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**AMERICAN FOREIGN POLICY IDEOLOGY &
THE RULE OF INTERNATIONAL LAW:
CONTESTING POWER THROUGH THE
INTERNATIONAL CRIMINAL COURT**

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ABSTRACT

American engagement with international law is regularly criticised as fraught with contradiction and distorted by beliefs in “exceptionalism.” That raises a puzzling question: Why is American international legal policy framed by commitment to the “rule of international law” when this systematically provides a benchmark for challenging the legitimacy of American global power? To answer that question this thesis addresses a gap in international legal scholarship on the influence of foreign policy ideology over the design and development of international law. It is argued that the very meaning of the rule of international law is contested according to competing ideological beliefs: between American policymakers and their global counterparts, and among American policymakers themselves. Opposition to US legal policy has been structured by forms of “legalism,” as a set of beliefs that law consists of non-instrumental rules, and that the international legal system should be developed by analogy with municipal law. Drawing from the International Relations subfield of Foreign Policy Analysis it is theorised that, in contrast, American legal policymakers receive international law through competing ideologies that correspond with divisions evident in both legal scholarship and diplomatic history. An *internationalist-nationalist* jurisdictional dimension intersects with a *liberal-illiberal* values dimension to form four ideal type conceptions of the rule of international law: *Liberal Internationalism*, *Illiberal Internationalism*, *Liberal Nationalism* and *Illiberal Nationalism*. These ideal types, including legalism, are applied to reinterpret the classic formulation of the rule of law comprised of three elements which, when translated to the global level, are concerned with: developing non-arbitrary global governance; defining equality under international law; and the ordering of international legal power. It is hypothesised that American legal policymakers will systematically contradict legalist principles while adhering to the structure of the four ideal types. The model is tested through a longitudinal case study on American policy toward the International Criminal Court. Documentary evidence is used to demonstrate that policy decision-making was structured by the theorised conceptions of international law, rather than by tactical compromises between “law” and “politics.” It is concluded that the role of foreign policy ideology sets hard limits on the ability of the US to reach consensus on rule of IL ideals with even its closest allies.

For my grandmothers
Chen Siu June & Rosa Elisabetta Jorgensen, née Caccioppoli

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DECLARATION OF ORIGINALITY

I hereby certify that this thesis is entirely my own work and that any material written by others has been acknowledged in the text.

The thesis has not been presented for a degree or for any other purposes at The University of Sydney or at any other university or institution.

The empirical work undertaken for this thesis (interviews) was approved by The University of Sydney Human Research Ethics Committee (HREC).

*United States! the ages plead,—
Present and Past in under-song,—
Go put your creed into your deed,—
Nor speak with double tongue.*
— RALPH WALDO EMERSON, 1857

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ABBREVIATIONS

ASP	Assembly of States Parties
ASPA	<i>American Service-Members' Protection Act (2002)</i>
Bush 41	George H.W. Bush, 41 st President of the United States of America
Bush 43	George W. Bush, 43 rd President of the United States of America
CCFR	Chicago Council on Foreign Relations
CI	Cooperative Internationalism
CICC	Coalition for the International Criminal Court
EU	European Union
FPA	Foreign Policy Analysis
FPLP	Foreign Policy Leadership Project
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IL	International Law
ILC	International Law Commission
IR	International Relations
LMS	Like Minded States
MI	Militant Internationalism
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NSS	National Security Strategy
P-5	Permanent Five Members of the United Nations Security Council
SOFA	Status of Force Agreement
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCLOS	<i>United Nations Convention on the Law of the Sea (1982)</i>
UNSC	United Nations Security Council
US	United States of America
WWI	World War One
WWII	World War Two

**American Foreign Policy Ideology & The Rule Of International Law:
Contesting Power through the International Criminal Court**

CONTESTING THE RULE OF INTERNATIONAL LAW

In *The Epochs of International Law* Wilhelm Grewe periodised the history of modern international law (“IL”) according to the rise and fall of great powers.¹ As Spain, France and Britain in turn enjoyed global predominance, so each moulded prevailing international legal doctrines according to distinctive national ideologies. That pattern has continued in the “American Century”² with the United States seeking to distinguish itself for promoting the “rule of law” in international affairs.³ President Truman, in authorising the 1950 Korean War, argued that: “A return to the rule of force in international affairs would have far-reaching effects. The United States will continue to uphold the rule of law.”⁴ President Eisenhower, in his 1959 State of the Union address, expressed hope that “the rule of law may replace the rule of force in the affairs of nations.”⁵ Perhaps most notably, in his 1991 national address at the commencement of the Persian Gulf War, President Bush envisioned “the opportunity to forge for ourselves and for future generations a new world order – a world where the rule of law, not the law of the jungle, governs the conduct of nations.”⁶ This thesis sets out to explain how the very meaning of the “rule of international law,”⁷ as deployed by President Bush’s predecessors and successors, has been informed by long established ideas of American foreign policy ideology, and the challenges that presents for future US engagement with international rules and institutions.

The puzzling aspect of these Presidential statements is that they invite immediate charges of hypocrisy: that America has failed to honour the rule of IL ideal, with practice instead fraught with contradiction and distorted by beliefs in “exceptionalism.”⁸ The standard inventory starts with the US presenting itself as architect and chief advocate of the League of Nations at the conclusion of the First World War (“WWI”) and then failing to join the organisation. At the conclusion of the Second World War (“WWII”) it again assumed this leadership role in the creation of the United Nations (“UN”), this

¹ Grewe, Wilhelm G., *The Epochs Of International Law; Translated and Revised by Michael Byers* (Walter de Gruyter, 2000). The first edition of the book was published in Germany in 1944 and has been criticised on the basis of this wartime association: See Koskenniemi, Martti, ‘Book Reviews: The Epochs of International Law. By Wilhelm Grewe. Translated and revised by Michael Byers.’ (2002) 51 *International and Comparative Law Quarterly* 746

² Luce, Henry R., ‘The American Century’ (1941) 17 February *Life Magazine* 61

³ For an early review of these pronouncements see Bishop, William W., ‘The International Rule of Law’ (1961) 59 *Michigan Journal of International Law* 553 at 554-555, 562-563. See generally Byers, Michael & Georg Nolte, *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003); Krisch, Nico, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’ (2005) 16 *European Journal of International Law* 369

⁴ Truman, Harry S., *Statement by the President on the Situation in Korea* (27 June, 1950) <<http://trumanlibrary.org/publicpapers/viewpapers.php?pid=800>>

⁵ Eisenhower, Dwight D., *Radio and Television Report to the American People on the Developments in Eastern Europe and the Middle East* (31 October, 1956) <<http://www.presidency.ucsb.edu/ws/?pid=10685>>

⁶ Bush, George H.W., *Address to the Nation Announcing Allied Military Action in the Persian Gulf* (16 January, 1991) <<http://www.presidency.ucsb.edu/ws/index.php?pid=19222>>

⁷ This term is preferred to “international rule of law,” which has often been used merely to signify strengthening the municipal rule of law within the various states of the international system

⁸ See for example Luck, Edward C., *Mixed Messages: American Politics and International Organization, 1919-1999* (Brookings Institution Press, 1999) at 5-6; Slaughter, Anne-Marie, ‘The Partial Rule of Law,’ *The American Prospect* (19 September, 2004) <<http://www.webcitation.org/6DCYk2Vz9>>; Mowle, Thomas S., *Allies at Odds?: The United States and the European Union* (Palgrave Macmillan, 2004) at 85; Moravcsik, Andrew, ‘The Paradox of US Human Rights Policy’ in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005); Gosalbo-Bono, Ricardo ‘The Significance of the Rule of Law and Its Implications for the European Union and the United States’ (2010) 72 *University of Pittsburgh Law Review* 229 at 347-348; Fehl, Caroline, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford University Press, 2012) at 4-5; Scott, Shirley V., *International Law, US Power: The United States’ Quest for Legal Security* (Cambridge University Press, 2012) at 2-3

time as a founding member. Yet the US subsequently became a conspicuous critic of the institution, and was the greatest defaulter on UN dues by the close of the twentieth century.⁹ The US has repeatedly used military force outside of UN prohibitions, withdrawing consent to jurisdiction before the International Court of Justice (“ICJ”) in part for ruling to that effect,¹⁰ and notoriously in the 2003 Iraq War.¹¹ More broadly the US has led or strongly supported efforts to create the International Criminal Court (“ICC”),¹² ban anti-personnel landmines¹³ and establish the *United Nations Convention on the Law of the Sea* (1982),¹⁴ while in each case ultimately failing to ratify the relevant treaties.

In his 2006 book *Lawless World*, British jurist Philippe Sands launched an influential critique of contemporary American legal policy by asking the question: “How could it be that a country as profoundly attached to the rule of law and principles of constitutionality as the United States could have so little regard for international law?”¹⁵ Reviewing US rejection of the founding statute of the ICC, Sands charged that US policy came down to a question of: “When can brute political power override the rule of law and legal processes?”¹⁶ Similarly Michael Mandel has charged that references to the rule of law in American ICC policy were mere “hypocrisy” in the sense that the US “claims to be acting for some principled reason, but in fact has something less noble in mind.”¹⁷

Such challenges have been no less intense within the US itself. Then legal adviser to the Department of State William Taft IV argued that America’s use of force in the 2003 Iraq War “was and is lawful,”¹⁸ yet in the same period Taft’s eventual successor Harold Koh characterised the Iraq policy as a violation of IL that set the US against its historical mission of creating “a multilateral world under law.”¹⁹ Charges of weak fidelity to the rule of law by American allies have been no less passionate amongst American legal policymakers themselves. That dynamic forms the puzzle animating this thesis: Why is American international legal policy framed by commitment to the “rule of law” when this systematically provides a benchmark for challenging the legitimacy of American global power?

⁹ See Luck, Edward C., ‘American Exceptionalism and International Organization: Lessons from the 1990s’ in Rosemary S. Foot, Neil MacFarlane & Michael Mastanduno (ed), *US Hegemony and International Organizations: The United States and Multilateral Institutions* (Oxford University Press, 2003) at 42-46

¹⁰ See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* [1984] ICJ Rep 392

¹¹ The legality of the war has been almost universally rejected: See Johnstone, Ian, ‘Security Council Deliberations: The Power of the Better Argument’ (2003) 14 *European Journal of International Law* 437 at 477-478; Duffy, Helen, *The “War on Terror” and the Framework of International Law* (Cambridge University Press, 2005) at 197; Chesterman, Simon, ‘Just War or Just Peace After September 11: Axes of Evil and Wars Against Terror In Iraq and Beyond’ (2005) 37 *International Law and Politics* 281 at 295; Bellamy, Alex J., ‘Ethics and Intervention: The ‘Humanitarian Exception’ and the Problem of Abuse in the Case of Iraq’ (2004) 41 *Journal of Peace Research* 131 at 134-136

¹² *Rome Statute of the International Criminal Court* (1998). See Scheffer, David J., ‘Staying the Course with the International Criminal Court’ (2001) 35 *Cornell International Law Journal* 47; Feinstein, Lee & Tod Lindberg, *Means to an End: U.S. Interest in the International Criminal Court* (Brookings Institution Press, 2009)

¹³ *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* (1999). See Efav, Andrew C.S., ‘The United States Refusal to Ban Landmines: The Intersection between Tactics, Strategy, Policy, and International Law’ (1999) 159 *Military Law Review* 87

¹⁴ See Richardson, Elliot L., ‘The United States Posture toward the Law of the Sea Convention: Awkward But Not Irreparable’ (1982) 20 *San Diego Law Review* 505; Malone, James L., ‘The United States and the Law of the Sea’ (1983) 24 *Virginia Journal of International Law* 785

¹⁵ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at xv

¹⁶ *Ibid* at 58

¹⁷ Mandel, Michael, *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity* (Pluto Press, 2004) at 215 & 219

¹⁸ Taft IV, William H. & Todd F. Buchwald, ‘Preemption, Iraq and International Law’ (2003) 97 *American Journal of International Law* 557 at 557

¹⁹ Koh, Harold H., *A Better Way To Deal With Iraq* (21 October, 2002) <<http://www.law.yale.edu/news/4407.htm>>

Hypothesis and Argument

Critiques in the form levelled by Sands and Mandel establish a binary opposition between the legal ideal of the rule of IL and the political interests of states: contradictions in American IL policy ultimately reflect a contest between law and power. Sands characterises his examples of contradictory US legal behaviour “as conflicts, between political values and legal rules, between competing conceptions as to the hierarchy of moral choices, between different interpretations of what the rules require.”²⁰ The underlying conception is of the rule of IL as a universally understood ideal that remains independent of the ideological commitments and political identity of states. In this standard view the dynamics of American engagement with IL reveal the consistent logic of rational state interests causing inconsistent compliance with legal ideals. American policymakers show instrumental deference to the rule of IL where it aligns with US interests, but override its constraints wherever political expedience demands. The consequence from a legal perspective is “continued schizophrenia about global rules and foreign policies” as American legal policymakers challenge the rule of IL ideal through tactical political manipulations.²¹

This thesis refines the standard view by arguing that the commitment of American legal policymakers is to distinctive conceptions of the rule of IL that cannot be understood apart from American foreign policy ideology. This is an argument against an impartial and universal ideal of the rule of IL against which “politics is an external spectre threatening to undo its good works.”²² Rather, disputes between the US and its global counterparts reflect a power contest fought through competing conceptions of the very meaning of the rule of IL. Foreign policy ideology crystallises political interests and cultural ideas in distinct interpretations of legal principle such that contradictions are best explained as opposition at the level of competing legal ideals. These divisions extend outward between American legal policymakers and their global counterparts, and inward between American legal policymakers themselves. The significance of this distinction is that divergent global interests become more intractable than a mere political contest: they are constitutive of IL. By demonstrating the role of foreign policy ideology in the case of the ICC this study is expected to reveal hard limits to the ability of American legal policy to accommodate visions for the rule of IL advanced by even its closest allies.

Opposition to US legal policy has been largely structured by forms of “legalism,” as a set of beliefs that law consists of non-instrumental rules, and that the international legal system should be developed by analogy with municipal legal institutions.²³ This is a conception of IL as impartial rules independent from and superior to the interests of any one state. In practice, however, legalism is itself structured by politics, with adherents having a common interest in substituting the advantages of preponderant American power with formally equal rights and duties. Following Martti Koskenniemi, this study accepts that international legal rules and institutions cannot be apolitical, but rather are understood “only by reference to substantive ideals about the political good we wish to pursue.” In

²⁰ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at xvi

²¹ *Ibid* at 252. See especially Sands' concluding chapter at 240-256

²² Simpson, Gerry J., *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Polity, 2007) at 11;

Simpson, Gerry J., 'Throwing a Little Remembering on the Past: The International Criminal Court and the Politics of Sovereignty' (1999) 5 *UC Davis Journal of International Law and Policy* 133 at 141-142

²³ See Chapter 4 *infra*; Shklar, Judith N., *Legalism* (Harvard University Press, 1964)

short: “Institutions do not *replace* politics, but *enact* them.”²⁴ IL is thus a site for contesting international power according to competing ideologies.

The reason for making this intervention in the literature is to address a gap between the existing analytical tools available to legal scholars and practitioners and the task of establishing common ground with American legal policymakers. Specifically there is a gap in international legal scholarship on the influence of foreign policy ideology over the design and development of IL. In Philip Bobbitt’s sweeping account of international legal history *The Shield of Achilles*,²⁵ he raised the notion that legal policy in each state is inevitably:

formed by a particular view of law, and what law ought to be, and how it ought to be enforced. Every leadership of every state has such a view—self-interested, culturally idiosyncratic, haunted by historical threats, excited by historic visions—that is its own view of international law. The law thus viewed is an amalgam of the common practices of other states in an international context that reflects the collectivity of state views.²⁶

Following in this tradition I argue that, far from engaging in tactical modifications to law, American IL policy exhibits a clear ideological structure such that contradictions emerge from conflicts between alternative but internally coherent conceptions of the rule of IL. American international legal policy framed by commitment to the “rule of law” adheres not to a universal benchmark, but to these ideologically informed conceptions.

The explanation of law consciously trumping politics also poses inconsistencies with the evidence from legal decision-making processes. For this claim to be true it must be asserted that international lawyers employed to develop and advise on American legal compliance systematically compromise recognised legal ideals. If American lawyers were indeed subverting an agreed conception of the rule of law to power, then repeated expressions of commitment to the principle must be interpreted as consciously disingenuous.²⁷ This is a possible interpretation of what is happening, but not one that accords with the “direct historical evidence—of which there is a great deal—of the actual motivations” of policymakers,²⁸ and beliefs “that the Legal Adviser’s key role is to promote the rule of law based on principle, not politics.”²⁹ More broadly the evidence suggests that the US genuinely “conceives of itself as a nation dedicated to the rule of law, both at home and abroad.”³⁰ I instead expect evidence to show that policymakers genuinely take account of legal obligation, albeit according to ideologically-informed interpretations that systematically diverge from the assumed conceptions of global counterparts, and in many cases, from each other.

²⁴ Koskeniemi, Martti, *The Gentle Civilizer of Nations 1870-1960* (Cambridge University Press, 2001) at 177, original emphasis. See also Wippman, David, ‘The International Criminal Court’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) at 154; Hurd, Ian, ‘The International Rule of Law: Law and the Limit of Politics’ (2014) 28 *Ethics & International Affairs* 39

²⁵ Bobbitt, Philip, *The Shield of Achilles: War, Peace and the Course of History* (Penguin, 2003)

²⁶ *Ibid* at 356

²⁷ For example Paris noted recurrent use of the word “bogus” by critics describing American objections to the ICC: Paris, Erna, *The Sun Climbs Slow: The International Criminal Court and the Struggle for Justice* (Seven Stories Press, 2009) at 75

²⁸ Golove, David M., ‘Leaving Customary International Law Where It Is: Goldsmith and Posner’s The Limits of International Law’ (2005) 34 *Georgia Journal of International and Comparative Law* 333 at 348

²⁹ Koh, Harold H., cited in Scharf, Michael P. & 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) at xiii. See in particular the comprehensive account of all living State Department Legal Advisers in this volume

³⁰ Wippman, David, ‘The International Criminal Court’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) at 162

To establish the influence of ideology my research relates insights from the International Relations (IR) subfield of Foreign Policy Analysis (FPA) to legal scholarship in order to specify the structure of beliefs informing conceptions of IL. Empirical survey research combined with a rich history of diplomatic thought has shown American foreign policy ideology to be structured according to two ideological dimensions. I approach American IL policy as a species of foreign policy concerned with the conception of and strategies taken in relation to international legal rules and institutions, and therefore exhibiting the same ideological structure. A *jurisdictional* dimension measures whether policy is primarily concerned with establishing and exercising American power through international institutions, or conversely whether it prefers to advance US foreign policy interests through domestic law and institutions. A second *values* dimension measures whether US policy is constructed to promote the values of individual liberty through law, or whether it is used primarily to promote illiberal values of national security or non-universal cultural values. Accordingly IL policy can be located along an *internationalist-nationalist* dimension and a crosscutting *liberal-illiberal* dimension which together form four ideal policy types. I term these *Liberal Internationalism*, *Illiberal Internationalism*, *Liberal Nationalism* and *Illiberal Nationalism*.

These four ideal types set the universe of legal conceptions capable of structuring American IL policy, and the limits to engagement with global counterparts. The ideal types are treated not as mere policy positions, but as expressions of law itself. American jurisprudence is distinctive for theorising IL as a process of achieving international policy objectives, rather than as a body or rules and doctrines. American policymakers acknowledge that politics is integral to the functioning of IL, with the objective being not to eliminate politics but rather to foster the right sort of politics within law. The ideal types, including legalism, are accordingly applied to reinterpret the classic conception of the rule of law comprised of three elements which, when translated to the global level, are concerned with: developing non-arbitrary global governance; defining equality under IL; and the ordering of international legal power. Each element of the rule of law has been interpreted in a distinctive form by the competing ideologies, thus establishing a clearly structured contest over the principles for designing and developing global legal institutions.

This therefore becomes, not a story of political power challenging legal principle, but a story of competing understandings of power constituting multiple meanings of the rule of law. It is hypothesised that American legal policymakers will systematically contradict legalist principles while adhering to the structure of the four ideal types. Competition between these legal conceptions may at times frustrate a coherent IL policy, but this does not deny the essential contest as one within law rather than one against law. The implication for the case of the ICC is that political interests are imbued into the law such that even principled commitment to a court designed in accordance with the rule of IL will mean different things to differently situated legal policymakers. The battle identified by Sands and others is thus one often fought between policymakers guided by legal principles that are equally clear and deeply entrenched, but are fundamentally incompatible. Entreaties for the US to abandon parochialism and accept the rule of law rely on an artificial understanding of the nature of legal ideals.

This intervention is not intended as the basis for a normative argument: that because US policymakers' divergent legal conceptions demonstrate IL is radically contested, legal scholars and practitioners should yield to American conceptions. The study could well be used to make that argument, with Michael Glennon being one prominent example of an American legal scholar arguing that what IL “*should* look like must be a function of what it *can* look like.”³¹ Conversely, the insights of this thesis are equally valid for those who wish to understand American policy in order to challenge its ideological assumptions. What I am advocating is that legal scholars and practitioners take seriously the proposition that American IL policy is often guided by sincerely held beliefs about the nature of IL and its role in global governance, but that these conceptions are not those articulated in conventional legal scholarship. Identifying a clear ideological structure to American legal conceptions allows proponents and challengers alike to move beyond critiquing American policy in the negative (in terms of what principles US policymakers have contravened) to a positive account of the distinct principles setting American legal policymakers apart. Creating a particular global legal order will be more effectively achieved when advocates appreciate that simply asserting legalist conceptions of the rule of law is limited not merely by preponderant American power, but by the transformation of power into legal ideals.

INTERNATIONAL LAW POLICY

The object of analysis in this thesis is American *international law policy*. This is the specific form of foreign policy concerned with the conception of and strategies taken in relation to international legal rules and institutions. Framing the research in this way requires some explanation, as it is not the standard approach to analyse American international legal practice as a species of foreign policy, while the term itself is not one that appears in the literature.³² The dominant methodology in legal research remains “doctrinal analysis” which directly focuses on doctrines of IL as the object of analysis.³³ This is defined as “research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments,”³⁴ and the use of “interpretive methods in order to systematically expose the law and to find out what the law is.”³⁵ In a strict sense the methodology treats law as a sealed set of norms to be analysed by reference only to its internal content. However questions of *why* the US advocates a particular “institutional design” while qualifying its support for

³¹ Glennon, Michael J., ‘Why the Security Council Failed’ (2003) 82 *Foreign Affairs* 16 at 31, original emphasis. See also Krisch, Nico, ‘More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law’ in Michael Byers & Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 174-175; Bradford, Anu & Eric A. Posner, ‘Universal Exceptionalism in International Law’ (2011) 52 *Harvard International Law Journal* 1 at 6

³² For rare references to “Soviet” and “Russia’s international law policy” see respectively: Schweisfurth, Theodor, ‘The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions’ (1991) 2 *European Journal of International Law* 110 at 117; Ginsburgs, George, *From Soviet to Russian International Law: Studies in Continuity and Change* (Martinus Nijhoff Publishers, 1998) at i

³³ Vick, Douglas W., ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 163 at 177-179; Hutchinson, Terry C.M. & Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 *Deakin Law Review* 83 at 102

³⁴ From the “Pearce Committee” (1987), cited in Hutchinson, Terry C.M., *Researching and Writing in Law* (Thomson Reuters/Lawbook Co., 3rd ed, 2010) at 7

³⁵ Gelter, Martin and Kristoffel Grechenig, ‘The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism’ (2008) 31 *Hastings International and Comparative Law Review* 295 at 295-296

another “are not susceptible to resolution through simple application of pre-existing legal principles.”³⁶ Rather a concept is required that moves beyond doctrinal analysis to capture the influence of political ideas on legal doctrine.

Foreign policy more generally has been defined as actions of government representatives “directed towards objectives, conditions and actors—both governmental and non-governmental— which they want to affect and which lie beyond their territorial legitimacy,”³⁷ and “the strategy or approach chosen by the national government to achieve its goals in its relations with external entities.”³⁸ IL policy falls within these definitions for all such actions directed specifically at the international legal system. This is the rationale for analysing “international law policy” as a compound concept concerned with the structure of *political* ideas about *legal* obligation. The concept necessarily weakens the conceptual bright-line between law and politics, but a distinction can nevertheless be maintained. Harold Lasswell, a cofounder of the “New Haven School” of jurisprudence,³⁹ memorably defined politics as the determination of “who gets what, when, how.”⁴⁰ In that sense IL is undeniably a form of politics, since its rules and institutions represent the ongoing bargains between states about how to allocate international rights and resources. Yet the concept of the rule of IL invokes an ideal of foreign policy made by reference to principles external to the immediate objectives of policy itself. In this sense, what distinguishes IL policy from general foreign policy is an ongoing commitment to reconciling policy with obligations established by international legal rules and institutions. The lens of ideology may cause policymakers to receive the reach and depth of obligations in sharply divergent ways. But commitment to foreign policy that makes its terms with processes of the international legal system remains the necessary foundation for any conception of the rule of IL. Conversely, truly lawless foreign policy is that in which policymakers lack any conception of international legal obligations, and any commitment to engaging with institutions and rules in those terms. To demonstrate the value of the IL policy concept I will first consider the current state and purposes of interdisciplinary research between IL and IR. From this it can be seen that, even on IL scholarship’s own terms, the integration of empirical insights of political science will significantly strengthen legal analysis.

Interdisciplinary Research

In one sense it seems desirable to approach this project by attempting a synthesis speaking to the disciplines of both IL and IR. The objective of interdisciplinary research, however, is not to dissolve disciplinary identity, but instead to situate research within a distinct discipline, and then to enhance that scholarship by arbitrating insights from another.⁴¹ IL and IR are prime examples of disciplines that

³⁶ Wippman, David, ‘The International Criminal Court’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) at 153

³⁷ Carlsnaes, Walter, ‘Foreign Policy’ in Thomas Risse & Beth A. Simmons Walter Carlsnaes (ed), *Handbook of International Relations* (SAGE Publications, 2002) at 335

³⁸ Hudson, Valerie M., ‘The History and Evolution of Foreign Policy Analysis’ in Steve Smith, Amelia Hadfield & Tim Dunne (ed), *Foreign policy: Theories, Actors, Cases* (Oxford University Press, 2008) at 12

³⁹ See Chapter 2 *infra*

⁴⁰ Lasswell, Harold D., *Politics, Who Gets What, When, How* (Peter Smith, 1950)

⁴¹ Vick, Douglas W., ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 163 at 165

share an overlapping “territory,” but are separated by distinct “tribal cultures.”⁴² The shared territory is a fundamental concern with forms of governance in the international system.⁴³ But, as this thesis demonstrates, they have generally approached the task armed with divergent epistemologies and agendas. It is therefore important to emphasise that legal scholarship most closely resembles my interest in the norms and legal obligations guiding American policymakers. Although the present research is indeed based on key methods and insights drawn from political science, a consequence of “disciplinary identity politics”⁴⁴ is that interdisciplinary work is most valued where it conforms to the conventions and culture of a distinct discipline rather than attempting to straddle many.⁴⁵ Accordingly, for reasons of both analytical substance and academic convention, this thesis remains a work of interdisciplinary legal scholarship.

A further reason for this distinction is to avoid the pitfall in interdisciplinary research of reproducing shallow understandings of another discipline. Drawing usefully on the insights of an adjoining discipline requires a level of literacy in that field sufficient to avoid caricatured understandings that defeat the benefits of collaboration.⁴⁶ A threshold requirement is thus that interdisciplinary legal research clearly circumscribes what type of knowledge is being brought in from political science.⁴⁷ Much of this thesis builds upon the “Wittkopf-Holsti-Rosenau” (WHR) model of foreign policy beliefs which was constructed primarily through large-N survey research, and regression analysis of statistical data.⁴⁸ The focus of this thesis is not on testing the robustness of the model, which requires specialised knowledge appropriately reserved for political science. Consistent with the guidelines for interdisciplinary research set out here, the structure of the WHR model is instead taken as adequately established by an extensive literature, with the focus rather on determining the fit between the given model and American IL policy as a specific form of foreign policy. The WHR typology is an empirically grounded representation of foreign policy beliefs, but with the complexity of those beliefs broken down into four ideal types based on two dimensions. These discrete elements resemble those that often comprise legal doctrine and are therefore sufficiently parsimonious for integration into legal scholarship. In this way empirical insights are translated into a comprehensible form with which lawyers can usefully engage.

International Law and International Relations Scholarship

Historical cycles of convergence and divergence between these disciplines have received extensive treatment within legal scholarship. Louis Henkin’s landmark text *How Nations Behave* begins by lamenting the mutual impoverishment caused by an ongoing “*dialogue de sourds*” between lawyer

⁴² Becher, Tony & Paul Trowler, *Academic Tribes and Territories: Intellectual Inquiry and the Cultures of Disciplines* (Open University Press, 2nd ed, 2001) at 25 & 60. Beck questions whether the distinction between the two disciplines is even real, and therefore whether the concept of “interdisciplinary scholarship” is useful as a category: Beck, Robert J., ‘International Law and International Relations Scholarship’ in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge, 2009) at 13-14

⁴³ Ku, Charlotte, *International Law, International Relations, and Global Governance* (Routledge, 2012) at 4

⁴⁴ The term is from Wight, Colin, *Agents, Structures and International Relations: Politics as Ontology* (Cambridge University Press, 2006) at 1-2

⁴⁵ See Becher, Tony & Paul Trowler, *Academic Tribes and Territories: Intellectual Inquiry and the Cultures of Disciplines* (Open University Press, 2nd ed, 2001) at 45-47

⁴⁶ Vick, Douglas W., ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 163 at 185

⁴⁷ Rhode, Deborah L., ‘Legal Scholarship’ (2001) 115 *Harvard Law Review* 1327 at 1340

⁴⁸ See Chapter 3 *infra*

and diplomat.⁴⁹ Given that the two disciplines appear to be looking at the same subject matter, it is tempting to compare the division to the fable of blind persons each feeling isolated parts of an elephant, but with none seeing and understanding the complete animal.⁵⁰ Critics argue that the traditional organisational structure of the disciplines has sometimes come at the expense of substance, resulting in a “fragmentation of knowledge.”⁵¹ The academic response can be seen in a growing body of review articles tracking the state of disciplinary collaboration and mapping out areas for joint future research.⁵²

There are nevertheless important and substantive differences that justify some elements of the traditional division of labour. Law continues to address the normativity of interstate conduct in a way unique from other disciplines. Keohane characterised the difference as a case of “Two Optics”: The “instrumentalist” optic of political science sees law as a tool designed by and reproducing states’ material interests, while the “normative” optic of IL treats legal norms as an independent influence on state behaviour.⁵³ Charlotte Ku emphasises that each discipline serves a distinct but complementary function in developing the rule of IL. For Ku, these “are distinct disciplines because their fundamental objectives differ. In international relations, the objective is to understand behaviour. In international law, the objective is to direct behaviour.”⁵⁴ Specifically this involves legal scholars identifying and articulating which norms and doctrines have achieved the status of law, while leaving explanations of state behaviour to the realm of IR.⁵⁵

The real value of interdisciplinary research is where legal analysis relies on assumptions about matters outside law’s own field that cannot be explained according to legal methodology. In these cases the methods of political science (and IR specifically) can provide an account of the context and effects of the law that enhances the unique analysis of legal scholarship. Abbott argues that “IR is not a ‘legal method’” but that when “coupled with the study of law and legal institutions...it can be the

⁴⁹ “Dialogue of the deaf”: Henkin, Louis, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 2nd ed, 1979) at 2-4. See also Abbott, Kenneth W., ‘Modern International Relations Theory: A Prospectus for International Lawyers’ (1989) 14 *Yale Journal of International Law* 335 at 337-340

⁵⁰ The story originated in the Indian Subcontinent but is well known in Western literature:

“So, oft in theologic wars
The disputants, I ween,
Rail on in utter ignorance
Of what each other mean,
And prate about an Elephant
Not one of them has seen!”

From Saxe, John G., ‘The Blind Man and the Elephant: A Hindoo Fable,’ *The Poems of John Godfrey Saxe: Complete In One Volume* (Ticknor and Fields, 1868) at 259-261

⁵¹ Vick, Douglas W., ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 163 at 170

⁵² Abbott, Kenneth W., ‘Modern International Relations Theory: A Prospectus for International Lawyers’ (1989) 14 *Yale Journal of International Law* 335; Slaughter Burley, Anne-Marie, ‘International Law and International Relations Theory: A Dual Agenda’ (1993) 87 *American Journal of International Law* 205; Keohane, Robert O., ‘International Relations and International Law: Two Optics’ (1997) 38 *Harvard International Law Journal* 487; Slaughter, Anne-Marie, Andrew S. Tulumello & Stepan Wood, ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’ (1998) 92 *American Journal of International Law* 367; Beck, Robert J., ‘International Law and International Relations Scholarship’ in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge, 2009); Raustiala, Kal & Anne-Marie Slaughter, ‘International Law, International Relations and Compliance’ in Thomas Risse & Beth A. Simmons Walter Carlsnaes (ed), *Handbook of International Relations* (SAGE Publications, 2002); Cox, David & Andrew O’Neil, ‘The Unhappy Marriage Between International Relations Theory and International Law’ (2008) 20 *Global Change, Peace & Security* 201; Hafner-Burton, Emilie M., David G. Victor, Yonatan Lupu, ‘Political Science Research on International Law: The State of the Field’ (2012) 106 *American Journal of International Law* 47; Irish, Adam, Charlotte Ku & Paul F. Diehl, ‘Bridging the International Law-International Relations Divide: Taking Stock of Progress’ (2013) 41 *Georgia Journal of International and Comparative Law* 357

⁵³ Keohane, Robert O., ‘International Relations and International Law: Two Optics’ (1997) 38 *Harvard International Law Journal* 487. See also Kennedy, David, ‘The Disciplines of International Law and Policy’ (1999) 12 *Leiden Journal of International Law* 9 at 103

⁵⁴ Ku, Charlotte, *International Law, International Relations, and Global Governance* (Routledge, 2012) at 26

⁵⁵ *Ibid* at 21-22

cornerstone for a deeper understanding of international governance.”⁵⁶ Precisely because of legal scholarship’s necessary distance from empirical methods it remains reliant on social science to “provide an understanding of the forces that act upon the legal system and of the impact of legal decisions.”⁵⁷ In this sense “legal scholars are not shopping for a methodology, but for a correspondence in subject matter.”⁵⁸

By this logic interdisciplinary research becomes valid where legal scholarship is assessed on its own terms and deficiencies are revealed in areas addressed by political science. A driving purpose of legal scholarship is to specify the rights and obligations of states to advance an international rule of law. The necessary correlative of this task is that legal scholarship requires some understanding of how norms are actually received within a named state and what status they hold for legal policymakers. For a universal conception of the rule of IL to be fully realised it would require that all states internalise its constitutive norms in identical form, as part of their own normative commitments, and that foreign policy be structured to promote this ideal both domestically and internationally.⁵⁹ It is clear that to the extent that states do internalise rule of law norms it is not in a theoretically pure form, but rather in a form received through a state’s particular interests, culture, historical experience, and ideology. These influences “condition and limit the range of options viewed by the participants in the process as possible” and can include “shared notions of what legal institutions ought to look like.”⁶⁰ Assessing the meaning of the rule of IL among US policymakers is not a theoretical question, but an empirical one of what these influences are. It is here that doctrinal approaches to legal scholarship exhibit blind-spots by virtue of being divorced from political science.

