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Bush 43 Administration, 2004–2008

The sense of ICC policy shifting between the first and second terms of the Bush 43 administration was pronounced enough for the *Wall Street Journal* to report: 'US Warms to Hague Tribunal'. The first term preference 'that countries apply their own versions of international law in their own courts' was observed to shift toward more pragmatic engagement and even tacit endorsement of the court.[1] Perceptions had grown within the administration that US diplomatic influence was being eroded, with incoming Secretary of State Condoleezza Rice describing Ambassador Bolton's antagonistic ICC policy as 'shooting ourselves in the foot'.[2] The evolving policy fuelled optimism among global court advocates that the United States might become more receptive to legalist principles. These remained unchanged, emphasising the progressive formalisation of global governance through the court, the principle of sovereign equality – especially in opposing immunities for non-states parties in UNSC referrals, and the greatest possible separation of the court's judicial power from parallel international legal powers. Softening attitudes to the ICC were indeed more complementary with elements of legalism in accepting a role for the ICC in global governance. However, more tempered rhetoric notwithstanding, the United States ultimately settled on an arm's-length relationship with the court that never included any intention to submit to its jurisdiction.

From the US perspective, the key issue to be settled in the second term was rebalancing toward an internationalist conception of IL. Despite the administration's previous unsigning of the Rome Statute, allowing it as

[1] Jess Bravin, 'U.S. Warms to Hague Tribunal', *The Wall Street Journal*, 14 June 2006, http://online.wsj.com/articles/SB115024503087679549. This piece was reportedly read and discussed by Condoleezza Rice and John Bellinger: David Bosco, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014), p. 123.

[2] Condoleezza Rice, 'Trip Briefing', En Route to San Juan, Puerto Rico, 10 March, 2006, https://2001-2009.state.gov/secretary/rm/2006/63001.htm.

a matter of law to act contrary to the objects and purposes of the treaty, the administration moved to support the treaty both directly and indirectly. Demands ceased for further renewal of UNSC immunity as a precondition to military support for peacekeeping operations. The ASPA was amended to allow for greater cooperation with US allies, and the Article 98 campaign was wound down and eventually halted. The United States thus dropped its insistence on the sole legitimacy of domestic legal processes and recommitted itself to the ICC as a real source of influence in the international legal system. Yet, despite these various acts of re-engagement, the United States continued to make clear its intention not to join the ICC as a state party and to actively oppose the positions of court advocates at every stage. In circumstances where US policymakers continued to express fidelity to the rule of law, there is again a prima facie case of contestation at the level of competing ideologically informed conceptions of the international rule of law.

Dominant Foreign Policy Ideology

Substantial continuity in IL beliefs persisted across both terms of the Bush administration. During his 2004 re-election campaign, Bush continued to dismiss the very concept of the ICC as 'a body based in The Hague where unaccountable judges and prosecutors can pull our troops or diplomats up for trial . . . [I]t's the right move not to join a foreign court . . . where our people could be prosecuted.'[3] There was, however, a turnover in key legal policymakers dealing with the ICC, which 'allowed room for the pragmatists to assume a greater role' in shifting policy toward a more internationalist and therefore accommodating stance.[4] Sands noted that the reality of having to work within a rules-based order was 'belatedly' recognised by this period, although he remained sceptical that this amounted to a meaningful shift in IL policy.[5]

The leading personnel change was the replacement of Colin Powell with Condoleezza Rice as Secretary of State. Statements on IL made across Rice's career reveal a strong adherence to illiberal internationalist

[3] George W. Bush, 'Transcript: What Is Kerry's Position on Pre-Emptive War?', *CNN Politics*, 1 October 2004, http://edition.cnn.com/2004/ALLPOLITICS/10/01/debate.transcript.13/index.html?iref=mpstoryview.

[4] John P. Cerone, 'U.S. Attitudes toward International Criminal Courts and Tribunals', in Cesare P.R. Romano (ed.), *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge University Press, 2009), p. 304.

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

legal conceptions. In an influential 2000 *Foreign Affairs* article, she drew a sharp distinction between her conception of IL and the 'Wilsonian thought' of the Clinton administration.[6] Her criticism of 'at best, illusory "norms" of international behavior' appeared to replicate Bolton's antagonism toward IL, but remained distinct in a commitment to internationalism. Her objection was toward legal policy structured by liberal values of 'humanitarian interests' or a notion of an 'international community'. Rather, she supported 'multilateral agreements and institutions', provided that they were 'well-crafted' to advance narrowly defined national interests and not merely as 'ends in themselves'.[7] In her first town hall meeting as Secretary of State, Rice affirmed that IL 'is critical to the proper function of international diplomacy . . . We depend on a world in which there is some international legal order.' In this, Rice committed to IL developed as a tool for advancing American national security interests. Where 'there are so many countries in the world that don't have our own domestic . . . legal order, we depend on norms of behavior in international politics'. On that basis, Rice declared that the administration would be 'a strong voice for international legal norms, for living up to our treaty obligations, to recognizing that America's moral authority in international politics also rests on our ability to defend international laws and international treaties'.[8] Notably, these statements were taken by outsiders as evidence of the United States' 'commitment to the international rule of law'.[9]

Rice's stated beliefs also revealed the compatibility of her internationalist outlook with elements of illiberal nationalist ideology influencing the administration. In an illuminating exchange during her confirmation hearings, Senator Chris Dodd set his liberal internationalist conception of IL, expressed since the Clinton administration, against Rice's role in developing detainee policy during the first term. Rice described a personal understanding of her legal policymaking role as National Security Adviser, which was not to directly advise the president on law, but rather to consider independent legal advice 'in a policy context'.[10]

[6] Condoleezza Rice, 'Promoting the National Interest' (2000) 79 *Foreign Affairs* 45, p. 47.
[7] Ibid., pp. 47–8.
[8] Condoleezza Rice, 'Remarks at Town Hall Meeting', Dean Acheson Auditorium, Washington, DC, 31 January 2005, https://2001-2009.state.gov/secretary/rm/2005/41414.htm.
[9] Sands, *Lawless World*, p. 240.
[10] Committee on Foreign Relations, United States Senate, *Senate Committee on Foreign Relations, Nomination of Dr. Condoleezza Rice To Be Secretary of State,* 1st Session 109th Congress (2005), p. 117.

Rice maintained that the decision not to apply the Geneva Conventions to certain classes of detainees and the approval of waterboarding as an interrogation technique had been cleared by the Justice Department as 'consistent with our international obligations and American law'.[11]

To this, Dodd responded that fidelity to the international rule of law is not about 'what the law says, not dotting the I's and crossing the T's [sic], but speaking more fundamentally as to who we are as a people'. In discussing the establishment of international criminal justice specifically, the senator argued that what matters is not 'legalisms' but, rather, an IL policy expressing the principle that America is 'very, very different not just in terms of our economic plans and political plans, but how we viewed mankind'.[12] For Dodd, the legitimacy of IL was founded in the extension outward of liberal values at the heart of American constitutional democracy.

