see *Vienna Convention on the Law of Treaties*, Arts. 31 & 32.

a US role enforcing international criminal law. Such a rationale did not therefore extend to non-government representatives who, although US nationals, were not performing legally relevant functions.

Scheffer's critique of Article 98 immunities clearly diverged from illiberal nationalist initiatives as spearheaded by John Bolton. Bolton sought immunity for every American: 'private citizens such as missionaries, journalists, NGO members, businesspeople, even tourists, who could be swept up in a conflict and used as scapegoats simply because they were Americans'.[141] During this period, Lincoln Bloomfield, as Assistant Secretary of State for Political-Military Affairs (and head of the bureau within which Bolton worked), further elaborated on the rationale for the broad immunity, arguing: 'One does not have to hold a view of American exceptionalism to acknowledge the profile and symbolic resonance of the American identity in the world.'[142] The bureau was ultimately animated by the perception of an existential threat to all Americans, thereby justifying structuring IL to enshrine the supremacy of US courts over all Americans in order to uphold the rule of law.

Conclusion

Czarnetzky and Rychlak have described the absence of 'a meaningful political check' on ICC power during its formative years as its most serious deficiency. The objective of removing political judgement was problematic where '[p]olitical negotiations are essential to building a nation where the rule of law can be established and human rights can be respected'.[143] All American legal conceptions shaping the Bush 43 policy challenged the ICC for relying merely on good faith exercise of judicial power.[144] By the end of the period, US policy toward determining the integrity of ICC judicial powers was most consistent with ideological variants of nationalism. The process of developing and promoting the ASPA as a response to the ICC design was supported most forcefully by

[141] Bolton, *Surrender Is Not an Option*, p. 86.

[142] Lincoln P. Bloomfield Jr, 'The U.S. Government and the International Criminal Court', Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, 12 September 2003, https://2001-2009.state.gov/t/pm/rls/rm/24137.htm.

[143] John M. Czarnetzky & Ronald J. Rychlak, 'An Empire of Law: Legalism and the International Criminal Court' (2003) 79 *Notre Dame Law Review* 55, p. 116.

[144] Bolton has said in this context, 'I don't take anything this serious on faith': cited in Erna Paris, *The Sun Climbs Slow: The International Criminal Court and the Struggle for Justice* (Seven Stories Press, 2009), p. 85.

an illiberal nationalist commitment to the supremacy of municipal legal power. The Article 98 agreements had 'almost nil' practical effect on ICC operations,[145] emphasising the degree to which they represented ideological commitments of administration officials. Judicial arrangements located at the municipal level were accordingly held out by American legal policymakers as effective and enforceable against the world. Likewise, the ASPA was underpinned by liberal nationalist preferences to develop a vertical separation between the judicial power of the court and municipal judicial power. Rejecting the separation of powers and ICC independence may have contradicted rule of law expectations of global counterparts, but underlying decision-making processes remained coherent with well-defined legal conceptions drawn from American foreign policy ideology.

Chapter Conclusion

The first term of the Bush 43 administration was marked by clear rejection of legalist prescriptions for realising the international rule of law in the ICC, but equally a rejection of the previous administration's liberal internationalism. The legalist position continued to focus on: a court that progressively developed non-arbitrary global governance through universal acceptance of formalised rules; sovereign equality that prevailed over UNSC privileges; and an independent court separating the ICC's international judicial powers from competing legal and political institutions. American policy responses were never the product of a single conception of the international rule of law and yet, among the ideologies that did compete for influence, the legalist formulation never held any serious sway. The evidence does not support the claim that American policy outcomes represented tactical political calculations compromising commonly held legal ideals. Even in the dramatic act of unsigning the Rome Statute, US policymakers showed deference to the conventions of IL and the legality of opposing the court for perceived failures in advancing non-arbitrary global governance. When arguing for privileges through the UNSC, policymakers defined equality in relation to America's unique global role and exceptional character. Finally, policymakers variously justified the ASPA by reference to the principle of determining the court's judicial power through US consent, of

[145] Caroline Fehl, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford University Press, 2012), p. 98.

maintaining a vertical separation from municipal law, or simply of upholding the supremacy of municipal law.

Sands argued that the only way to explain the virulence of Bush 43 administration opposition was that the court had become 'a useful stalking horse for a broader attack on international law and the constraints which it may place on hegemonic power'.[146] The evidence from this chapter refines that conclusion to argue that the ICC policy was indeed couched in a broader strategy, not of defeating IL per se but of forcefully rejecting the constraining aspirations of legalism and liberal internationalism. The Bush administration's aggressive ICC opposition represented not merely a clash in politics but also the hardening of ideological divisions in the concept of the international rule of law itself. Any realistic prospect of a further policy shift could therefore come only from within American foreign policy ideology, which remained at the ready with alternative, coherent and resonant conceptions of law and American interests.

[146] Sands, *Lawless World*, p. 60.