For Hutchinson doctrinal research is best seen as a two-part process in which the researcher first locates sources of law, and then interprets and analyses this “text.”⁶¹ In this way the method is clearly distinguished from empirical and evidence-based methods. The researcher is not involved in observing social phenomena, but rather in correctly identifying authoritative sources and then critically analysing the internal rules and doctrines contained in those sources.⁶² This method is defensible where the objective is merely stating what the law is in a given context, irrespective of its political status. However in the specific case of analysing contradictions in American IL policy, it is clear that legal scholarship is interested in more than merely declaring legal rules. A basic feature distinguishing legal scholarship from the natural or social sciences is that it is explicitly prescriptive. Doctrinal analysis is used to identify the content of law for the purpose of influencing policymakers in the ongoing development of the legal system.⁶³

In the case of American IL policy, it becomes crucial that legal scholars understand the structure of world views that cause legal obligations to be systematically interpreted in ways different

⁵⁶ Abbott, Kenneth W., ‘International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflict’ (1999) 93 *American Journal of International Law* 361 at 379

⁵⁷ Rubin, Edward L., ‘Law and the Methodology of Law’ (1997) *Wisconsin Law Review* 521 at 521 & 553

⁵⁸ *Ibid* at 553

⁵⁹ See Franck, Thomas M., ‘The Power of Legitimacy and the Legitimacy of Power: International Law in an age of Power Disequilibrium’ (2006) 100 *American Journal of International Law* 88 at 91

⁶⁰ Wippman, David, ‘The International Criminal Court’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) at 158

⁶¹ Hutchinson, Terry C.M. & Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 *Deakin Law Review* 83 at 110

⁶² *Ibid* at 114-115

⁶³ Rubin, Edward L., ‘Law and the Methodology of Law’ (1997) *Wisconsin Law Review* 521 at 542 & 546

from universal legal conceptions.⁶⁴ This engagement with empirical factors is especially important for international legal scholarship, which depends on an understanding of political context to be effective. For this reason Henkin reminded international lawyers that:

International law in particular is not a self-contained abstraction, or even a distant star for nations to steer by. It affords a framework, a pattern, a fabric for international society, grown out of relations in turn. The law that is made or left unmade reflects the political forces effective in the system. Law that is made is a force in international affairs, but its influence can be understood only in the context of other forces governing the behaviour of nations and their governments.⁶⁵

In the case of American foreign policy these “other forces” include American foreign policy ideology. For legal scholarship to meet its normative objectives it will be most effective where it takes account of the ideological structures through which legal norms are received, and moreover, is able to specify *how* those structures modify the design and development of law.

The value of importing the insights of political science becomes evident at the stage of applying legal analysis to understand and influence actual US legal practice. Conceptions of IL are relevant to two tasks for legal scholars and practitioners engaging with the US. The first is in achieving a meeting of minds about the proper role of IL in global governance and what form the international legal system should take. Policymakers internationally help construct the architecture of the international legal system through every legally relevant foreign policy action taken. These actions range from involvement in the negotiation of treaties, debates over the role of the UN, responses to the legal behaviour of other states, to the stance toward IL in domestic courts. This process goes to the heart of establishing a clear understanding between participants about the meaning of the rule of IL. The second task is then assessing the probability and extent of US compliance with these institutions and rules. Raustiala and Slaughter define compliance as “a state of conformity or identity between an actor’s behaviour and a specified rule.”⁶⁶ Whether the US is likely to comply with international legal obligations will depend in part on whether there is any disparity between the design and obligations created by legal institutions and American conceptions of the proper function of IL. Where legal scholarship has a clear conception of the structure of competing IL concepts influencing American policymakers it will be able to better explain why the US is likely to comply and endorse legal developments in specific areas of IL, and why it is less likely to do so in others. For both tasks the objectives of international legal scholarship will be served by a clear understanding of how American policymakers conceive the international legal system compared to other states, and therefore what strategies international lawyers should adopt to most effectively engage with the US to strengthen the rule of IL.

Foreign Policy Analysis

Having set out the rationale for undertaking interdisciplinary research, and the parameters of what IL scholarship can gain by drawing upon the insights of IR, I now turn to consider what specific IR

⁶⁴ *Ibid* at 545

⁶⁵ Henkin, Louis, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 2nd ed, 1979) at 4-5

⁶⁶ Raustiala, Kal & Anne-Marie Slaughter, ‘International Law, International Relations and Compliance’ in Thomas Risse & Beth A. Simmons Walter Carlsnaes (ed), *Handbook of International Relations* (SAGE Publications, 2002) at 539

content would actually meet these objectives. The puzzle being addressed is contradictory American legal behaviour and how this is explained by the structure of legal policymakers' ideas about the nature of IL and the international legal system. As such, I am interested in IR scholarship that directly analyses the beliefs of decision-makers. Mainstream theories of IR do not focus on such particularised frameworks for analysing the foreign policy of a named state, but rather strive for generalisable principles of state behaviour.⁶⁷ The most well-established of these is Kenneth Waltz's parsimonious theory of neorealism.⁶⁸ This theory argues that the key determinant of state behaviour is not the identity of named states, but the structure of the international system comprised of states as "like units."⁶⁹ The idiosyncrasies of domestic institutions, personalities and, in particular, ideas, are excluded from the concept of structure, yielding a billiard ball conception of states. Neorealism is thus underdetermining if the focus of inquiry is on understanding particular decisions in American foreign policy. For that reason Waltz explicitly disavowed that neorealism was a theory of foreign policy.⁷⁰ He explained only "why states similarly placed behave similarly despite their internal differences." A specific theory of foreign policy was instead required where the objective was to "explain why states similarly placed in a system behave in *different ways*."⁷¹

My research turns to the IR subfield of FPA, which is so designated because it is committed to the unit level of analysis; eschewing questions of what behaviours exist *between* states in favour of analysing how these behaviours are determined by what happens *within* a state's foreign policy processes.⁷² This level of analysis aims for idiographic analyses of particular states, aiming to understand the key variables in specific cases. For this reason FPA provides a promising avenue for integrating ideas about IL as causal explanations into the existing literature. It is after all at this "actor-specific" level that legal beliefs necessarily exist.⁷³ Valerie Hudson argues that the rationality assumptions of IR theory have eroded the theoretical foundations of the mainstream discipline. FPA redresses this weakness through its assumption that "human decision-makers acting singly or in groups are the ground of all that happens in international relations." This permits development of theories capable of encompassing the identity and ideas motivating foreign policymakers in a named state. The agency of "human decision-makers" is thus placed at the centre of theory in contradistinction to the structural focus of conventional IR.⁷⁴ This yields a further distinction in FPA's

⁶⁷ See Singer, J. David, 'The Level-of-Analysis Problem in International Relations' (1961) 14 *World Politics* 77

⁶⁸ Waltz, Kenneth N., *Theory of International Politics* (McGraw-Hill, 1979). See for example Rose, Gideon, 'Neoclassical Realism and Theories of Foreign Policy' (1998) 51 *World Politics* 144 at note 1; Freyberg-Inan, Annette, Ewan Harrison & Patrick James, 'What Way Forward for Contemporary Realism?' in Annette Freyberg-Inan, Ewan Harrison & Patrick James (ed), *Rethinking Realism in International Relations: Between Tradition and Innovation* (Johns Hopkins University Press, 2009) at 4

⁶⁹ See Mearsheimer, John J., 'Structural Realism' in Tim Dunne, Milja Kurki & Steve Smith (ed), *International Relations Theories: Discipline and Diversity* (Oxford University Press, 2007) at 72

⁷⁰ Waltz, Kenneth N., *Theory of International Politics* (McGraw-Hill, 1979) at 71-72; Waltz, Kenneth N., 'International Politics Is Not Foreign Policy' (1996) 6 *Security Studies* 54; Elman, Colin, 'Horses for Courses: Why Not Neorealist Theories of Foreign Policy?' (1996) 6 *Security Studies* 7 at 37

⁷¹ Waltz, Kenneth N., 'International Politics Is Not Foreign Policy' (1996) 6 *Security Studies* 54 at 54. Emphasis added

⁷² See Walker, Stephen G., 'Foreign Policy Analysis and Behavioral International Relations' in Stephen G. Walker, Akan Malici & Mark Schafer (ed), *Rethinking Foreign Policy Analysis: States, Leaders, and the Microfoundations of Behavioral International Relations* (Routledge, 2011)

⁷³ Hudson, Valerie M., 'Foreign Policy Analysis: Actor-Specific Theory and the Ground of International Relations' (2005) 1 *Foreign Policy Analysis* 1 at 2

⁷⁴ *Ibid* at 2-3

focus on “*decision-making*” rather than “*out-comes*.”⁷⁵ As Hudson argues, the mind of each decision-maker under analysis is a:

microcosm of the variety possible in a given society. Culture, history, geography, economics, political institutions, ideology, demographics, and innumerable other factors shape the societal context in which the decision-maker operates.⁷⁶

Many of the theoretical insights of the major IR debates have been operationalised within FPA, with no single theory defining the subfield. The role for ideas in FPA is indebted to IR’s theorisation about informational, cognitive and institutional limitations of decision-makers. However, in the subfield, these idiosyncrasies become the variations to be explained, rather than anomalies to an assumed mode of rational state behaviour.⁷⁷ As a whole, FPA provides a rich literature on methodological approaches to understanding how ideas matter in foreign policy.

The advantages of arbitrating FPA insights into legal scholarship aligns precisely with Ku’s observation that law is limited to making “broad propositions with regard to governance” but that social science is needed to:

test and to understand law’s specific effects. We realize more and more that the functionality of a governing unit may differ dramatically in different contexts. It is therefore important to create a mode of inquiry that can explain the behaviour of actors at a fine grained level, but still maintain the ability to enhance understanding of the broader system within which these actions take place.⁷⁸

The FPA approach directly addresses the question of why American IL policy exhibits contradictions at this “fine grained level.” The Wittkopf-Holsti-Rosenau typology of foreign policy beliefs moves beyond not only legal methodology, but IR itself in seeking to answer questions about legal policy outcomes. James Rosenau is himself considered a founder of the FPA subfield, by virtue of his early call to integrate system level with actor-specific theories in IR.⁷⁹ Rosenau realised this approach in the surveys conducted in conjunction with Wittkopf and Holsti on the structure of foreign policy beliefs among leaders and the mass public.⁸⁰ Consistent with FPA, the aim was to ground understanding of American foreign policy behaviour in the empirically verifiable agency of foreign policy actors. Researching American IL policy according to the WHR model directly incorporates policymakers’ ideas about legal decision-making as a causal factor. The model enables analysis at a level capable of drawing out particularistic elements of America’s foreign policy ideology to permit finely grained explanations of the current and future trajectory of IL policy.⁸¹

⁷⁵ *Ibid* at 6. Original emphasis

⁷⁶ The “milieu of decision-making”: *ibid* at 10. See Sprout, Harold & Margaret Sprout, *Man-Milieu Relationship Hypotheses in the Context of International Politics* (Princeton University Press, 1956)

⁷⁷ Hudson, Valerie M., ‘Foreign Policy Analysis: Actor-Specific Theory and the Ground of International Relations’ (2005) 1 *Foreign Policy Analysis* 1 at 7

⁷⁸ Ku, Charlotte, *International Law, International Relations, and Global Governance* (Routledge, 2012) at 14

⁷⁹ Hudson, Valerie M., ‘Foreign Policy Analysis: Actor-Specific Theory and the Ground of International Relations’ (2005) 1 *Foreign Policy Analysis* 1 at 5-6. See Rosenau, James N., ‘Pre-theories and Theories of Foreign Policy’ in R. B. Farrell (ed), *Approaches in Comparative and International Politics* (Northwestern University Press, 1966)

⁸⁰ For an early example see Holsti, Ole R. & James N. Rosenau, ‘Vietnam, Consensus, and the Belief Systems of American Leaders’ (1979) 32 *World Politics* 1

⁸¹ Hudson, Valerie M., ‘The History and Evolution of Foreign Policy Analysis’ in Steve Smith, Amelia Hadfield & Tim Dunne (ed), *Foreign policy: Theories, Actors, Cases* (Oxford University Press, 2008) at 12-13

Legal Policymakers

In this study the focus turns to “legal policymakers” as a unit of analysis. Foreign policymakers more generally are the focus of analysis in the subfield for the epistemological reasons identified by Hudson.⁸² In the present investigation the concern is with the real people conferred with power to make “authoritative” decisions⁸³ about the American government’s interests and strategy in engaging with IL. By treating IL policy as a specific form of general foreign policy this analysis necessarily encompasses legal advisers and senior foreign policymakers irrespective of legal training. Senior foreign policymakers within each branch of government regularly face the task of authoritatively deciding on the importance and role of particular international institutions and rules to America’s general foreign policy, both as lawyers and non-lawyers. The prevalence of lawyers among these senior policymakers is notable however – including half of all US Presidents and three-quarters of US Secretaries of State.⁸⁴ Moreover, under these senior figures sit large teams of lawyers trained to advise on international legal obligations.⁸⁵ IL policy is the primary responsibility of the Department of State and the Office of the Legal Adviser within.⁸⁶ However, other key stakeholders include the Office of Legal Counsel within the Department of Justice,⁸⁷ the Department of Defence and the National Security Council,⁸⁸ each with its own team of international lawyers. Each department and body potentially operates according to distinct legal ideas,⁸⁹ but even within departments the evidence is that legal advisers may hold “a diverse array of perspectives and have differing opinions as to their role in ensuring proper adherence to international law.”⁹⁰

The significance of identifying the role of lawyers in policymaking is that these individuals can be expected to adopt a distinctive approach to IL policy compared to other possible stakeholders.⁹¹ The determinacy of law, and therefore difference from general foreign policy, can be overstated in that IL “grades seamlessly into policy” to a far greater extent than municipal law.⁹² International legal policy is not infinitely malleable however, but must make its terms with existing structures and methods of international rules and institutions. Legal policymaking “has points of reference in the Constitution, statutes, and court precedents,” and therefore “should be more objective and reliable.”⁹³ International legal policymaking is thus a constrained form of policymaking which must proceed within

⁸² See Hudson, Valerie M. & Christopher S. Vore, ‘Foreign Policy Analysis Yesterday, Today, and Tomorrow’ (1995) 39 *Mershon International Studies Review* 209

⁸³ For a discussion of policymakers as comprising a “authoritative decision unit” see: Hermann, Margaret G., ‘How Decision Units Shape Foreign Policy: A Theoretical Framework’ (2001) 3 *International Studies Review* 47 at 48

⁸⁴ Scott, Shirley V., *International Law, US Power: The United States’ Quest for Legal Security* (Cambridge University Press, 2012) at 10. For an exhaustive list see Scott’s appendix (tables 1-3) at 249-262

⁸⁵ *Ibid* at 10

⁸⁶ Kaye, David, ‘The Legal Bureaucracy and the Law of War’ (2006) 38 *George Washington International Law Review* 589 at 591; Scharf, Michael P., ‘The Torture Lawyers’ (2009) 20 *Duke Journal of Comparative and International Law* 389 at 409; Scharf, Michael P. & 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) at xi

⁸⁷ See Bruff, Harold H., *Bad Advice: Bush’s Lawyers in the War on Terror* (University Press of Kansas, 2009) at 63 at 67-71

⁸⁸ See Rothkopf, David, *Running the World: The inside Story of the National Security Council and the Architects of American Power* (PublicAffairs, 2009)

⁸⁹ See Murphy, John F., ‘The Quivering Gulliver: US Views on a Permanent International Criminal Court’ (2000) 34 *International Lawyer* 45 at 58-59; Bruff, Harold H., *Bad Advice: Bush’s Lawyers in the War on Terror* (University Press of Kansas, 2009) at 63

⁹⁰ Scharf, Michael P. & 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) at 1

⁹¹ Evered, Timothy C., ‘An International Criminal Court: Recent Proposals and American Concerns’ (1994) 6 *Pace International Law Review* 121 at 129

⁹² Bruff, Harold H., *Bad Advice: Bush’s Lawyers in the War on Terror* (University Press of Kansas, 2009) at 1

⁹³ *Ibid* at 1

more pronounced structural limitations than general foreign policy. Former British legal adviser Daniel Bethlehem describes the task of being a “keeper of the bright lines”: the responsibility to protect “a certain core of legal rules that form the irreducible minimum of what we understand to be a society governed by law.”⁹⁴ This distinguishes the general foreign policymaker from the international legal policymaker, as the latter must “ensure that, even in dangerous times, regard is given to the strategic, to the system of law by which we live—not only to the tactical, the operational, the imperative of the moment.”⁹⁵ This creates unique challenges for legal policymakers, who must balance their role in advising government against a duty to uphold law as something other than naked politics.⁹⁶ At the very least legal policymakers must “exercise the self-discipline of questioning the legal significance of their acts and, often, of providing explicit justification for those acts in legal terms.”⁹⁷ The evidence is that US State Department Legal Advisers have not perceived their duty as merely promoting government interests – as they would if retained by a private client. Rather, there is recognition of “a special or higher professional responsibility to provide a disinterested assessment, because...advice is not normally tested in courts of law or by other outside checks.”⁹⁸ The legal policymaker of any named state is engaged in a process of advancing foreign policy interests through institutions and rules of law that have many other masters in the form of other states, but are uniquely authoritative for that very reason. Particularistic state interests contend with the universal pretensions of IL so that the “challenge of reconciling parochialism with cosmopolitanism is thus inherent in the basic structure of international law.”⁹⁹

CONTESTING POWER THROUGH THE INTERNATIONAL CRIMINAL COURT

International Criminal Courts through American History

The project of establishing an international criminal court has a history that predates the twentieth century and rise of the US as a great power.¹⁰⁰ Indeed the US actively thwarted the creation of such a court as early as 1919 when the prospect was raised pursuant to a provision in the Treaty of Versailles. The court proposed there had jurisdictional reach extending from the foot soldiers of Imperial Germany all the way up to Kaiser Wilhelm II but American leaders rejected the proposal as an unacceptable incursion on state sovereignty.¹⁰¹ The US has nevertheless long championed the

⁹⁴ Bethlehem, Daniel, ‘A Transatlantic View of International Law and Lawyers: Cooperation and Conflict in Hard Times’ (2009) 103 *American Society of International Law Proceedings* 455 at 459

⁹⁵ *Ibid* at 459

⁹⁶ See Wang, Jennifer, ‘Raising the Stakes at the White House: Legal and Ethical Duties of the White House Counsel’ (1994) 8 *Georgetown Journal of Legal Ethics* 115 at 134-135. See also Bruff, Harold H., *Bad Advice: Bush’s Lawyers in the War on Terror* (University Press of Kansas, 2009) at 74

⁹⁷ Shane, Peter M, ‘Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress’ (1986) 71 *Minnesota Law Review* 461 at 491-492

⁹⁸ Scharf, Michael P. & 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) at 206

⁹⁹ Sellers, Mortimer N.S., *Parochialism, Cosmopolitanism, and the Foundations of International Law* (Cambridge University Press, 2012) at 3

¹⁰⁰ See Hall, Christopher K., ‘The First Proposal for a Permanent ICC’ (1998) 322 *International Review of the Red Cross* 57 who traces the idea to an 1872 proposal by Gustave Moynier as a founder of the International Committee of the Red Cross. For a more sweeping historical overview of international criminal law going back millennia see Bassiouni, M. Cherif, *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) at 3-40

¹⁰¹ Leonard, Eric K., *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (Ashgate, 2005) at 22

idea of an international court for prosecuting war crimes and other breaches of IL by individuals.¹⁰² The US strongly advocated the creation of the Nuremberg and Tokyo War Crimes Tribunals, which reproduced key elements of due process available in American municipal courts. As military tribunals with jurisdiction over personnel only from the defeated enemies, these fell well short of the level of protections offered by regular civilian courts.¹⁰³ Nevertheless, they were created in the face of considerable scepticism by British Allies who preferred a more summary treatment of defendants, and of Soviet leaders who relished the idea of courts only in show trial form.¹⁰⁴ More particularly, US enthusiasm for the tribunals flowed from a specific strategy for augmenting its rising political power by fostering a rule of IL that positioned the US as the exemplar of that ideal.

It was in these immediate post-WWII years that the UN General Assembly commissioned and acted on a report by the International Law Commission (“ILC”)¹⁰⁵ that recommended the creation of a permanent court.¹⁰⁶ A founding statute was drafted along with a code of offences. However the project failed to gain adequate state support and ultimately stalled with the onset of the Cold War.¹⁰⁷ Despite the long history of American and ILC interest in an international criminal court, it was not until 1989, in the waning years of the Cold War, that a resolution was passed in the UN General Assembly mindful of the Charter obligation of “encouraging the progressive development of international law and its codification.”¹⁰⁸ The resolution called once again on the ILC to consider and report on the creation of a court for consideration by the General Assembly at its next session.¹⁰⁹

Renewed enthusiasm for the criminal court proposal undoubtedly coincided with favourable global conditions, and most especially the perceived rise in America’s relative power at the end of the Cold War. This fostered an internationalist stance in the general foreign policy of both the George H.W. Bush (“Bush 41”) and Clinton Administrations and openness to a renewed role for IL.¹¹⁰ At the same time, there was increased “supply” of political will brought about by the end of the Cold War rivalry that had hitherto overwhelmed the UN, and a related increase in “demand” for justice created by outbreaks in humanitarian atrocities that accompanied political fragmentation and rising

¹⁰² See Bridge, John W., ‘The Case for an International Court of Criminal Justice’ in Mark W. Janis. (ed), *International Courts for the Twenty-First Century* (Martinus Nijhoff Publishers, 1992); Office of the Legal Adviser, Department of State, in Margaret S. Pickering, Sally J. Cummins & David P. Stewart (ed), *Digest of United States Practice in International Law: 1989-1990* (International Law Institute, 2003) at 127-128

¹⁰³ See generally Tusa, Ann, *The Nuremberg Trial* (Skyhorse Publishing Inc., 2012); Brackman, Arnold C., *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (Quill, 1988)

¹⁰⁴ Leonard, Eric K., *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (Ashgate, 2005) at 24

¹⁰⁵ Established pursuant to *Charter of the United Nations* (1945), Art. 13(1) for the purpose of “encouraging the progressive development of international law and its codification”

¹⁰⁶ See International Law Commission, *Report of the International Law Commission on the Work of its Forty-Second Session (1 May -20 July 1990)*, UN Doc A/45/10 (1990) at 20

¹⁰⁷ Leonard, Eric K., *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (Ashgate, 2005) at 26-28. For a history of the development of the court during this period see Scharf, Michael P., ‘The Jury Is Still Out on the Need for an International Criminal Court’ (1991) 1 *Duke Journal of Comparative and International Law* 135 at 137-140

¹⁰⁸ GA Res 44/39, *Individual Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over Such Crimes*, 72nd Sess. UN GAOR, Supp. 47, UN Doc A/44/39 (1989); Office of the Legal Adviser, Department of State, in Margaret S. Pickering, Sally J. Cummins & David P. Stewart (ed), *Digest of United States Practice in International Law: 1989-1990* (International Law Institute, 2003) at 133

¹⁰⁹ For an overview of this period see Bassiouni, M. Cherif, *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) at 61-65; International Law Commission, *Report of the International Law Commission on the Work of its Forty-Sixth Session*, UN Doc. A/49/10 (1994) at 18-20

¹¹⁰ Goldstone, Richard and Adam M Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (Taylor & Francis, 2009) at 95; Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 268-269

nationalism. The fracturing of power that came with the end of bipolarity yielded humanitarian atrocities of which the Former Yugoslavia and Rwanda are only the most prominent examples. This created a new challenge of how best to secure international stability to fortify American national security. It was increasingly clear that only a court that addressed individual criminal responsibility would be able to use IL as a tool for peace and security in these cases.¹¹¹ On this basis then UN Ambassador and later Secretary of State Madeleine Albright led efforts to create the International Criminal Tribunal for the Former Yugoslavia (ICTY), as the first such tribunal since Nuremberg, and later the International Criminal Tribunal for Rwanda (ICTR).¹¹² Global conditions combined with the administration's experience in supporting the ad hoc tribunals can be seen as both permissive and substantive causes of the process that ultimately produced the ICC.¹¹³

The ICC project was finally realised between June-July 1998 at the *United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court* ("Rome Conference").¹¹⁴ One hundred and sixty states convened along with 33 international governmental coalitions and more than 200 nongovernmental organisations ("NGOs").¹¹⁵ After negotiations lasting five weeks, the court was established by the *Rome Statute of the International Criminal Court* ("Rome Statute") with jurisdiction over three crimes, and potential jurisdiction over a fourth: genocide, crimes against humanity, war crimes, and the future crime of aggression.¹¹⁶ On 17 July 1998, 120 states voted to adopt the Rome Statute, 21 states abstained and seven voted against – including the US.

Case Selection

The negotiation and establishment of the permanent International Criminal Court emerges as the leading case for testing American policymakers' expression of commitment to the rule of IL, and countervailing charges of contradiction and hypocrisy. The case has been described as "perhaps the classic example of an interpretive challenge to observers of international law" due to inconsistent policy approaches.¹¹⁷ Schabas depicts US policy as a "muddle of arguments,"¹¹⁸ while Van der Vyver sees it as "confusing" and beset by "schizophrenia."¹¹⁹ Du Plessis describes US policy as "ironic" where "an important element of the United States' conception of its own national interest has been the development and maintenance of an international rule of law,"¹²⁰ while Paulus similarly notes that a record of leading the establishment of the World Trade Organisation dispute settlement system yet

¹¹¹ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 18; Shattuck, John, *Freedom on Fire: Human Rights Wars and America's Response* (Harvard University Press, 2005) at 124; Leonard, Eric K., *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (Ashgate, 2005) at 31-32

¹¹² ICTY, UN Doc S/Res/827 (1993); ICTR, UN Doc S/Res/955 (1994)

¹¹³ See Cassese, Antonio, 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court' in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 10-17; Goldstone, Richard and Adam M Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (Taylor & Francis, 2009) at 95-97

¹¹⁴ See UNGA, *Establishment of an International Criminal Court*, UN Doc A/RES/51/207 (1997)

¹¹⁵ See Dutton, Yvonne, *Rules, Politics, and the International Criminal Court: Committing to the Court* (Routledge, 2013) at 12

¹¹⁶ See *Rome Statute of the International Criminal Court* (1998), Art.5 & *Amendments to the Rome Statute of the International Criminal Court on the crime of aggression* (2010)

¹¹⁷ Scott, Shirley V., *International Law, US Power: The United States' Quest for Legal Security* (Cambridge University Press, 2012) at 1

¹¹⁸ Schabas, William, *An Introduction to the International Criminal Court* (Cambridge University Press, 4th ed, 2011) at 25

¹¹⁹ van der Vyver, Johan D., 'American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness' (2001) 50 *Emory Law Journal* 775 at 776

¹²⁰ Du Plessis, Max, 'Seeking an International International Criminal Court - Some Reflections on the United States Opposition to the ICC' (2002) 15 *South African Journal of Criminal Justice* 301 at 305

opposing the ICC reveals “contradictory attitudes towards international adjudication.”¹²¹ The frustration is evident in Cherif Bassiouni’s statement after negotiations establishing the court that “the interests of the United States in having an ICC far outweigh the marginal and far-fetched concerns that have been articulated by political opponents.”¹²² Ambassador David Scheffer, as one of the most forceful advocates among US legal policymakers, has noted the contradiction of the US creating and associating itself with the principles of the post WWII tribunals yet appearing “awkwardly conflicted” with the more robust regime of the ICC. In consequence the project “has proven to be an enigma for Americans from its beginning to the present day.”¹²³

What is not documented adequately in the literature is the extent to which contradictions stem from contestation over the very concept of the rule of IL – between key parties and the US, and amongst American legal policymakers themselves. Opponents of US policy have specifically characterised its incompatibility with the rule of IL. Van der Vyver concludes that US policy has failed to “uphold the rule of international law,”¹²⁴ Sadat perceives “a profound rejection of what makes America great: our deep and abiding commitment to the rule of law,”¹²⁵ while British Queens Counsel Cherie Blair and US legal policymakers Chayes and Slaughter have all described US policy as “a high-profile rejection of a major initiative for the rule of law in international affairs.”¹²⁶ Yet the historical record equally shows that American attitudes to the ICC always exhibited the influence of competing beliefs about the nature of IL,¹²⁷ and have often been defended as a good faith commitment to the “rule of law in international affairs.”¹²⁸ The ICC case seeks to specify the structure of competing conceptions of the rule of IL according to underlying foreign policy ideologies.

Part I of this thesis develops the theoretical framework for considering these questions. Part II is devoted to analysing the history of US ICC policy as a single longitudinal case in which global power was contested through ideologically informed conceptions of the rule of IL. The explanandum is therefore the apparently contradictory IL policy positions taken by the US in relation to the ICC across four distinct observations comprised of the Clinton administration, first and second terms of the George W. Bush (“Bush 43”) administration, and the Obama administration. The explanans is the competition between theorised ideal type conceptions of the rule of IL in each observation.¹²⁹ Within consecutive observations, legal policymakers faced the task of designing and developing the ICC in conformity with three recognised elements of the rule of IL concerned with: developing non-arbitrary

¹²¹ Paulus, Andreas L., ‘From Neglect to Defiance? The United States and International Adjudication’ (2004) 15 *European Journal of International Law* 783 at 783 & 785

¹²² Bassiouni, M. Cherif et.al., ‘War Crimes Tribunals: The Record and the Prospects: Conference Convocation’ (1998) 13 *American University International Law Review* 1383 at 1403. See also van der Vyver, Johan D., ‘American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness’ (2001) 50 *Emory Law Journal* 775 at 831-832

¹²³ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 164

¹²⁴ van der Vyver, Johan D., ‘American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness’ (2001) 50 *Emory Law Journal* 775 at 832

¹²⁵ Sadat, Leila Nadya, ‘Summer in Rome, Spring in the Hague, Winter in Washington-US Policy towards the International Criminal Court’ (2003) 21 *Wisconsin International Law Journal* 557 at 596

¹²⁶ MacAskill, Ewen, ‘Cherie Booth Hits Out At US over International Court,’ *The Guardian* (13 June, 2002)

<<http://www.theguardian.com/uk/2002/jun/13/cherieblair.politics>>; Chayes, Abram & Anne-Marie Slaughter, ‘The ICC and the Future of the Global Legal System’ in Sarah B. Sewell & Carl Kaysen (ed), *The United States and the International Criminal Court: National Security and International Law* (Rowman & Littlefield Publishers, 2000) at 238

¹²⁷ See for example Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 167

¹²⁸ See Part II, Chapters 5-8 *infra*

¹²⁹ See Hempel, Carl G. & Paul Oppenheim, ‘Studies in the Logic of Explanation’ (1948) 15 *Philosophy of Science* 135 at 136-137

global governance; defining equality under IL; and ordering international legal power. The interpretation of each element is theorised to be drawn from the competition between five ideal legal conceptions. The four ideal types of Liberal Internationalism, Illiberal Internationalism, Liberal Nationalism and Illiberal Nationalism have each represented a plausible alternative resonating with US policymakers. At the same time America's global partners converged on key elements of legalist thought.

The ICC has been selected as the strongest case for testing the research question for two key reasons. The first is that this is the "crucial"¹³⁰ or "critical"¹³¹ case for testing the hypothesised influence of the competing rule of IL conceptions. The case is broadly about the 'legalisation' of world politics, which is at the forefront of debates about the global application of rule of law principles.¹³² The court itself has been described as potentially "the most important institutional innovation since the founding of the United Nations,"¹³³ as heralding "a new world order based on the rule of international law,"¹³⁴ and as representing "the establishment of the rule of law in the international community."¹³⁵ The ICC has also been the most prominent focal point for claims of contradiction and hypocrisy in post-Cold War American IL policy with increasing recognition that opposition to American policy has taken the form of "legalist" interpretations of IL.¹³⁶ Czarnetzky and Rychlak have described the ICC as the "apotheosis" of legalism,¹³⁷ while for Moyn the concept is "indispensable" for understanding the ICC.¹³⁸ If the hypothesis of competing conceptions of the rule of IL has any validity at all, it will be evident in this case.