Rice responded readily accepting that Americans 'are and have been different' in their liberal values, but did not accept the further proposition that these values must prevail in IL policy. For Rice, there were 'tensions between trying to live with the laws and the norms that we have become accustomed to and the new kind of war that we are in'.[13] Resisting Dodd's argument that Americans and non-Americans alike must be granted liberal equality,[14] the nominee responded obliquely that the administration intended to 'look at what other kinds of international standards might be needed to deal with this very special war because we are a country of laws'.[15] So arguing is consistent with nationalist strands of illiberalism in addition to Rice's internationalist outlook. As Mead argues in relation to his equivalent ideal type, illiberal nationalist duties are owed based on respect for 'an honour code in international life'; those who violate it, 'who commit terrorist acts against innocent civilians', for example, 'forfeit its protection'.[16] The limits of IL in cases involving 'enemy combatants' was defended by Rice on the basis that the persons in question were not themselves 'living up to the laws of war'. Rice

[11] Ibid., p. 118; Condoleezza Rice, *No Higher Honor: A Memoir of My Years in Washington* (Random House LLC, 2011), pp. 117, 121 & 497.
[12] United States Senate, *Nomination of Dr. Condoleezza Rice*, p. 146.
[13] Ibid., p. 118; Rice, *No Higher Honor*, pp. 117, 121 & 497.
[14] See Dodd's argument for the application of the Geneva conventions without discrimination as to nationality: United States Senate, *Nomination of Dr. Condoleezza Rice*, pp. 118–19.
[15] Ibid., p. 147.
[16] Walter R. Mead, *Special Providence: American Foreign Policy and How It Changed the World* (Routledge, 2002), p. 246.

defended the president for an IL policy that 'was consistent with both living up to our international obligations and allowed us to recognize that the Geneva Conventions should not apply to a particular category of people'.[17] This contradicts both legalist and liberal internationalist conceptions of law, which resist sanctioning gaps in the legal framework determining basic rights. In contrast, the idea that the United States could designate gradations of legal rights based on the character of adversaries is entirely in line with illiberal nationalist conceptions of law. Consistent with illiberal ideological perspectives, Rice viewed strained transatlantic relations as 'the mistaken perception that the United States' detention and interrogation policies operated outside the bounds of international law'.[18] Certainly, despite certain misgivings about Bolton's clashes with Powell, Rice had some sympathy for his hardline views against IL.[19] She supported his nomination as UN Ambassador on the basis that 'his skepticism about the organization was an asset with conservatives and, from my point of view, a corrective to the excessive multilateralism of our diplomats in New York'.[20]

At this time, William Taft was also succeeded as Legal Adviser to the State Department by National Security Council Legal Adviser John Bellinger who, above all others, drove the second term shift in ICC policy.[21] Yoo observed that Bellinger 'often shared Taft's accommodating attitude toward international law', thereby resisting illiberal nationalist impulses within the government.[22] Rice had a longstanding close working relationship with Bellinger, characterising his worldview as being that of 'neither a skeptic nor an unthinking proponent of the international community's supposed code of conduct'.[23] Bellinger was sceptical about elements of liberal internationalism, denying that there was 'an incredibly tight connection between promoting the rule of law in individual countries and promoting international law'.[24] He appeared to accept

[17] United States Senate, *Nomination of Dr. Condoleezza Rice*, p. 117.
[18] Rice, *No Higher Honor*, p. 497.
[19] Erna Paris, *The Sun Climbs Slow: The International Criminal Court and the Struggle for Justice* (Seven Stories Press, 2009), p. 60.
[20] Rice, *No Higher Honor*, p. 306.
[21] 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. 137.
[22] John C. Yoo, *War by Other Means: An Insider's Account of the War on Terror* (Atlantic Monthly Press, 2006), pp. 41–2.
[23] Rice, *No Higher Honor*, p. 303.
[24] John B. Bellinger III, Interview with Author (12 January 2012).

Robert Kagan's 2002 thesis, arguing that 'in some European countries, largely as a result of United States' efforts after World War Two, there has been a tendency to "apotheosise" international law . . . as an incredibly holy body. One merely needs to say the words "international law" and many Europeans will sort of worship the concept.' Yet, as head of the Office of the Legal Adviser, he remained committed 'to observe international law because we see that it is in our interests to do so and to always ensure that US actions, to the extent possible, are consistent with international law'.[25]

Bellinger's views were significant in particular because of his greater influence in shaping State Department ICC policy compared to his predecessor. Bellinger attributed the increased role of the Legal Adviser to recognition that marginalising State Department lawyers had eroded national interests.[26] Under Bellinger, there was renewed commitment to 'international legal diplomacy' as a guiding principle for IL policy, consistent with illiberal internationalist commitments.[27] Interwoven through these beliefs were exceptionalist influences, evident in responses to charges of US 'hypocrisy'. This Bellinger defined as the charge of wanting 'justice for others but not for the US'. He contended: 'The problem is that the US really *is* differently situated and . . . we are uniquely called upon to be the policeman around the world.'[28] The United States has thereby demanded that IL encompass its 'unique role and interests' flowing from global power, as well as its 'historically rooted suspicions of institutions with unchecked powers'.[29] These sets of rule of law beliefs became pivotal to the internationalist policies that came to define the second term.

Developing Non-arbitrary Global Governance

The ongoing vision of legalist advocates remained consolidation of the ICC as a core component of global governance architecture. That entailed measures to formally integrate the ICC into established governance frameworks

[25] Ibid.
[26] Scharf & Williams, *Shaping Foreign Policy in Times of Crisis*, p. 136.
[27] Ibid., p. 137.
[28] John B. Bellinger III, 'Interview with John Bellinger', International Bar Association, 9 November 2010, www.ibanet.org/Article/Detail.aspx?ArticleUid=37f4f087-bc3a-4c21-a108-92f15391785c, emphasis added.
[29] John B. Bellinger III, 'The United States and the International Criminal Court: Where We've Been and Where We're Going', Remarks to the DePaul University College of Law, 25 April 2008, https://2001-2009.state.gov/s/l/rls/104053.htm.

to ensure uniformity in the application of international criminal law. For its part, the United States continued to strongly express support for the principle of international criminal accountability, including a shift to publicly acknowledge the ICC as a legitimate feature of the international system. However, the Bush administration also continued to argue for the equal legitimacy of alternative forms of accountability that had the effect of limiting the reach of global governance. The seeming legal inconsistency in the US position again raised questions about the role of ideological rule of law beliefs in explaining such divergent outcomes.

Legalist Policy

During this period, the ICC concluded agreements with the UN and the EU to consolidate its formal role in existing networks of global governance. The preamble to the 2004 UN agreement affirmed that 'the International Criminal Court is established as an independent permanent institution in relationship with the United Nations system'. Under Article 2(1), the UN 'recognizes the Court as an independent permanent judicial institution' possessing 'international legal personality'. The preamble to the 2006 EU agreement confirmed 'the fundamental importance and the priority that must be given to the consolidation of the rule of law and respect for human rights and humanitarian law'.[30] In recognising the ICC's role in global governance, the EU further reaffirmed commitment to advancing 'universal support for it by promoting the widest possible participation in the Rome Statute'. Both agreements identified an objective of 'facilitating the effective discharge of their respective responsibilities' (of the ICC, the UN and the EU) toward developing global governance. These intentions to entrench ICC authority did not go unnoticed by America's UN Ambassador John Danforth. In classified communications, he warned that language that 'treats the ICC as an integral part of the international landscape' now regularly appeared in UN resolutions.[31]

Legalist advocates clearly set themselves against any design derogating from formalised global governance. In 2004 the UNSC commissioned the *International Commission of Inquiry on Darfur* to investigate alleged

[30] *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* (2004), Art. 3; *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance* (2006), Art. 4.