The second reason for selecting this case is that it involves multiple observations across the period under analysis against which the hypothesis can be tested.¹³⁹ The hypothesis will be most apparent over periods where a significant national security issue involving IL has remained constant, but IL policy has shifted.¹⁴⁰ This is akin to a "most similar cases" research design, with each observation differing only in relation to the independent variable of legal policymakers' ideologies. This permits the inference of a causal relationship with observed variation in the dependent variable

¹³⁰ George, Alexander L. & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) at 120

¹³¹ Yin, Robert K, *Case Study Research: Design and Methods* (Sage, 2009) at 40

¹³² See Goldstein, Judith, et. al., *Legalization and World Politics* (The MIT Press, 2001)

¹³³ Robert C. Johansen (1997) cited in Schabas, William, *An Introduction to the International Criminal Court* (Cambridge University Press, 4th ed, 2011) at x

¹³⁴ Cassese, Antonio, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2 at 8

¹³⁵ Anderson, Kenneth, 'The Ottawa Convention Banning Landmines, The Role of International Non-Governmental Organizations and the Idea of International Civil Society' (2000) 11 *European Journal of International Law* 91 at 92

¹³⁶ Smith, Thomas W., 'Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism' (2002) 39 *International Politics* 175; Czarnetzky, John M. & Ronald J. Rychlak, 'An Empire of Law: Legalism and the International Criminal Court' (2003) 79 *Notre Dame Law Review* 55; Pildes, Richard H., 'Conflicts Between American and European Views of Law: The Dark Side of Legalism' (2003) 44 *Virginia Journal of International Law* 145 at 158-161; Wippman, David, 'The International Criminal Court' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004); Brubacher, Matthew R., 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 *Journal of International Criminal Justice* 71; Posner, Eric A., *The Perils of Global Legalism* (University of Chicago Press, 2009) at 198-204; Moyn, Samuel, 'Judith Shklar versus the International Criminal Court' (2013) 4 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 473

¹³⁷ Czarnetzky, John M. & Ronald J. Rychlak, 'An Empire of Law: Legalism and the International Criminal Court' (2003) 79 *Notre Dame Law Review* 55 at 61

¹³⁸ Moyn, Samuel, 'Judith Shklar versus the International Criminal Court' (2013) 4 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 473 at 473

¹³⁹ See Yin, Robert K, *Case Study Research: Design and Methods* (Sage, 2009) at 42

¹⁴⁰ For a useful definition of "national security" see: Baker, James E., *In the Common Defense: National Security Law for Perilous Times* (Cambridge University Press, 2007) at 13-22

of IL policy.¹⁴¹ There is general agreement in the literature that the case involves four distinct observations of change in the dependant variable of policy outcomes.¹⁴² The first is the policy of the Clinton administration in expressing in principle support for the creation of the court but opposition to US membership due to the court's institutional design. The second observation is of the shift in the first term of the Bush 43 administration to opposing not only the design, but the very existence of an international court. The third observation is of acceptance of the court's existence and limited cooperation during the second term of the Bush 43 administration. Finally, under the Obama administration, policy shifted back to in principle support for the court combined with opposition to its design and therefore US membership. The longitudinal case exhibits four distinct phases which is important because it provides multiple opportunities to test the hypothesis that competing rule of law conceptions are the most significant explanation for apparent legal contradictions within each observation.¹⁴³ This additionally allows for a form of "cross-case synthesis," in which inferences can be drawn about the longitudinal influence of legal conceptions.¹⁴⁴

The longitudinal case therefore allows testing of the hypothesis that American legal policymakers systematically contradict legalist principles while conforming to the structure of the four theorised ideal types. It will provide evidence that American IL policy is based on an established structure of legal beliefs as opposed to tactical decisions tailored to political circumstances. The claim being made for the model is that it represents all conceptions of IL capable of politically influencing American IL policy.¹⁴⁵ Confirming the hypothesis would challenge the conclusions of scholars such as Posner who identify American policymakers such as Harold Koh as "global legalists."¹⁴⁶ Conversely, the hypothesis will thus be falsified if it can be shown at any point that American policymakers did recognise the ideal of the rule of IL in legalist terms, but contradicted it according to extralegal considerations. The implication is that the ability of US and non-US policymakers alike to reach a common understanding of discrete elements of the rule of IL was severely limited, irrespective of intervening personalities or historical circumstances.

Excluded from the case is the political science question of *why* a particular ideology prevailed over another at a particular point in time and what factors caused that set of ideas to be more politically successful. The objective of the case is to isolate the role of competing foreign policy ideologies informing decision-making from variables relevant primarily to policy outcomes. The unique institutional structure of US government, for example, is indispensable to understanding foreign policy outcomes, but is considered in this study only to the extent that an identified ideology incorporates a preference for promoting one branch of US government over another.¹⁴⁷ Dueck sets out a highly persuasive framework for locating the causal impact of foreign policy ideology relative to broader

¹⁴¹ George, Alexander L. & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) at 252

¹⁴² Bosco has independently structured his analysis of the ICC approximately according to these four observations: See Bosco, David, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014)

¹⁴³ George, Alexander L. & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) at 32-33

¹⁴⁴ Yin, Robert K, *Case Study Research: Design and Methods* (Sage, 2009) at 133-134

¹⁴⁵ George, Alexander L. & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) at 190

¹⁴⁶ Posner, Eric A., *The Perils of Global Legalism* (University of Chicago Press, 2009) at 230, n.11

¹⁴⁷ See Chapter 4 *infra*

political and institutional pressures in order to explain the direction of shifts in general foreign policy.¹⁴⁸ The present analysis is more modest in seeking to answer the legal question of what political beliefs informed the interpretation and development of law at designated points in time. Neither does the case focus on US foreign policy ideology's influence on the ICC itself, but rather on demonstrating the way ideology structured US ICC policy. Certainly the analysis provides substantial evidence that US legal conceptions had a disproportionate influence on the ultimate design of the court, but that is secondary to the primary analysis of substantive beliefs about IL.¹⁴⁹

Methodology

Research methods must be selected to show that theorised legal beliefs actually played a causal role in reaching decisions and were not simply used by legal policymakers to justify those decisions. This is an especially onerous task in the case of ideology, which necessitates analysis "through rich descriptive interpretive analysis rather than through quantifiable, reproducible measurement."¹⁵⁰ The ideal in the natural sciences is to identify two cases that remain identical in all respects but one, thereby allowing for a controlled comparison and drawing of a causal inference for the hypothesised effect.¹⁵¹ This can be difficult to achieve in the social sciences, with each case potentially influenced by an unknown number of variables.¹⁵² A single case with multiple observations of the dependant variable can be a valid research design for this purpose provided strict criteria are met, including most importantly the combining of multiple research methods.¹⁵³ The approach employed here uses the four-part typology to construct a *counterfactual analysis* of alternative policy options for each observation which is analysed through the methodologies of *process-tracing* and *congruence testing*.

Counterfactual analysis is especially well suited to the ICC case, with the two dimensional model of IL policy types immediately providing four plausible alternatives at each point in time.¹⁵⁴ These alternatives can be shown to have been advocated by actual actors involved in the policymaking process. Each policy alternative is disaggregated further according to its interpretation of the three theorised elements defining the rule of IL. For each observation across the case these three elements are considered in turn to analyse how they were defined by competition between various legal conceptions. Together this equates to an extremely diverse range of possible policy combinations for the period under examination. Thus the single case masks fertile ground for applying the model to explain unique American policy positions.

¹⁴⁸ Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006). See at 41 for six stages of "strategic adjustment"

¹⁴⁹ For an example of such an approach see Byers, Michael, 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *The Journal of Political Philosophy* 171

¹⁵⁰ Appel, Hilary, 'The Ideological Determinants of Liberal Economic Reform: The Case of Privatization' (2000) 52 *World Politics* 520 at 547

¹⁵¹ George, Alexander L. & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) at 151-52

¹⁵² See King, Gary, Robert O. Keohane & Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton University Press, 1994) at 199-207

¹⁵³ See George, Alexander L. & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) at 80-81; Yin, Robert K, *Case Study Research: Design and Methods* (Sage, 2009) at 150-151

¹⁵⁴ See George, Alexander L. & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) at 167-169. For a well known example of this methodology being applied see Khong, Yuen F., *Analogies at War: Korea, Munich, Dien Bien Phu, and the Vietnam Decisions of 1965* (Princeton University Press, 1992)

The development of a counterfactual scenario brings its own methodological drawbacks, but is especially useful for enhancing the other research methods employed.¹⁵⁵ The most involved task in demonstrating causality is showing how the independent variable of legal conceptions produced observed effects on the dependant variable. Here process-tracing allows for identifying the actual ideas of legal policymakers in order to code them according to the two dimensions and four ideal types.¹⁵⁶ This task is achieved by reconstructing the process of designing and developing the ICC through close analysis of statements and decisions of key legal policymakers and political institutions. Evidence is drawn from both open source material, including public statements and recollections, from archival material, and from research interviews with key US policymakers. What is being looked for at this stage is evidence of ideology intervening at each step of the policymaking process. Process-tracing is crucial to overcome the problem, inherent to a typological theory, of equifinality: that “the same outcome can arise through different pathways.”¹⁵⁷ It is frequently the case that the divergent strategic ideas of the four ideal types converge on less than four possible policies in a given issue area. Tracing the process of policymaking is often the only method for identifying which set of ideas led to an observed outcome.¹⁵⁸

The resulting framework allows for the application of the complementary method of congruence testing between the observed outcomes and the alternative policy paths. The congruence method uses the model of IL policy types developed in this thesis to theorise the effect that each belief is likely to have on the dependant variable of IL policy. A typological theory as employed in this research sets out generalised pathways by which variables produce outcomes.¹⁵⁹ If the outcome is congruent with the hypothesis for each observation, this, combined with evidence from process tracing, will form the basis for a strong causal inference.¹⁶⁰

CHAPTER OVERVIEW

Part I of the thesis considers limitations in legal scholarship’s explanations for contradictory American IL policy and the insights from political science capable of addressing that gap. Chapter Two assesses the extent to which international legal scholarship provides compelling explanations for distinctive American IL policy. An increasing number of analyses have approached the task drawing on the pedigree of a long established literature on “American exceptionalism.” Unpacking these approaches reveals three possible sources of idiosyncratic policy: the expected rational behaviour of a state with uniquely preponderant global power; distinctive American jurisprudence; and unique political culture forged in the nation’s historical experiences. Reviewing this literature demonstrates the merit in each approach, but also shows that a clearer account is needed of the relationship between each distinct yet clearly correlated explanation.

¹⁵⁵ George, Alexander L. & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) at 231

¹⁵⁶ *Ibid* at 183

¹⁵⁷ *Ibid* at 235

¹⁵⁸ *Ibid* at 254

¹⁵⁹ *Ibid* at 235

¹⁶⁰ *Ibid* at 182 & 207

Chapter Three draws insights from FPA to better explain the relationship between power, beliefs and interests as causes of distinctive American IL policy. The focus is on “foreign policy ideology” as the ideational concept that best captures the transformation of power into ideas capable of shaping global interests. To identify ideological structure I adopt the influential four-part typology developed by Wittkopf, Holsti, and Rosenau and corroborated by a vast intellectual and diplomatic history. Reviewing that scholarship reveals an avenue for bridging contradictions between legal scholarship and American IL policy through four discrete foreign policy ideologies: Liberal Internationalism, Illiberal Internationalism, Liberal Nationalism and Illiberal Nationalism.

Chapter Four integrates legal scholarship’s existing explanations for contradictory US policy into the four-part ideological typology to develop a model of competing conceptions of the rule of IL. The ideal types, including legalism, are applied to reinterpret the classic conception of the rule of law comprised of three elements which, when translated to the global level, are concerned with: how IL should be developed to advance non-arbitrary global governance; the meaning of equality under IL; and the proper ordering of international legal power. The meaning of “coherence” becomes that a legal policymaker’s interpretation of one of the three elements is a reliable indicator of positions taken on remaining elements.

Part II of the thesis applies this model to the case of American ICC policy. Chapter Five analyses the Clinton administration (1993-2000) where US policy was characterised as contradictory for traversing from being the most prominent advocate of the project in the early years, to conspicuously voting against the final treaty establishing the court, then signing it, but warning against Senate ratification. I argue that the dominant conception of the rule of IL was that of Liberal Internationalism, combined with competing Illiberal Internationalist beliefs. Despite similar policy outcomes this represented a shift from the primarily Illiberal Internationalist policy of the Bush 41 administration. Nevertheless, the design advocated by global advocates was structured by legalist principles not recognised by US policymakers, such that US policy appeared contradictory for following internally coherent ideological conceptions of IL.

Chapter Six considers the first term of the Bush 43 administration (2000-2004) when the US “unsigned” the founding ICC statute, and used a combination of domestic legislation and bilateral treaties to obstruct its further development. I argue that this period demonstrated a clear rejection of both legalist and Liberal Internationalist conceptions of the court. The dominant conception of the rule of IL was instead that of Illiberal Nationalism combined with elements of Illiberal Internationalism, leading to widespread global criticism that US policy was contrary to the rule of IL. US policymakers nevertheless continued to defend US compliance with legal obligations and international criminal justice, while opposing a court advancing the principles recognised by legalist advocates.

Chapter Seven turns to the second term of the Bush administration (2004-2008) which was characterised by more pragmatic engagement and even tacit endorsement of the court, yet continued to insist on legal privileges through the United Nations Security Council (“UNSC”). Here I argue that the US expressed an Illiberal Internationalist conception that appeared more complementary with legalism, but remained distinct from it. Significantly, the negation of exceptionalist ideological beliefs by the Abu Ghraib prisoner abuse scandal led to acceptance of limited equal rights under the UNSC

consistent with legalism. This did, however, reinforce ideology's controlling role in interpreting legal principle, and the exclusion of legalist conceptions from American IL policy formation.

Chapter Eight concludes analysis of the ICC by considering the first term of the Obama administration (2008-2012) in which there was a conspicuous "reset" of ICC policy to positive engagement. The US attended annual meetings for the first time and contributed substantively to negotiations establishing the crime of aggression. There was no formal "re-signing" of the ICC treaty however, the aggression definition agreed by other states was rejected, and the US continued to deny any prospect of becoming a member of the court. This most recent period has less material, primary and interpretive, on which to make absolutely firm conclusions. Nevertheless, I argue that US policy reflected an amalgam of ideologies, but predominantly conceived the rule of IL in Liberal Internationalist terms, combined with strong illiberal and nationalist beliefs. The consequence was that US re-engagement was always distinct from the legalist position, and thus highlighted incompatible legal ideals, even as all parties pledged fidelity to the rule of IL.

The final chapter concludes that there is compelling evidence for foreign policy ideology structuring distinct conceptions of the rule of IL amongst American legal policymakers, and that these received principles set hard limits to reaching a universal understanding of the proper design and development of the rule of IL. Defining the rule of IL is accordingly a dialectical process in which ideological visions of global order compete through the shared space of the international legal system. Continued commitment to this contest is evidence nevertheless of the consequence of IL as a framework for sustaining discourse about global power and transcendent values.

Part I: The Ideological Structure of American International Law Policy

AMERICA'S "EXCEPTIONAL" INTERNATIONAL LAW POLICY

Part I seeks to identify limitations in legal scholarship's explanations for contradictory American policy and then define the insights from political science capable of addressing that gap. The following chapter accordingly assesses the extent to which legal scholarship provides compelling explanations for distinctive American IL policy. Characterising US policy as an outlier is commonplace – most especially in terms of a “transatlantic” divide separating America even from allies sharing the same Western tradition.¹ An increasing number of legal analyses approach the issue by drawing on the pedigree of a long established literature analysing “American exceptionalism.” As a term of art in political science American exceptionalism refers to the idea that history and values set the country apart from other nations in global politics.² That meaning will be adopted as the most historically grounded and analytically useful for present purposes. By comparison the concept, as more commonly used in legal scholarship, has narrowed principally to a pejorative shorthand for the American practice of seeking “exceptions” to global legal rules.³ By stripping away the explanatory role of “exceptionalist beliefs” these approaches thereby fail to explain *why* the US repeatedly promotes and then retreats from global legal institutions, and thereby systematically exposes itself to the charge of hypocrisy. By reviving the richer meaning from political science the “exceptionalism” label is saved from reduction to a mere tautological restatement of the primary observation that policy is divergent.⁴

Unpacking approaches in international legal scholarship reveals three possible sources of policy distinctiveness. The first is that of relative political power and the consequences of its unequal distribution in the international system. The possession of preponderant global power has created incentives for the US to engage in “hegemonial lawmaking” to institutionalise advantages within the international legal system. Here the rules and doctrines of IL are influenced both to reduce constraints upon the US, and to enable greater global autonomy. This dynamic produces legal policy that diverges from states with less capacity and therefore incentive to reshape IL. This level of analysis matches that of conventional IR scholarship, and therefore relies on the same assumption of consistent state rationality. Such an approach replicates the limitation of being unable to account for specific policy outcomes, and therefore legal contradictions.

¹ Taft IV, William H. & Frances G. Burwell, *Law and the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law* (Policy Paper, The Atlantic Council of the United States, April, 2007); Bellinger III, John B., ‘Reflections on Transatlantic Approaches to International Law’ (2007) 17 *Duke Journal of Comparative and International Law* 513; Bethlehem, Daniel, ‘A Transatlantic View of International Law and Lawyers: Cooperation and Conflict in Hard Times’ (2009) 103 *American Society of International Law Proceedings* 455

² See Lipset, Seymour M., *American Exceptionalism: A Double-Edged Sword* (W.W. Norton, 1996)

³ Gunn, Jeremy T., ‘American Exceptionalism and Globalist Double Standards: A More Balanced Alternative’ (2002) 41 *Columbia Journal of Transnational Law* 137 at 138-139, n.9

⁴ For a comparison of these alternative uses of the term that reaches the same conclusion see: Thimm, Johannes, ‘American Exceptionalism – Conceptual Thoughts and Empirical Evidence’ (2007) 13 *Paper für die Tagung der Nachwuchsgruppe “Internationale Politik” der DVPW* 14

The second explanation is an institutional one, in the form of distinctive American jurisprudence in the teaching and practice of IL. Accounts by American scholars and policymakers identify their most distinctive jurisprudential contribution in redefining IL as a policy process rightfully encompassing political considerations. The basic rejection of the assumption that IL exists separately from international politics translates into an approach to law less as formalised rules and doctrines, and more as a process embedded in a broader political and social context. Such jurisprudence can indeed facilitate distinctive outcomes in cases where policy overrides formal rules. However the conception of law as policy ultimately relies on an equally generalised explanation that cannot account for specific outcomes appearing to follow contradictory logics. Moreover, there is a clear nexus between this jurisprudence and hegemonic power, with the imprecision of a policy orientation complementing hegemonic impulses.

The final explanation for difference is a cultural one. Scholarship has identified the contours of American IL policy with a unique political culture forged in the nation's historical experiences. This comes closest to the insights of exceptionalist literature by identifying the importance of beliefs in American difference for explaining divergent legal policies. Yet, as with the institutional account, American cultural beliefs correlate with power based explanations in a way that indicates deep-seated connections between ideas and interests. Reading these accounts together suggests that a clearer account is required of the relationship between distinct yet correlated explanations.

THE TURN TO AMERICAN EXCEPTIONALISM

In 2013 "American Exceptionalism" became a focal point in Sino-US wrangling over alleged use of chemical weapons in the Syrian Civil War. President Barack Obama advocated a military intervention over the top of strict legal prohibitions against the use of force outside of UNSC authorisation. To make this case he turned to American "ideals and principles" as the more fundamental source of legitimacy. For the end of "enforcing" international agreements Obama argued: "I believe we should act. That's what makes America different. That's what makes us exceptional."⁵ These assertions and the attempt to "bypass the United Nations" were rejected by Russian President Vladimir Putin in the *New York Times*:

It is extremely dangerous to encourage people to see themselves as exceptional, whatever the motivation. There are big countries and small countries, rich and poor, those with long democratic traditions and those still finding their way to democracy. Their policies differ, too. We are all different, but when we ask for the Lord's blessings, we must not forget that God created us equal.⁶

The high-level conversation on exceptionalism concluded that month when Obama responded in the UN General Assembly that: "Some may disagree, but I believe America is exceptional – in part

⁵ Obama, Barack H., *Remarks by the President in Address to the Nation on Syria* (10 September, 2013)

<<http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>>

⁶ Putin, Vladimir, V., 'A Plea for Caution From Russia: What Putin Has to Say to Americans About Syria,' *New York Times* (11 September, 2013) <<http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html>>

because we have shown a willingness through the sacrifice of blood and treasure to stand up not only for our own narrow self-interests, but for the interests of all."⁷

References to "American Exceptionalism" have become ubiquitous in discussions of US foreign policy, with its use increasing exponentially in recent years.⁸ In this process the term has swollen into a catchall explanation for every idiosyncrasy in American politics, and therefore an adequate explanation of less and less. The term is treated as if self-explanatory in accordance with its ordinary dictionary definition of "the condition of being different from the norm."⁹ On this reading every deviation in American foreign policy from the behaviour of comparative countries could be seen as "exceptional." More usefully defined, American exceptionalism is "the notion that the United States was born in, and continues to embody, qualitative differences from other nations. Understanding other nations will not help in understanding it; understanding it will only mislead in understanding them."¹⁰ Lipset's leading work on the topic claimed that the concept properly used does not mean that "America is better than other countries or has a superior culture." Rather it encapsulates the idea that America is "qualitatively different, that it is an outlier."¹¹ Yet it is clear that the idea has always been accompanied by a notion that the distinctive values of American political culture do offer a superior alternative to extant values.¹²

The term resonates by virtue of the long history of exceptionalist analysis, often traced back to the 19th century writings of de Tocqueville.¹³ The defining formulation was in John Winthrop's much quoted 1630 invocation that the American people "shall be as a city upon a hill, the eyes of all people are upon us."¹⁴ The core of exceptionalist thought is the idea that the founding of the American polity marked a break from the values and practices of the Old World.¹⁵ Politics in the European continent were marked by relentless wars and the dominance of mercenary political interests over moral purpose. For Anatol Lieven "the most important root" of exceptionalist ideas is the geographic and cultural separation of America from the destructive experiences of war and revolution that beset Europe.¹⁶ For the colonists of New England, the confluence of religious puritan values and secular enlightenment ideals of human progress forged the belief that America had a uniquely reforming role in its global relations, and thereby an exceptional place in history. In his 1776 rallying cry for

⁷ Obama, Barack H., *Remarks by President Obama in Address to the United Nations General Assembly* (24 September, 2013) <<http://www.whitehouse.gov/the-press-office/2013/09/24/remarks-president-obama-address-united-nations-general-assembly>>

⁸ Terrance McCoy of the *The Atlantic* found the term in national publications only 457 times for the 20 years up to 2000; 2,558 times during the next ten years; and approximately 4,172 times when he published these findings in March 2012: See McCoy, Terrence, 'How Joseph Stalin Invented 'American Exceptionalism', *The Atlantic* (2012)

<<http://www.theatlantic.com/politics/archive/2012/03/how-joseph-stalin-invented-american-exceptionalism/254534/>>

⁹ Merriam-Webster, *Merriam-Webster Online Dictionary and Thesaurus* <<http://www.merriam-webster.com/dictionary/exceptionalism>>. Notably, since this chapter was first drafted, the Merriam-Webster definition has been expanded to include a second meaning: "also: a theory expounding the exceptionalism especially of a nation or region"

¹⁰ Shafer, Byron E., 'American Exceptionalism' (1999) 2 *Annual Review of Political Science* 445 at 446

¹¹ Lipset, Seymour M., *American Exceptionalism: A Double-Edged Sword* (W.W. Norton, 1996) at 18. Lipset's well known "American creed" sets out the exceptional elements of political culture as "liberty, egalitarianism, individualism, populism, and laissez-faire": at 19

¹² Hoffman, Stanley, 'The American Style: Our Past and Our Principles' (1967-68) 46 *Foreign Affairs* 362 at 363. Anatol Lieven makes this point through a survey finding that "six in ten Americans in 2003 believed that "our culture is superior to others," compared – against every stereotype of the snobby French – to only three in ten French people": Lieven, Anatol, *America Right or Wrong: An Anatomy of American Nationalism* (Oxford University Press, 1st paperback ed, 2005) at 19-20

¹³ De Tocqueville, Alexis, *Democracy in America* (Knopf, 1945)

¹⁴ Cited in Kennedy, John F., "'City Upon a Hill" Speech,' *Miller Center, University of Virginia* (9 January, 1961) <<http://millercenter.org/president/speeches/speech-3364>>

¹⁵ Ross, Dorothy, *The Origins of American Social Science* (Cambridge University Press, 1992) at 26

¹⁶ Lieven, Anatol, *America Right or Wrong: An Anatomy of American Nationalism* (Oxford University Press, 1st paperback ed, 2005) at 30; Whitcomb, Roger S., *The American Approach to Foreign Affairs: An Uncertain Tradition* (Praeger Publishers, 1998) at 9

revolution Thomas Paine expressed the conviction that "we have it in our power to begin the world over again."¹⁷

Because this thesis focuses on the influence of foreign policy ideology over policymaking, the truth or otherwise of appeals to normative superiority is not relevant.¹⁸ What matters is that there has been "throughout American history a strong belief that the United States is an exceptional nation, not only unique but also superior among nations."¹⁹ As long as policymakers genuinely hold such beliefs, and employ them in formulating and garnering support for policy, then "exceptionalism is a genuine and confirmed empirical phenomenon."²⁰ Former Secretary of State Madeleine Albright explicitly affirmed her belief in American exceptionalism, which underpinned her frequent portrayal of the US as "the indispensable nation."²¹ Irrespective of the veracity of the concept, she remained equally aware of the term's political power. Acknowledging global allies' negative associations with the idea of "American exceptionalism," she defended her invocation of the belief for its power "to stir a sense of pride and responsibility among Americans, so that we would be less reluctant to take on problems."²² In other words, whatever the empirical basis for the claim, it was a concept with real political influence in directing political actions. Starkly divergent formulations have been propounded under the exceptionalist rubric, but the core belief that America is exceptional persists and shapes discourse at the highest levels of political power.

Exceptionalist Analysis in Legal Scholarship

Legal scholarship has seized upon the concept with particular vigour, with critical assessments of American IL policy as beset by "exceptionalism" becoming an article of faith. The topic has likely been framed in this way precisely because it rides on the pedigree and familiarity of these ideas in American domestic and foreign politics. The problem is that adoption of the term in legal scholarship has often been disconnected from the insights and nuances of the rich body of thought giving the concept analytical worth. In legal scholarship the concept has primarily narrowed to a disapproving reference to a specific point of difference in US IL policy, which is its sometimes contradictory or even hypocritical nature – a policy of "international law for others and not for itself."²³ A representative example is Hilary Charlesworth's definition of exceptionalism to mean that "while other states should comply with international legal norms, it is not appropriate to subject the United States to the same

¹⁷ Cited in Reagan, Ronald W., 'Ronald Reagan's Announcement for Presidential Candidacy,' *Ronald Reagan Presidential Library & Museum* (13 November, 1979) <<http://www.reagan.utexas.edu/archives/reference/11.13.79.html>>

¹⁸ For empirical research sceptical of the truth of exceptionalist claims see Lepgold, Joseph & Timothy McKeown, 'Is American Foreign Policy Exceptional? An Empirical Analysis' (1995) 110 *Political Science Quarterly* 369. See also Holsti, Karl J., 'Exceptionalism in American Foreign Policy: Is it Exceptional?' (2011) 17 *European Journal of International Relations* 381

¹⁹ McCrisken, Trevor B., *American Exceptionalism and the Legacy of Vietnam: US Foreign Policy Since 1974* (Palgrave Macmillan, 2003) at 4

²⁰ Shafer, Byron E., 'American Exceptionalism' (1999) 2 *Annual Review of Political Science* 445 at 446; McCrisken, Trevor B., *American Exceptionalism and the Legacy of Vietnam: US Foreign Policy Since 1974* (Palgrave Macmillan, 2003) at 4-6

²¹ Albright attributes the phrase to President Clinton from the period when she served as UN Ambassador: Albright, Madeleine K., *Madam Secretary: A Memoir* (Macmillan, 2003) at 506

²² For empirical research that is sceptical of the truth of exceptionalist claims see Lepgold, Joseph & Timothy McKeown, 'Is American Foreign Policy Exceptional? An Empirical Analysis' (1995) 110 *Political Science Quarterly* 369

²³ Crawford, James, 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review* 3 at 8. See especially Ignatieff, Michael, 'Introduction: American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005); Koh, Harold H., 'On American Exceptionalism' (2003) 55 *Stanford Law Review* 1479. Discussed below. Shattuck, John, *Freedom on Fire: Human Rights Wars and America's Response* (Harvard University Press, 2005) at 309; Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at 14-15; Finkelstein, Lawrence S., 'The Rule of Law, the United States, and the United Nations: An Ambiguous Record' (2006) 28 *American Foreign Policy Interests* 297 at 302

regime." The reasons for this include a belief that "the United States is already an exemplary international citizen and its domestic legal system can be relied on to provide appropriate accountability and/or the expectation that international law will inevitably be used in a politicised way to discriminate against the United States." For Charlesworth such exceptionalism, whatever its origins, is antithetical to the rule of law.²⁴ Similarly, Natsu Saito defines exceptionalism in relation to "uniquely American" IL policy as the belief that "America is special, or exceptional, because it claims certain incontestable values; the possibility that its hegemony was consolidated and continues to be exercised at the expense of those values can be ignored in the name of a greater good."²⁵ This forms the basis for Saito's argument that it is only by overcoming the "tremendous power of the narrative of American exceptionalism" that the US can contribute to strengthening the rule of law.²⁶ Scott observes that the term has been employed "cynically" to mean "the perception that key figures in US foreign policy circles apparently believe that a different rule should apply to the United States than applies to the rest of the world."²⁷

Murphy sets out to address the apparent contradiction that, despite being the key proponent of the major Twentieth Century international institutions, the US has itself found it "increasingly difficult to adhere to the rule of law in international affairs."²⁸ He argues that US legal policy is shaped by attitudes of "triumphalism, exceptionalism, and provincialism" which "stand in the way of US support of the rule of law in international affairs." This troika of concepts encompass various aspects of exceptionalist thinking, with "exceptionalism" itself defined as the idea that "the United States bears special burdens and is entitled to special privileges because of its status as the sole surviving superpower."²⁹ Murphy does not however specify how the distinct "attitudes" he identifies enhance understanding of the particular policy approach adopted by the US toward the rule of law. Slaughter observes that, although Murphy's approach identifies clearly relevant attitudes, his application of them has "shed no light on the microfoundations of U.S. decisions to take specific positions in individual cases."³⁰

A choice definition from a scholar and practitioner is in the memoirs of former US Ambassador at Large for War Crimes David Scheffer, which in part explore his difficulties securing US support for the creation of the ICC. For Scheffer "the siren of exceptionalism enveloped the entire enterprise of the International Criminal Court on my watch." His subsequent definition of exceptionalism in US IL policy reveals that this single concept masks multiple competing influences on policy:

By "exceptionalism" in the realm of international law, I mean that the United States has a tradition of leading other nations in global treaty-making endeavours to create a more law-abiding international community, only to seek

²⁴ Charlesworth, Hilary, *No Country is an Island: Australia and International Law* (University of New South Wales Press, 2006) at 147; Scott, Shirley V., *International Law, US Power: The United States' Quest for Legal Security* (Cambridge University Press, 2012) at 20

²⁵ Saito, Natsu T., *Meeting the Enemy: American Exceptionalism and International Law* (New York University Press, 2010) at 4

²⁶ *Ibid* at 229

²⁷ Scott, Shirley V., *International Law, US Power: The United States' Quest for Legal Security* (Cambridge University Press, 2012) at 20

²⁸ Murphy, John F., *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004) at 4 & 349

²⁹ *Ibid* at 7. Murphy provides more detailed definitions for these elements in his earlier work: Murphy, John F., 'The Quivering Gulliver: US Views on a Permanent International Criminal Court' (2000) 34 *International Lawyer* 45 at 46

³⁰ Slaughter, Anne-Marie, 'Book Reviews: The United States and the Rule of Law in International Affairs' (2005) 99 *American Journal of International Law* 2 at 516

exceptions to the new rules for the United States because of its constitutional heritage of defending individual rights, its military responsibilities worldwide requiring freedom to act in times of war, its superior economy demanding free trade one day and labor protection and environmental concessions the next, or just stark nativist insularity. We sometimes want the rest of the world to "right itself" but to leave the United States alone because of its "exceptional" character.³¹

Scheffer's definition demonstrates the narrowness of identifying the influence of exceptionalist ideas only where the US seeks exemptions from international rules. At the same time it is too broad in including all such exemptions irrespective of whether they are explained by exceptionalist beliefs. Certainly divergent IL policy motivated by "constitutional heritage" fits squarely within an exceptionalist explanation. Analysing the contours of such policy would require an understanding of the unique elements of American constitutionalism rather than a general theory of IL policy.³² On the other hand, divergent IL policy stemming from unrivalled military and economic interests is not necessarily a product of a belief in "American exceptionalism," but rather a consequence of unrivalled US power. Loose use of the term hinders the understanding that is promised by an exceptionalist legal analysis, and therefore the implications of this body of thought for the rule of IL.

Ignatieff and Koh's Exceptionalism

Beyond these partial analyses of American exceptionalism two works have adopted a more systematic analysis, thereby becoming standard references. Michael Ignatieff's edited book *American Exceptionalism and Human Rights*³³ and Harold Koh's article *On American Exceptionalism*³⁴ each provide a definition and typology of American exceptionalism representative of the general usage in legal scholarship. Moreover, the works were produced contemporaneously and so usefully draw upon and critique each other's approach.

For Ignatieff American exceptionalism is the uniquely contradictory "combination of leadership and resistance" to IL which has produced the "paradox of being simultaneously a leader and an outlier."³⁵ Ignatieff identifies three forms of policy labelled as exceptionalism: *exemptionalism*, *double standards* and *legal isolationism*.³⁶ *Exemptionalism* is where America supports and even promotes international legal regimes, but exempts itself through treaty reservations, failure to ratify treaties or mere noncompliance. *Double standards* occur where the US judges its own behaviour and that of its allies according to different standards than other countries, and particularly its enemies.³⁷ Finally *legal isolationism* is the resistance within sections of the US judiciary to the infiltration of precedents and jurisprudence of foreign and international courts. Ignatieff claims that these constitute an exceptional

³¹ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 165

³² See Shafer, Byron E., 'American Exceptionalism' (1999) 2 *Annual Review of Political Science* 445 at 446 *infra*

³³ Ignatieff, Michael, 'Introduction: American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005)

³⁴ Koh, Harold H., 'On American Exceptionalism' (2003) 55 *Stanford Law Review* 1479

³⁵ Ignatieff, Michael, 'Introduction: American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) at 1. Ignatieff writes specifically in the context of US human rights legal policy, but makes it clear that his conclusions are relevant to US IL policy generally: at 2

³⁶ *Ibid* at 3-11

³⁷ Ignatieff cross-references Koh's piece for this terminology and policy type: See *ibid* at 7

and harmful IL policy, in that no other democracy engages in these practices to the same extent as the US, and none does so while simultaneously claiming to lead the global human rights movement.³⁸

Koh finds Ignatieff's typology "both under- and over inclusive" in that it conflates some forms of exceptionalism and omits others.³⁹ Koh's own piece engages more effectively with the exceptionalist literature in that he aims not to defeat exceptionalism, but rather to channel it positively to advance the rule of law. Koh acknowledges the indeterminacy of exceptionalist ideas by calling on the US to "preserve its capacity for positive exceptionalism by avoiding the most negative features of American exceptionalism."⁴⁰ To clarify the concept Koh adopts a four part typology listed "in order of ascending opprobrium": *distinctive rights culture, different labels, the "flying buttress" mentality, and double standards.*⁴¹ The greater nuance in Koh's typology is in making a distinction between unique IL practices according to whether they strengthen or weaken IL. Invoking Gothic architectural imagery, the "flying buttress mentality" for instance describes the idea that the US has frequently provided crucial support for treaty regimes from outside the institution, while refusing to stand as pillar within.⁴² Koh concludes that, on the whole, this is a threat to America's own interests far more than it is a problem for IL generally. It is only the final form of policy that Koh identifies as a challenge to the integrity of IL, where the US "uses its exceptional power and wealth to promote a *double standard.*"⁴³

The key question for present purposes is what specific factors cause American IL policy to exhibit contradictory behaviours, including the disjunct between expressions of commitment to the rule of law and policy outcomes. In particular, are these outcomes explained by exceptionalist beliefs properly so called, thereby justifying adoption of the terminology? The typologies of Ignatieff and Koh mask a range of competing and perhaps interrelated causes of distinctive behaviour such that the exceptionalism label may do more to obscure than to clarify. Ignatieff identifies four possible explanations for distinctive US policy:

a realist one, based in America's exceptional power; a cultural one, related to an American sense of Providential destiny; an institutional one, based in America's specific institutional organization; and finally a political one, related to the supposedly distinctive conservatism and individualism of American political culture.⁴⁴

Of these only the "cultural" explanation directly encapsulates the influence of exceptionalism as the term is used here. The distinct elements are not mutually exclusive however, such that exceptionalist beliefs indirectly shape each of the alternative explanations for the uniqueness of American legal policy. Ignatieff recognises these linkages to the degree that international institutions have been supported with an enthusiasm that cannot be explained by realist power based motives alone.⁴⁵ American IL policy goes further than realism strictly requires in "defending a mission, an identity, and

³⁸ *Ibid* at 4; Moravcsik, Andrew, 'The Paradox of US Human Rights Policy' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) at 148

³⁹ Koh, Harold H., 'On American Exceptionalism' (2003) 55 *Stanford Law Review* 1479 at 1483

⁴⁰ *Ibid* at 1503

⁴¹ *Ibid* at 1483

⁴² The architectural analogy is Louis Henkin's: "In the cathedral of human rights the United States is more like a flying buttress than a pillar – choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of that system.": Henkin, Louis, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 2nd ed, 1979) at 183

⁴³ Koh, Harold H., 'On American Exceptionalism' (2003) 55 *Stanford Law Review* 1479 at 1486-1487. Original emphasis

⁴⁴ Ignatieff, Michael, 'Introduction: American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) at 11

⁴⁵ *Ibid* at 13

a distinctive destiny as a free people."⁴⁶ A culturally entrenched faith in America's mission to promote human rights has transformed the conventional conception of IL as a constraint on power to a system for enabling the US to advance a form of global governance. Cultural attachment to messianism is thereby a key explanation for the "power dynamics and the distinctive ideology" underpinning different forms of "exceptional" IL policy.⁴⁷ At the same time the correlative of the messianic project is that the US is less willing to recognise IL as a legitimate constraint on itself.

Likewise, the institutional explanation reveals much about unique IL outcomes, but ultimately depends on exceptionalist and ideological factors to explain policy contradictions. The institutional power to develop and execute IL policy resides primarily with the US executive,⁴⁸ but is divided between the branches of federal government, and subject to prerogatives of the various states.⁴⁹ Constitutional scholar Edward Corwin characterised the effect as "an *invitation to struggle* for the privilege of directing American foreign policy."⁵⁰ IL policy is not determined merely by a free-market of ideas across government, but through the amplification or suppression of certain ideas via "decentralized and fragmented political institutions."⁵¹ Citing these institutional factors, however, merely begs the question of *what* divergent beliefs distinguish policymakers competing for influence across divided government. Within Ignatieff's work Moravcsik identifies "in particular, supermajoritarian treaty ratification rules in the Senate, the federal system, and the strength of the judiciary" as subjecting US IL policymaking to competing voices.⁵² For Moravcsik, the outlier status of the US in failing to ratify key human rights treaties owes much to the unique constitutional requirement that treaties be approved by a super-majority of the US Senate.⁵³ However, his further analysis identifies the root cause of resistance in "senatorial suspicion of liberal multilateralism" among a minority of senators "disproportionately representative of the conservative southern and rural Midwestern or western states."⁵⁴ This suggests that the exceptionalist beliefs and ideological commitments of policymakers remain prior to institutional explanations for unique policy outcomes. Although institutional veto points are important for understanding the dynamics through which foreign policy ideologies inform legal policy outcomes, this thesis addresses the more basic task of specifying the content of ideology itself.

Although Ignatieff takes a largely critical view of exceptionalism, his analysis corroborates the principle that exceptionalist beliefs have a variable influence on IL. Writing during the Bush 43 years Ignatieff concludes that the administration's brand of American exceptionalism was "fundamentally explained by the weakness of American liberalism." By extension it is the extent that liberal variants of American exceptionalism have "waxed and waned" that is decisive for IL, rather than the influence of

⁴⁶ *Ibid* at 14

⁴⁷ *Ibid* at 16

⁴⁸ For judicial approval of the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" see: *United States v. Curtiss-Wright Export Corp.* (1936) 299 U.S. 304 at 320, per Sutherland J

⁴⁹ See Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 35-36

⁵⁰ Corwin, Edward S., *The President: Office and Powers 1787-1957* (New York University Press, 4th ed, 1957) at 171.

Emphasis added

⁵¹ Moravcsik, Andrew, 'The Paradox of US Human Rights Policy' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) at 150

⁵² *Ibid* at 150

⁵³ *Ibid* at 187

⁵⁴ *Ibid* at 187. This observation correlates with the geographical distribution of nationalist foreign policy ideologies identified in this study: See Chapter 4 *infra*

American exceptionalism *per se*.⁵⁵ This reinforces the point that the actual content of exceptionalist ideas needs to be specified before any normative judgment about exceptionalism can be made. To the extent that exceptionalist ideas influence policy the label is appropriate, but Ignatieff's classification inadequately sets out the relationship between competing causes of divergent IL policy.

Despite its advantages Koh's typology exhibits a similar limitation to Ignatieff's, which is to inadequately distinguish the role of exceptionalist ideas relative to other influences on policy. In practice Koh's first three forms of exceptionalism promote "double standards" as much as the fourth form of exceptionalism that Koh finds so troubling. His example of double standards in ambivalent American engagement with the ICC has variously been defended in terms of "distinctive" American constitutional rights or as an example of the "flying buttress" mentality. The constitutional right to a trial by jury, and the rule against double jeopardy, are both examples of distinctive rights that have been used to resist ICC jurisdiction over US citizens. Similarly US policy has been defended for supporting the ICC from outside formal membership. Accordingly any useful typology of exceptionalism must be built not upon policy outcomes, but rather on the exceptionalist beliefs guiding policymakers' decisions and the ways these interact with other factors.

To his typology Koh adds a fifth positive element of *exceptional global leadership*.⁵⁶ This term comes closer to describing the variable influence of exceptionalist ideas on American IL policy.⁵⁷ Koh describes the US commitment to establish an international system "committed to international law, democracy, and the promotion of human rights."⁵⁸ Yet even here Koh diffuses this discussion with references to the exceptional nature of America's "global interest and its global influence."⁵⁹ In this formulation, and that of the other four types, it is clear that Koh is not always describing expressions of "American exceptionalism," but simply differences in American legal practice which may or may not be related to exceptionalist beliefs. He concludes by posing a choice between an American exceptionalism that is "power-based" and disregards IL, or "good exceptionalism"⁶⁰ that is "norm-based," showing deference to "universal values of democracy, human rights, and the rule of law."⁶¹ Yet grounding in the ideas of American exceptionalism demonstrates that this is a false dichotomy. Exceptionalist norms guiding policymakers can promote or derogate from IL depending on the form of exceptionalist thought. At the same time there is clearly a relationship between norms and power in which even advocates of IL perceive fidelity to the rule of law as being consistent with American interests and power.

⁵⁵ Ignatieff, Michael, 'Introduction: American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) at 20

⁵⁶ Koh, Harold H., 'On American Exceptionalism' (2003) 55 *Stanford Law Review* 1479 at 1487

⁵⁷ Koh's divergent interpretations of "exceptionalism" lead Scott to set aside the concept altogether in favour of a "more analytically precise" term: Scott, Shirley V., *International Law, US Power: The United States' Quest for Legal Security* (Cambridge University Press, 2012) at 20

⁵⁸ Koh, Harold H., 'On American Exceptionalism' (2003) 55 *Stanford Law Review* 1479 at 1487

⁵⁹ *Ibid* at 1489

⁶⁰ *Ibid* at 1501

⁶¹ *Ibid* at 1526-1527

SOURCES OF UNIQUE AMERICAN INTERNATIONAL LAW POLICY

From this review of legal treatments it is possible to discern three distinct explanations for the outlier status of American IL policy. The first is that hegemonic power possessed by the US creates the capabilities and incentives to reshape or evade IL. This is not a product of exceptionalist beliefs, but rather a manifestation of general principles of great power behaviour. The second is that distinct institutional differences influence the American approach to IL. Specifically, jurisprudence ingrained in the academy and among practitioners is distinctive for reconceptualising IL as a purposive process of policymaking rather than as formalised rules. Finally are cultural explanations that identify the role of exceptionalist ideas in shaping American engagement with IL. The possible effect of these ideas is to alter American commitment to legal rules in ways directly influenced by national political culture. In analysing these separate possible explanations the focus will be on isolating the distinct influence of each variable. Analysis can then proceed to identifying how these variables relate to one another to produce "exceptional" legal policy.

Power Based Explanations: Hegemonic International Law

In the year prior to the 2003 Iraq War Robert Kagan surveyed divided transatlantic approaches to IL to conclude that "Americans are from Mars and Europeans are from Venus."⁶² Europeans evinced a preference for "a world where strength doesn't matter, where international law and international institutions predominate, where unilateral action by powerful nations is forbidden, where all nations regardless of their strength have equal rights and are equally protected by commonly agreed-upon international rules of behaviour."⁶³ The success of the EU in ending centuries of interstate conflict encouraged faith in this formula as the answer to a more peaceful world. The US in contrast continued to perceive a "Hobbesian world where 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."⁶⁴ For Kagan "these differences in strategic culture do not spring naturally from the national characters of Americans and Europeans" but rather from underlying power differentials.⁶⁵ Tracing a shift in global power over 200 years, he observed that:

When the United States was weak, it practiced the strategies of indirection, the strategies of weakness; now that the United States is powerful, it behaves as powerful nations do. When the European great powers were strong, they believed in strength and martial glory. Now, they see the world through the eyes of weaker powers.⁶⁶

The disparity of transatlantic power has accordingly lain behind "a broad ideological gap" in which "material and ideological differences reinforce one another" to crystallise in irreconcilable conceptions of IL.⁶⁷ Kagan's thesis was especially significant for its influence over the Bush 43 administration,

⁶² Kagan, Robert, 'Power and Weakness' (2002) June-July *Policy Review* 3 at 3. For a fuller treatment see also Kagan, Robert, *Of Paradise and Power* (Vintage Books, 2004)

⁶³ Kagan, Robert, 'Power and Weakness' (2002) June-July *Policy Review* 3 at 10 & 15

⁶⁴ *Ibid* at 3

⁶⁵ *Ibid* at 5. For a similar analysis see Rabkin, Jeremy A., 'Worlds Apart on International Justice' (2002) 15 *Leiden Journal of International Law* 835

⁶⁶ Kagan, Robert, 'Power and Weakness' (2002) June-July *Policy Review* 3 at 6. For a similar conclusion regarding the connection between 18th Century American military weakness and respect for IL see: Jay, Stewart, 'The Status of the Law of Nations in Early American Law' (1989) 42 *Vanderbilt Law Review* 819 at 839

⁶⁷ Kagan, Robert, 'Power and Weakness' (2002) June-July *Policy Review* 3 at 6. See also Shapiro, Jeremy & Daniel Byman, 'Bridging the Transatlantic Counterterrorism Gap' (2006) 29 *Washington Quarterly* 33

where it was widely circulated and read in 2002. Then senior administration lawyer Jack Goldsmith wrote that the "essay gave structure to intuitions that top administration officials already possessed."⁶⁸

The decisive role of preponderant global power provides the first explanation for distinctive American IL policy. Oppenheim argued over a century ago that an effective balance of power between states is the supreme and necessary precondition for the survival of IL. Without a functioning balance of power, "an overpowerful State will naturally try to act according to discretion and disobey the law," thereby becoming "omnipotent."⁶⁹ Hedley Bull likewise recognised a mutual relationship between the efficacy of the balance of power and of IL.⁷⁰ For Morgenthau the condition of international anarchy⁷¹ meant that enforcement of IL was ultimately left to "the vicissitudes of the distribution of power between the violator of the law and the victim of the violation."⁷² Morgenthau thus recognised that applying a legal "positivist" account "cannot but draw a completely distorted picture of those rules which belong in the category of *political* international law."⁷³ The consequence was that "the rights and duties established by them appear to be clearly determined, whereas they are subject actually to the most contradictory interpretations."⁷⁴ This expresses political realism's basic view of institutions as 'epiphenomenal': a mere expression of power distribution between states and of their self-interested behaviour. IL has an instrumental value when serving state interests, but any general commitment to its terms is anomalous.⁷⁵ The bulk of IL may even command voluntary compliance by virtue of its useful administrative functions, but in cases where IL has a direct bearing on relative power between states, especially in matters of national security, power and not law determines compliance.⁷⁶

The most influential modern account in these terms is Goldsmith and Posner's *The Limits of International Law*.⁷⁷ The authors' aim is "to explain how international law works by integrating the study of international law with the realities of international politics." Specifically they summarise their theory as being "that international law emerges from states acting rationally to maximise their interests, given their perceptions of the interests of other states and the distribution of state power."⁷⁸ They conclude: "the best explanation for when and why states comply with international law is not that states have internalized international law, or have a habit of complying with it, or are drawn by its

⁶⁸ Goldsmith, Jack L., *The Terror Presidency: Law and Judgment inside the Bush Administration* (W.W. Norton & Co, 2007) at 126-127. It is cited approvingly by former Deputy Assistant U.S. Attorney General in the Office of Legal Counsel, Department of Justice during the Bush 43 administration: Yoo, John C., *War by Other Means: An Insider's Account of the War on Terror* (Atlantic Monthly Press, 2006) at 47

⁶⁹ Oppenheim, L. 1912, cited in Morgenthau, Hans Joachim, *Politics Among Nations: The Struggle for Power and Peace* (Knopf, 5th ed, 1973) at 274

⁷⁰ Bull, Hedley, *The Anarchical Society* (Macmillan Press, 2nd ed, 1995) at 125-126

⁷¹ In the IR sense of an absence of global government rather than a world in chaos

⁷² Morgenthau, Hans Joachim, *Politics Among Nations: The Struggle for Power and Peace* (Knopf, 5th ed, 1973) at 290

⁷³ Morgenthau, Hans Joachim, 'Positivism, Functionalism, and International Law' (1940) 34 *American Journal of International Law* 260 at 279. Emphasis added

⁷⁴ *Ibid* at 279

⁷⁵ Taubman, Jarrett, 'Towards a Theory of Democratic Compliance: Security Council Legitimacy and Effectiveness after Iraq' (2004) 37 *International Law and Politics* 161 at 167; Kingsbury, Benedict, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998) 19 *Michigan Journal of International Law* 345 at 350-351; Mearshimer, John J., 'The False Promise of International Institutions' (1994-1995) 19 *International Security* 5 at 13. See generally Waltz, Kenneth N., *Theory of International Politics* (McGraw-Hill, 1979)

⁷⁶ Morgenthau, Hans Joachim, *Politics Among Nations: The Struggle for Power and Peace* (Knopf, 5th ed, 1973) at 273 & 291

⁷⁷ Goldsmith, Jack L. & Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005). Golove notes the "puzzling" omission of any acknowledgment by the authors that the book closely aligns with political realism: Golove, David M., 'Leaving Customary International Law Where It Is: Goldsmith and Posner's *The Limits of International Law*' (2005) 34 *Georgia Journal of International and Comparative Law* 333 at 339-340

⁷⁸ Goldsmith, Jack L. & Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005) at 3

moral pull, but simply that states act out of self-interest.”⁷⁹ In this view the expectation that the US will act in the same way as every other state is implausible for expecting US policymakers to commit to the legal fiction of sovereign equality. The disjunct between the legal fiction and the reality of America's global power renders such accounts an inadequate basis for theorising about US legal behaviour. In earlier writing defending an American “double standard” Goldsmith noted that: “The explanation is not subtle. The United States declines to embrace international human rights law because it can.”⁸⁰

Bradford and Posner reject the utility of exceptionalist explanations altogether by finding that all great powers claim to be exceptional in some form. Their general position is that “great powers typically support a view of international law that embodies their own normative commitments but is presented as a universal set of commitments.”⁸¹ This fundamental denial of the distinctive quality of law underpins their unorthodox redefining of “exceptionalism” to effectively exclude criticisms of US IL policy. The authors appear to agree with Koh and Ignatieff that the most serious mischief justifying criticism is the creation of double standards by the US. However they then proceed to adopt a terminological distinction that excludes the very possibility of the US acting in this way. They define *exceptionalism* as “the view that the values of one particular country should be reflected in the norms of international law.” This entails a belief by that country that it “is a model or leader in international relations because of its unique attributes.”⁸² This is distinct from their definition of *exemptionalism* as “the claim that the rules of international law, or of certain international treaties, should apply to all states except for one particular state.”⁸³ The distinction is of questionable value when exemption from legal rules is a logical and natural implication of exceptionalism, as demonstrated by Ignatieff's typology.⁸⁴ The distinction simply defines the mischief threatening IL in terms so artificially narrow that they inoculate the US from criticism.

The presumption that law is fundamentally an expression of relative power thereby precludes any non-political arguments for why one nationalistic interpretation of IL is more legitimate than another. “American Exceptionalism” is defined as the belief “that international law should promote free markets and liberal democracy” and that “Military force may be used by any country against threats to this order.”⁸⁵ In contrast they define “European exceptionalism” as the belief that “international law should advance human rights (including positive or economic rights) and social welfare” and that: “Instead of resorting to military force, states should pool their sovereignty in international institutions that can resolve disputes.” Taken together with a definition of “Chinese exceptionalism” they argue that the “core of international law consists of the overlapping claims of these three states.”⁸⁶ On this view there is nothing inherently more “legal” about the multilateralism of European or Chinese policy than there is about the American view. In each case “criticism of exceptionalism, then, is just a

⁷⁹ *Ibid* at 225

⁸⁰ Goldsmith, Jack L., ‘International Human Rights Law & The United States Double Standard’ (1998) 1 *Green Bag* 365 at 371

⁸¹ Bradford, Anu & Eric A. Posner, ‘Universal Exceptionalism in International Law’ (2011) 52 *Harvard International Law Journal* 1 at 12

⁸² *Ibid* at 7

⁸³ *Ibid* at 7

⁸⁴ Ignatieff, Michael, ‘Introduction: American Exceptionalism and Human Rights’ in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) at 3-7

⁸⁵ Bradford, Anu & Eric A. Posner, ‘Universal Exceptionalism in International Law’ (2011) 52 *Harvard International Law Journal* 1 at 13

⁸⁶ *Ibid* at 13

criticism of power, or the use of power to achieve ends of which the critic disapproves."⁸⁷ Treating IL as a form of rationally based politics entails the denial that exceptional ideas possess any explanatory power in evaluating transatlantic IL policy divisions. The exceptionalist beliefs of American, European and Chinese policy are in the end epiphenomenal.

These various power-based explanations raise the key question of what effect hegemonic power specifically has in shaping legal policy. A preponderant power will be faced with a broad and frequent range of system wide tasks affecting its interests, thereby providing the greatest number of opportunities to engage in legally relevant acts.⁸⁸ Grewe's periodisation of modern IL according to the rise and fall of great powers turns on this "close connection between legal theory and State practice." The upshot is thus "cohesiveness of the law of nations and the international political system."⁸⁹ Writing in the immediate post-Cold War period, Grewe speculated whether "we have entered a new age of United States hegemony" in which the US would play a distinctive role in shaping the global legal order.⁹⁰ The weight of evidence strongly suggests that changes in the international system at the end of each of the World Wars and the Cold War indeed galvanized US efforts to build international legal architecture developing and entrenching American interests.⁹¹ American hegemony has played out not as control over every legal development, but rather that the US is "the one against whose ideas regarding the system of international law all others debate."⁹² The fact of political inequality creates incentives for the US to exercise its powers to entrench hierarchy in a manner antithetical to the notional equality underpinning the international legal system.⁹³

This insight founds the "hegemonial approach" to lawmaking, which Brownlie defines as the translation of power differentials into specific advantages, maximising a powerful state's ability to gain legal approval, and minimising occasions when approval is "conspicuously withheld."⁹⁴ American IL policy never explicitly violates the law, even where existing legal rules are perceived to directly contradict national interests. A powerful state enjoys the privilege of disproportionately constraining weaker states through IL, while using those same rules to legitimate its own actions. Outright rejection of law would render the exercise of power less efficient, and create a form of disorder unnecessarily detrimental to American interests.⁹⁵ Rather the general practice is for the US to apply its influence to establish favourable legal rights and privileges while defending the legal framework that sustains

⁸⁷ *Ibid* at 53

⁸⁸ Byers, Michael, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999) at 37; Duffy, Helen, *The "War on Terror" and the Framework of International Law* (Cambridge University Press, 2005) at 6

⁸⁹ Grewe, Wilhelm G., *The Epochs Of International Law; Translated and Revised by Michael Byers* (Walter de Gruyter, 2000) at 6

⁹⁰ *Ibid* at 703

⁹¹ See generally Byers, Michael & Georg Nolte, *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003); Krisch, Nico, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *European Journal of International Law* 369

⁹² Scott, Shirley V., 'The Impact on International Law of US Non-Compliance' in Michael Byers and Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 450-451

⁹³ Glennon, Michael J., 'Why the Security Council Failed' (2003) 82 *Foreign Affairs* 16 at 29

⁹⁴ Brownlie, Ian, *International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff, 1995) at 49

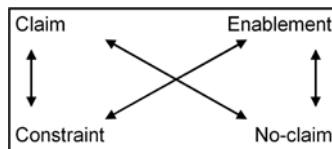
⁹⁵ Byers, Michael, 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *The Journal of Political Philosophy* 171 at 173

them. In the words of ICJ Judge Charles De Visscher: "the great powers after imprinting a definite direction upon a usage make themselves its guarantors and defenders."⁹⁶

The predicament for the US is how to avoid legal constraints on its foreign policy without destroying the system of IL it has helped create. In colloquial terms: how can the US have its cake and eat it? The answer lies in an altered conception of the conventional jurisprudential understanding of relationships between the subjects of IL.⁹⁷ The objective of both upholding the legal system *and* its own unique privileges creates an incentive for the US to observe legal rules, but in a way that blunts their *constraining* effect upon itself while enhancing their value as *enabling* instruments that facilitate strategic objectives.⁹⁸ This practice challenges the basic assumption of orthodox legal scholarship: that by ensuring a hegemon adheres to legal rules international order is thereby made more secure. Hegemonial lawmaking shifts the boundaries of what can be sanctioned as lawful and, therefore, benign conduct. The extent of censure demanded by US non-compliance becomes indeterminate where the boundaries of legality shift according to hegemonic influence. The reliability of IL as a framework for international order is thereby not assured, lacking any necessary equivalence between law abiding behaviour and the preservation of the *status quo*. Scott explains apparent contradictions as the product of a US "quest for legal security." This has taken both a "defensive" form in the sense

⁹⁶ Cited in Schachter, Oscar, 'New Custom: Power, Opinio Juris and Contrary Practice' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwar Law International, 1996) at 531

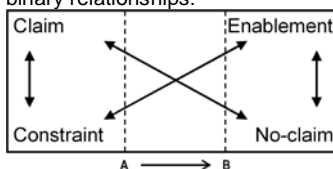
⁹⁷ The precise way that rules within a legal system create clear relationships is the basis for Hohfeld's well known depiction of "fundamental legal conceptions," which has come to form the cornerstone of the jurisprudence of legal rights, including within IL scholarship and practice:



See Hohfeld, Wesley N., 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-14) 23 *Yale Law Journal* 16; Hohfeld, Wesley N., 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710.

For judicial application of Hohfeld in an international law context see *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90 at 208-212, per Weeramantry J. For academic applications see Morss, John R., 'The Legal Relations of Collectives: Belated Insights from Hohfeld' (2009) 22 *Leiden Journal of International Law* 289 at 291-293; Mendelson, Maurice, 'State Acts and Omissions as Explicit or Implicit Claims' in (ed), *Le Droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (A. Pedone, 1991); Rodin, David, *War and Self-Defense* (Oxford University Press, 2002); Carmody, Chios, 'A Theory of WTO Law' (2008) 11 *Journal of International Economic Law* 527 at 4-5

⁹⁸ Byers, Michael, 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *The Journal of Political Philosophy* 171 at 176. This requires the reformulation of Hohfeld's scheme to depict dynamic relationships that exist on a spectrum, rather than static and discrete binary relationships:



Under this scheme US IL policy does not accept "duties" under IL, which implies fixed pre-ordained obligations. Rather the purported duties under IL are better thought of as "constraints," a more apt term to reflect the amorphous nature of obligations IL places on the US. The correlative of a legal constraint is the "claim" of a legal subject χ to be immune from the actions of γ . This is something less than a "right" properly defined, suggesting "something asserted but not necessarily recognised," but still with the character of a legal relation that can appeal to pre-determined criteria: Lloyd of Hampstead, Lord & M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (Stevens, 5th ed, 1985) at 443. The opposite of constraint under IL is "enablement," where the US exercises political power to interpret legal obligations in a form that increases the extent that its actions can be defended as 'legal.' Again this is weaker than having a clear "liberty" to act, as the precise nature of that liberty is dependent on contemporaneous political circumstances. "Enablement" nevertheless exists on the same spectrum as this category of legal relationship. The correlative of enablement is thus that affected states have "no-claim" to resist such action. Hegemonial lawmaking is essentially the process of applying power to transform legal rules from constraints at "A" to enabling interests at "B"

of seeking "protection of its domestic political and legal systems from external influence via law" as well as an "offensive" strategy of influencing the "legal and policy choices of other states via law."⁹⁹ Identifying these strategies reveals a "remarkable degree of consistency" beneath apparent contradictions in legal policy.¹⁰⁰ The explanation is effectively a description of hegemonial lawmaking, where the motivation to achieve an "increase in relative power" provides the logic of otherwise inconsistent policy.¹⁰¹

At times these impulses have translated into explicit US privileges under the law, as most conspicuously achieved in its designation as one of the five permanent members of the UNSC. The principle of "common but differentiated responsibilities" has also been applied within international treaty regimes to reconcile the unequal obligations of states parties with the notion of sovereign equality.¹⁰² However the most contentious debates over American IL policy relate to its *de facto* exceptional legal status rather than the limited cases where it is accorded *de jure* privileges. Byers notes two strategies through which the US has achieved hegemonial lawmaking within the existing framework of IL.¹⁰³ Firstly, laws may sanction behaviour that is only practically available to a limited number of states. Preponderant military power over any other state or alliance means that broad legal rights may in practice form "exceptional" rights exercisable only by the US.¹⁰⁴ An example is in the 2001 US military action in Afghanistan, where a potential new rule of customary IL was established that self-defence extends to use of force against states which harbour terrorists. Acceptance of this interpretation broadened the rule beyond its previous ambit, which constrained rights of self-defence to attacks emanating directly from a state.¹⁰⁵ This development yielded the benefits of legal compliance in a manner consistent with power political considerations, and in practice benefits only states with power projection capabilities.¹⁰⁶ Preponderant US political power thereby translated into "de facto exceptionalism" within the doctrines of IL.¹⁰⁷ A second form of hegemonial lawmaking is where rules remain deliberately indeterminate "enabling power and influence to determine where and when" actions are legal, thus deflecting criticism under the guise of legality.¹⁰⁸ Rights can then be denied to weaker states pursuant to this discretion.¹⁰⁹ As Morgenthau noted, imprecision becomes a tool for furthering national interests through unsupported claims and manipulative interpretation of

⁹⁹ Scott, Shirley V., *International Law, US Power: The United States' Quest for Legal Security* (Cambridge University Press, 2012) at 17-18

¹⁰⁰ *Ibid* at 29

¹⁰¹ *Ibid* at 46. Scott acknowledges that these practices are evident more generally in the IL policy of other powerful states: at 42

¹⁰² See Stone, Christopher D., 'Common but Differentiated Responsibilities in International Law' (2004) 98 *American Journal of International Law* 276. The principle has been most significant in international environmental law: See Cullet, Philippe, 'Common but Differentiated Responsibilities' in Malgosia Fitzmaurice, David M. Ong & Panos Merkouris (ed), *Research Handbook on International Environmental Law* (Edward Elgar, 2010) at 161

¹⁰³ Byers, Michael, 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *The Journal of Political Philosophy* 171 at 176

¹⁰⁴ Krisch, Nico, 'More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law' in Michael Byers & Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 149

¹⁰⁵ Byers, Michael, 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *The Journal of Political Philosophy* 171 at 179. See Harris, David John, *Cases and Materials on International Law* (Sweet & Maxwell, 2010) at 772-774

¹⁰⁶ Byers, Michael, 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *The Journal of Political Philosophy* 171 at 179

¹⁰⁷ *Ibid* at 184

¹⁰⁸ *Ibid* at 180. See also Murphy, John F., *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004) at 351

¹⁰⁹ Byers, Michael, 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *The Journal of Political Philosophy* 171 at 176

recognised rules, generating further indeterminacy.¹¹⁰ Precise "rules" enable *ex ante* decisions about acceptable conduct, whereas creating vague "standards" enables *ex post* definitions of legality.¹¹¹ This weakens the quest for precision in law, being one of the features distinguishing it from other normative systems.

The observed effects of hegemonic power work in a corresponding way to shape the interests of states forced to adapt to conditions of international hegemony. Those who oppose preponderant American power and legal policy have a vested interest in an international legal system that diminishes political advantages. An overriding political interest thus exists to structure international legal rules and institutions in accordance with "counter-hegemonic" interests.¹¹² In this vein, Koskeniemi persuasively argued that the shape of the international legal system represents a form of "hegemonic contestation" in which participants aim to "make their partial view of...[legal doctrines] appear as the total view, their preference seem like the *universal preference*."¹¹³ For this reason Koskeniemi concluded that the "fight for an international Rule of Law is a fight against politics."¹¹⁴ Here the rule of law will be achieved through the levelling of international power via rules that are nominally universal, and therefore place a constraint on states that increases commensurate with political power.

This counter-hegemonic dynamic corroborates the arguments of scholars who argue that "universal" legal rules pose a challenge to American political power.¹¹⁵ The validity of Kagan's insight into the nexus between law and power is therefore highly persuasive, even for those critical of his ultimate conclusions.¹¹⁶ However, from the perspective of legal theory, his argument equally demonstrates the limits of a purely power based explanation for US IL policy. Kagan relies on a problematic assumption that divergent EU and US policy is formed against a binary opposition between American political interests and the ideal of the rule of IL. This is suggested in the way that Kagan characterises European policy as being "all about subjecting inter-state relations to the rule of law,"¹¹⁷ whereas the US chooses to operate outside of the rule of law.¹¹⁸ It is more consistent with the evidence however to say that legal policymakers on both sides interpret legal principles through political interests, such that the concept of law itself is contested. The effect of preponderant power is thus intimately connected to the "exceptional" character of American IL policy in creating incentives and pressures to follow certain patterns of behaviour. But at the level of analysing policy outcomes, power is indeterminate as an explanation for the intensity of domestic debates between opposing legal policymakers each claiming to advance American national security interests. Explanation at the

¹¹⁰ Morgenthau, Hans Joachim, *Politics Among Nations: The Struggle for Power and Peace* (Knopf, 5th ed, 1973) at 277

¹¹¹ Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, 'The Concept of Legalization' (2000) 54 *International Organization* 401 at 413

¹¹² As opposed to the more established literature on "Hegemonic International Law." For use of the term in relation to the ICC see Manuel, José, 'Defensive and Oppositional Counter-Hegemonic uses of International Law: From the International Criminal Court to the Common Heritage of Mankind' in Boaventura de Sousa Santos & César A. Rodríguez-Garavito (ed), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005)

¹¹³ Koskeniemi, Martti, 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197 at 199. Original emphasis

¹¹⁴ Koskeniemi, Martti, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4 at 5

¹¹⁵ See Bradford, Anu & Eric A. Posner, 'Universal Exceptionalism in International Law' (2011) 52 *Harvard International Law Journal* 1

¹¹⁶ Nicolaidis, Kalypso, 'The Power of the Superpowerless' in Tod Lindberg (ed), *Beyond Paradise and Power: Europeans, Americans and the Future of a Troubled Partnership* (Routledge, 2005) at 94

¹¹⁷ Kagan, Robert, 'Power and Weakness' (2002) June-July *Policy Review* 3 at 17, quoting Steven Everts

¹¹⁸ See *ibid* at 15 & 27

level of political realism "discounts the influence of particular normative values, history, and culture, all of which shape the attitudes of a country's leaders toward international law and foreign affairs."¹¹⁹ Power alone cannot explain observed contradictions in policy whereby the US expresses fidelity to the rule of law while breaching the expectations this creates.