[31] John C. Danforth, 'Peace and Accountability: A Way Forward', 7 January 2005, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB335/Document4.PDF.

crimes in the Darfur region of Sudan (Darfur situation) and recommend appropriate accountability measures.[32] The commission was chaired by leading ICC advocate Antonio Cassese, and concluded that the ICC was 'the only credible way of bringing alleged perpetrators to justice'.[33] In so concluding, the commission referenced the legal flaws in permitting domains of international affairs to remain the province of non-uniform or diplomatic solutions. To the US preference for a hybrid court, the commission noted that 'many of the Sudanese laws are grossly incompatible with international norms'. Contrastingly, the implementation of IL through a formalised institution at the global level would ensure uniformity in legal rights and duties: '[T]he ICC constitutes a self-contained regime, with a set of detailed rules on both substantive and procedural law that are fully attuned to respect for . . . fundamental human rights.'[34] Formalised and universal legal rules were not merely a matter of practical justice; they went to the heart of the meaning of the international rule of law.

Beliefs of American Legal Policymakers

Defining Pragmatic Limits to ICC Authority

The re-emergence of illiberal internationalism was succinctly contained in John Bellinger's statement that the administration's 'general approach to international courts and tribunals is pragmatic'. International courts were foremost 'potential tools to advance shared international interests in developing and promoting the rule of law, ensuring justice and accountability, and solving legal disputes'.[35] That framing pointedly does not endorse the role for the court proposed in the UN and EU ICC agreements. There, the court held a privileged status for embodying progressive development of global governance in the domain of criminal law. The conception advocated by Bellinger instead maintained that US accession to the Rome Statute would not in itself demonstrate 'deeper commitment to the rule of law and [prove] . . . us to be better

[32] Pursuant to SC Res 1564, UN Doc S/RES/1564 (18 September 2004).

[33] Antonio Cassese et al., *Report of the International Commission on Darfur to the United Nations Secretary-General*, Pursuant to Security Council Resolution 1564 of 18 September 2004 (25 January 2005), p. 146; SC Res 1593, UN Doc S/RES/1593 (31 March 2005).

[34] Cassese et al., *Report of the International Commission on Darfur*, p. 147.

[35] John B. Bellinger III, 'International Courts and Tribunals and the Rule of Law', in Cesare P.R. Romano (ed.), *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge University Press, 2009), p. 2.

international citizens'. To the contrary, US scepticism was said to show 'how seriously we take international law. Embracing the Rome Statute in spite of our serious concerns could only reflect a cavalier attitude towards the Court and international law more generally.'[36] This foremost rebuffed legalist demands for the progressive formalisation of legal obligations, but also contradicted liberal internationalist beliefs in the value of symbolically aligning US policy with legal principles. Rather, for Bellinger, global governance was assigned to the ICC only to the extent that it directly complemented American national security interests, with the United States otherwise demarcating the pragmatic limits of the legal regime.

Although Bellinger acknowledged that the ICC 'has a role to play in the overall system of international justice',[37] he did so seeking to 'agree to disagree' – favouring the term *modus vivendi* to describe the new position.[38] The underlying principle was that the shared ends of 'promoting international criminal justice' remained 'far more important than the means by which we seek them'.[39] In practical terms, this was an argument for circumscribing the role of the ICC, not in opposition to international criminal justice but in the belief that it would enhance its practical realisation. The goal in the EU-ICC agreement of securing universal membership was characterised as 'counterproductive' by Bellinger for impeding a practical working relationship with the United States. Rather, 'ICC supporters will ultimately have to decide which they value more: hewing to an idealistic commitment to universality or pursing practical efforts to build an effective court'.[40] Provided the United States then complied with these predetermined obligations, the conception offered an ideal of non-arbitrary global governance.

Providing analysis at the level of legal beliefs takes on a special importance where policymakers themselves have drawn attention to outcomes rather than decision-making, to make the case for continuity. Bellinger has consistently argued, both during his time in office and subsequently, that US ICC policy has been basically unchanged – across and within US administrations. In his view presidents and congresses have differed according to 'the tone and means' by which they express concerns, but

[36] John B. Bellinger III, 'Reflections on Transatlantic Approaches to International Law' (2007) 17 *Duke Journal of Comparative and International Law* 513, p. 520.
[37] Bravin, 'U.S. Warms to Hague Tribunal'.
[38] Bellinger, Interview with Author.
[39] Bellinger, 'The US and the ICC'.
[40] Ibid.

there is otherwise a 'relatively straight line' running through US ICC opposition.[41] Focusing at the level of competing ideologies, however, provides the true measure of policy discontinuity, even between the first and second Bush 43 terms. Bellinger argued that 'people misread the Bolton letter' (notifying the 2002 unsigning decision) as evidence of a deeply conflicted US attitude toward the ICC. While the letter has been interpreted as expressing 'in aggressive or confrontational terms U.S. rejection of the ICC', Bellinger instead saw it as an attempt to clarify the nature of US obligations in conformity with treaty law.[42] Nevertheless, Bellinger's own stance on the ICC's role in global governance reveals a real shift toward pragmatic development, whereby the United States readily supports global institutions so far as they advance national security interests, while clearly distinguishing the domain of diplomatic or non-legal forms of resolution. Bellinger suggested that the 'warming' of relations reported in the 2006 *Wall Street Journal* article 'overstates the case', but that it did accurately reflect the strong desire to reach a practical understanding with the court.[43] This IL policy constituted a categorical shift away from ideological beliefs that structured decision-making in the first term.

At the level of analysing legal conceptions, Bolton's illiberal nationalist interpretation of ICC obligations *was* precisely intended to be 'aggressive or confrontational'. Bolton was nominated as UN Ambassador at a time when the United States had shifted from unyielding ICC opposition, to agreeing not to block the UNSC referring an investigation into the Darfur situation. In Bellinger's words, where there were 'no other ways to achieve accountability for the genocide in Sudan, then we don't have any problem abstaining'.[44] Bolton strongly rejected any such investigation at the level of international legal governance, dismissing EU advocates as frivolously 'getting out their wig boxes and preparing to go to court'. US acquiescence amounted merely to 'a gesture to the EUroids, which they cynically pocketed, knowing they had a precedent they could and would use against us later'. Instead the United States 'should have voted "no," insisting on actually doing something', such as establishing an ad hoc international tribunal following the model of the Extraordinary Chambers in the Courts of Cambodia.[45] Beliefs that IL should develop

[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Cited in Bosco, *Rough Justice*, pp. 111–12.
[45] John R. Bolton, *Surrender Is Not an Option: Defending America at the United Nations* (Simon & Schuster, 2007), pp. 360–1.

permissively, solely to enable US autonomy, remained distinct from the pragmatic development advocated by Bellinger.

The predominant strategic conclusion by this period was that uncompromising opposition to the ICC had harmed American interests. Ambassador Danforth warned against cases such as the Darfur situation, in which the United States was forced to abstain or even vote against UN resolutions mentioning the court, even where they advanced national interests. He recommended that the United States instead pass an 'agreement to disagree' resolution permitting greater flexibility in US voting. Such a resolution would affirm that states were governed by separate jurisdictional regimes, depending on whether they were parties to the Rome Statute, but that each approach equally represented a legal commitment 'in accordance with international standards of justice, fairness and due process of law'.[46] Permissive development had previously been followed, whereby officials avoided any acknowledgement of the court lest it embolden pretensions to constrain US policy. Policy now shifted to a pragmatic development of global governance as most consistent with an effective international legal system.

The new attitude was clear in US responses to the 2004 ICC-UN negotiated agreement and its objective of consolidating the place of the ICC in global governance. Deputy Legal Adviser to the US Mission to the UN Eric Rosand reiterated to the UNGA that the ICC 'is not part of the UN Charter System' and as such should not be treated as having an equivalent status.[47] Most significantly, Rosand reaffirmed 'U.S. commitment to accountability for war crimes, genocide, and crimes against humanity', but in a form contrary to the development of global governance advocated by ICC supporters. Rather, this commitment was demonstrated in a US record 'second to none in holding its own officials and citizens accountable for such crimes, as well as for supporting properly constituted international war crimes tribunals'. Rosand concluded: 'Properly understood, therefore, our decision not to support the ICC reflects our commitment to the rule of law, not our opposition to it.'[48] This reasoning is a repudiation of rule of law ideals embedded in the ICC-UN agreement, which seeks to invoke UN Charter commitments to the progressive development of IL. Viewed within the structure of ideologically informed American conceptions, however, the reasoning assumes a coherence it otherwise lacks.

[46] Danforth, 'Peace and Accountability'.
[47] Cited in Sally J. Cummins (ed.), *Digest of United States Practice in International Law: 2004* (International Law Institute, 2006), p. 177.
[48] Ibid., p. 178.

Resistance to accepting the ICC as a core institution of global governance remained strong to the end of the administration. US Deputy Representative at the UN Ambassador Alejandro Wolff rejected a 2007 UNGA resolution that confirmed 'the role of the International Criminal Court in a multilateral system that aims to end impunity, establish the rule of law, promote and encourage respect for human rights and achieve sustainable peace'.[49] Wolff responded that the resolution failed to acknowledge that US rights remained outside the regime, thereby demonstrating that its sponsors and members of the LMS

> view such a basic expression of respect as inconsistent with their aspiration of universal membership of the ICC, as if it is, in fact, somehow illegitimate for a state to choose not to become party to the Rome Statute. By their actions, they have made clear that the pragmatic *modus vivendi* that we have been seeking to promote is simply not working.[50]

The frustration arose directly from the fault line between the legalist conception that *did* view US obstruction to the development of global governance as illegitimate, and the belief by US legal policymakers that pragmatic development remained a legitimate strategy for advancing the international rule of law.

Too Legalistic or Too Political?

The prevalent alternative explanation for outcomes in this period is that US legal policymakers sought to mitigate global criticism by engaging in tactical compromises between a unified rule of law ideal and US political interests. In this vein, a specific claim made by some US policymakers is of a shift from *excessive* attention to law in the first term to more politically informed decision-making in the second. Philip Zelikow served as Counselor of the US Department of State through the second term, having previously drafted the NSS 2002 that introduced the legal argument for 'pre-emptive' self-defence in the War on Terror.[51] For Zelikow, there was an unwarranted reliance on lawyers in the first term, who thought in terms of 'a binary division between the world of policy judgment and the world of

[49] GA Res 62/12, UN Doc A/RES/62/12 (26 November 2007).

[50] Cited in Sally J. Cummins (ed.), *Digest of United States Practice in International Law: 2007* (International Law Institute, 2008), p. 181.

[51] James Mann, *Rise of the Vulcans: The History of Bush's War Cabinet* (Viking, 2004), pp. 316–17 & 331. Zelikow attributes authorship of the doctrine to Bellinger: Philip D. Zelikow, 'In Uncertain Times: American Foreign Policy after the Berlin Wall and 9/11', 13 October 2011, www.wilsoncenter.org/event/uncertain-times-american-foreign-policy-after-the-berlin-wall-and-911. That claim is expressly refuted by Bellinger: Bellinger, Interview with Author.

legal analysis'.[52] The consequence was an approach to national security questions 'less as a detailed analysis of what *should* be done, and more as a problem of what *could* be done'.[53] Bradley concurs that the administration demonstrated 'an almost obsessive attention to international legal process'. The lesson learnt was that, although the 'rule of law promotes important values, framing questions in legal terms can sometimes produce undesirable outcomes'.[54] Zelikow and Bradley both commended the 'pragmatic' return to reasserting diplomatic interests over legal doctrine.[55] Rice offers some corroboration, in recalling that President Bush's first question when faced with proposed 'enhanced interrogation' techniques was whether they were legal, and then holding off interrogations until assurance was received. Rice remained faithful to Justice Department guidance, since she 'would never have engaged in – or encouraged the President to undertake – activities that I thought to be illegal'.[56]

The account of too much legality contrasts dramatically with the interpretation of Sands and others, for whom the first term was dominated by political interests and only belatedly began to acknowledge IL obligations.[57] The contradiction cannot be resolved merely by analysing US policy in terms of the opposition between law and politics, as each side has sought to do. Rather, the most coherent explanation is that of competing underlying conceptions of law, which were themselves constituted by politics. First term IL policy did rely on legalistic justifications, but it would be implausible to characterise these as strategically neutral for that reason.[58] Rather, commitments were consistently structured by an illiberal nationalist conception of IL as a permissive legal framework enabling almost unconstrained discretion to implement substantive foreign policy decisions. Zelikow's analysis chiefly considered legal justifications for detainee treatment in the War on Terror, but is equally relevant to interpreting ICC policy. In these cases, administration lawyers defined IL as malleable almost

[52] Philip Zelikow, 'Codes of Conduct for a Twilight War' (2012) 49 *Houston Law Review* 1, p. 5.
[53] Philip Zelikow, 'Legal Policy for a Twilight War' (2007) 30 *Houston Journal of International Law* 89, p. 94.
[54] 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. 74.
[55] Ibid., p. 58; Zelikow, 'Codes of Conduct for a Twilight War', pp. 107–9.
[56] Rice, *No Higher Honor*, pp. 117–20.
[57] See Sands, *Lawless World*, p. xix.
[58] For a response to Zelikow see David Cole, 'The Taint of Torture: The Roles of Law and Policy in Our Descent to the Dark Side' (2012) 49 *Houston Law Review* 53.

without limit in order to accommodate ideologically informed national security and cultural values.

Conclusion

Throughout the second term of the Bush administration, the ICC sought to consolidate its status as the principal institution of global governance in international criminal law. This was reflected in agreements with the UN and the EU, each confirming that formalised role. As for the United States, there was a meaningful shift in IL policy along the governance dimension – from the more nationalist conception of the first term treating municipal law as sufficient to advance American interests, to an internationalist stance seeking to advance those interests through IL. In Bellinger's terms, the shift was to 'a very pragmatic approach to the ICC in the second term that was really substantially different from the first term'.[59] Such softening of objections to the ICC may be read as signalling a US position moving closer to legalist ideals for the court. Yet the consistency of the underlying beliefs of policymakers with illiberal internationalist legal conceptions reiterates that US policy continued to be structured by fundamentally different ideological understandings of the international rule of law itself. On the evidence, at no point in this period did legalist conceptions form a meaningful element of American IL policy.

Defining Equality under International Law

US demands to carve out unequal legal privileges through UNSC resolutions were strongly opposed by other states from the earliest years of negotiating the Rome Statute. By the second term of the Bush administration, legalist policymakers focused efforts on opposing US demands for further renewal of Article 16 UNSC immunity, as a precondition to supporting peacekeeping operations.[60] It was during this period that the UNSC decided to refer the Darfur situation to the ICC, as a possible genocide case. That became a test for the United States to demonstrate how committed it was to opposing a court based on the principle of sovereign equality. Bush's IL policy notably relented, dropping demands for renewal of ICC immunity through the UNSC and acquiescing to the

[59] Bellinger, Interview with Author.

[60] See *Rome Statute*, Art. 16 'Deferral of investigation or prosecution'; SC Res 1422, UN Doc S/RES/1422 (12 July 2002); SC Res 1487, UN Doc S/RES/1487 (12 June 2003).