Institutional Explanations: Policy-Oriented Jurisprudence

A second explanation for distinctive American IL policy is that academic and government institutions impart and reinforce unique conceptions of the nature of IL. Institutionalised theories about the proper interpretation and practice of IL become a causal explanation conceptually distinct from either relative power or the cultural beliefs of individuals.¹²⁰ The most distinctive feature within American IL jurisprudence is greater scepticism toward the basic assumption that IL exists separately from its social and political context.¹²¹ American international legal jurisprudence has instead been strongly influenced by various "policy-oriented" approaches. These conceptions of IL were a response to perceived limitations in legal positivism and have grown into the dominant IL jurisprudence in American scholarship and practice. The most well known is the distinctive "New Haven School," but elaborate variants abound and continue to be fiercely debated.¹²² The precise formulation is less important than the general observation that "policy-oriented law is, by now, an accepted orthodoxy in the United States."¹²³

The chief innovation of the policy-oriented approach is its dissolution of the strict division between law and politics and its treatment of IL as a form of policy. Correspondingly, the concept of IL as a body of impartial rules is rejected as naïve at best and a threat to American interests at worst. Rules represent "merely the accumulated trends of past decisions" stripped of the context of their creation and their connection to contemporary circumstances.¹²⁴ In Koskenniemi's historical review of this jurisprudence he identifies the "one theme" connecting different approaches as a "deformalized concept of law." By this it is meant that IL should not be seen as:

merely formal diplomacy or cases from the International Court of Justice but that...it had to be conceived in terms of broader political processes or techniques that aimed towards policy "objectives." A relevant law would be enmeshed in the social context and studied through the best techniques of neighboring disciplines.¹²⁵

¹¹⁹ Noyes, John E., 'American Hegemony, U.S. Political Leaders, and General International Law' (2004) 19 *Connecticut Journal of International Law* 293 at 294 & 297

¹²⁰ For an overview of the distinctiveness of IL at an institutional level see: Kennedy, David, 'The Disciplines of International Law and Policy' (1999) 12 *Leiden Journal of International Law* 9 at 19-22

¹²¹ See Chen, Lung-chu, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (Yale University Press, 2000) at 11; Byers, Michael, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999) at 207. For an excellent overview of historical stages of American IL jurisprudence see: Kennedy, David, 'The Twentieth-Century Discipline of International Law in the United States' in Austin Sarat, Bryant Garth & Robert A. Kagan (ed), *Looking Back at Law's Century* (Cornell University Press, 2002)

¹²² See Koh, Harold H., 'Is there a "New" New Haven School of International Law?' (2007) 32 *Yale Journal of International Law* 559. For an excellent general overview see Koskenniemi, Martti, *The Gentle Civilizer of Nations 1870-1960* (Cambridge University Press, 2001) at 474-480

¹²³ Higgins, Rosalyn, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, 2009) at 20. Higgins identifies herself among an "outer circle" of international lawyers who adopt the core insights of the New Haven School without necessarily accepting the methodology and analytical frameworks developed by the Schools founders: at 50, n.24; Jouannet, Emmanuelle, 'French and American Perspectives on International Law: Legal Cultures and International Law' (2006) 58 *Maine Law Review* 292 at 302-307

¹²⁴ Higgins, Rosalyn, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, 2009) at 101

¹²⁵ Koskenniemi, Martti, *The Gentle Civilizer of Nations 1870-1960* (Cambridge University Press, 2001) at 478-479

David Kennedy documents the rise of this approach across the twentieth century, where it was the proponents of IL themselves who:

slowly abandoned the doctrinal purity and institutional isolation characteristic of the pre-war generation... They imported into public international law precisely the realist attack on doctrinal formalism which the pre-war generation had resisted. They rejoiced as the discipline lost its coherence – renaming it 'transnational' law. These men were also successors to the progressive faith in international administration – and they brought to the United Nations their faith in New Deal federal reform.¹²⁶

The conception built upon the work of American Legal Realism, which had aimed to penetrate the legal formalist myth that law was a self-contained body of rules that could produce determinate outcomes.¹²⁷ Legal Realism established policy considerations as an uncontroversial and necessary component for overcoming indeterminacy in judicial decision-making.¹²⁸ Most significantly, for present purposes, is acceptance that "law" is more than merely the rules and principles set out in legal texts and court judgments. Rather it encompasses the relationship between decision-makers and law: "legal history could not simply chronicle the emergence and development of legal doctrines, nor treat them largely as intellectual insights divorced from the actual world in which they occurred."¹²⁹ This has created an enduring "tension between the [legal] realist understanding of law as an instrument of policy and the legalist view of law as a constraint on policy."¹³⁰

The "New Haven School" of McDougal and Lasswell aimed to move legal realism beyond mere critique toward a methodology that made these insights "*operational in a systemic way*."¹³¹ To this end the approach adopted the legal realist's methodology of using social science methods to achieve set policy goals.¹³² 'Law' becomes the outcome of 'policy-oriented' decision-making, with legality conditional upon attaining underlying social, moral, and political goals. Law works in this conception as a purposive *process* of "authoritative and effective decision-making."¹³³ Authority is determined in each case by showing that policy decisions advance "world public order" and "human dignity."¹³⁴ At the same time decisions must be effective in the sense that they are backed by enforcement mechanisms and are therefore controlling.¹³⁵

¹²⁶ Kennedy, David, 'A New Stream of International Law Scholarship' (1988) 7 *Wisconsin International Law Journal* 1 at 4

¹²⁷ Leiter, Brian, 'American Legal Realism' in Martin P. Golding & William A. Edmundson (ed), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing, 2005) at 52; Nardin, Terry, *Law, Morality, and the Relations of States* (Princeton University Press, 1983) at 189-190

¹²⁸ The claimed forefather of American Legal Realism is Supreme Court Justice Oliver Wendell Holmes:

"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

Holmes, Oliver Wendell, Jr., *The Common Law* (Little, Brown and Company, 1881) at 1. See also the writings of Justice Jackson of the US Supreme Court: Jackson, Robert H., *The Supreme Court in the American System of Government* (Harvard University Press, 1955) at 5

¹²⁹ Diamond, Stephen, 'Legal Realism and Historical Method: J. Willard Hurst and American Legal History' (1979) 77 *Michigan Law Review* 784 at 785

¹³⁰ Chesterman, Simon, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331 at 358, n.150

¹³¹ Falk, Richard A., 'Book Reviews: McDougal, M. S. and Associates. *Studies in World Public Order*. New Haven: Yale University Press, 1960. Pp. xx, 1058.' (1961) 10 *American Journal of Comparative Law* 297 at 299. Original emphasis; Koh, Harold H., 'Is there a "New" New Haven School of International Law?' (2007) 32 *Yale Journal of International Law* 559 at 561; Bobbitt, Philip, *The Shield of Achilles: War, Peace and the Course of History* (Penguin, 2003) at 649

¹³² Leiter, Brian, 'American Legal Realism' in Martin P. Golding & William A. Edmundson (ed), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing, 2005) at 61

¹³³ The foundational treatise on this approach is contained in Lasswell, Harold D. & Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy* (Martinus Nijhoff, 1992). Named for its intellectual birthplace at Yale University in New Haven, CT

¹³⁴ McDougal, Myres S. & Michael W. Reisman, 'International Law In Policy-Oriented Perspective' in Ronald St. J. MacDonald & Douglas M. Johnston (ed), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory*

In Michael Reisman's formulation law is a "process of communication"¹³⁶ where policymakers and political elites communicate decisions and justifications in a way that "shapes wide expectations about appropriate future behaviour."¹³⁷ In this way foreign policy decisions fulfil the legal function of creating a predetermined set of criteria that allows legal subjects to organise their actions with known consequences.¹³⁸ These decisions thus constitute a form of law in setting precedents to guide state behaviour according to pre-existing policy criteria. With the twin criteria of authority and control the policy-oriented approach aims to overcome a misperception in IR and IL scholarship that "law is concerned with authority (but not power) and that international relations is concerned with power (but not authority)."¹³⁹ Decisions that lack one or both of the elements of authority and efficacy are distinguished from law and remain merely political acts.

Wiessner and Willard illustrate the distinctiveness of this jurisprudence by contrasting the policy-oriented approach with its "counterimage" of legal positivism which:

remains fixated on the past, trying to reap from words laid down, irrespective of the context in which they were written, the solution to a problem that arises today or tomorrow in very different circumstances... Moreover, positivists gain no help from their theory when asked what the law 'should' be. Indeed, their theory eschews any creative or prescriptive function.¹⁴⁰

These distinctions shape the critiques American policymakers direct at other states who aspire to constrain the US through legal rules. The retort is that positive rules are no less politicised than the policy actions they are aimed at. An example is in the statements of former Legal Adviser to the Department of State John Bellinger. Bellinger highlights transatlantic differences in legal traditions and culture, in particular the divergence between the Anglo-American common law tradition and the civil law tradition of continental Europe.¹⁴¹ Consistently with the policy-oriented approach Bellinger characterises American jurisprudence as inclined toward "pragmatism and scepticism":

we probe the purpose and function of law, examine it through the lenses of other disciplines such as economics and sociology, weigh its costs against its benefits, test its flexibility against the facts at hand, judge its value by its effectiveness, and seek, where we can, an equitable solution.¹⁴²

Moreover Bellinger emphasises the importance of devising law that reflects "the virtues that have been drummed into us." This divergence is given as a key reason for the view in Continental jurisprudence that American IL policy is "opportunistic or, worse, self-serving." Conversely the European conception is criticised as marked by "excessive formalism, a doctrinal inflexibility, and an

(Martinus Nijhoff, 1983) at 112-114; Lasswell, Harold D. & Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy* (Martinus Nijhoff, 1992) at 192-193 (on "The Global Public Order") and 737-741 (on "Human Dignity")

¹³⁵ Lasswell, Harold D. & Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy* (Martinus Nijhoff, 1992) at 190

¹³⁶ Reisman, Michael W., 'International Lawmaking: A Process of Communication: The Harold D. Lasswell Memorial Lecture' (1981) 75 *Proceedings of the Annual Meeting (American Society of International Law)* 101 at 113

¹³⁷ *Ibid* at 107

¹³⁸ A central function of the rule of law identified by Hayek: Hayek, Friedrich A., *The Road to Serfdom* (University of Chicago Press, 1944) at 54

¹³⁹ Higgins, Rosalyn, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, 2009) at 106

¹⁴⁰ Wiessner, Siegfried & Andrew R. Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' (1999) 93 *American Journal of International Law* 316 at 320

¹⁴¹ On this divide see Jouannet, Emmanuelle, 'French and American Perspectives on International Law: Legal Cultures and International Law' (2006) 58 *Maine Law Review* 292

¹⁴² Bellinger III, John B., 'Reflections on Transatlantic Approaches to International Law' (2007) 17 *Duke Journal of Comparative and International Law* 513 at 518

unwillingness to acknowledge that different paths may lead to the same end."¹⁴³ Although Bellinger relates this divergence to the common law tradition, the divergence is more specifically a product of American legal culture. Former ICJ President Rosalyn Higgins notes that divergent "American" and "British" views "now permeate the entire fabric of international law."¹⁴⁴ Higgins herself is a British jurist, but a protégé of the founder of the New Haven School at Yale, Myers McDougal.¹⁴⁵ Her characterisation of the mutual misgivings between these two strongholds of the common law precisely mirrors Bellinger's comparison with Continental Europe.¹⁴⁶

A further illustrative example of a practitioner's policy defence in these terms is in the writings of Abraham Sofaer, who served as Legal Adviser to the Department of State under Presidents Reagan and Bush 41. In a critique of the ICJ, Sofaer writes that: "Many, if not most international lawyers, have reacted to the need to use force in self-defense and in the defense of humanitarian rights by seeking to preserve what they consider the purity of international law." In particular Sofaer critiques an article by Professor Tom Franck entitled *Break It, Don't Fake It*, which argued that the US should have explicitly breached international law when it failed to obtain UN authorisation for the 1999 Kosovo intervention, rather than trying to fit it into existing doctrine.¹⁴⁷ Franck's rationale was that in so doing the purity and therefore integrity of IL would be preserved. To this Sofaer responds:

It would be like people in the 1930s dealing with Constitutional issues in the U.S. saying 'Don't make up new constitutional law, it's going to mess up our Constitution. Just break the Constitution, violate the Constitution, with no explanation, and that way we will keep the purity of this rigid Constitution that the pre-New Deal Supreme Court was insisting on applying. Everything will be fine someday when we all return to the purity of the intended words.'¹⁴⁸

Policy jurisprudence sees such expunging of policy from law as chimerical, and instead aims to make law conform to the *right* sort of policy. The proper distinction for the policy-oriented approach is that: "the terms 'political dispute' and 'legal dispute' refer to the decision-making process which is to be employed in respect of them, and not to the nature of the dispute itself."¹⁴⁹ The precise formulations of the New Haven School have receded in prominence, but its legacy is the consensus that IL is a policy process rightfully encompassing political values. Oscar Schachter and Richard Falk identified themselves as key critics of the New Haven School during its heyday,¹⁵⁰ but remain among the most distinguished exponents of policy-oriented jurisprudence.

The elaborate variations of policy oriented jurisprudence, and their forceful defence by adherents, suggest that the institutional explanation of a distinctive structure of conventions governing the teaching and practice of IL does have some explanatory value in addressing the issue of

¹⁴³ *Ibid* at 519. See also Pildes, Richard H., 'Conflicts Between American and European Views of Law: The Dark Side of Legalism' (2003) 44 *Virginia Journal of International Law* 145 at 161

¹⁴⁴ Higgins, Rosalyn, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, 2009) at 20

¹⁴⁵ See Higgins, Rosalyn, 'McDougal as Teacher, Mentor, and Friend' (1999) 108 *Yale Law Journal* 957

¹⁴⁶ Higgins, Rosalyn, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, 2009) at 17 & 21

¹⁴⁷ Franck, Thomas M., 'Break It, Don't Fake It' (1999) 78 *Foreign Affairs* 116

¹⁴⁸ Sofaer, Abraham D., 'The International Court of Justice and Armed Conflict' (2003) 1 *Northwestern Journal of International Human Rights* i at vii

¹⁴⁹ Higgins, Rosalyn, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, 2009) at 34

¹⁵⁰ See Schachter, Oscar, 'McDougal's Jurisprudence: Utility Influence Controversy: Remarks' (1985) 79 *American Society of International Law Proceedings* 266; Falk, Richard A., 'McDougal's Jurisprudence: Utility Influence Controversy: Remarks' (1985) 79 *American Society of International Law Proceedings* 266; Falk, Richard A., 'Casting the Spell: The New Haven School of International Law' (1995) 104 *Yale Law Journal* 1991 at 2000-2007

contradiction. However this explanation also remains intertwined with explanations from both power and culture in ways that are not always clear. Connections exist between the political realism of IR and American legal realism: that "law was a 'means to social ends and not... an end in itself; a 'distrust' of 'traditional legal rules and concepts,' as a description of what the system actually does; and an 'insistence on evaluation of any part of the law in terms of its effects.'"¹⁵¹ A comparable relationship exists between hegemonial lawmaking and policy-oriented jurisprudence, with the latter being heavily criticised for subverting law to American political values. Specific policy oriented theories developed across the twentieth century inevitably came to reflect national interests by virtue of the long fixation of US foreign policy on Cold War politics.¹⁵²

Koskenniemi notes that this form of jurisprudence originated with American lawyers who "increasingly conceived international law from the perspective of a world power, whose leaders have "options" and routinely choose among alternative "strategies" in an ultimately hostile world."¹⁵³ Some accounts of the New Haven jurisprudence effectively defined "world public order" as coinciding exactly with the interests of the Western Bloc.¹⁵⁴ The all consuming influence on strategic thinking had the effect of locking IL into a mode that promoted more narrowly defined state interests than otherwise may have been the case.¹⁵⁵ More generally, a well-founded criticism is that powerful states are able to use this jurisprudence to rationalise parochial interests as "law."¹⁵⁶ The clear prescriptions of legal rules and decisions of international courts are liable to be set aside for purported inconsistency with "fundamental goals of the international community."¹⁵⁷ A powerful state may or may not sincerely adhere to this universal principle, but in either case the rule of law becomes subject to the self-judging of that state. The procedural protection of pluralism drawn from sovereign equality is liable to be sacrificed to specific conceptions of justice emanating from a hegemonic state as "authoritative decision-maker."¹⁵⁸

Hedley Bull thus rejected the imprecision of the policy oriented approach as liable to render law unintelligible.¹⁵⁹ Likewise the former President of the International Criminal Tribunal for the former Yugoslavia described the tribunal as "bound only by international law" to the exclusion of "meta-legal analyses." Accordingly "a policy-oriented approach in the area of criminal law runs contrary to the

¹⁵¹ Llewellyn, Karl N., cited in Greenberg, Jonathan D., 'Does Power Trump Law?' (2003) 55 *Stanford Law Review* 1789 at 1805. See also Jouannet, Emmanuelle, 'French and American Perspectives on International Law: Legal Cultures and International Law' (2006) 58 *Maine Law Review* 292 at 304; Nardin, Terry, 'Theorising the International Rule of Law' (2008) 34 *Review of International Studies* 385 at 391

¹⁵² Falk, Richard A., 'McDougal's Jurisprudence: Utility Influence Controversy: Remarks' (1985) 79 *American Society of International Law Proceedings* 266 at 282

¹⁵³ Koskenniemi, Martti, *The Gentle Civilizer of Nations 1870-1960* (Cambridge University Press, 2001) at 475

¹⁵⁴ See for a summary of this view Falk, Richard A., *Legal Order in a Violent World* (Princeton University Press, 1968) at 86-87

¹⁵⁵ Raustiala, Kal & Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Thomas Risse & Beth A. Simmons Walter Carlsnaes (ed), *Handbook of International Relations* (SAGE Publications, 2002) at 540

¹⁵⁶ Roth, Brad, 'Bending the Law, Breaking it, or Developing it? The United States and the Humanitarian Use of Force in the Post-Cold War Era' in Michael & Georg Nolte Byers (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 245-246; Leiter, Brian, 'American Legal Realism' in Martin P. Golding & William A. Edmundson (ed), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing, 2005) at 61

¹⁵⁷ Reisman, Michael W., *Nullity and Revision: The Review and Enforcement of International Judgements and Awards* (Yale University Press, 1971) at 562

¹⁵⁸ See McDougal, Myres S. & Michael W. Reisman, 'International Law In Policy-Oriented Perspective' in Ronald St. J. MacDonald & Douglas M. Johnston (ed), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (Martinus Nijhoff, 1983) at 122

¹⁵⁹ Bull, Hedley, *The Anarchical Society* (Macmillan Press, 2nd ed, 1995) at 123-124 & 153-154

fundamental customary principle *nullum crimen sine lege*.”¹⁶⁰ Professor Oscar Schachter levelled a particularly strident critique while sitting on a conference panel with McDougal, warning that the tendency to conflate American national interests with “fundamental goals of the world community” was incompatible with an effective system of IL.¹⁶¹ The actual influence of the approach was to produce a “unilateralist version of policy jurisprudence in which law plays a secondary role and policy is determined by the [American] perception of self-interest.”¹⁶² On the same panel Professor Richard Falk wryly described the “miraculous” capacity of McDougal’s jurisprudence to coincide with US foreign policy interests.¹⁶³ Even Higgins, as a strong advocate of the jurisprudence, accepts that there is “a very fine line between insisting that decisions be taken in accordance with the policy objectives of a liberal, democratic world community and asserting that *any* action taken by a liberal democracy against a totalitarian nation is lawful.”¹⁶⁴ The jurisprudence is capable of providing a framework that advances IL in a manner consistent with more orthodox conceptions of IL where it is underpinned by complementary values.¹⁶⁵ But it also remains open to the insertion of particularistic political values. Modern exponents have applied a policy-oriented analysis to support the legality of some of the most prominent examples of American IL policy diverging from orthodox interpretations of IL. This includes arguments for the legality of the 2003 Iraq War,¹⁶⁶ and using a policy analysis to challenge the legal definition of torture.¹⁶⁷ In all such cases the choice of jurisprudence has political consequences in enabling the further entrenchment of American hegemonic power within international legal institutions.

Cultural Explanations: Exceptionalist Beliefs

The final causal explanation evident in “exceptionalist” accounts is the role of culturally specific beliefs about America’s unique role in the international legal system. These explanations come closest to justifying the exceptionalist label in its sense of a special role drawn not from hegemonic power or distinctive institutions, but from unique values and identity. John Murphy’s analysis of “exceptional” American legal practice is sceptical of Kagan’s argument that distinct approaches to IL are rooted in transatlantic differences in power and weakness.¹⁶⁸ Focussing on the role of beliefs he argues that there “is no doubt that European states are much stronger proponents of international law and institutions than is the United States.”¹⁶⁹ In contrast he argues that, on the basis of political beliefs, the sovereignty limitations created by the EU “are simply inconceivable” to most Americans who possess

¹⁶⁰ “No crime without law.” *Prosecutor v. Drazen Erdemovic (Appeal Judgment), Separate and Dissenting Opinion of Judge Cassese* (1997) IT-96-22-A at par.11

¹⁶¹ Schachter, Oscar, ‘McDougal’s Jurisprudence: Utility Influence Controversy: Remarks’ (1985) 79 *American Society of International Law Proceedings* 266 at 272

¹⁶² *Ibid* at 273

¹⁶³ Falk, Richard A., ‘McDougal’s Jurisprudence: Utility Influence Controversy: Remarks’ (1985) 79 *American Society of International Law Proceedings* 266 at 281:

“I am not sure if it is just a matter of prophetic coincidence, or that somehow or other the U.S. Government, no matter which administration is in the White House, has managed to study the works of the New Haven School and assimilated the theory at such a fundamental level that their automatic response to overseas challenges is to promote the values of human dignity no matter what they do.”

¹⁶⁴ Higgins, Rosalyn, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, 2009) at 52

¹⁶⁵ See Koh, Harold H., ‘Jefferson Memorial Lecture: Transnational Legal Process after September 11th’ (2004) 22 *Berkeley Journal of International Law* 337

¹⁶⁶ For a contrary argument from a policy-oriented approach see: Reisman, Michael W. & Andrea Armstrong, ‘The Past and Future of the Claim of Preemptive Self-Defense’ (2006) 100 *American Journal of International Law* 525

¹⁶⁷ Cheng, Tai-Heng., *When International Law Works* (Oxford University Press, 2012) at 227-248

¹⁶⁸ See *supra*

¹⁶⁹ Murphy, John F., *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004) at 354

"an historical distrust of power, especially centralized power."¹⁷⁰ Here culturally based attitudes remain a principle explanation of distinctive policy.

One of the most influential contemporary contributions to this debate has been Jed Rubenfeld's 2004 article *Unilateralism and Constitutionalism*,¹⁷¹ which argued that American conceptions of constitutional democracy have produced an exceptional approach to IL. Rubenfeld's argument for exceptionalism starts in the divergent political and normative lessons WWII had for Europe and America. For continental Europe WWII represented the perverse outcome of unrestrained democratic will. The nationalism and populism fuelling the war confirmed for European leaders that national politics must be answerable to the explicitly antinationalist and antidemocratic higher authority of IL.¹⁷² In contrast the lesson for America was confirmation that its nationalism and system of constitutional government was the surest guardian of individual liberty. Far from seeking to curb American popular will, the post-war years saw a US strategy to extend its democratic values outward and "Americanise" the rest of the world.¹⁷³

The exceptional experience of the US translated to a strategy of creating international legal institutions reinforcing American political values. Yet as Rubenfeld emphasises, this entailed the contradiction that legal regimes created to moderate the politics of other states had no legitimate role modifying the US itself. Hence the US became both the principal architect of IL and its most conspicuously reluctant subject.¹⁷⁴ Rubenfeld argues that these formative experiences have evolved into two distinct understandings of constitutionalism in guarding liberty. For European states "international constitutionalism" recognises supranational legal institutions transcending state sovereignty as the ultimate guardians of liberty. Power is deliberately transferred from the control of popular sovereignty to "international experts – bureaucrats, technocrats, diplomats, and judges – at a considerable remove from popular politics and popular will."¹⁷⁵ In contrast American "democratic constitutionalism" identifies the legitimacy of constitutional law in its foundations as a special act of popular lawmaking. American jurisprudence is also more sceptical about the possibility of a strict separation between politics and law, and thus of the possibility of a higher law that maintains its integrity when divorced from democratic foundations.¹⁷⁶ Nau concurs in this analysis in arguing that, from "the European point of view, law must be inclusive of all cultures and check democratic as well as non-democratic states." In contrast, for Americans, "democratic politics legitimates law." For Nau this explains much of the divergence in beliefs about the binding authority of the UN in the 2003 Iraq

¹⁷⁰ *Ibid* at 354

¹⁷¹ Rubenfeld, Jed, 'Commentary: Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971. Described in Koh's article as "a powerful statement" of a "deeply rooted American culture of unilateralism and parochialism": Koh, Harold H., 'On American Exceptionalism' (2003) 55 *Stanford Law Review* 1479 at 1495, n.52. For sceptical responses to Rubenfeld's 2004 article see: Bradford, Anu & Eric A. Posner, 'Universal Exceptionalism in International Law' (2011) 52 *Harvard International Law Journal* 1; Delahunty, Robert J., 'The Battle of Mars and Venus: Why Do American and European Attitudes Toward International Law Differ?' (2006) 4 *Loyola University Chicago International Law Review* 11

¹⁷² Rubenfeld, Jed, 'Commentary: Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971 at 1985-1986

¹⁷³ *Ibid* at 1986

¹⁷⁴ *Ibid* at 1981-1982

¹⁷⁵ *Ibid* at 1987

¹⁷⁶ *Ibid* at 1997

invasion relative to the democratic legitimacy of US policy.¹⁷⁷ The intentionally undemocratic foundations of IL are therefore illegitimate fetters on American constitutional government.

It is European international constitutionalism however that has dominated the institutions and jurisprudence of IL developed from WWII to the present day. US IL policy is thus an outlier consistent with exceptionalist beliefs, resisting the constraints of IL on what Rubinfeld sets out as principled legal grounds. In this Rubinfeld agrees with Kagan's conclusion that, although US actions are exceptional, they are not thereby hypocritical in the proper sense of that word.¹⁷⁸ The drawback of US resistance to legal constraints is that: "To the rest of the world, this is bound to look hypocritical. In the United States, it will look like an insistence on democratic self-government."¹⁷⁹ That interpretation supports the approach of this thesis, which is that divergence from orthodox conceptions of IL by American lawyers cannot be treated as evidence of bad faith without further evidence.

Although Rubinfeld's thesis relies heavily on a cultural explanation for distinctive IL policy, he does recognise the important linkages between ideas and power that this chapter seeks to identify. Rubinfeld, like Kagan, acknowledges that exceptional conceptions of IL have complemented the exercise of exceptional American power possessed since WWII. America can act unilaterally and Europeans must act multilaterally, and each has acted accordingly. However self-interest does not explain why each state settled on a particular policy course. Rubinfeld emphasises that perceptions of self-interest are not determined objectively, but through a nations "history, culture, values, and worldviews."¹⁸⁰ American promotion of internationalism was led by two interests: a "high-minded" messianic impulse to spread American constitutional rights, and a "geopolitical" motive to construct and order that augmented American economic and political power. Both sets of motives were united in the objective of establishing a new global order replicating American values.¹⁸¹ In this the connections between these two distinct causal explanations begin to emerge.

Rubinfeld's argument generated much scholarly debate, with a particular focus on the question of whether exceptionalist explanation provides any insight beyond the influence of power and political interests.¹⁸² Delahunty argues that the explanatory value of Rubinfeld's argument is "incontestable," particularly in relation to the depth of commitment of each side to their worldview.¹⁸³ He accepts, consistently with Rubinfeld, that the US is distinguished by its concern for democratic legitimacy, construing treaty and customary obligations narrowly by reference to state consent. In contrast Europe identifies the legitimacy of IL in natural law, therefore interpreting it broadly by reference to universal aspirations.¹⁸⁴ Nevertheless, Delahunty favours a theory of transatlantic

¹⁷⁷ Nau, Henry, *Perspectives on International Relations: Power, Institutions, and Ideas* (CQ Press, 2014) at 266. Nau does however concede the problem of self-judging and justifications for unilateral action introduced by the American position

¹⁷⁸ Rubinfeld, Jed, 'Commentary: Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971 at 1989

¹⁷⁹ Kahn, Paul W., 'American Exceptionalism, Popular Sovereignty, and the Rule of Law' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) at 221

¹⁸⁰ Rubinfeld, Jed, 'Commentary: Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971 at 1984

¹⁸¹ *Ibid* at 1987-1988

¹⁸² For sceptical responses to Rubinfeld's 2004 article see: Bradford, Anu & Eric A. Posner, 'Universal Exceptionalism in International Law' (2011) 52 *Harvard International Law Journal* 1; Delahunty, Robert J., 'The Battle of Mars and Venus: Why Do American and European Attitudes Toward International Law Differ?' (2006) 4 *Loyola University Chicago International Law Review* 11

¹⁸³ Delahunty, Robert J., 'The Battle of Mars and Venus: Why Do American and European Attitudes Toward International Law Differ?' (2006) 4 *Loyola University Chicago International Law Review* 11 at 36-37

¹⁸⁴ *Ibid* at 25-6

divergence based on national interests, as propounded by Kagan. He concludes that this more orthodox explanation has equivalent or greater explanatory power, while eschewing complex historical explanations.¹⁸⁵

The justification for a richer analysis, as exemplified by Rubenfeld, lies in a different analytical purpose. Delahunty aims to develop an abstract theory of the fundamental principles of states' IL policies, making it unnecessary to move beyond the concept of "national interests." However, when the objective is to develop a framework for understanding the IL policy of a named state in specific policy contexts, then an abstract concept of national interest is simply inadequate. The national interest is a collective concept comprised of multiple specific objectives; but what are these objectives? And how will the state interpret IL to advance the objectives? Upholding *America's* national interest, as defined by Rubenfeld, entails constructing a system of IL that reproduces distinct American constitutional values, while using those same values as a shield against the penetration of that legal system into American domestic law. Each conception is compatible and equally valid. But just as a parsimonious approach best explains abstract motivations, it is weakest in providing an account of the conception of interests as they actually guide policymakers.

CHAPTER CONCLUSION

The most striking thing that emerges from the review of exceptionalist legal scholarship is insufficient rigour in the use of the central concept. Legal applications appear to ride on the pedigree of the broader literature, but have generally categorised any unique feature of American legal policy as "exceptional." Questioning this use of language is no mere terminological dispute, as it weakens the analysis that an understanding of exceptionalist ideas can offer; believing that America is guided by exceptional values sustains support for IL just as often as it erodes it. Moreover, the idiosyncratic logic of exceptionalist ideas is only one potential explanation among others. Labelling all such policies as examples of American exceptionalism, and then employing exceptionalist ideas to explain them, introduces circularity in reasoning. This chapter demonstrates that a necessary step in explaining the initial puzzle of contradictory IL policy is disaggregating distinct causal explanations and mapping out the relations between them.

A notable feature of the three broad causal explanations for distinctive American IL policy is the extent that they are correlated.¹⁸⁶ In the case of power based explanations even strong defenders of IL policy based on American preponderance have sought reconciliation with normative explanations of why such might is also right. Kagan acknowledges that the "modern liberal mind is offended by the notion that a single world power may be unfettered except by its own sense of restraint...the spirit of liberal democracy recoils at the idea of hegemonic dominance, even when it is exercised benignly."¹⁸⁷ Responding in these terms he asserts that by "nature, tradition, and ideology, the United States has generally favoured the promotion of liberal principles over the niceties of

¹⁸⁵ *Ibid* at 38

¹⁸⁶ For a similar observation see Fehl, Caroline, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford University Press, 2012) at 16

¹⁸⁷ Kagan, Robert, 'America's Crisis of Legitimacy' (2004) 83 *Foreign Affairs* 65 at 70

Westphalian democracy."¹⁸⁸ Conversely, from a critical perspective, Charlesworth acknowledges that the exceptionalist ideas evident in American IL policy that she finds so problematic have "at least some basis in US political, military and economic dominance globally."¹⁸⁹

Likewise the substantive content of policy-oriented jurisprudence is provided by "exceptionalist" ideas as defined in this thesis. In the New Haven approach, conceptions of "world public order" and "human dignity," and of the American role in bringing these values about, necessarily draw upon long established conceptions of America's global mission.¹⁹⁰ By conceiving law in this manner the substantive norms drawn from American political culture become the basis for the very legitimacy of IL. McDougal and Lasswell's extensive exposition of specific community values underpinning their system only highlights the way that policy-oriented jurisprudence institutes values at the core of legality.¹⁹¹ The main challenge to the New Haven approach was led by Richard Falk of Columbia University, who criticised his contemporaries' overt parochialism. Yet, ultimately these approaches converged: "one on the right, the other on the left, but alike in projecting American values on the rest of the world."¹⁹² In this way the dominant American approach to jurisprudence opens the way for messianic and teleological forms of exceptionalism to be instituted as a foundational element of American IL policy.¹⁹³ Interpretations of IL that are inconsistent with exceptionalist liberal values are able to be rejected as not only politically undesirable, but for that very reason, lacking *legal* authority. A central role is thus preserved for political culture.

So what does this observed convergence mean for our understanding of the "rule of international law?" One way of proceeding is treating these observations as located at different levels of analysis that reflect the distinction between IR and FPA.¹⁹⁴ The rationality of relative power approaches the question of policy contradictions at the level of the international system and the incentives for a uniquely powerful state to institutionalise its position in law. Jurisprudential explanations provide the framework within which these interests can be flexibly promoted while maintaining fidelity to legal principle. Finally, cultural beliefs provide the substantive content of legal policy in line with exceptionalist ideas. These different sources of distinctiveness fail to provide a satisfactory explanation for observed contradictions in isolation, but complement each other when approached as nested levels of explanation.

These explanations, when viewed in concert, challenge suggestions that American legal policymakers perceive a simple choice between the ideal of the rule of IL and national political interests. Through the intertwining of power, jurisprudence and culture, a legal policymaker could conceivably pledge good faith fidelity to the rule of IL and yet depart significantly from global expectations. Many policymakers may indeed value raw political power over legal principle and act

¹⁸⁸ *Ibid* at 79

¹⁸⁹ Charlesworth, Hilary, *No Country is an Island: Australia and International Law* (University of New South Wales Press, 2006) at 147

¹⁹⁰ Schachter, Oscar, 'McDougal's Jurisprudence: Utility Influence Controversy: Remarks' (1985) 79 *American Society of International Law Proceedings* 266 at 270

¹⁹¹ See Lasswell, Harold D. & Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy* (Martinus Nijhoff, 1992) at Part II, Ch.2

¹⁹² Nardin, Terry, 'Theorising the International Rule of Law' (2008) 34 *Review of International Studies* 385 at 389. On the "Columbia School" see: Kennedy, David, 'The Twentieth-Century Discipline of International Law in the United States' in Austin Sarat, Bryant Garth & Robert A. Kagan (ed), *Looking Back at Law's Century* (Cornell University Press, 2002) at 403-404

¹⁹³ See Koskenniemi, Martti, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Co., 1989) at 171

¹⁹⁴ See Chapter 1 *supra*

accordingly, but the evidence suggests a more symbiotic relationship between law and power. The final approach based on beliefs in America's exceptionalism is the level of analysis that can offer the ideographic explanation necessary to explain how these factors ultimately produce contradictory policies. For this reason the next chapter turns to the role of foreign policy ideology to demonstrate that exceptionalist ideas are not merely epiphenomenal, but retain independent explanatory power. Delving further to specify the influence of those ideas thus requires a theory of the precise role of ideas and ideology in policymaking, and the structure of beliefs held by American policymakers.

THE STRUCTURE OF AMERICAN FOREIGN POLICY IDEOLOGY

Chapter Two identified the limitations in existing international legal scholarship when explaining the relationship between power, beliefs and interests as causes of distinctive American IL policy. This chapter seeks to overcome such limitations through “ideology” as the ideational concept that best captures the transformation of power into ideas that shape interests. “Foreign policy ideology” is shown to be a compound concept that connects power and ideas as a single variable influencing a state’s IL policy. Identifying the persistent and interrelated sets of ideas comprising America’s foreign policy ideologies provides a framework for understanding how US IL policy can be consistent with broad expectations of power based explanations, yet also conform to the core ideas of American political culture.