Darfur referral. In both cases, the outcome for US policy was to move toward a position more consistent with legalist preferences for the court. The outcome raises an intriguing challenge for the argument that foreign policy ideology creates hard limits to reaching a common conception of the international rule of law. An examination of beliefs structuring decision-making is necessary to determine whether the case supports or falsifies this book's central claim for the controlling role of ideology.

Legalist Policy

UNSC exemptions granted to US peacekeepers were always considered contrary to sovereign equality, as a core rule of law principle. In June 2004, when the United States insisted on its third annual renewal, UN Secretary General Kofi Annan responded that, in light of a developing prisoner abuse scandal in Iraq, it would be improper both for the United States to request an exemption and for the UNSC to grant it: 'It would discredit the Council and the United Nations that stands for rule of law and the primacy of rule of law.'[61] Entailed in this admonition was an insistence that rules of IL within the court's jurisdiction be applied equally to all states without allowances for any claimed special character, rights, or duties. NGO groups similarly referenced legalist principles defining the proper relationship between sovereign states. The CICC commended eventual US withdrawal of the renewal request, which 'reflected the growing international support for the ICC and the diminishing capacity of the US to stand above international law'.[62] Similarly, Amnesty International found the immunity resolutions problematic not merely for undermining the ICC and IL more generally, but because they were for that reason 'unlawful'. Amnesty head Irene Khan described the failure of the United States to gain the renewal as 'a victory for international justice and the rule of law'.[63]

At this time the UNSC also moved to refer the Darfur situation to the ICC, pursuant to Chapter VII of the UN Charter.[64] This followed the

[61] Colum Lynch, 'Annan Opposes Exempting U.S. from Court', *The Washington Post*, 18 June 2004, www.washingtonpost.com/wp-dyn/articles/A50531-2004Jun17.html.

[62] Cited in CICC, 'Chronology of the Adoption of Security Council Resolutions 1422/1487 and Withdrawal of the Proposed Renewal in 2004', Factsheet, 2004, www.iccnow.org/documents/FS-1422and1487Chronology_26March2008.pdf last accessed 27 February 2015.

[63] Amnesty International, 'US Withdrawal: Determination of International Community Is "Victory for International Justice and the Rule of Law," says AI', Amnesty International Press Release, 24 June 2004, www.amnesty.org/download/Documents/96000/ior300162004en.pdf.

[64] *Rome Statute*, Art. 13(b); SC Res 1593.

recommendation of the *International Commission of Inquiry on Darfur* in circumstances where a UNSC referral under Article 13(b) of the Rome Statute was the only way to exercise jurisdiction over Sudan, as a non-state party.[65] The existence of that power contradicted legalist insistence on sovereign equality, but it had been a concession at the Rome negotiations. In these circumstances, statements of support for the referral sought to frame the power as one being exercised on behalf of all states equally, rather than by the P5 in their own right. The *International Commission* report, for example, supported the appropriateness of the referral as a statement on behalf of 'the whole world community through its most important political organ'.[66] Similarly, in an open letter to Condoleezza Rice, the Executive Director of Human Rights Watch challenged the legitimacy of the US veto powers when exercised as parochial privilege.[67] Rather, the P5 powers were construed as legitimate when voicing the equal interest of all states in the ICC.

US insistence on a form of immunity in Resolution 1593 led Brazil, which then held the rotating UNSC presidency, to abstain from the vote. Despite confirming its support for the referral, Brazil's representative protested that the 'maintenance of international peace and the fight against impunity cannot be viewed as conflicting objectives'.[68] Brazil 'rejected initiatives aimed at extending exemptions of certain categories of individuals from ICC jurisdiction' as contrary to international criminal justice. Divergence between the assumption of sovereign equality and the competing principles structuring American IL policy fortified claims that the United States was contradicting its claimed commitment to the international rule of law.

Beliefs of American Legal Policymakers

Contradiction of Exceptionalist Beliefs in US Prisoner Abuse Scandals

In 2005, then Senator Hillary Clinton continued to defend American IL policy in broadly internationalist terms, emphasising principles of both liberal equality and hegemonic privilege. Clinton reminded European critics:

[65] Sudan signed on 8 September 2000 but failed to ratify the treaty.
[66] Cassese et al., *Report of the International Commission*, p. 149.
[67] Kenneth Roth, 'U.S.: ICC Best Chance for Justice in Darfur', Letter to Condoleezza Rice, 22 January 2005, www.hrw.org/news/2005/01/21/us-icc-best-chance-justice-darfur.
[68] Representative Ronaldo M. Sardenberg for Brazil: UN, *Record of the 5158th Meeting of the United Nations Security Council, Sudan,* UN Doc S/PV.5158 (31 March 2005), p. 11.

> [T]he United States has global responsibilities that create unique circumstances. For example, we are more vulnerable to the misuse of an international criminal court because of the international role we play and the resentments that flow from that ubiquitous presence around the world.[69]

Clinton thus framed the 'lawfare' threat as the direct cost of exceptionalist American duties: of legalist judicial institutions being used to constrain the United States and thereby eroding not merely its global power but also the international legal system it underwrote. Where Clinton sought to speak for 'all of those people looking at us and yearning to be part of what we are',[70] her determination of the proper relationship between sovereign states reflected the ideological commitment to principles of liberal equality.

The significance of exceptionalist beliefs to American legal conceptions became strongly apparent in the second Bush 43 term, but in the unique circumstances of their *elimination* from policymaking processes. Schabas documented the first sign of a shift in ICC policy from 2004, when the United States backed down on requested renewal of UNSC resolutions granting peacekeepers ICC immunity.[71] The turning point was revelations about the abuses in Abu Ghraib Prison in the aftermath of the 2003 Iraq War: '[s]hamed and humbled by the tales of abuse', the United States withdrew its deferral resolution.[72] The significance of prisoner abuse scandals in Afghanistan, Guantanamo, but especially Abu Ghraib, was that they provided compelling evidence *against* US political culture being a sufficient check against international illegality. In terms of the theoretical framework adopted here, any piercing of the exceptionalist veil would be expected to undermine US commitment to legal conceptions drawn from associated ideologies. If foreign policy ideology does play a meaningful role in structuring IL policy, then the

[69] Hillary Rodham Clinton, 'Excerpts from Remarks of Senator Hillary Rodham Clinton German Media Prize Dinner', 13 February 2005, https://web.archive.org/web/20050315191146/http://clinton.senate.gov/~clinton/speeches/2005217C29.html. When asked if this statement demonstrated a belief that it was necessary to exempt the US from ICC jurisdiction to uphold the international rule of law, Taft responded, 'I don't think she really believed that . . . It's more of a political judgement.' William H. Taft IV, Interview with Author (22 November 2011).

[70] Clinton, 'German Media Prize Dinner'.

[71] William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2011), p. 31.

[72] Ibid., p.32. On the prisoner abuse scandal, generally, see Diane M. Amann, 'Abu Ghraib' (2005) 153 *University of Pennsylvania Law Review* 2085.

United States would become more likely to accede to legalist demands for sovereign equality – even as political interests were held constant.

Rice accepted that the images from Abu Ghraib diminished global perceptions of 'America as something different'.[73] She later lamented the lasting damage caused when 'the image of the U.S. soldier around the world became associated with the depravity of Abu Ghraib'.[74] Translation of this recognition into IL policy was evident in Ambassador Danforth's classified communications, which advised that failure to renew UNSC Resolution 1487 was 'principally because it came up at the same time as the Abu Ghraib abuses came to light'.[75] Bassiouni explained that the examples 'evidenced to the international community the need for accountability', and most especially for the United States, who had claimed that 'its system of criminal justice is better than that of most other countries and that its system of military justice can be relied upon to perform its mission without international monitoring'.[76] To the contrary, Amnesty International argued that the scandal demonstrated 'blatant disregard being shown for the rule of law, and the Bush Administration should be doing everything in its power to support the principles embodied in the ICC'.[77]

That these circumstances led to the withdrawal of US demands for hegemonic privilege, or even for deference to the interests of liberal equality, is compelling evidence of the extent to which foreign policy ideology was structuring conceptions of IL. Once the foundation of exceptionalist beliefs was fractured, the entire edifice of distinctive interpretations of the rule of law collapsed. The only coherent legal policy remaining that did not depend on exceptionalist beliefs was that of legalism. Following the lapsing of Resolution 1487, US policy accepted a legal status in UN peacekeeping missions that, formally at least, was as a sovereign equal. The policy outcome in this narrowly defined area therefore provided an insight into US legal policy stripped of its exceptionalist foundations – which, through its absence, confirmed the power of foreign policy ideology.

[73] United States Senate, *Nomination of Dr. Condoleezza Rice*, p. 147.
[74] Rice, *No Higher Honor*, p. 274.
[75] Danforth, 'Peace and Accountability'.
[76] 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), pp. 143–4.
[77] Amnesty, 'US Withdrawal'.

Reframing UNSC Referral of the Darfur Situation

The shift in US policy culminated in tacit support for a UNSC referral of the Darfur situation in March 2005, described by David Bosco as a 'major breakthrough'.[78] The congruence of the shift with the model of legal conceptions is evident in a prescient statement five years earlier by Michael Scharf, which had advocated the illiberal internationalism that made such a comeback in Bush's second term. In reference to evidence of rising illiberal nationalist hostility in the first term, Scharf warned that IL must be preserved as a diplomatic tool since 'when the next Rwanda-like situation comes along, the Bush administration will find value in having the option of Security Council Referral to the ICC in its arsenal of foreign policy responses'.[79] That was precisely the realisation reached in coming to see the ICC as the best forum for fulfilling US interests in the case of a humanitarian crisis not directly involving American security interests.

Goldsmith provided the most explicit defence of the Darfur referral in illiberal internationalist terms. In *The Washington Post* he reminded the administration that a successful UNSC referral reinforced the wisdom of the original US demands for an international court under UNSC control. Goldsmith readily acknowledged the inconsistency of UNSC control with sovereign equality, which critics would likely reject as 'a double standard for Security Council members, who can protect themselves by vetoing a referral'. Yet, rather than defending the US position as consistent with sovereign equality, he instead observed that

> this double standard is woven into the fabric of international politics and is the relatively small price the international system pays for the political accountability and support that only the big powers, acting through the Security Council, can provide.[80]

This is an assertion of hegemonic privilege as an element of the international rule of law: that IL must be harnessed to the realities of political power if it is to be a meaningful force in ameliorating raw political ambition. Bosco characterised Goldsmith as effectively calling for the United States 'to informally merge the court into the system of major-

[78] Bosco, *Rough Justice*, p. 108.

[79] 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, p. 389.

[80] Jack Goldsmith, 'Support War Crimes Trials for Darfur', *The Washington Post*, 24 January 2005, www.washingtonpost.com/wp-dyn/articles/A31594-2005Jan23.html.

power privilege'.[81] Likewise, Corrina Heyder repeated the legalist critique that US acquiescence to the Darfur referral was contradictory in jurisprudential terms and coherent only when understood as tactical manipulations of the law to 'maintain hegemonic power over international criminal justice'. The referral thus 'must be interpreted as an attempt to safeguard American exceptionalism and enable the United States to more easily advance its particular interest'.[82] These statements are undoubtedly accurate accounts of the political dynamics underpinning policy outcomes. But, where inquiry is located at the more fine-grained level of decision-making processes, the crucial interplay between law and ideology becomes necessary to explain the underlying logic. Identifying Goldsmith's argument in illiberal internationalism reveals the ideological reconciliation of political interests with expressed commitment to IL.

The power of exceptionalist beliefs was laid bare in US explanations for why citizens of Sudan, as a non-party to the Rome Statute, should be subject to ICC jurisdiction even as the United States denied that jurisdiction over itself. For Rice, it was 'important to uphold the principle that non-parties to a treaty are indeed non-parties to a treaty', but that 'Sudan is an extraordinary circumstance'. The United States reasoned that the referring UNSC resolution itself created a general exemption to non-parties to the treaty, but this was hardly an answer given it was the United States who demanded those protections in the first place. Rice's further explanation was that, as a practical matter, Sudan represented 'a humanitarian crisis, . . . a moral crisis, and . . . a crisis that is extraordinary in its scope and in its potential for even greater damage to those populations. So I think this is a different situation, frankly.'[83] Sands described this explanation as 'flummoxed'.[84] From these statements, the most consistent principle that emerges is that, precisely because of the perceived unequal position occupied by the United States, the meaning of equality under IL properly encompassed a commensurate counterbalance in legal rights and duties. Certainly, Rice appeared satisfied that US policy was consistent with the international rule of law when she addressed the

[81] Bosco, *Rough Justice*, p. 111.

[82] Corrina Heyder, 'The UN Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of US Opposition to the Court: Implications for the International Criminal Court's Functions and Status' (2006) 24 *Berkeley Journal of International Law* 650, pp. 666–7.

[83] Condoleezza Rice, 'Remarks with Hungarian Foreign Minister Ferenc Somogyi after Meeting', Treaty Room, Washington, DC, 1 April 2005, https://2001-2009.state.gov/secretary/rm/2005/44104.htm.

[84] Sands, *Lawless World*, p. 248.

American Society of International Law within the same day as her initial statements:

> America is a country of laws . . . [W]hen we respect our international legal obligations and support an international system based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America.[85]

Beyond objections to the principle of UNSC control, Bosco noted that Resolution 1593 created an important precedent whereby P5 members were effectively able to circumscribe the rights and privileges enjoyed by specific states before the ICC. This appeared to go beyond the UNSC's proper power to simply refer situations to the court, but not to set the terms for prosecution.[86] Robert Cryer cited this as a key reason for raising 'serious questions' about the resolution's 'compliance with basic principles of the rule of law'.[87] He noted previous statements by Scheffer appearing to interpret Article 13(b) of the Rome Statute as permitting the United States to specifically 'define the parameters' of ICC jurisdiction over states who play a special enforcement role in the international legal system.[88] In the quest for fidelity to the international rule of law, Cryer rejected the legitimacy of elevating 'exceptionalist claims' over sovereign equality.[89]

Cryer's argument demonstrates the limitations of compartmentalising law and politics when explaining US ICC policy, and the fertile ground for ideology to bridge the gap between them. Cryer noted that, on the one hand, the possibility of selective justice resulting from exceptionalist beliefs was 'a sobering reminder that the international legal order is not one in which the rule of law is easy to realize'. Yet he also conceded that 'prosecutions for extremely serious crimes are likely now to occur, when they were unlikely to have done so if the Security Council had no role in referring cases to the ICC'. In that light, Cryer was wary of 'being too precious about principle' where practical justice was at stake.[90] This is

[85] Condoleezza Rice, 'Remarks at Annual Meeting of the American Society of International Law', Lowes L'Enfant Plaza Hotel, Washington, DC, 1 April 2005, https://2001-2009.state.gov/secretary/rm/2005/44159.htm.
[86] Bosco, *Rough Justice*, p. 112.
[87] Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 *Leiden Journal of International Law* 195, p. 205.
[88] Ibid., p. 212, citing David J. Scheffer, 'Staying the Course with the International Criminal Court' (2001) 35 *Cornell International Law Journal* 47, p. 90.
[89] Cryer, 'Sudan, Resolution 1593', p. 215.
[90] Ibid., pp. 216–17.

precisely the kind of dissonance that drives evolution of ideological beliefs to reconcile law and politics in the distinct configurations now structuring American IL policy. For US legal policymakers, the perceived nexus between exceptionalism and the operation of IL is not unique to the Darfur referral but is constitutive more generally of the international legal system. In short, a system defined by reference to unyielding sovereign equality is not merely a poor description of the rule of law: it is an account incompatible with the realisation of the ideal. The quality of ideology evolving to accommodate the 'needs and interests of a group or class at a particular time in history'[91] is thus well demonstrated in this case.