To identify the structure of American foreign policy ideology I adopt the influential four-parted typology developed by Wittkopf, Holsti, and Rosenau (“WHR”). Survey research on both political leaders and the mass public has repeatedly demonstrated an underlying belief structure comprised of two orthogonal and intersecting dimensions relating to the level of US international engagement, and the type of values being promoted. This empirically derived belief structure is corroborated by a vast intellectual and diplomatic history of American foreign policy. Locating policymakers within the resulting four-part typology has proven a powerful indicator of foreign policy preferences. A small and largely disconnected group of legal scholars have taken up the task of applying this structure of foreign policy ideologies to American IL policy. Reviewing that scholarship reveals a fruitful avenue for bridging the contradictions between legal scholarship and American IL policies.

To address identified limitations the WHR typology is synthesised with evidence from diplomatic history to develop four ideal types that together form the parameters of American IL policy. The *jurisdictional* scope of policymaker’s attention is arrayed along an internationalist-nationalist dimension, while *values* shaping legal policy sit along a liberal-illiberal dimension. The crossing of these dimensions produces four discrete ideal types of American IL policy: *Liberal Internationalism*, *Illiberal Internationalism*, *Liberal Nationalism* and *Illiberal Nationalism*. This typology provides the ideological structure applied in this thesis to analyse competing conceptions of the rule of IL.

THE POWER OF FOREIGN POLICY IDEOLOGY

International Relations Theory and Ideology

The question raised in reviewing legal scholarship is not whether the unique dynamics of American IL policy are best explained by power *or* ideas, since they are evidently correlated. Rather the question is: how do culturally ingrained ideas about America’s global role mediate between the fact of preponderant power and legal policymakers’ engagement with IL? In IR terms this becomes a question of how a state’s perception of its interests alters the way that it behaves within the

international system, and therefore the causal role of ideas. It has become almost ritualistic to begin such an enquiry by identifying the limitations of Kenneth Waltz's neorealist tenet that "considerations of power dominate considerations of ideology,"¹ and then to describe the advantages of a flourishing array of alternative IR theories that reassert the power of ideas.² As a work of legal scholarship this thesis is reluctant to strongly identify itself within any one of the many IR "tribes" capable of integrating ideas into Foreign Policy Analysis. Katzenstein's argument for "analytical eclecticism" is pertinent, and the merits of combining approaches according to their analytical value.³

In that spirit, the observation of material power interacting with cultural ideas can draw useful insights from the IR school of "neoclassical" realism, which effectively synthesises material and ideational theories. Steinberg notes that international legal scholarship has demonstrated a tendency to "perpetuate a common misperception that realism is a monolithic approach that denies any role for law."⁴ Yet among the theoretical variants the "softest realist position is that of the traditional or neoclassical realists," who recognise power and ideas as mutually constitutive.⁵ Gideon Rose sets out the basis of neoclassical realism in recognising that "the scope and ambition of a country's foreign policy is driven first and foremost by its place in the international system and specifically by its relative material power capabilities. This is why they are realist." However neoclassical realists also argue that "the impact of such power capabilities on foreign policy is indirect and complex, because systemic pressures must be translated through intervening variables at the unit level. This is why they are neoclassical."⁶ The "intervening variable" becomes ideas held at both the public and elite level. Foreign policy ideas "embedded in social norms, patterns of discourse and collective identities" operate as an "intervening variable," with ideology forming the bridge between material power and policy.⁷ Ideology operates to "filter and limit options, ruling out policies that fail to resonate with the national political culture."⁸ The neoclassical realist approach opens up the conceptual space for

¹ Waltz, Kenneth N., 'Realist Thought and Neorealist Theory' (1990) 44 *Journal of International Affairs* 21 at 31. See for example Haas, Mark L., *The Ideological Origins of Great Power Politics, 1789-1989* (Cornell University Press, 2005) at 2-3 & 24-25

² For a good overview see Steinberg, Richard H. & Jonathan M. Zasloff, 'Power and International Law' (2006) 100 *American Journal of International Law* 64. The standard triumvirate includes variants of "liberal institutionalism" and "constructivism," each of which identifies a causal role for human agency and ideational variables. For liberal approaches to foreign policy generally see: Freund, Corinna & Volker Rittberger, 'Utilitarian-Liberal Foreign Policy Theory' in Volker Rittberger (ed), *German Foreign Policy Since Unification: Theories and Case Studies* (Manchester University Press, 2001); Doyle, Michael, W., 'Liberalism and Foreign Policy' in Steve Smith, Amelia Hadfield & Tim Dunne (ed), *Foreign Policy: Theories, Actors, Cases* (Oxford University Press, 2008). For constructivist approaches see: Boekle, Henning, Volker Rittberger & Wolfgang Wagner, 'Constructivist Foreign Policy Theory' in Volker Rittberger (ed), *German Foreign Policy Since Unification: Theories and Case Studies* (Manchester University Press, 2001); Fearon, James & Alexander Wendt, 'Rationalism v. Constructivism: A Skeptical View' in Walter Carlsnaes, Thomas Risse & Beth A. Simmons (ed), *Handbook of International Relations* (SAGE Publications, 2002); Checkel, Jeffrey T., 'Constructivism and Foreign Policy' in Steve Smith, Amelia Hadfield & Tim Dunne (ed), *Foreign Policy: Theories, Actors, Cases* (Oxford University Press, 2008)

³ Katzenstein, Peter J., Robert O. Keohane & Stephen D. Krasner, 'Preface: *International Organization* at Its Golden Anniversary' in Peter J. Katzenstein, Robert O. Keohane & Stephen D. Krasner (ed), *Exploration and Contestation in the Study of World Politics* (MIT Press, 1999) at 16-18; Katzenstein, Peter J. & Rudra Sil, 'Rethinking Asian Security: A Case for Analytical Eclecticism' in J. J. Suh, Peter J. Katzenstein & Allen Carlson (ed), *Rethinking Security in East Asia: Identity, Power, and Efficiency* (Stanford University Press, 2004) at 4

⁴ Steinberg, Richard H., 'Overview: Realism in International Law' (2002) 96 *Proceedings of the Annual Meeting (American Society of International Law)* 260 at 261

⁵ *Ibid* at 261. For a classical realist analysis of ideas see: Williams, Michael C., 'Why Ideas Matter in International Relations: Hans Morgenthau, Classical Realism, and the Moral Construction of Power Politics' (2004) 58 *International Organization* 633

⁶ Rose, Gideon, 'Neoclassical Realism and Theories of Foreign Policy' (1998) 51 *World Politics* 144 at 146; Rathbun, Brian C., 'A Rose by Any Other Name: Neoclassical Realism as the Logical and Necessary Extension of Structural Realism' (2008) 17 *Security Studies* 294 at 296

⁷ Kitchen, Nicholas, 'Systemic Pressures and Domestic Ideas: A Neoclassical Realist Model of Grand Strategy Formation' (2010) 36 *Review of International Studies* 117 at 131

⁸ *Ibid* at 141

policymakers' beliefs and the material structure of the international system to become mutually constitutive.⁹ This renders realism compatible with "constructivist" theories in IR, which have conventionally been seen as the ideal entry point for IL scholarship.¹⁰ A review of interdisciplinary scholarship notes that IL scholarship often "echoes the flavour and ontology of constructivist theory" in treating ideas and identity as the fundamental building blocks of international politics.¹¹ In these approaches IL policy can be analysed by reference to the "competing general conceptions of what legal institutions and rules should look like," which are in turn "shaped by the actors conceptions of their interests and their identities."¹²

The advantages of a synthesised approach can be seen in Rose's analysis of America's rising relative power and the concomitant assertion of its normative exceptionalism. He argues that "instead of viewing ideas as either purely independent or purely dependent variables" there is scope for identifying "how, in conjunction with relative power, they could play both roles simultaneously." Specifically Rose considers shifting interpretations of the widespread belief that American "domestic institutions should be disseminated to others." This idea has been expressed by both the "exemplars" of the nineteenth century and the "crusaders" in the twentieth century.¹³ By adopting a neoclassical realist framework he argues that the most important explanation for this shift remains the "massive increase in relative power" that gave the US the means to contemplate a strategy of shaping global politics. The role of political power and basic premise of political realism thereby remains intact. Yet analysts "still need to know the content of American political ideology...in order to understand the specific policy choices officials made in either era."¹⁴ The causal role for ideology and law is thereby preserved even when proceeding from an ostensibly political realist approach. The immediate inquiry thus turns to identifying the precise role of foreign policy ideology in policymaking processes.

Ideas as Beliefs

To achieve greater clarity in the meaning of ideology as it will be used here, it is useful to start with a more precise definition of "ideas" as its basic building blocks. There is a degree of imprecision in formulations that variously label the constitutive elements of ideology as "ideas," "opinions," "values," "symbols" and "beliefs." For the purposes of this study the approach of Goldstein *et al.* is instructive, which defines ideas simply as "beliefs held by individuals."¹⁵ Focussing on beliefs is persuasive as it expresses the connection between political ideas and the actors who hold them, who are central to

⁹ *Ibid* at 142-143

¹⁰ Cox, David & Andrew O'Neil, 'The Unhappy Marriage Between International Relations Theory and International Law' (2008) 20 *Global Change, Peace & Security* 201 at 209-10. For examples of analysis in this form see: Barkin, J. Samuel, *Realist Constructivism* (Cambridge University Press, 2010) at 169-173; See also Fearon, James & Alexander Wendt, 'Rationalism v. Constructivism: A Skeptical View' in Walter Carlsnaes, Thomas Risse & Beth A. Simmons (ed), *Handbook of International Relations* (SAGE Publications, 2002); Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 18-20; Quinn, Adam, *US Foreign Policy in Context: National Ideology from the Founders to the Bush Doctrine* (Routledge, 2010) at 20-21

¹¹ Raustiala, Kal & Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Thomas Risse & Beth A. Simmons Walter Carlsnaes (ed), *Handbook of International Relations* (SAGE Publications, 2002) at 544

¹² Wippman, David, 'The International Criminal Court' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) at 154

¹³ Rose, Gideon, 'Neoclassical Realism and Theories of Foreign Policy' (1998) 51 *World Politics* 144 at 169

¹⁴ *Ibid* at 170. See also Schweller, Randall L., *Unanswered Threats: Political Constraints on the Balance of Power* (Princeton University Press, 2006)

¹⁵ Goldstein, Judith & Robert O. Keohane, 'Ideas and Foreign Policy: An Analytical Framework' in Judith Goldstein & Robert O. Keohane (ed), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Cornell University Press, 1993) at 3

any research project of this nature. Focussing on “ideas” *simpliciter* is a more abstract endeavour, suggesting an object that exists independently of agents who possess those ideas. Accordingly this thesis will focus on “beliefs” as causal variables in foreign policy outcomes, and as the basic elements from which ideologies are constructed. For Goldstein *et al.* these are of three types: world views defining possible modes of thought and discourse;¹⁶ principled beliefs providing normative criteria for assessing right from wrong;¹⁷ and causal beliefs about the cause-effect relationships that will yield strategic outcomes.¹⁸ As will be seen, all three forms of belief inhere in a single ideology.

Building on from this treatment, George and Bennett argue that rather than exerting a deterministic influence, political beliefs increase the propensity of decision-makers to reach particular “diagnostic” and “choice” decisions. In the former case beliefs create in policymakers a propensity to reach a particular diagnosis about what is happening in a case. In the latter situation beliefs direct policymakers’ propensity in choosing what action to then take.¹⁹ The distinction alludes to the role of political beliefs in not merely recognising interests, but in defining what they are.²⁰ Blyth argues that a useful understanding of beliefs must distinguish between the *concept* of interests and the necessarily prior *cognates* of interest.²¹ Making this distinction permits interests to be “less about *a priori* structural determination and more about the construction of wants as mediated by beliefs and desires (i.e., ideas).”²² Blyth emphasis that, although structures such as relative global power remain important in determining interests, they “do not come with an instruction sheet.”²³

Defining Ideology

The reason for focussing on “ideology” is that it remains the leading concept integrating power and beliefs to bridge the putative dichotomy between “interests” and “ideas” in legal and political analysis. Michael Freeden provides a basic definition of political ideology as “a set of ideas, beliefs, opinions, and values that”:

1. exhibit a recurring pattern;
2. are held by significant groups;
3. compete over providing and controlling plans for public policy; [and,]
4. do so with the aim of justifying, contesting or changing the social and political arrangements and processes of a political community.²⁴

This definition identifies ideology as pervasive in all political thought, being comprised of the “ideas and symbols through which political actors find their way and comprehend their social

¹⁶ *Ibid* at 8

¹⁷ *Ibid* at 9

¹⁸ *Ibid* at 10

¹⁹ George, Alexander L. & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) at 193. See for a research design using this distinction Khong, Yuen F., *Analogies at War: Korea, Munich, Dien Bien Phu, and the Vietnam Decisions of 1965* (Princeton University Press, 1992)

²⁰ Ruggie, John G., ‘The Past as Prologue?: Interests, Identity, and American Foreign Policy’ (1997) 21 *International Security* 89 at 120

²¹ Blyth, Mark, ‘Structures Do Not Come with an Instruction Sheet: Interests, Ideas, and Progress in Political Science’ (2003) 1 *Perspective on Politics* 695 at 697

²² *Ibid* at 697

²³ *Ibid* at 698

²⁴ Freeden, Michael *Ideology: A Very Short Introduction* (Oxford University Press, 2003) at 32. For an application of this definition in a foreign policy context see: Nincic, Miroslav & Jennifer M. Ramos, ‘Ideological Structure and Foreign Policy Preferences’ (2010) 15 *Journal of Political Ideologies* 119

surroundings.”²⁵ Constituent ideas are necessary abstractions from reality, providing a descriptive and prescriptive heuristic for taking action in a complex world.²⁶ The way beliefs are configured in a specific ideology enables the “decontesting” of their meaning, thereby narrowing the valid policy implications to be drawn from a political situation.²⁷ Nincic and Ramos approvingly adopt Freedden’s definition for highlighting ideology as a form of “structured thinking: a stable and coherent relationship among the cognitions and preferences people hold.”²⁸ Importantly, for present purposes, Freedden addresses the question of the correlation between material power and belief. Ideology is characterised as both a representation of an objective reality, and as part of the discourse that constructs it:

[Ideologies] interact with historical and political events and retain some representative value. But they do so while emphasizing some features of that reality and de-emphasizing others, and by adding mythical and imaginary happenings to make up for the ‘reality gaps.’ A constant feedback operates between the ‘soft’ ideological imagination and the ‘hard’ constraints of the real world.²⁹

Crucially this approach recognises the dialectical nature of ideology. A nation’s political ideology does not develop in a vacuum, but rather through encounters with the constraints and opportunities afforded by power.

Jonathan Zasloff explores the meaning of ideology in a context closer to home, albeit from the reverse angle to this thesis: analysing the influence of “legal ideology” on early American foreign policy. His account of the “notoriously treacherous” concept is on point for drawing attention to the causal role of ideology in mediating between power and international legal policy.³⁰ Zasloff adopts David Davis’ definition of ideology as: “an integrated system of beliefs, assumptions, and values, not necessarily true or false, which reflects the needs and interests of a group or class at a particular time in history.”³¹ Davis’ own further explanation is useful for reminding us that “there is a continuous interaction between ideology and the material forces of history.”³² This element comports with the observation that the rise in ideas about America’s “exceptional” global role has paralleled and reinforced the reality of growing preponderant global power. Zasloff’s most important point for present purposes is that, by so defining ideology, it cannot be approached as merely “a cynical cover for the naked pursuit of self-interest.”³³ That conclusion is central to the argument of this thesis which is that, although law is at times employed to promote political ends, the fact of contradictions in American IL policy cannot itself be evidence of hypocrisy. Zasloff puts the case well:

²⁵ Freedden, Michael *Ideology: A Very Short Introduction* (Oxford University Press, 2003) at 123

²⁶ See also Appel, Hilary, ‘The Ideological Determinants of Liberal Economic Reform: The Case of Privatization’ (2000) 52 *World Politics* 520 at 527

²⁷ Freedden, Michael *Ideology: A Very Short Introduction* (Oxford University Press, 2003) at 54-55

²⁸ Nincic, Miroslav & Jennifer M. Ramos, ‘Ideological Structure and Foreign Policy Preferences’ (2010) 15 *Journal of Political Ideologies* 119 at 121

²⁹ Freedden, Michael *Ideology: A Very Short Introduction* (Oxford University Press, 2003) at 106

³⁰ Zasloff, Jonathan M., ‘Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era’ (2003) 78 *New York University Law Review* 239 at 247-250. See also Zasloff, Jonathan M., ‘Law and the Shaping of American Foreign Policy: The Twenty Years’ Crisis’ (2004) 77 *Southern California Law Review* 583

³¹ Zasloff, Jonathan M., ‘Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era’ (2003) 78 *New York University Law Review* 239 at 247. See Davis, David B., *The Problem of Slavery in the Age of Revolution, 1770-1823* (Cornell University Press, 1975) at 14

³² Davis, David B., *The Problem of Slavery in the Age of Revolution, 1770-1823* (Cornell University Press, 1975) at 14

³³ Zasloff, Jonathan M., ‘Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era’ (2003) 78 *New York University Law Review* 239 at 248

ideologies carry power precisely because they allow people to believe that they are acting properly while at the same time serving their own interests. Legitimation, then, is directed more at the producer of ideology than at the consumer. Put another way, an effective ideology enables action because it helps avoid the cognitive dissonance that arises when a person advocates something she knows to be unjust or destructive simply to further her own interest.³⁴

In the case of American IL policy, ideology operates to translate power into legal principle – in effect deriving an “ought” from an “is”³⁵ – which adherents can then adopt as both a good faith commitment to IL and simultaneously an affirmation of American power.

Zasloff notes that the power of ideology in the specific context of foreign policy is of particular consequence, since policymakers are faced with immense uncertainty about the intentions of external parties due to “gaps in distance, culture, and understanding.” Even more so than in domestic politics, policymakers are “forced to rely upon ideological assumptions to guide their action.”³⁶ The leading account of American foreign policy ideology remains that of Michael Hunt, who defines ideology in terms consistent with the foregoing insights as: “an interrelated set of convictions or assumptions that reduces the complexities of a particular slice of reality to easily comprehensible terms and suggest appropriate ways of dealing with reality.”³⁷ For George, foreign policy ideology is “a belief system that explains and justifies a preferred political order for society, either one that already exists or one that is proposed, and offers at least a sketchy notion of strategy...for its maintenance and attainment.”³⁸ Legro’s definition identifies three characteristics of ideas in the specific context of foreign policy that distinguish them from other sets of political ideas. These are that foreign policy ideas: “(1) are collectively held; (2) involve beliefs about affective means; and (3) refer specifically to national conceptions about international society.”³⁹ For Legro these ideas “are not so much mental as symbolic and organizational; they are embedded not only in human brains but also in the ‘collective memories,’ government procedures, educational systems, and the rhetoric of statecraft.”⁴⁰ Moreover his definition of ideology draws attention to the inherent “instrumentality” of foreign policy ideas, which are beliefs not just about the objectives of policy, but also the effective means for achieving them.⁴¹ His final element is of particular interest to the present analysis, which is that a foreign policy ideology entails beliefs about the proper attitude toward the existing international order: whether to join, remain outside, or overturn it.⁴²

From these accounts, foreign policy ideology can be defined as a shared set of interrelated beliefs that interpret global power and help define a state’s international interests and strategies for achieving them. The nature of ideology as beliefs entrenched in a political community ensures that evaluations of success will be heavily biased by a conviction that an ideology is effective.⁴³ It is hard,

³⁴ *Ibid* at 248. Citations removed

³⁵ A form of Hume’s “is-ought” fallacy: See Pidgen, Charles R., *Hume on Is and Ought* (Palgrave Macmillan, 2010)

³⁶ Zasloff, Jonathan M., ‘Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era’ (2003) 78 *New York University Law Review* 239 at 248-249

³⁷ Hunt, Michael H., *Ideology and U.S. foreign policy* (Yale University Press, 1987) at xi

³⁸ George, Alexander L., ‘Ideology and International Relations: A Conceptual Analysis’ (1987) 9 *Jerusalem Journal of International Relations* 1 at 1

³⁹ Legro, Jeffrey W., *Rethinking the World: Great Power Strategies and International Order* (Cornell University Press, 2005) at 4

⁴⁰ *Ibid* at 6

⁴¹ *Ibid* at 7

⁴² Legro typologises these positions as “Revisionist,” “Separatist” and “Integrationist”: *ibid* at 10

⁴³ *Ibid* at 26

if not impossible, to conclusively falsify beliefs about foreign policy once ideologically entrenched. They do not provide an “absolute truth” about foreign policy interests and strategies, but merely beliefs that have become influential as an article of faith.⁴⁴ Any established American foreign policy ideology entails a claim that its constitutive beliefs are a formula for strengthening national power and interests. Adherents therefore formulate policy on the basis that it resonates with both themselves and a significant segment of the American polity.

THE STRUCTURE OF AMERICAN FOREIGN POLICY IDEOLOGY

The Wittkopf-Holsti-Rosenau Typology

Attention can now turn to the substance and structure of American foreign policy ideologies with the object of identifying the specific sets of ideas influencing conceptions of IL. The most well established and widely used model by political scientists analysing the structure of American foreign policy attitudes is the “Wittkopf-Holsti-Rosenau” typology.⁴⁵ The underlying rationale for this typology is the same as this thesis, which is that it “is useful in understanding the frequent inconsistency of American foreign policy, for the maintenance of a coherent foreign policy is more difficult in a domestic environment characterized by the absence of consensus.”⁴⁶ Although the foundational literature does not adopt the term “ideology” to describe this belief structure, it is clear that the underlying concept is the same. In a review of foreign policy ideology literature, Hunt cited the work of Holsti and Rosenau as an example of “a new concern with ideology” that had “infiltrated the field of diplomatic history.”⁴⁷ The authors’ own terminology of “attitude structures,”⁴⁸ “worldviews”⁴⁹ and in particular “belief systems”⁵⁰ entails the key elements of interrelated ideas about the nature of the world and political strategies for responding to it.⁵¹ The model will accordingly be adapted in this thesis to identify and classify the constitutive beliefs and structure of American foreign policy ideology and thereby of American IL policy.

As a preliminary point, it is worth emphasising that the most analytically useful typology in social science is one that moves beyond mere listing and instead maps out the structure of how

⁴⁴ Davis, David B., *The Problem of Slavery in the Age of Revolution, 1770-1823* (Cornell University Press, 1975) at 14; Hamilton, Malcolm B., ‘The Elements of the Concept of Ideology’ (1987) 35 *Political Studies* 18 at 38

⁴⁵ Chittick, William O., Keith R. Billingsley & Rick Travis, ‘A Three-Dimensional Model of American Foreign Policy Beliefs’ (1995) 39 *International Studies Quarterly* 313 at 313; Rathbun, Brian C., ‘Hierarchy and Community at Home and Abroad: Evidence of a Common Structure of Domestic and Foreign Policy Beliefs in American Elites’ (2007) 51 *Journal of Conflict Resolution* 379 at 386

⁴⁶ Wittkopf, Eugene R., ‘On the Foreign Policy Beliefs of the American People: A Critique and Some Evidence’ (1986) *International Studies Quarterly* 425 at 443

⁴⁷ Hunt, Michael H., ‘Ideology’ (1990) 77 *The Journal of American History* 108 at 112-113. See also Martini, Nicholas F., ‘Foreign Policy Ideology and Conflict Preferences: A Look at Afghanistan and Libya’ (2014) 0 *Foreign Policy Analysis* 1 at 3-4

⁴⁸ Holsti, Ole R. & James N. Rosenau, ‘The Structure of Foreign Policy Beliefs among American Opinion Leaders - After the Cold War’ (1993) 22 *Millennium-Journal of International Studies* 235

⁴⁹ As described by Baum, Matthew A. & Henry R. Nau, ‘Foreign Policy Views and U.S. Standing in the World’ (2009) 28 *Harvard Kennedy School Faculty Research Working Paper Series* at 5-6

⁵⁰ Holsti, Ole R., ‘The Belief System and National Images: A Case Study’ (1962) 6 *Journal of Conflict Resolution* 244; Converse, Philip E., ‘The Nature of Belief Systems in Mass Publics (1964)’ (2006) 18 *Critical Review* 1

⁵¹ See Martini, Nicholas F., ‘Foreign Policy Ideology and Conflict Preferences: A Look at Afghanistan and Libya’ (2014) 0 *Foreign Policy Analysis* 1 at 3; Larson, Deborah W., ‘The Role of Belief Systems and Schemas in Foreign Policy Decision-Making’ (1994) 15 *Political Psychology* 17 at 21. Note that economist Douglass North preferred the term “belief system” to avoid difficulties associated with “ideology: cited in Appel, Hilary, ‘The Ideological Determinants of Liberal Economic Reform: The Case of Privatization’ (2000) 52 *World Politics* 520 at 526, n.13

different types relate to one another.⁵² Collier *et al* define an analytical typology as “an organized system of types that breaks down an overarching concept into component dimensions and types.”⁵³ “Dimensionality” is a broader concept than “type” and refers to the “number of variables entailed in a concept or a data set.”⁵⁴ Common variables may be evident in different types and so the goal of the analyst is to isolate each variable, then show how types are connected and differentiated through them. Where the concept under analysis exhibits multidimensionality a clear typology will be one constructed by the intersection of orthogonal dimensions to form discrete types. An underlying strength of the WHR typology is that it goes beyond merely listing different forms of ideology, instead meeting the more rigorous standard of mapping out how different types relate to one another. A further point is that the product of this typology is four “ideal types” of foreign policy ideology. In Max Weber’s terms “an ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct.”⁵⁵ These types are therefore analytical constructs that usefully capture patterns of observed behaviour, rather than an account of any particular person’s belief system. Outlying cases and inconsistencies do not falsify the typology, but merely remind that it represents a synthesised ideal.

The WHR typology rests upon extensive survey research that has confirmed an extremely robust structure of two orthogonal dimensions crossing to form four discrete belief types.⁵⁶ Holsti first described a “Three-Headed Eagle” of foreign policy types in 1979 comprised of “Cold War Internationalism,” “Post-Cold War Internationalism” and “Isolationism.”⁵⁷ Holsti noted that the three parted typology encompassed the “two versions of internationalism” identified previously by Mandelbaum and Schneider as “conservative internationalism” and “liberal internationalism.”⁵⁸ *Cold War internationalism/conservative internationalism* emphasised elements of traditional *Realpolitik*, including a zero-sum contest between the US and its adversaries and the importance of US leadership to maintain a favourable balance of power.⁵⁹ In contrast *post-Cold War internationalism/liberal internationalism* rejected the wisdom of pursuing US primacy, instead emphasising global interdependence and thus the need for cooperation – particularly in economic and

⁵² On typological construction see Collier, David, Jody LaPorte & Jason Seawright, ‘Putting Typologies to Work: Concept-Formation, Measurement, and Analytic Rigor’ (2012) 65 *Political Research Quarterly* 217 at 222-223; Elman, Colin, ‘Explanatory Typologies in Qualitative Studies of International Politics’ (2005) 59 *International Organization* 293

⁵³ Collier, David, Jody LaPorte & Jason Seawright, ‘Putting Typologies to Work: Supplementary Material,’ *Political Research Quarterly* (2012) <http://prq.sagepub.com/content/suppl/2012/03/30/65.1.217.DC1/10.1177_1065912912437162.pdf>. See also George, Alexander L. & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) at 235

⁵⁴ Collier, David, Jody LaPorte & Jason Seawright, ‘Putting Typologies to Work: Supplementary Material,’ *Political Research Quarterly* (2012) <http://prq.sagepub.com/content/suppl/2012/03/30/65.1.217.DC1/10.1177_1065912912437162.pdf>

⁵⁵ Weber, Max, *The Methodology of the Social Sciences* (The Free Press, 1949) at 90; Watkins, John W.N., ‘Ideal Types and Historical Explanation’ (1952) 3 *The British Journal for the Philosophy of Science* 22 at 24. Finnis used the term “central case” in the same way within law specifically: Finnis, John, *Natural Law and Natural Rights* (Clarendon Press, 1980) at 9-11

⁵⁶ See George, Alexander L. & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) on mutual exclusivity and exhaustiveness in typologies 238

⁵⁷ Holsti, Ole R., ‘The Three-Headed Eagle: The United States and System Change’ (1979) 23 *International Studies Quarterly* 339. See also Holsti, Ole R. & James N. Rosenau, *American Leadership in World Affairs* (George Allen & Unwin Ltd, 1984) at Ch.4

⁵⁸ Holsti, Ole R., ‘The Three-Headed Eagle: The United States and System Change’ (1979) 23 *International Studies Quarterly* 339 at 356; Mandelbaum, Michael & William Schneider, ‘The New Internationalisms’ (1978) 2 *International Security* 81 at 93

⁵⁹ Holsti, Ole R., ‘The Three-Headed Eagle: The United States and System Change’ (1979) 23 *International Studies Quarterly* 339 at 343-345; Mandelbaum, Michael & William Schneider, ‘The New Internationalisms’ (1978) 2 *International Security* 81 at 93-94

humanitarian issues.⁶⁰ Mandelbaum and Schneider then arranged these types in relation to a third “noninternationalist”⁶¹ category to conclude that foreign policy is best thought of in terms of two dimensions: “an internationalist-isolationist dimension (*whether* the United States should play an active role in world affairs) and a cross-cutting liberal-conservative dimension (*what kind* of role it should play).”⁶² The “internationalist-isolationist” dimension measures perceptions of what degree of involvement with the external world will best serve American interests. The “liberal-conservative” dimension measures political values, specifically whether American interests are defined in zero-sum terms, or whether they are defined according to a commonality of interests that transcend national identity.

In secondary analyses Wittkopf, and later Holsti and Rosenau, used survey research on the American public’s foreign policy attitudes to corroborate these findings. Data from both the Chicago Council on Foreign Relations (“CCFR”)⁶³ and the Foreign Policy Leadership Project (“FPLP”)⁶⁴ was used to identify a bi-dimensional structure of “support-oppose militant internationalism” and “support-oppose cooperative internationalism.”⁶⁵ “Militant internationalism” (“MI”) was evident in positions that supported American leadership in opposing the Soviet Union and a willingness to use American military power abroad. On Mandelbaum and Schneider’s dimensions support for MI is equivalent to holding “conservative” values, while opposition to MI is equivalent to a “liberal” foreign policy position.⁶⁶ In contrast “cooperative internationalism” (“CI”) was evidenced by pro détente policies and a preference for cooperating with other countries rather than focussing on a zero-sum competition with the Soviet Union. Here support for CI is equivalent to an “internationalist” position, while opposition to CI indicates a more “nationalist” position.⁶⁷ Wittkopf crossed these dimensions to produce four mutually exclusive belief types:⁶⁸

⁶⁰ Holsti, Ole R., ‘The Three-Headed Eagle: The United States and System Change’ (1979) 23 *International Studies Quarterly* 339 at 346-347; Mandelbaum, Michael & William Schneider, ‘The New Internationalisms’ (1978) 2 *International Security* 81 at 94-95

⁶¹ Equivalent to Holsti’s “isolationist” category: Holsti, Ole R., ‘The Three-Headed Eagle: The United States and System Change’ (1979) 23 *International Studies Quarterly* 339 at 348-352

⁶² Mandelbaum, Michael & William Schneider, ‘The New Internationalisms’ in Kenneth A. Oye, Donald Rothchild & Robert J. Lieber (ed), *Eagle Entangled: U.S. Foreign Policy in a Complex World* (Longman, 1979) at 41. Original emphasis

⁶³ Since renamed: Chicago Council on Global Affairs, *Chicago Council Surveys* <http://www.thechicagocouncil.org/files/Surveys/Chicago_Council_Survey_Home/files/Studies_Publications/POS/Public_Opinion.aspx>. See Reilly, John E., *American Public Opinion and U.S. Foreign Policy* (Chicago Council on Foreign Relations, 1995)

⁶⁴ See Holsti, Ole R. & James N. Rosenau, ‘Liberals, Populists, Libertarians, and Conservatives: The Link between Domestic and International Affairs’ (1996) 17 *International Political Science Review* 29 at 32

⁶⁵ Wittkopf, Eugene R., ‘The Structure of Foreign Policy Attitudes: An Alternative View’ (1981) 62 *Social Science Quarterly* 108 at 114-115; Maggiotto, Michael A. & Eugene R. Wittkopf, ‘American Public Attitudes toward Foreign Policy’ (1981) 25 *International Studies Quarterly* 601 at 608; Holsti, Ole R. & James N. Rosenau, ‘The Structure of Foreign Policy Attitudes among American Leaders’ (1990) 52 *Journal of Politics* 94 at 96

⁶⁶ This is corroborated by the self-identification of survey respondents according to political ideology (ranging from “very liberal” to “very conservative”) and partisanship: Holsti, Ole R. & James N. Rosenau, ‘Liberals, Populists, Libertarians, and Conservatives: The Link between Domestic and International Affairs’ (1996) 17 *International Political Science Review* 29 at 52

⁶⁷ Maggiotto, Michael A. & Eugene R. Wittkopf, ‘American Public Attitudes toward Foreign Policy’ (1981) 25 *International Studies Quarterly* 601 at 610

⁶⁸ Wittkopf, Eugene R., ‘The Structure of Foreign Policy Attitudes: An Alternative View’ (1981) 62 *Social Science Quarterly* 108 at 115; Maggiotto, Michael A. & Eugene R. Wittkopf, ‘American Public Attitudes toward Foreign Policy’ (1981) 25 *International Studies Quarterly* 601 at 610-611; Holsti, Ole R. & James N. Rosenau, ‘The Structure of Foreign Policy Attitudes among American Leaders’ (1990) 52 *Journal of Politics* 94 at 96. A parallel structure of “Potential Divisions Among American Leaders” was suggested by Holsti and Rosenau in the following table:

	Liberal	Conservative
Internationalist	Post-Cold War Internationalists	Cold War Multilateralists
Isolationist	Semi-Isolationists	Cold War Unilateralists

	Oppose MI	Support MI
Support CI	Accommodationists	Internationalists
Oppose CI	Isolationists	Hard-liners

Accommodationists support cooperative internationalism and oppose militant internationalism. They adopt an internationalist focus according to a liberal world view that focuses on non traditional security threats such as democratisation and human rights, with a preference for working multilaterally through IL and institutions. *Internationalists* support both cooperative internationalism and militant internationalism. They have an internationalist focus, but according to a conservative world view that is willing to combine diplomatic cooperation with military superiority to maintain America's global position. *Isolationists* oppose both cooperative internationalism and militant internationalism. They oppose unnecessary international involvement in order to protect liberal values at home. Finally *Hard-liners* oppose cooperative internationalism and support militant internationalism. They adopt a nationalistic rather than international focus, but do so to uphold national security and America's global position rather than for liberal objectives.

Subsequent survey research confirmed that these same dimensions structure the beliefs of American foreign policy elites. This rebutted the presumption created by the pioneering work of Converse, who previously found that elite foreign policy beliefs diverged from that of the mass public.⁶⁹ Wittkopf analysed "leaders" beliefs within the CCFR survey data, being those respondents "in leadership positions with the greatest influence upon and knowledge about foreign relations."⁷⁰ Falling in this category are "policymakers" in the sense used in this thesis, which included members of Congress (in particular members of the Foreign Relations and Foreign Affairs committees) and the executive (including State Department officials and "officials with international responsibilities from other government departments").⁷¹ The real difference between elites and masses was in the distribution between types. Survey results demonstrated a relatively even distribution of the mass public among the four types.⁷² In contrast leaders were more likely to support CI compared to the mass public, with a far greater distribution between the two internationalist quadrants (Accommodationists and Internationalists).⁷³ This difference stemmed specifically from the occupancy of leadership positions itself rather than from the demographic characteristics of those leaders. However this did not alter the structure of leaders' beliefs, which remained the same as masses.⁷⁴

Holsti, Ole R. & James N. Rosenau, *American Leadership in World Affairs* (George Allen & Unwin Ltd, 1984) at 244

⁶⁹ Converse, Philip E., 'The Nature of Belief Systems in Mass Publics (1964)' (2006) 18 *Critical Review* 1

⁷⁰ Wittkopf, Eugene R. & Michael A. Maggiotto, 'Elites and Masses: A Comparative Analysis of Attitudes Toward America's World Role' (1983) 45 *Journal of Politics* 303 at 308

⁷¹ *Ibid* at 308-309, n.9; For the distribution of respondents between groups see Wittkopf, Eugene R., 'Elites and Masses: Another Look at Attitudes Toward America's World Role' (1987) 31 *International Studies Quarterly* 131 at 133, n.1

⁷² Holsti, Ole R. & James N. Rosenau, 'The Structure of Foreign Policy Attitudes among American Leaders' (1990) 52 *Journal of Politics* 94 at 103; Wittkopf, Eugene R., 'What Americans Really Think About Foreign Policy' (1996) 19 *Washington Quarterly* 88 at 94-95

⁷³ This finding is replicated in more recent analysis of CCFR survey data: Busby, Joshua W. & Jonathan Monten, 'Who are the Hardliners? Public Opinion and Republican Elite Attitudes on U.S. Foreign Policy after the Cold War' (2008) 2008 *Annual Meeting of the International Studies Association, San Francisco, CA March 27-30* at 16-17

⁷⁴ Wittkopf, Eugene R. & Michael A. Maggiotto, 'Elites and Masses: A Comparative Analysis of Attitudes Toward America's World Role' (1983) 45 *Journal of Politics* 303 at 322; Wittkopf, Eugene R., 'Elites and Masses: Another Look at Attitudes Toward America's World Role' (1987) 31 *International Studies Quarterly* 131 at 134

Distribution of leaders and masses between types was determined foremost by political ideology and party affiliation.⁷⁵ Data indicated that self identified liberals were more likely to adopt a support CI/oppose MI position. In contrast conservatives and moderates were more likely to adopt a support MI/oppose CI position.⁷⁶ In terms of partisanship this translated into a greater number of Democrats identifying as Accommodationists, while Internationalists and Hardliners were more likely to be Republicans. Partisan affiliation of Isolationists was less apparent but leaned toward Republican or independent.⁷⁷ Recent analysis of the CCFR data by Busby and Monten demonstrates that the proportion of Republican elites categorised as Hardliners has grown, thereby narrowing the gap between the mass public and elites in levels of support for both forms of internationalism.⁷⁸ By 2002 significant partisan differences had emerged, with growing support for CI among Democrat leaders matched by a sharp increase in support for MI among Republican leaders.⁷⁹ Overall however Busby and Monten's updated analysis confirmed both the persistence of the WHR structure of beliefs and the continued concentration of leaders between internationalist types.⁸⁰

The WHR typology has been repeatedly verified through empirical data on the structure of foreign policy ideology among the American public and elites,⁸¹ and through evidence that the types correlate with domestic political beliefs.⁸² The historical context of the typology was of course heavily influenced by Cold War thinking and US-Soviet relations. However, subsequent research has demonstrated a "remarkable continuity" in ideological structure following the end of the Cold War.⁸³ Holsti and Rosenau have traced the evidence across a period spanning the immediate post-Vietnam War through to the post-Cold War era. Their conclusion is that foreign policy belief structures have "persisted through a period of historic international change." That continuity is evident not only in "high politics" on the causes of war and peace, but also in emerging non-traditional security threats that

⁷⁵ This use of the term "ideology" to describe political placement on a left-right spectrum may explain part of the reluctance to adopt the term to describe the structure of beliefs as a whole

⁷⁶ Wittkopf, Eugene R., 'Elites and Masses: Another Look at Attitudes Toward America's World Role' (1987) 31 *International Studies Quarterly* 131 at 134; Ninic, Miroslav & Jennifer M. Ramos, 'Ideological Structure and Foreign Policy Preferences' (2010) 15 *Journal of Political Ideologies* 119 at 122

⁷⁷ Holsti, Ole R. & James N. Rosenau, 'The Structure of Foreign Policy Beliefs among American Opinion Leaders - After the Cold War' (1993) 22 *Millennium-Journal of International Studies* 235 at 248 & 278. Isolationists have also been found to liberal tendencies: Holsti, Ole R. & James N. Rosenau, 'Consensus Lost. Consensus Regained?: Foreign Policy Beliefs of American Leaders, 1976-1980' (1986) 30 *International Studies Quarterly* 375 at 398

⁷⁸ Busby, Joshua W. & Jonathan Monten, 'Who are the Hardliners? Public Opinion and Republican Elite Attitudes on U.S. Foreign Policy after the Cold War' (2008) 2008 *Annual Meeting of the International Studies Association, San Francisco, CA March 27-30* at 17-18

⁷⁹ *Ibid* at 27-28

⁸⁰ *Ibid* at 28-29. A significant difference however is that Busby and Monten's methodology classifies a significantly greater proportion of this group as Internationalists rather than Accommodationists when compared to Holsti's approach.

⁸¹ Wittkopf, Eugene R., *Faces of Internationalism: Public Opinion and American Foreign Policy* (Duke University Press, 1990); Holsti, Ole R., 'Continuity and Change in the Domestic and Foreign Policy Beliefs of American Opinion Leaders' (1997) *Annual Conference of the American Political Science Association, September, Washington, DC*; Rosati, Jerel A., Michael W. Link & John Creed, 'A New Perspective on the Foreign Policy Views of American Opinion Leaders in the Cold War and Post-Cold War Eras' (1998) 51 *Political Research Quarterly* 461; Holsti, Ole R., *Public Opinion and American Foreign Policy* (University of Michigan Press, Rev. ed, 2004); Busby, Joshua W. & Jonathan Monten, 'Who are the Hardliners? Public Opinion and Republican Elite Attitudes on U.S. Foreign Policy after the Cold War' (2008) 2008 *Annual Meeting of the International Studies Association, San Francisco, CA March 27-30*

⁸² Holsti, Ole R. & James N. Rosenau, 'Liberals, Populists, Libertarians, and Conservatives: The Link between Domestic and International Affairs' (1996) 17 *International Political Science Review* 29; Rathbun, Brian C., 'Steeped in International Affairs?: The Foreign Policy Views of the Tea Party' (2012) 9 *Foreign Policy Analysis* 21; Herrmann, Richard K., Philip E. Tetlock & Penny S. Visser, 'Mass Public Decisions to go to War: A Cognitive-Interactionist Framework' (1999) 93 *American Political Science Review* 553

⁸³ Murray, Shoon K., Jonathan A. Cowden & Bruce M. Russett, 'The Convergence of American Elites' Domestic Beliefs with their Foreign Policy Beliefs' (1999) 25 *International Interactions* 153 at 478

span state boundaries.⁸⁴ Murray and Cowden agree in finding that American leaders effectively adapted existing Cold-War ideological attachments to new international circumstances.⁸⁵ As such, there is strong evidence that the WHR structure of foreign policy ideology is invariant over time and independent of changing distributions of international power. Critiques of the typology have been offered over the years,⁸⁶ including arguments that foreign policy beliefs are structured by either more⁸⁷ or by less⁸⁸ than the two MI/CI dimensions. None of these formulations has eclipsed the WHR scheme however in popularity or influence.⁸⁹ More importantly, as Baum and Nau have more recently noted, the typology remains “impressively reliable at predicting support or opposition to U.S. approaches toward foreign policy in general, and specific policy initiatives in particular.”⁹⁰ Alternative formulations may have merit therefore, but the WHR has been proven adequate to the task of an analytical typology of foreign policy ideology, while offering the advantages of parsimony and an impressive pedigree as the “gold standard” within the literature.⁹¹

Evidence from Diplomatic History

A frequent observation within the WHR literature is that each belief type parallels long established traditions of thought found in American diplomatic history. The WHR scheme is valuable for using quantitative research to classify how types of American foreign policy beliefs interrelate. The typology nevertheless remains a parsimonious rendering of rich traditions of thought that have long shaped American foreign policy. Foremost this history provides clear evidence of analogous dimensionality in attitudes to foreign policy. An early analysis by Klingberg observed that the US foreign policy “mood” has cycled between periods of “extroversion” and “introversion.”⁹² Louis Hartz identified the same pattern in the context of arguing that American foreign policy has been historically influenced by a

⁸⁴ Holsti, Ole R. & James N. Rosenau, ‘The Structure of Foreign Policy Beliefs among American Opinion Leaders - After the Cold War’ (1993) 22 *Millennium-Journal of International Studies* 235 at 252; Holsti, Ole R., ‘Continuity and Change in the Domestic and Foreign Policy Beliefs of American Opinion Leaders’ (1997) *Annual Conference of the American Political Science Association, September, Washington, DC*

⁸⁵ Murray, Shoon K., Jonathan A. Cowden & Bruce M. Russett, ‘The Convergence of American Elites’ Domestic Beliefs with their Foreign Policy Beliefs’ (1999) 25 *International Interactions* 153 at 456

⁸⁶ Wittkopf, Holsti and Rosenau debated the methodology and underlying assumptions of the emerging typology in a 1986 symposium: Ferguson, Thomas, ‘The Right Consensus?: Holsti and Rosenau’s New Foreign Policy Belief Surveys’ (1986) 30 *International Studies Quarterly* 411; Wittkopf, Eugene R., ‘On the Foreign Policy Beliefs of the American People: A Critique and Some Evidence’ (1986) *International Studies Quarterly* 425; Kegley Jr., Charles W., ‘Assumptions and Dilemmas in the Study of Americans’ Foreign Policy Beliefs: A Caveat’ (1986) 30 *International Studies Quarterly* 447; Holsti, Ole R. & James N. Rosenau, ‘The Foreign Policy Beliefs of American Leaders: Some Further Thoughts on Theory and Method’ (1986) 30 *International Studies Quarterly* 473

⁸⁷ See Rathbun, Brian C., ‘Hierarchy and Community at Home and Abroad: Evidence of a Common Structure of Domestic and Foreign Policy Beliefs in American Elites’ (2007) 51 *Journal of Conflict Resolution* 379 who introduces an “isolationist dimension” that is independent from that formed by the MI/CI scheme. Chittick, William O., Keith R. Billingsley & Rick Travis, ‘A Three-Dimensional Model of American Foreign Policy Beliefs’ (1995) 39 *International Studies Quarterly* 313 introduce a “third dimension” to the WHR scheme of “multilateralism-unilateralism.” The three dimensional approach receives support by Aguilar, Edwin, Benjamin O. Fordham & G. Patrick Lynch, ‘The Foreign Policy Beliefs of Political Campaign Contributors: A Post-Cold War Analysis’ (2001) 82 *Social Science Quarterly* 89, and even by Holsti himself: Holsti, Ole R., ‘Continuity and Change in the Domestic and Foreign Policy Beliefs of American Opinion Leaders’ (1997) *Annual Conference of the American Political Science Association, September, Washington, DC* at 18-19. Rosati, Jerel & John Creed, ‘Extending the Three- and Four-Headed Eagles: The Foreign Policy Orientations of American Elites during the 80s and 90s’ (1997) 18 *Political Psychology* 583 also extend the scheme to find evidence of up to six foreign policy orientations

⁸⁸ Murray, Shoon K., Jonathan A. Cowden & Bruce M. Russett, ‘The Convergence of American Elites’ Domestic Beliefs with their Foreign Policy Beliefs’ (1999) 25 *International Interactions* 153 arguing that a single ideological “liberalism-conservatism” dimension constrains both the MI and CI dimensions

⁸⁹ Baum, Matthew A. & Henry R. Nau, ‘Foreign Policy Views and U.S. Standing in the World’ (2009) 28 *Harvard Kennedy School Faculty Research Working Paper Series* at 3

⁹⁰ *Ibid* at 3

⁹¹ Nincic, Miroslav & Jennifer M. Ramos, ‘Ideological Structure and Foreign Policy Preferences’ (2010) 15 *Journal of Political Ideologies* 119 at 122

⁹² Klingberg, Frank L., ‘The Historical Alternation of Moods in American Foreign Policy’ (1952) 4 *World Politics* 239 at 239-240

Lockean “liberal tradition,” which has manifested in two distinct forms.⁹³ The first is an “exemplarist” strand that seeks to spread American values primarily by preserving the unique character of the nation as an example to the world.⁹⁴ This has meant promoting the superiority of the American example within the confines of the existing international order. Alternatively American foreign policy has taken a “messianic” form in which the US seeks to actively spread exceptional values abroad.⁹⁵ Here the focus is on using American values as a platform for reforming the international order in line with its own values. For Hartz the connection between these divergent outlooks is that “absolute national morality is inspired either to withdraw from “alien” things or to transform them: it cannot live in comfort constantly by their side.” The consequence is that liberalism can manifest both in an internationalist and nationalist form so that for America “messianism is the polar counterpart to its isolationism.”⁹⁶ Against Hartz’s “thesis” is an opposing tradition of thought that directly challenges the liberal conception of America’s place in the world. Lieven describes this as the “American antithesis” grounded not in universal values but particularistic ethnoreligious roots.⁹⁷ For Brock the universal and liberal view of American purpose has been “constantly at war with the idea that Americanism belongs exclusively to the American people and must be defended against alien influences rather than shared with mankind.”⁹⁸

These connections were recognised in Holsti and Rosenau’s earlier work, which noted that their Isolationists “revived a theme with venerable roots in American political thought—that the ability to nurture and sustain democratic institutions at home is inversely related to the scope of the nation’s commitments abroad.”⁹⁹ They cite as evidence of this view George Kennan’s contemplation “I think I am a semi-isolationist.”¹⁰⁰ Similarly the strong connection between domestic liberalism and Accommodationist beliefs is explained as the legacy of the ideas of democracy promotion, human rights, and collective security in the foreign policy of Woodrow Wilson.¹⁰¹ Finally Hardliners are described in terms directly attributable to what is sometimes labelled the “Jacksonian” tradition of foreign policy, with strong Southern roots and an emphasis on military virtues.¹⁰² In the WHR typology Hardliners are identified as predominantly Southern, typified by former chairman of the Foreign

⁹³ Hartz, Louis, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (Harcourt, Brace, 1955). See also Ku, Charlotte, *International Law, International Relations, and Global Governance* (Routledge, 2012) at 43-44

⁹⁴ The term is Brands: See Brands, H. W., *What America Owes the World: The Struggle for the Soul of Foreign Policy* (Cambridge University Press, 1998) at vii

⁹⁵ McEvoy-Levy labels this “Globalist exceptionalism”: McEvoy-Levy, Siobhán, *American Exceptionalism and US Foreign Policy: Public Diplomacy at the End of the Cold War* (Palgrave, 2001) at 25; Brands terms these the “vindicators”: Brands, H. W., *What America Owes the World: The Struggle for the Soul of Foreign Policy* (Cambridge University Press, 1998) at viii

⁹⁶ Hartz, Louis, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (Harcourt, Brace, 1955) at 286

⁹⁷ Lieven, Anatol, *America Right or Wrong: An Anatomy of American Nationalism* (Oxford University Press, 1st paperback ed, 2005) at 5

⁹⁸ Brock, William R., ‘Americanism’ in Dennis S.R. Welland (ed), *The United States: A Companion to American Studies* (Methuen, 1974) at 59

⁹⁹ Holsti, Ole R. & James N. Rosenau, ‘Consensus Lost. Consensus Regained?: Foreign Policy Beliefs of American Leaders, 1976-1980’ (1986) 30 *International Studies Quarterly* 375 at 379

¹⁰⁰ Kennan (1978) “An Appeal for Thought.” New York Times Magazine (May 7) cited in Holsti, Ole R. & James N. Rosenau, *American Leadership in World Affairs* (George Allen & Unwin Ltd, 1984) at 123

¹⁰¹ Holsti, Ole R. & James N. Rosenau, ‘Liberals, Populists, Libertarians, and Conservatives: The Link between Domestic and International Affairs’ (1996) 17 *International Political Science Review* 29 at 47-49

¹⁰² Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 227 & 254-255; Lieven, Anatol, *America Right or Wrong: An Anatomy of American Nationalism* (Oxford University Press, 1st paperback ed, 2005) at 88-122

Relations Committee Senator Jesse Helms,¹⁰³ and “strongly pro-military and right wing, but staunchly nationalist and outspokenly protectionist opponents of the New Deal.”¹⁰⁴

Fleshing out the WHR model requires attention to the sets of ideas that have developed around each point of intersection across American diplomatic history. Policymakers located along the two dimensions can be expected to hold specific sets of ideas consistent with their position within the typology. However, those ideas are not derived from the logic of the scheme itself but are informed by the cultural and historical influences of diplomatic history, which have rendered determinate sets of ideas about policy means and ends. Freedden notes the importance of cultural and historical influences rendering a circumscribed “range of meanings and arguments” from a broader ideology.¹⁰⁵ Similarly for Hunt this process permits a “relatively coherent, emotionally charged, and conceptually interlocking sets of ideas,”¹⁰⁶ while for Dueck “culture” establishes a “set of interlocking values, beliefs, and assumptions that are held collectively by a given group and passed on through socialisation.”¹⁰⁷ This suggests the formation of an American foreign policy *Weltanschauung*, largely defining the universe of acceptable policy options. The two dimensions of the WHR scheme provide a skeleton for analytically ordering these more diffuse sets of competing ideas that American policymakers hold about the nature of American power, and its purpose in the world. Perhaps the strongest evidence of the WHR typology’s external validity is that the four ideal types are corroborated by these well established sets of foreign policy beliefs that precede the specific typology by many decades and even centuries.

There is now an identifiable body of literature that has drawn upon American diplomatic history to find that American foreign policies can be divided into four distinct types structured analogously to the WHR model.¹⁰⁸ These formulations necessarily differ given that they are developed through a forensic reconstruction of established patterns of conduct in diplomatic history. There are inevitable overlaps and inconsistencies between types, but a review of this literature reveals sufficient correspondence to treat these as corroborating the approach. The most well known is that of Walter Russell Mead, who argues that his classification of the Wilsonian, Hamiltonian, Jeffersonian, and Jacksonian traditions of thought allows for the interpretation of “American foreign policy as more of a unified whole and less as a sequence of unrelated episodes.”¹⁰⁹ Mead sees these

¹⁰³ Helms has been uniformly categorised according to equivalent types to Illiberal Nationalism: Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 32; Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 268

¹⁰⁴ Ferguson, Thomas, ‘The Right Consensus?: Holsti and Rosenau’s New Foreign Policy Belief Surveys’ (1986) 30 *International Studies Quarterly* 411 at 414; Wittkopf, Eugene R., ‘What Americans Really Think About Foreign Policy’ (1996) 19 *Washington Quarterly* 88 at 103

¹⁰⁵ Freedden, Michael *Ideology: A Very Short Introduction* (Oxford University Press, 2003) at 50

¹⁰⁶ Hunt, Michael H., *Ideology and U.S. foreign policy* (Yale University Press, 1987) at 12

¹⁰⁷ Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 15

¹⁰⁸ See Nacht, Alexander, ‘U.S. Foreign Policy Strategies’ (1995) 18 *Washington Quarterly* 195 at 203; Posen, Barry R. & Andrew L. Ross, ‘Competing Visions for U.S. Grand Strategy’ (1996/97) 21 *International Security* 5 at 4; Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002); Nau, Henry R., *At Home Abroad: Identity and Power in American Foreign Policy* (Cornell University Press, 2002); Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006). For related but alternative four-part typologies see: Nau, Henry R., *Conservative Internationalism* (Princeton University Press, 2008) at 27; Dueck, Colin, *Hard Line: The Republican Party and U.S. Foreign Policy Since World War II* (Princeton University Press, 2010); Oudenaren, John van, ‘Transatlantic Bipolarity and the End of Multilateralism’ (2005) 120 *Political Science Quarterly* 1 at 65

¹⁰⁹ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 87-90. For approving use of Mead’s formulation see: Nye Jr, Joseph S., ‘Soft Power and American Foreign Policy’ (2004) 119 *Political*

four traditions as an organic product of the American experience, with each deeply rooted in regional, economic, social and class interests. More specifically he speculates that the traditions may be traced to the four “folkways” inherited from the regional cultures of the British Isles.¹¹⁰

Wilsonians focus on the moral dimension of US political culture and the interests in spreading these values internationally through democracy promotion and the rule of law. Mead sees the roots of this tradition lying deep in 19th century American missionary activities¹¹¹ so that, despite the moniker, “there were Wilsonians long before Woodrow Wilson was born.”¹¹² This tradition is more than mere idealism, emerging “as a middle way between reactionary militarism and revolutionary internationalism.”¹¹³ *Hamiltonians* focus on strengthening the state through an alliance between government and big business, which serves as the basis for policies directed toward protecting the nation’s economic power.¹¹⁴ *Jeffersonians* emphasise liberty at home as the pre-eminent American value, and thus focus on avoiding the corrupting influence of an activist foreign policy. For Mead this is the only tradition “that believes history is not necessarily on the side of the American experiment,” producing a fear that overseas commitments erode American liberty through both neglect and centralisation of government power that this necessitates.¹¹⁵ Brands’ “exemplarists” terminology captures the idea that America owes the world only the example of its constitutional freedoms. Going any further threatens to “jeopardize American values at the source. In attempting to save the world, and probably failing, America would risk losing its democratic soul.”¹¹⁶ Finally *Jacksonians* represent the populist tradition in US foreign policy, which values national security above all else.

Mead argues that US foreign policy is notable for the continuity of these four traditions in shaping America’s world view and the character of its international engagement.¹¹⁷ The history of US foreign policy is thus viewed as one of the traditions vying for political influence separately and together in shifting combinations. Each has contributed to national power and shown themselves naturally capable of complementing one another as if led by Adam Smith’s invisible hand.¹¹⁸ The traditions represent a uniquely American paradigm, with the continuing influence of the Continental realism of the Cold War amounting to a perversion of US foreign policy.¹¹⁹ Mead argues that “Economics, morality, and democracy are three things that Continental realism largely seeks to

Science Quarterly 255 at 264-266; Dueck, Colin, ‘Jacksonian Republicans,’ *American Review* (2011)

<<http://americanreviewmag.com/stories/jacksonian-republicans>>

¹¹⁰ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 87, citing Fischer, David H., *Albion’s Seed: Four British Folkways in America* (Oxford University Press, 1989). Compare Lynch and Singh who attribute their belief systems in large part to American geography: Lynch, Timothy J. & Robert S. Singh, *After Bush: The Case for Continuity in American Foreign Policy* (Cambridge University Press, 2008) at Ch.1

¹¹¹ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 139. For a contrary view see McDougall, Walter A., *Promised Land, Crusader State: The American Encounter with the World since 1776* (Houghton Mifflin, 1997) at 213

¹¹² Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 88

¹¹³ Scully, Eileen P., ‘The United States and International Affairs, 1789-1919’ in Michael Grossberg & Christopher L. Tomlins (ed), *The Cambridge History of Law in America: Volume 2, The Long Nineteenth Century (1789-1920)* (Cambridge University Press, 2008) at 612

¹¹⁴ Hamilton has been described elsewhere as the “American Machiavelli,” evoking the prominence of Niccolò Machiavelli to European political realism: See Harper, John Lamberton, *American Machiavelli: Alexander Hamilton and the Origins of U.S. Foreign Policy* (Cambridge University Press, 2004)

¹¹⁵ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 183 & 217

¹¹⁶ Brands, H. W., *What America Owes the World: The Struggle for the Soul of Foreign Policy* (Cambridge University Press, 1998) at vii-viii. Brands specifically notes the exemplarist beliefs of Jefferson at 1-2 & 4

¹¹⁷ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 92

¹¹⁸ *Ibid* at 95 & 311

¹¹⁹ *Ibid* at 74 & 77

banish from the realm of high international politics,” yet these concerns “are and inevitably will be central concerns of American foreign policy far into the future.”¹²⁰

The parallels between the WHR and Mead typology are obvious. Holsti states that, although never attributed as such, the four types “bear more than a passing resemblance to the distinction between the Hamiltonian (internationalists), Wilsonian (accommodationists), Jeffersonian (isolationists), and Jacksonian (hard-liners) approaches to American foreign policy.”¹²¹ The WHR typology has indeed been treated as synonymous with Mead’s for analytical purposes, with the primary difference being in its more rigorous structure.¹²² Mead himself disavows any intent to “prove” that policymakers hold these beliefs, or indeed to treat his typology as a model suited to empirical testing.¹²³ His work is presented as a “classificatory typology” listing named types, rather than a “conceptual typology” constructed on underlying dimensions.¹²⁴ Nevertheless, there is certainly evidence that Mead’s typology exhibits the same dimensionality as the WHR scheme. Mead classes Wilsonianism and Hamiltonianism together as specific types of a “globalist” tradition, while Jeffersonianism and Jacksonianism are both types of a “nationalist” tradition.¹²⁵ Moreover Mead emphasises the liberal values at the core of both Wilsonianism and Jeffersonianism, which distinguishes them from the other two traditions. Other variants of the typology confirm the same dimensions. In Nau’s examination his “internationalists” and “realists” are actively engaged in the international sphere, while his “neoisolationists” and “nationalists” resist international engagement.¹²⁶ Dueck is more explicit, setting out two dimensions of *strongly/weakly committed to liberalism* and *strongly/weakly committed to limited liability*, which closely mirror the WHR dimensions and resulting typology.¹²⁷

A similar distribution of elites and masses between the historical and WHR types is also evident. Mead in particular emphasises the populist appeal of Jacksonianism and Jeffersonianism, in contrast to the greater support among foreign policy elites for his two globalist traditions.¹²⁸ Likewise Dueck emphasises that of his two internationalist traditions his Wilsonian equivalent has been the most influential among elites, while his Hamiltonian equivalent has consistently failed to resonate with

¹²⁰ *Ibid* at 78

¹²¹ Holsti, Ole R., *Public Opinion and American Foreign Policy* (University of Michigan Press, Rev. ed, 2004) at 54, citing Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002). Mead emphasises that his typology was developed independently of the WHR or associated approaches: Mead, Walter R., *Personal Communication with Author* (4 November, 2013)

¹²² See Busby, Joshua W. & Jonathan Monten, ‘Who are the Hardliners? Public Opinion and Republican Elite Attitudes on U.S. Foreign Policy after the Cold War’ (2008) *2008 Annual Meeting of the International Studies Association, San Francisco, CA March 27-30*; Rathbun, Brian C., ‘Steeped in International Affairs?: The Foreign Policy Views of the Tea Party’ (2012) 9 *Foreign Policy Analysis* 21

¹²³ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 89

¹²⁴ See Collier, David, Jody LaPorte & Jason Seawright, ‘Putting Typologies to Work: Concept-Formation, Measurement, and Analytic Rigor’ (2012) 65 *Political Research Quarterly* 217 at 218 & Collier, David, Jody LaPorte & Jason Seawright, ‘Putting Typologies to Work: Supplementary Material,’ *Political Research Quarterly* (2012)

<http://prq.sagepub.com/content/suppl/2012/03/30/65.1.217.DC1/10.1177_1065912912437162.pdf>

¹²⁵ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 175 & 268

¹²⁶ Nau, Henry R., *At Home Abroad: Identity and Power in American Foreign Policy* (Cornell University Press, 2002) at 43

¹²⁷ See Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 31-33

¹²⁸ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 267, and generally Chapter 8 “The Rise and Retreat of the New World Order,” 264-309 on the reasons for weak popular support of the globalist traditions at the end of the Cold War

the American public.¹²⁹ These suppositions accord with the empirical evidence that leaders and foreign policymakers are located in the internationalist quadrants in far greater proportions than the mass public.¹³⁰

The Status of American Exceptionalism

An important implication of thinking in terms of diplomatic history is that this brings the WHR structure to bear on the divergent strands of “exceptionalism” noted in legal analysis. American exceptionalism has itself been called an ideology that has “deeply shaped the structure of social and political thought.”¹³¹ However, in the context of foreign policy, McEvoy-Levy prefers to describe American exceptionalism as “*the* ‘para-ideological’ umbrella” encompassing the many recurrent themes of America’s global engagement. By this she means that the concept lacks the coherence of an ideology, but rather is “a crystallization of a set of related ideas which explain the world and the US role therein.”¹³² This is the conclusion preferred in this study, which does not find exceptionalist beliefs to meet the features of an ideology. Rather the interplay between America’s uniquely preponderant power and foreign policy ideology has produced exceptionalist beliefs as the inevitable outcome of grappling to explain its own normative significance. Each of the four American foreign policy ideologies has settled on distinct explanations for American uniqueness which, when taken together, represent the different faces of what has become known as “American exceptionalism.” These beliefs remain components of broader foreign policy ideologies however rather than comprising a distinct exceptionalist ideology. The term is empty as a categorical label, and only provides insight into American foreign policy where the particular variants of exceptionalist ideas are specified as liberal, illiberal, internationalist or nationalist.

Mead directly describes Jacksonian thinking as combining “a firm belief in American exceptionalism and an American world mission with deep scepticism about the United States’ ability to create a liberal world order.”¹³³ But the same logic applies to his Wilsonians’ perception of an “American duty to remake the world in its image,”¹³⁴ and the Jeffersonian view that the American Revolution “was the start of a new era in the world.”¹³⁵ Baum and Nau are more explicit in identifying each of the WHR types as entailing a particular interpretation of exceptionalist thinking, observing that “Americans do not have a single, uniform view of American exceptionalism or foreign policy. Instead,

¹²⁹ Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 31-33

¹³⁰ Wittkopf, Eugene R., ‘Elites and Masses: Another Look at Attitudes Toward America’s World Role’ (1987) 31 *International Studies Quarterly* 131 at 134; Busby, Joshua W. & Jonathan Monten, ‘Who are the Hardliners? Public Opinion and Republican Elite Attitudes on U.S. Foreign Policy after the Cold War’ (2008) *2008 Annual Meeting of the International Studies Association, San Francisco, CA March 27-30* at 16-17

¹³¹ Ross, Dorothy, *The Origins of American Social Science* (Cambridge University Press, 1992) at xviii & 22; Tyrrell, Ian, ‘American Exceptionalism in an Age of International History’ (1991) 96 *The American Historical Review* 1031

¹³² McEvoy-Levy, Siobhán, *American Exceptionalism and US Foreign Policy: Public Diplomacy at the End of the Cold War* (Palgrave, 2001) at 23. Original emphasis

¹³³ Mead, Walter R., ‘The Tea Party and American Foreign Policy - What Populism Means for Globalism’ (2011) 90 *Foreign Affairs* 28 at 35

¹³⁴ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 147

¹³⁵ *Ibid* at 180

they have several distinct ones.”¹³⁶ In particular their equivalents to the Accommodationists, Hardliners and Isolationists all explicitly encompass variants of exceptionalist beliefs.¹³⁷

For all treatments of the four-part typology the outlier in terms of exceptionalist beliefs is the WHR “Internationalist” type or Mead’s “Hamiltonian” tradition. This is notably labelled simply as the “Realist” tradition by both Dueck and by Baum and Nau. For Baum and Nau adherents “do not consider America as exceptional at all but ordinary like all other powers.”¹³⁸ Likewise for Dueck the internationalist focus of this type flows not from exceptionalist liberal values but rather “from an attempt to promote the national interest in a balanced manner.”¹³⁹ Consequently this form of ideology represents approaches to policy that are least influenced by beliefs in American exceptionalism. Exceptionalist ideas nevertheless remain an integral component to each of the alternative three approaches to foreign policy.