Prior to the Darfur referral, Heyder opined that it was 'difficult to understand' why the United States would not support such a resolution on at least an ad hoc basis when a commitment to international criminal justice 'is a deeply rooted part of U.S. foreign policy'.[92] Yet, so long as the court was defined by the principle of sovereign equality, any vote for the referral was tantamount to endorsing an ideal unrecognised by US policymakers. Instead, US hegemonic privilege was consolidated by 2008 when, having pocketed its own immunity, the United States supported the ICC in blocking African Union requests that then Sudanese president Omar al-Bashir be granted immunity in light of the Darfur referral. Scheffer observed that by this period 'the Bush administration had finally rid itself of Bolton', thereby allowing the policy shift toward a United States–specific vision for a functioning court.[93]

Conclusion

Complex adjustments in US policy regarding the proper relationship between sovereign states demonstrated the significant influence of exceptionalist beliefs on competing conceptions of IL. During the first term of the Bush 43 administration, the United States had assertively sought and obtained unequal immunities from ICC jurisdiction through the UNSC. From a political perspective, this could be explained broadly as predictable behaviour of a powerful state manipulating international legal rules. However, in legal terms, the foundation of

[91] David B. Davis, *The Problem of Slavery in the Age of Revolution, 1770–1823* (Cornell University Press, 1975), p. 14; see Chapter 2, p. 55, *supra*.
[92] Heyder, 'The UNSC's Referral of the Crimes in Darfur', p. 661.
[93] David J. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012), p. 416.

the US position was a conception of IL drawn from exceptionalist beliefs justifying either an exceptional US role as the guarantor of liberal equality or a form of hegemonic privilege. Revelations of prisoner abuse in the War on Terror fundamentally undermined beliefs that US democratic norms were a protection against such breaches, or that concessions to hegemonic privilege strengthened the international legal system as a whole. Only with the piercing of the exceptionalist veil did US IL policy acquiesce to legalist denial of UNSC immunity for being contrary to the rule of law.

Nevertheless, the US decision to abstain from any vote without positively endorsing the Darfur referral affirmed the limitations set by foreign policy ideology. For critics, the 'selective enforcement of international criminal law' in the referral reminded that the international legal system 'has a long way to go before it represents a system that truly reflects rule of law principles'.[94] Rather, US IL policy looked to an ideal of equality in law defined by illiberal internationalism, which recognised the opportunity to reassert the ICC as a diplomatic tool promoting US national security interests.

Determining International Judicial Power

The contest to determine the structure of international judicial power was focused on the ASPA by the second term, with its claim to alter the hierarchy of judicial and prosecutorial powers between the court and sovereign states. For legalist advocates, this was a clear contradiction of the separation of judicial powers necessary to sustain the international rule of law. The United States' legal policymakers increasingly accepted that insisting on the supremacy of its own legal powers was eroding cooperation with key partners, who now refused to formalise the revised ordering of powers in bilateral agreements. The problem had been flagged as early as Rice's confirmation hearings when Senator Dodd referenced disruptions to vital military relationships owing to the United States' 'fixation with the international criminal court, as codified by the American Servicemen's Protection Act'.[95] The United States relented and modified application of the ASPA to allow for greater cooperation with allies and for a more conciliatory policy permitting exceptions for US assistance to the ICC. Rice announced the changes by

[94] Cryer, 'Sudan, Resolution 1593', p. 222.
[95] United States Senate, *Nomination of Dr. Condoleezza Rice*, p. 43.

noting the negative impact upon counterterrorism, drug operations and military cooperation in Iraq and Afghanistan. The ASPA thus yielded to the preservation of 'relationships that are really important to us from the point of view of ... improving the security environment'.[96] However, even as US policy sanctioned the legitimacy of ICC judicial power, it continued to deny that its integrity was determined by ICC independence, thus reserving judicial authority over its own nationals. Policy outcomes thereby achieved greater compatibility with the ICC's judicial power, but stopped well short of relinquishing parallel judicial powers exercised at the US municipal level. The consequence was once again a perception of contradictory US legal practice and a causal role for ideology structuring legal decision-making processes.

Legalist Policy

Legalist advocates in this period maintained beliefs that the ICC was capable of counterbalancing political interests through independent judicial power. The developing UNSC–ICC relationship contained in the *International Commission of Inquiry on Darfur* was defended for upholding the UNSC as 'the highest body of the international community responsible for maintaining peace and security' and the ICC as 'the highest criminal judicial institution of the world community'.[97] That view was equally reflected in the position of NGOs, who continued to advocate institutionalisation of ICC powers above the exercise of parallel powers by states. Amnesty International's Irene Khan expressed hope that apparent softening of US policy 'will prompt the US to review its opposition to the ICC and join the world community in reaffirming the primacy of international law'.[98] Advocates continued invoking an ideal of the international rule of law in which judicial power was determined by its separation and exercise in designated global courts.

The inadequacy of any legal policy falling short of a separation of powers was evident in the frustrations of states engaging with the United States. For France's permanent representative to the UN, Jean-Marc de La Sablière, the immunity requested by the United States in resolution 1593 was acceded to only as a compromise position, with an expectation

[96] Rice, 'En Route to San Juan'.
[97] Cassese et al., *Report of the International Commission on Darfur*, p. 149.
[98] Amnesty, 'US Withdrawal'.

that such clauses cease in future referrals.[99] Brazil was less forbearing and abstained to protest the precedent of reserving judicial power to the United States at the expense of ICC authority. This was despite acknowledging the desirability of the resolution and the practical effect it would have in the particular circumstances. Rather, Brazil affirmed the need to protect the ICC as 'an independent judicial body' that already 'provides all the necessary checks and balances to prevent possible abuses and politically motivated misuse of its jurisdiction'. The Brazilian representative accepted neither a reference to Article 98 agreements in the preamble nor operative clause 6 'through which the Council recognizes the existence of exclusive jurisdiction, a legal exception that is inconsistent in international law'. Together, these measures were likely to 'have the effect of dismantling the achievements reached in the field of international criminal justice'.[100] Likewise, the Algerian representative abstained for reasons including that, in the endeavour to achieve practical justice, the terms of the referral improperly established a form of 'two-track justice'.[101] States were seeking not merely practical US support in the immediate case but an ICC regime consistent with perceived ideals of the international rule of law, too.

Beliefs of American Legal Policymakers

ICC Judicial Power Limited by US Consent

US approaches to the Darfur referral uniformly insisted on terms contrary to a court design determined by an effective separation of international legal powers. Legal disputes among American policymakers were thus not about how to accommodate the supremacy of the ICC's judicial power; rather, they were about how to reconcile ordering principles drawn from entirely separate ideological commitments. Bellinger emphasised that, in the second term, the administration resisted only the ICC's 'method for *achieving* accountability [original emphasis]', not its aspiration to do so. This was an argument about the proper determination of international judicial power according to a 'deeply held American belief that power needs to be checked and public actors need

[99] UN, 'Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court', Press Release SC/8351, 31 March 2005, www.un.org/press/en/2005/sc8351.doc.htm.

[100] Representative Ronaldo M. Sardenberg for Brazil: UN, *Record of the 5158th Meeting of the United Nations Security Council, Sudan*, p. 11.

[101] Representative Abdallah Baali for Algeria: ibid., pp. 4–5.

to be held accountable'.[102] The first term of the Bush administration was marked by insistence that judicial determination of international criminal matters be the sole province of municipal law – of American courts or tribunals in the case of US nationals and of locally constituted courts in the case of international prosecutions. The shift in the second term was to recognise that, in the latter case, there were strategic advantages to employing the ICC in lieu of locally constituted courts, provided the United States withheld consent for matters within its national jurisdiction. The shift along the governance dimension, from an illiberal nationalist to an illiberal internationalist conception of IL, bolstered functional cooperation but not agreement on rule of law ideals.

The United States initially continued to resist the UNSC Darfur referral according to its long-held insistence that matters of criminal justice be reserved to municipal legal processes. The United States had been among the first and most prominent states to declare that the Darfur situation met the legal definition of genocide.[103] Accordingly, policymakers were at great pains to defend US commitment to international criminal justice. Rice asserted that US resistance was instead towards the unaccountability of the ICC prosecutor to an identifiable government: 'an issue of sovereignty and a step that looked a bit too much like "world government"'.[104] Acting UN Ambassador Anne Patterson reiterated that the US preference remained for domestic-based resolutions, such as a hybrid tribunal in Africa.[105] The choice perceived by the United States was thus between blocking the referral in preference of a hybrid court using the infrastructure of the ICTR, or to 'carve out US exemption' within a referral it could support.[106] The State Department went to great lengths to achieve the former option, and it was only after failing to do so that it switched to the latter, as initially recommended by Ambassador Danforth.[107] Rice ultimately supported the referral on the basis that a change in strategy promised greater accountability under IL for Darfur perpetrators. To do otherwise would be 'just to make an ideological point about the

[102] Bellinger, 'Reflections on Transatlantic Approaches to International Law', p. 520, original emphasis.
[103] Rice, *No Higher Honor*, p. 387.
[104] Ibid., p. 388.
[105] See John R. Crook, 'United States Abstains on Security Council Resolution Authorizing Referral of Darfur Atrocities to International Criminal Court' (2005) 99 *American Journal of International Law* 691, p. 691.
[106] Scott Paul, 'From Mark Goldberg on Sudan and the International Criminal Court', *The Washington Note*, 2 August 2007, https://washingtonnote.com/from_mark_goldb/.
[107] Danforth, 'Peace and Accountability'.

construction of the court or the Rome Statute'.[108] This is a revealing insight into the dynamic relationship between ideology and legal accountability at the heart of shifting IL policies.

On US insistence, the terms of UNSC Resolution 1593 explicitly took note of 'agreements referred to in Article 98–2 of the Rome Statute'. The resolution directly reiterated the limits of US consent to ICC judicial authority in the sixth of its operative clauses, which stated that the UNSC:

> *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.[109]

Thus, although the resolution was designed to legitimise the ICC's exercise of international judicial power, it did so by certifying that the United States retained judicial power over international criminal matters in relation to its own nationals.

Patterson confirmed that consent to jurisdiction set the limits of US support for the Darfur referral, with any alternative arrangement striking 'at the essence of the nature of sovereignty'. On those terms the United States still wouldn't vote for the referral but ultimately

> decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in Sudan, and because the resolution provides protection from investigation or prosecution for U.S. nationals and members of the armed forces of non-state parties.[110]

Far from denying the legitimacy of IL, the United States remained committed to the principle that '[v]iolators of international humanitarian law and human rights law must be held accountable'. Patterson reminded that the United States had long argued for UNSC control of referrals and that, by doing so in relation to Darfur, 'firm political oversight of the process will be exercised'. She nevertheless reiterated that US objections to the ICC remained unchanged in the absence of 'sufficient protections from the possibility of politicized prosecutions'. In this sense, politics was identified as both the guarantor of the international rule of

[108] Rice, *No Higher Honor*, p. 388.
[109] SC Res 1593. See also operative clause 2 of the resolution.
[110] Crook, 'United States Abstains on Security Council Resolution', p. 692.

law, in the UNSC, and its enemy, in the ICC. Such incoherence is resolved only by viewing the underlying conception of IL in terms of the role of foreign policy ideology and exceptionalist beliefs. Patterson concluded by asserting that the position did not equate to sanctioned impunity, since the United States itself would 'continue to discipline our own people where appropriate'.[111] The arrangement achieved in the Darfur referral thus normalised and institutionalised parallel exercises of international judicial power divided between the ICC and US courts.

Conclusion

This period saw the realisation of illiberal internationalist preferences for determining the international judicial powers of the ICC, with the court confirmed as a legitimate source of international judicial authority, but subject to clear limits of US consent. That outcome contradicted the principled objections of US global counterparts, who continued seeking an oversight role for the ICC founded on independent international judicial power. Despite some optimism about the United States' shift toward legalist policies, even advocates conceded that the dynamics likely revealed hard limits to further cooperation. Heyder's analysis is instructive in expressing the legalist belief that, by removing any exceptional US control through the UNSC, 'the ICC has the authority to act exclusively based on purely factual and judicial motives, at any time, and free from political influence'. She further accepted, however, that persisting with this design made it 'very unlikely' that US opposition would subside. Even in the best-case scenario, a properly functioning court would likely lead only to the United States providing 'possible ad hoc cooperation in the long run'.[112] Any optimism about whether the United States might revise its position faced the reality of hard structural limitations – in the form of ideologically informed conceptions of the proper determination and thus limitations of international judicial power.

Chapter Conclusion

The shift in IL policy during the second term of the Bush 43 administration followed robust agreement among administration policymakers that previous illiberal nationalist approaches to the ICC had not optimised

[111] Ibid.
[112] Heyder, 'The UNSC's Referral of the Crimes in Darfur', p. 671.

American national security interests. The so-called *modus vivendi* with the court was evident in concerted efforts toward re-engagement and qualified acceptance of ICC legitimacy within global governance. Across the entirety of the Bush 43 administration, there were repeated calls, even from American voices representing NGOs and academic perspectives, for the United States to go further and accede to the ICC in terms structured by legalism. There is no evidence, however, that any such beliefs were accepted at the level of US policymakers – even in those cases where policy appeared to align more closely to legalist preferences. Bosco's review of the period affirms that, although US ICC policy became 'more pragmatic', it remained the case that 'no influential voices on the American political spectrum advocated membership'.[113]

A powerful insight into the limits of ideology does emerge from this period, however, with potentially far-reaching implications for broader American engagement with IL. The US decision to withdraw its long-standing requests to the UNSC for peacekeeping force immunity is among the most revealing ideological contests in US–ICC relations. The policy shift followed revelations of abuses in Abu Ghraib Prison that directly challenged exceptionalist beliefs sustaining American conceptions of the international rule of law. In this narrow case, the United States ultimately relented to the legal preferences of its global counterparts, not because its conceptions of IL were shown to be contradictory when measured against the rest of the world, but because they were revealed as contradictory when measured against its own ideological commitments. That contest confirmed both the pivotal significance of foreign policy ideology in structuring conceptions of IL and, thereby, the power conferred on those who understand and directly contest American IL policy at the level of its foundational ideological beliefs.

[113] Bosco, *Rough Justice*, p. 132.