FOREIGN POLICY IDEOLOGY IN LEGAL SCHOLARSHIP

Legal scholarship has been unwilling to acknowledge the influence of foreign policy ideology on receptions of IL for deep-seated epistemological and disciplinary reasons. The legalist narrative remains one of a unified body of impartial rules, doctrines and institutions with universal validity.¹⁴⁰ According to this view, the content and obligations created by IL can be determined without distinguishing between the identity and ideological commitments of the state subjects of IL. Shirley Scott has addressed the significance of ideology in IL consistently with this view by approaching the *idea* of IL itself as a legalist ideology.¹⁴¹ The core belief of this ideology is that “international law is ultimately distinguishable from, and superior to, politics.”¹⁴² From this perspective the efficacy of legal institutions depends on the strength of state observance of core legalist beliefs; where that ideology loses its adherents IL ceases to exist.¹⁴³ Scott concludes that, in practice, the obligation on states is not to comply with law *per se*, but rather to uphold the ideology.¹⁴⁴

¹³⁶ Baum, Matthew A. & Henry R. Nau, ‘Foreign Policy Views and U.S. Standing in the World’ (2009) 28 *Harvard Kennedy School Faculty Research Working Paper Series* at 5

¹³⁷ *Ibid* at 5-6

¹³⁸ *Ibid* at 5-6 & 26

¹³⁹ Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 33

¹⁴⁰ See at Introduction *supra* Ku, Charlotte, *International Law, International Relations, and Global Governance* (Routledge, 2012). See also Noyes, John E., ‘Universalism and the American Tradition of International Law’ (2006) 21 *Connecticut Journal of International Law* 199 at 199-200. Scott refers to this as the “rule-book” image of international law, see: Scott, Shirley V., ‘Identifying the Source and Nature of a State’s Political Obligation Towards International Law’ (2004-2005) 1 *Journal of International Law and International Relations* 49 at 56

¹⁴¹ Scott, Shirley V., ‘International Law as Ideology: Theorising the Relationship between International Law and International Politics’ (1994) 5 *European Journal of International Law* 313 at 319-322; Scott, Shirley V., ‘Identifying the Source and Nature of a State’s Political Obligation Towards International Law’ (2004-2005) 1 *Journal of International Law and International Relations* 49 at 54; Scott, Shirley V., *International Law, US Power: The United States’ Quest for Legal Security* (Cambridge University Press, 2012) at 211-215 & 234-235

¹⁴² Scott, Shirley V., ‘Identifying the Source and Nature of a State’s Political Obligation Towards International Law’ (2004-2005) 1 *Journal of International Law and International Relations* 49 54-55. For elements of this ideology see: Scott, Shirley V., ‘Beyond Compliance: Reconciling the International Law-Foreign Policy Dynamic’ (1998) 19 *Australian Year Book of International Law* 35 at 44

¹⁴³ Scott, Shirley V., ‘Building Bridges with Political Science?: A Response from the Other Side’ (1995) 16 *Australian Year Book of International Law* 271 at 277

¹⁴⁴ Scott, Shirley V., ‘Beyond Compliance: Reconciling the International Law-Foreign Policy Dynamic’ (1998) 19 *Australian Year Book of International Law* 35 at 44

The IL as ideology approach is advantageous for identifying the way that law's power is mediated through political ideology.¹⁴⁵ However, the conclusion that the power of IL is encapsulated in a single legalist ideology is inconsistent with the insights from both legal scholarship and American diplomatic history.¹⁴⁶ Scott appears to treat the ideology of IL as a free-floating concept rather than part of the belief system of any state or group of policymakers, with no requirement that any "believe the ideology to be true."¹⁴⁷ Ideological claims are however necessarily made by real states and persons promoting partial political interests. The power of ideology lies not in providing a rhetorical framework external to those it is directed at, but in its ability to constitute the beliefs and actions of its adherents. A rhetorical system of belief remains subordinate to internalised ideological commitments of legal policymakers. The insight from the present analysis is that there is likely to be an array of foreign policy ideologies, each upholding the "idea of international law"¹⁴⁸ through the very act of contesting its meaning – not by confirming a singular ideology of IL.

What is required is a specification of the content of the political ideologies that make "legal doctrine intelligible" to particular policymakers.¹⁴⁹ That task has been undertaken in the analogous case of foreign policy ideology shaping competing interpretations of the US President's constitutional powers. Trimble analyses the shifting balance of constitutional powers between the executive and Congress to find that "the dominance of the Presidency is intertwined with the prevailing ideology of U.S. foreign policy, which includes a notion of U.S. example and leadership in world affairs that requires executive initiative. The President's constitutional foreign affairs power must be defined in light of this background."¹⁵⁰ Constitutional interpretation must thereby "accommodate the self-image of world leadership that the American body politic has adopted and that forms the core of American foreign policy ideology."¹⁵¹ It is this approach of identifying the influence of ideology in constituting legal meaning that will provide the answers sought, rather than treating IL as its own ideology.¹⁵² Consistent with this frame, a small handful of authors have endeavoured to integrate substantive beliefs of American foreign policy ideology with divisions in conceptions of IL.¹⁵³

¹⁴⁵ Slaughter *et al.* noted the significance of Scott's novel approach as a promising avenue for further interdisciplinary research: Slaughter, Anne-Marie, Andrew S. Tulumello & Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 *American Journal of International Law* 367 at 882. For an application of the approach to the subject of international crises see: Withana, Radhika, *Power, Politics, Law: International Law and State Behaviour During International Crises* (Martinus Nijhoff Publishers, 2008) at 61-79

¹⁴⁶ The content of this ideology is drawn from the evidentiary sources of "references to international law and to legal rhetoric in inter-State correspondence": Scott, Shirley V., 'International Law as Ideology: Theorising the Relationship between International Law and International Politics' (1994) 5 *European Journal of International Law* 313 at 319

¹⁴⁷ Scott, Shirley V., 'Beyond Compliance: Reconceiving the International Law-Foreign Policy Dynamic' (1998) 19 *Australian Year Book of International Law* 35 at 44

¹⁴⁸ Scott, Shirley V., 'International Law as Ideology: Theorising the Relationship between International Law and International Politics' (1994) 5 *European Journal of International Law* 313 at 318

¹⁴⁹ Balkin, J. M., 'Ideology as Constraint' (1991) 43 *Stanford Law Review* 1133 at 1138

¹⁵⁰ Trimble, Phillip R., 'The President's Foreign Affairs Power' (1989) 83 *American Journal of International Law* 750 at 754

¹⁵¹ *Ibid* at 757

¹⁵² See also, in the context of Cold War ideological competition: Wright, Quincy, 'International Law and Ideologies' (1954) 48 *American Journal of International Law* 616

¹⁵³ Cohen, Harlan G., 'The American Challenge to International Law: A Tentative Framework for Debate' (2003) 28 *Yale Journal of International Law* 551; Cohen, Harlan G., 'Historical American Perspectives on International Law' (2009) 15 *Journal of International & Comparative Law* 485; Janis, Mark W., *The American Tradition of International Law: Great Expectations 1789-1914* (Oxford University Press, 2004); Janis, Mark W., 'How "Wilsonian" Was Woodrow Wilson?' (2007) 5 *Dartmouth Law Journal* 1; Lagassé, Phillippe, 'The International Criminal Court and the Foreign Policies of the United States' (2004) 59 *International Journal* 433; Noyes, John E., 'American Hegemony, U.S. Political Leaders, and General International Law' (2004) 19 *Connecticut Journal of International Law* 293; Noyes, John E., 'The United States, The Law of the Sea Convention, and Freedom of Navigation' (2005) 29 *Suffolk Transnational Law Review* 1; Noyes, John E., 'U.S. Policy and the United Nations Convention on the Law of the Sea' (2007) 39 *George Washington International Law Review* 621; Noyes, John E., 'The United States and the Law of the Sea Convention: U.S. Views on the Settlement of International Law Disputes in International

The sole book-length effort is Mark Janis' series of essays in *The American Tradition of International Law*.¹⁵⁴ Janis opens with the statement: "How we think about any aspect of the law is largely an inheritance,"¹⁵⁵ setting the context for examining how attitudes toward IL in the early republic have formed the parameters of an American tradition of IL. In the context of competing foreign policy ideologies Janis recognises that "some of America's fierce debates about the nature and advantages of international law have been generated by the disputants failing to acknowledge that they were actually talking about somewhat different things."¹⁵⁶

According to Janis two broad conceptions have historically competed for influence over American IL policy, termed "exceptionalism" and "universalism."¹⁵⁷ "Universalism" is equated with "naturalist" jurisprudence, a "society-centered" focus and an "international community." Universalism developed through the ideas of figures that Janis terms "American utopians"; defined by a determination to subject global politics to the authority of international institutions.¹⁵⁸ Universalism is comprised of two presumptions. The first is that IL is just as much "real law" as municipal law, on the basis that it is recognised by judges and lawyers alike. The second is that IL is founded on a "universal civilization shared by all humanity no matter what their discrete histories or societies."¹⁵⁹ "American utopians" are a broader category than Mead's "Wilsonians," but do encompass that tradition. A chapter is devoted to applying Mead's framework to answer the question: "how 'Wilsonian' was Woodrow Wilson?"¹⁶⁰ Janis argues that Wilson was an IL sceptic in his early academic career,¹⁶¹ and only lived up to his moniker in the aftermath of WWI.¹⁶² Wilson became the archetypal utopian in accepting that "it may be necessary to use the force of the United States to vindicate the right of American citizens everywhere to enjoy the protection of international law."¹⁶³

Janis' competing conception is that of "exceptionalism," which is "positivist," "state-centered" and "volunteeristic."¹⁶⁴ Janis defines exceptionalism as the idea "that America is intrinsically different

Tribunals and U.S. Courts' (2009) 1 *Berkeley Journal of International Law Publicist* 27; Bederman, David J., 'Constructivism, Positivism, and Empiricism in International Law' (2000) 89 *Georgetown Law Journal* 469; Bederman, David J., 'Globalization, International Law and United States Foreign Policy' (2001) 50 *Emory Law Journal* 717

¹⁵⁴ Janis, Mark W., *The American Tradition of International Law: Great Expectations 1789-1914* (Oxford University Press, 2004). This book was republished in a later but almost identical version: Janis, Mark W., *America and the Law of Nations: 1776-1939* (Oxford University Press, 2010). Some references in this section are to reviews of this later version. For a generally critical review see: Koskeniemi, Martti, 'Book Reviews: The American Tradition of International Law. Vol.1: Great Expectations 1789-1914. By Mark. Weston Janis' (2006) 100 *American Journal of International Law* 266

¹⁵⁵ Janis, Mark W., *The American Tradition of International Law: Great Expectations 1789-1914* (Oxford University Press, 2004) at 1

¹⁵⁶ *Ibid* at 2

¹⁵⁷ Janis, Mark W., 'The American Tradition of International Law: Exceptionalism and Universalism' (2006) 21 *Connecticut Journal of International Law* 211 at 211. Koh identifies three "traditions" in Janis' work which he labels the "universalist, or naturalist," "positivism" and "political realism": Koh, Harold H., 'Mark Janis and the American Tradition of International Law' (2006) 21 *Connecticut Journal of International Law* 191 at 192. Koh's argument treats the latter two as a single tradition however in referring to a "positivistic *Realpolitik* tradition" comprising one side of a "'Jekyll and Hyde' tradition in American International Law," thereby conforming to Janis' dual characterisation: at 193. Noyes also identifies three traditions in the book: A "revisionist" perspective, closely resembling the positivistic *Realpolitik* tradition; a "non-universal" view of IL that distinguishes between liberal and non-liberal states; and the "universalist tradition" identified by Janis and Koh: Noyes, John E., 'Universalism and the American Tradition of International Law' (2006) 21 *Connecticut Journal of International Law* 199 at 202-203

¹⁵⁸ Janis, Mark W., *America and the Law of Nations: 1776-1939* (Oxford University Press, 2010) at 144

¹⁵⁹ Janis, Mark W., 'International Law as Fundamental Justice: James Brown Scott, Harold Hongju Koh, and the American Universalist Tradition of International Law' (2002) 46 *Saint Louis University Law Journal* 345 at 346

¹⁶⁰ Janis, Mark W., *America and the Law of Nations: 1776-1939* (Oxford University Press, 2010) at 158-159. Chapter 9 of his 2010 book, entitled: "Woodrow Wilson: The Passion of the Converted," is directly reproduced from a previous article: Janis, Mark W., 'How "Wilsonian" Was Woodrow Wilson?' (2007) 5 *Dartmouth Law Journal* 1

¹⁶¹ Janis, Mark W., *America and the Law of Nations: 1776-1939* (Oxford University Press, 2010) at 162

¹⁶² *Ibid* at 170

¹⁶³ Woodrow Wilson, 2 February 1916, cited at *ibid* at 167

¹⁶⁴ Janis, Mark W., 'The American Tradition of International Law: Exceptionalism and Universalism' (2006) 21 *Connecticut Journal of International Law* 211 at 211

from other countries, and is therefore not necessarily a model.”¹⁶⁵ The “American consensus” on the desirability of IL¹⁶⁶ was destroyed by the searing experience of WWI and its political aftermath.¹⁶⁷ This facilitated the rise of exceptionalism, led largely by “American isolationism” and its adherence to the principle of neutrality toward global political events. On this view the exceptional nature and position of the US militated against universalism’s desire to impose utopian ideals through IL.¹⁶⁸ Janis’ meaning of “exceptionalism” is thus closer to the pejorative use common in legal scholarship to denote forms of exemption.¹⁶⁹

Janis’s work has been recognised as an important contribution to understanding the historical development of American approaches to IL.¹⁷⁰ However, caution is required in his call to integrate competing traditions of thought; that “American international lawyers need to translate international law universalism to America’s exceptionalists, and to translate American international law exceptionalism to international law’s universalists.”¹⁷¹ The problem is that conceptions falling under the universalist banner define themselves in opposition to recognising “exceptionalism” in IL in the sense used by Janis. Janis identifies his own thought with the universalist tradition¹⁷² and its belief that IL should be founded on a “universal civilization,” without distinction to the historical or political “exceptionalism” of IL’s subjects.¹⁷³ The proper conclusion to be drawn from Janis’ analysis is that there are fundamentally incompatible beliefs about IL, with resulting tensions something to be managed, not resolved through synthesis.

The other problematic feature of Janis’ argument is a failure to disaggregate distinct types of thought flowing from his observations, thereby yielding a framework too broad to capture the impact of ideology competing over IL policy. The problem is acute when Janis tries to draw conclusions from an aggregation of every non-universalist figure in US politics. His “isolationists” are a combination of disparate figures, united only by a less than total embrace of IL. Janis tries to specify the ideological beliefs shaping the Bush 43 administration’s IL policy, inferring that it was Kennan’s political realism that led to “simplistic and thoughtless repudiation of international law and morality.” “Mistakes” identified by Janis include the Bush doctrine of pre-emption and detainee policy, which “have hurt, rather than helped, American national interests.”¹⁷⁴ However in both these cases a realist IL policy could (and often did) support the contrary policy – emphasising a more limited understanding of national interests and a greater concern for upholding basic rules of the international system.¹⁷⁵

¹⁶⁵ Janis, Mark W., *America and the Law of Nations: 1776-1939* (Oxford University Press, 2010) at 113

¹⁶⁶ *Ibid* at 195

¹⁶⁷ *Ibid* at 157 & 194-195

¹⁶⁸ *Ibid* at 199-200

¹⁶⁹ See Chapter 2 *supra*

¹⁷⁰ See the symposium on Janis’ 2006 book in (2006) 21 *Connecticut Journal of International Law* 185-212. For a highly critical review however see Koskeniemi, Martti, ‘Book Reviews: The American Tradition of International Law. Vol.1: Great Expectations 1789-1914. By Mark. Weston Janis’ (2006) 100 *American Journal of International Law* 266

¹⁷¹ Janis, Mark W., ‘The American Tradition of International Law: Exceptionalism and Universalism’ (2006) 21 *Connecticut Journal of International Law* 211 at 212

¹⁷² See Janis, Mark W., ‘International Law as Fundamental Justice: James Brown Scott, Harold Hongju Koh, and the American Universalist Tradition of International Law’ (2002) 46 *Saint Louis University Law Journal* 345 at 345. Citing Friedberg, James J., ‘Book Review: An Introduction to International Law. By Mark. W. Janis’ (1990) 22 *New York University Journal of International Law and Politics* 319 at 321

¹⁷³ Janis, Mark W., ‘International Law as Fundamental Justice: James Brown Scott, Harold Hongju Koh, and the American Universalist Tradition of International Law’ (2002) 46 *Saint Louis University Law Journal* 345 at 346

¹⁷⁴ Janis, Mark W., *America and the Law of Nations: 1776-1939* (Oxford University Press, 2010) at 71

¹⁷⁵ See Mearsheimer, John J., *Hans Morgenthau and the Iraq War: Realism Versus Neo-Conservatism* (2005) <<http://www.opendemocracy.net/content/articles/PDF/2522.pdf>>

Dueck also identifies Kennan as a “Realist” (equivalent in his typology to an Illiberal Internationalist), but argues that this tradition militated strongly against the Bush incursions on IL.¹⁷⁶ The same criticism applies to Janis’ historical analysis of the debate over the Versailles treaty and ultimate rejection of the League of Nations.¹⁷⁷ Henry Cabot Lodge was no “American utopian,” but was willing to support the treaty if it was amended to better reflect US interests, “while divesting the League of Nations of the supranational authority that Wilson wanted.”¹⁷⁸ This nuanced approach reflects the influence of a realist IL policy supporting clearly circumscribed international institutions based on clear state consent. As a further example, the American Bar Association’s early efforts to oppose the International Declaration of “so-called human rights”¹⁷⁹ and the 1951 Genocide Convention¹⁸⁰ were underpinned by ideas that were neither universalist nor realist. In these cases policy was motivated by a belief that these constituted infringements of federalism, in that American states had the right to govern these issues according to parochial norms (in particular the institution of racial segregation).¹⁸¹ This is more consistent with Mead’s Jacksonian IL policy and the supremacy of particularistic cultural values over international engagement.

A sophisticated and more structured attempt to develop a framework for integrating ideology is in Harlan Cohen’s 2003 article *The American Challenge to International Law: A Tentative Framework for Debate*.¹⁸² Cohen’s key insight for the purposes of this research is in response to the question: “Can inconsistent [IL] policies be explained as mere hypocrisy, as the pragmatic application of hegemonic power?” Cohen’s answer is no.¹⁸³

Pragmatic assessments of American self-interest undoubtedly played a role in...policy decisions... But such an answer seems empty. Observers have long noticed the power of ideas in American foreign policy, and it has become commonplace to discuss how American foreign policy history reflects various *intellectual trends* – some dating to the founding of the Republic. It seems strange to discuss American perceptions of international law as somehow divorced from these intellectual trends. Ideas have long shaped American perceptions of the outside world and the United States’ relation to it; it seems logical that those same ideas would play a role in defining the tools of American international relations – the possible, the useful, the dangerous.¹⁸⁴

His objective is “to re-explain the American perception of international law as an extension of intellectual trends in American foreign policy,”¹⁸⁵ specifically citing Mead’s four traditions as exemplars of the “intellectual trends” informing his research.¹⁸⁶ Cohen chooses to focus on one specific “foundational ideology” which he terms “liberal constitutionalism as a utopian world vision.”¹⁸⁷ This is defined as America’s “particular mix of democracy, free-market capitalism, and constitutional

¹⁷⁶ Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 33 & 160

¹⁷⁷ Janis, Mark W., *America and the Law of Nations: 1776-1939* (Oxford University Press, 2010) at 194-200

¹⁷⁸ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 130; Dueck, Colin, *Hard Line: The Republican Party and U.S. Foreign Policy Since World War II* (Princeton University Press, 2010) at 19

¹⁷⁹ Holman, Frank E., ‘International Proposals Affecting So-Called Human Rights’ (1949) 14 *Law and Contemporary Problems* 479, cited in Janis, Mark W., *America and the Law of Nations: 1776-1939* (Oxford University Press, 2010) at 186

¹⁸⁰ Janis, Mark W., *America and the Law of Nations: 1776-1939* (Oxford University Press, 2010) at 187

¹⁸¹ *Ibid* at 187

¹⁸² Cohen, Harlan G., ‘The American Challenge to International Law: A Tentative Framework for Debate’ (2003) 28 *Yale Journal of International Law* 551

¹⁸³ *Ibid* at 553

¹⁸⁴ *Ibid* at 553-554. Emphasis added. Citations omitted.

¹⁸⁵ *Ibid* at 554-555

¹⁸⁶ *Ibid* at 553, n.13

¹⁸⁷ *Ibid* at 555 & 558

protection of human rights” as a model for the rest of the world.¹⁸⁸ Cohen argues that interpreting IL policy according to this set of ideas will demonstrate that apparent contradictions “may actually be informed by a coherent, specifically American conception of international law.”¹⁸⁹ The liberal constitutionalism ideology has manifested in two forms, being the internationalist “Wilsonian” school and a non-interventionist “Isolationist” school. It is clear from Cohen’s description¹⁹⁰ that these two schools align with the Accommodationist/Wilsonian and Isolationist/Jeffersonian types respectively.

Cohen proceeds to outline the parameters of IL seen through this ideology. The basis of liberal constitutionalism in protecting individual liberty dictates that people not states “*must* be the fundamental unit of international law.”¹⁹¹ This renders conditional the sovereignty of states that do not accept the American utopian vision. The appearance of hypocritical US behaviour follows, as America’s “foundational ideology presupposes that it is the only truly legitimate state.”¹⁹² The logical conclusion is thus: “According to this ideology, the American utopian vision is in itself the most true international law.”¹⁹³ This leads Cohen to specify the elements of IL policy in each of the two forms of ideology drawn from liberal constitutionalism as a utopian world vision. A Wilsonian IL policy privileges human rights over the sovereignty of states where they fail to uphold citizens’ liberty. IL is here utilised primarily as a sword to advance the utopian mission. In contrast an Isolationist policy privileges state sovereignty over competing claims that threaten to erode liberal constitutionalism at home. In this way IL is utilised as a shield to guard the integrity of the utopian mission as an example to the world.¹⁹⁴

Both policy approaches present a challenge to orthodox IL scholarship. Positivist and cosmopolitan jurisprudence each define IL’s legitimacy as exogenous to state ideologies and traditions. In contrast “ideological foreign policy seems to expose such neutral principles as mere chimera.”¹⁹⁵ Positivism assumes sovereign equality as the constitutional principle of IL.¹⁹⁶ In contrast American IL policy is premised on “sovereign inequality,” with states ranked according to their conformity with liberal utopianism.¹⁹⁷ Cohen characterises American IL policy as a form of cosmopolitanism, drawing its legitimacy from the universality of human rights rather than from state consent. However, he further notes that this approach entails an inherent contradiction: American IL policy, notionally drawn from universal principles of liberal constitutionalism, is unavoidably based on interpretations that themselves lack universality. Cohen argues that this explains the incomprehension of other states in the US’ refusal to participate in the ICC “despite its seeming reification of American

¹⁸⁸ *Ibid* at 555, n.19 & 558

¹⁸⁹ *Ibid* at 556

¹⁹⁰ *Ibid* at 559

¹⁹¹ *Ibid* at 561. Original emphasis.

¹⁹² *Ibid* at 562

¹⁹³ *Ibid* at 563

¹⁹⁴ *Ibid* at 564

¹⁹⁵ *Ibid* at 567-568

¹⁹⁶ Bull, Hedley, *The Anarchical Society* (Macmillan Press, 2nd ed, 1995) at 134-35; Cosnard, Michel, ‘Sovereign Equality - “The Wimbledon Sails On”’ in Michael Byers and Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 118; Glennon, Michael J., *Limits of Law, Prerogatives of Power* (Palgrave, 2001) at 148

¹⁹⁷ Cohen, Harlan G., ‘The American Challenge to International Law: A Tentative Framework for Debate’ (2003) 28 *Yale Journal of International Law* 551 at 569

values.”¹⁹⁸ The internal understanding of those values is in fact consistent with more qualified ICC engagement.

Cohen concludes that with the neutrality of IL exposed as “mere myth”¹⁹⁹ international lawyers must be guided by two principles. First “international law cannot ignore ideology,” which must be integrated into its doctrines and practice to be accepted as legitimate and effective.²⁰⁰ The second is that international lawyers must consciously construct IL to give effect to the ideas underpinning state policy – constructing IL on a “pragmatic, parochial foundation.”²⁰¹ Here Cohen approves the New Haven policy oriented jurisprudence, arguing that IL founded upon “parochial ideas” provides the surest avenue to establishing “self-perpetuating universal norms.” This argument provides crucial support to the argument that foreign policy ideologies express the “authoritative” and “controlling” norms that have been established at the core of IL policy, and therefore the source of legality itself.²⁰² For Cohen an IL grounded in foreign policy ideology will resonate most strongly with the American polity, who will thereby become more receptive to the cosmopolitan project through this dialectical relationship.²⁰³

The gap in IL scholarship filled by foreign policy ideology is reiterated by Cohen in a subsequent contribution on the topic of *Historical American Perspectives on International Law*.²⁰⁴ Cohen outlines the academic context of this review piece:

Scholarship on American ideas about international law and justice seeks to fill a major gap in the legal literature. Despite voluminous scholarship on the history of the United States and international law, the intellectual history of American perceptions of, engagement with, and contributions to international law remain amazingly underdeveloped.²⁰⁵

In Cohen’s view existing histories mistakenly conceive of IL as “a body of rules either to be observed or violated” while ignoring their context “as part of a constantly evolving set of ideas and normative commitments about international relations, justice, and governance.” In particular Cohen emphasises the way that these broader ideas and norms²⁰⁶ have competed for influence over IL policy:

Understanding the diverse positions the United States has taken toward international law in the past, e.g., support for the creation of the United Nations and the Nuremberg Tribunal but opposition to the League of Nations and the International Criminal Court, requires a fuller understanding of how each of those institutions either resonated or was in tension with other ideological commitments of particular groups of Americans. Predicting the positions future American administrations might take on international law and institutions requires a deeper understanding of international law’s place within competing foreign policy ideas and philosophies.²⁰⁷

As a whole Cohen’s framework provides fertile ground for introducing foreign policy ideology into explanations of American IL policy. Nevertheless, as with Janis, a limitation in Cohen’s argument

¹⁹⁸ *Ibid* at 572

¹⁹⁹ *Ibid* at 573

²⁰⁰ *Ibid* at 574

²⁰¹ *Ibid* at 575

²⁰² *Ibid* at 574. Citing Reisman, Michael W., ‘The View from the New Haven School of International Law’ (1992) 86 *Proceedings of the Annual Meeting (American Society of International Law)* 118 at 121

²⁰³ Cohen, Harlan G., ‘The American Challenge to International Law: A Tentative Framework for Debate’ (2003) 28 *Yale Journal of International Law* 551 at 577

²⁰⁴ Cohen, Harlan G., ‘Historical American Perspectives on International Law’ (2009) 15 *Journal of International & Comparative Law* 485

²⁰⁵ *Ibid* at 487

²⁰⁶ Explicitly including Mead’s traditions: *ibid* at 488, n.19

²⁰⁷ *Ibid* at 489

is that, although he is careful to narrow his analysis to “liberal constitutionalism as a utopian vision” and its dependant traditions, he is not so methodical in limiting his conclusions. Like Janis he analyses the “Bush Doctrine” as articulated in advance of the 2001 Afghanistan War²⁰⁸ and the 2003 Iraq invasion,²⁰⁹ but unlike Janis’ characterisation of this as an expression of *Realpolitik*, Cohen argues that liberal constitutionalism explains these episodes. There is merit in arguing that these episodes bear the imprint of foreign policy ideology, but the evidence does not point to liberal constitutionalist ideology as the operative tradition. Cohen appears to be well versed in Mead’s Jacksonian tradition,²¹⁰ yet does not consider the extent to which this illiberal approach contributed to the IL policy of the Bush 43 administration. In this regard Cohen appears to rely too heavily on the democracy promotion rhetoric of the administration in advance of each of these wars, without considering the broader ideological context of the first term of the administration, often in direct conflict with the strategic logic of liberal foreign policy ideologies.

Mead’s typology has proved the most adaptable for legal scholars for reasons most likely related to its pithy rendering of complex ideas and Mead’s own easily accessible, if not populist, writing style. Julian Ku has noted that Mead’s analysis of “liberal internationalist” and “neoconservative” variants of Wilsonianism is useful for its “classification of different approaches to foreign policy and international law.”²¹¹ John Noyes and David Bederman have each demonstrated this value in taking the next step of specifically setting out the elements of IL policy drawn from each of Mead’s types.²¹² Noyes’ work is also notable for making the first attempt to review and integrate different literature on foreign policy ideology in IL by summarising Mead’s and Janis’ work.²¹³ Noyes advances this literature by moving beyond policy outcomes to disaggregate the role of competing forms of ideology, using US accession to the *United Nations Convention on the Law of the Sea* (“UNCLOS”) as a case study. He recognises that seeming policy consensus may mask the influence of competing beliefs:

[T]he stable system of rules embodied in...[UNCLOS] may appeal to people with different priorities: those who value international institutions and cooperative endeavours to address common space issues; those who favour open commercial relations; and those who support freedom of action for the U.S. military.²¹⁴

²⁰⁸ Cohen, Harlan G., ‘The American Challenge to International Law: A Tentative Framework for Debate’ (2003) 28 *Yale Journal of International Law* 551 at 564-565

²⁰⁹ *Ibid* at 578

²¹⁰ *Ibid* at 553, n.13; Cohen, Harlan G., ‘Historical American Perspectives on International Law’ (2009) 15 *Journal of International & Comparative Law* 485 at 488, n.19

²¹¹ Ku, Julian, ‘Explaining American Foreign Policy: Obama’s Liberal Internationalism v. Bush’s Neoconservatism,’ *Opinio Juris* (6 April, 2010) <<http://opiniojuris.org/2010/04/06/explaining-american-foreign-policy-obamas-liberal-internationalism-v-bushs-neoconservatism/>>. Citing Mead, Walter R., ‘Liberal Internationalism: The Twilight of a Dream,’ *The American Interest* (1 April, 2010) <<http://www.the-american-interest.com/wrm/2010/04/01/liberal-internationalism-the-twilight-of-a-dream/>>

²¹² Noyes has previously collaborated with and builds upon the work of Janis: Janis, Mark W. & John E. Noyes, *Cases and Commentary on International Law* (West Pub, 4th ed, 2011); Noyes, John E., ‘The Caroline: International Law Limits on Resort to Force’ in John E. Noyes, Laura A. Dickinson & Mark W. Janis (ed), *International Law Stories* (West Group, 2007)

²¹³ Noyes, John E., ‘U.S. Policy and the United Nations Convention on the Law of the Sea’ (2007) 39 *George Washington International Law Review* 621 at 624-625. Noyes’ engagement with the traditions literature has been refined over time since a first reference to Mead in a 2004 footnote asserted questionably that: ‘Realist theories are strongly associated with what Walter Russell Mead has termed the ‘Jacksonian’ strand of U.S. foreign policy’: Noyes, John E., ‘American Hegemony, U.S. Political Leaders, and General International Law’ (2004) 19 *Connecticut Journal of International Law* 293 at 293, n.4

²¹⁴ Noyes, John E., ‘U.S. Policy and the United Nations Convention on the Law of the Sea’ (2007) 39 *George Washington International Law Review* 621 at 625. Noyes initially omitted consideration of a Jeffersonian approach, presumably on the basis that Jeffersonian concerns have no bearing on an international regime such as UNCLOS. Noyes acknowledges this shortcoming (at 636, n.62) and addresses it in his later work

In setting out four positions drawn from Mead, Noyes accepts that the impact of each type “cannot always be neatly compartmentalized” with “overlap in views” likely.²¹⁵ Wilsonian IL policy emphasises “a U.S. version of the rule of law,” consisting of universally agreed rules, consistency with human rights norms, and the creation of an institutional framework for dispute settlement and further regulation of the oceans. Hamiltonians focus on the benefits of a stable system of rules that facilitate freedom of navigation and certainty in trade and commercial dealings. In contrast Jacksonian IL policy takes a “unilateralist/anti-institutionalist” approach, and therefore is defined by principles that limit the scope of IL. Because Jacksonians emphasise US national security, IL is developed to unilaterally implement policies through military strength. They are sceptical about the ability of IL to improve global politics through common values, the desirability of compromising US policy autonomy, and the importance of preserving national honour by not acceding to agreements which cannot be kept.²¹⁶ Notably this belief type will resist the promotion of IL even where there is strong evidence that engagement with IL will serve national interests – such as the navigational benefits that UNCLOS would deliver to the US military.²¹⁷ Finally Jeffersonian IL policy is centred on a “human rights exceptionalist/sovereigntist” view, which emphasises resistance to IL infiltrating domestic institutions and US conceptions of individual rights. Because IL develops separately from the specific institutions of American constitutional democracy it can only erode the integrity of these institutions.

Noyes’ approach is also notable for taking seriously the implications of the foreign policy ideology approach: employing his account of Jacksonian opposition to UNCLOS in order to engage Jacksonians on their own terms.²¹⁸ This targeted dialogue is precisely the type of contribution that ideology can contribute to developing American IL policy. Nevertheless, Noyes’ approach, while valuable, could be refined to better distinguish different ideologies from each other. Problematic conclusions include the characterisation of George Kennan as a Jacksonian,²¹⁹ and Bush 43 administration lawyers Jack Goldsmith and John Yoo as Jeffersonians – despite the latter being the primary author of the illiberal “torture memos.”²²⁰ This is perhaps explained by Noyes focussing on specific rhetoric employed by IL policymakers consistent with each of these belief types. But in each case there is evidence in public statements and policy actions that are far more consistent with

²¹⁵ Noyes, John E., ‘The United States and the Law of the Sea Convention: U.S. Views on the Settlement of International Law Disputes in International Tribunals and U.S. Courts’ (2009) 1 *Berkeley Journal of International Law Publicist* 27 at 32; Noyes, John E., ‘U.S. Policy and the United Nations Convention on the Law of the Sea’ (2007) 39 *George Washington International Law Review* 621 at 626

²¹⁶ Noyes, John E., ‘U.S. Policy and the United Nations Convention on the Law of the Sea’ (2007) 39 *George Washington International Law Review* 621 at 627. Here Noyes extrapolates Mead’s discussion of the role of Jacksonian codes of honour to the international level: 627, n.25, citing Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 251. Mead himself agrees with this analysis: Mead, Walter R., *Personal Communication with Author* (19 January, 2015)

²¹⁷ Noyes, John E., ‘U.S. Policy and the United Nations Convention on the Law of the Sea’ (2007) 39 *George Washington International Law Review* 621 at 638

²¹⁸ See generally Noyes, John E., ‘The United States and the Law of the Sea Convention: U.S. Views on the Settlement of International Law Disputes in International Tribunals and U.S. Courts’ (2009) 1 *Berkeley Journal of International Law Publicist* 27

²¹⁹ Inferred in the conclusion that critics of “legalism-moralism” follow this tradition: *ibid* at 30. This is Kennan’s well known phrase: See Kennan, George F., *American Diplomacy* (University of Chicago Press, 1984) at 95

²²⁰ Noyes, John E., ‘The United States and the Law of the Sea Convention: U.S. Views on the Settlement of International Law Disputes in International Tribunals and U.S. Courts’ (2009) 1 *Berkeley Journal of International Law Publicist* 27 at 30, n.10, which refers to Curtis Bradley’s definition of “Constitutionalist” scholars, a group encompassing Bush 43 lawyers Jack Goldsmith and John Yoo: Bradley, Curtis A., ‘The Federal Judicial Power and the International Legal Order’ (2006) 3 *The Supreme Court Review* 59 at 60, n.3.

competing ideological types: Kennan and Goldsmith as Illiberal Internationalists, and Yoo as an Illiberal Internationalist and Nationalist.

David Bederman's approach is to adopt Mead's traditions to distinguish divergent ideas underlying US debates for and against post-Cold war engagement with IL.²²¹ In setting out the elements of IL policy he argues that resistance to US engagement with IL has "centered around Hamiltonian and Jacksonian idioms,"²²² although also includes "Jeffersonian Neo-Isolationists."²²³ Hamiltonians reject moral justifications for extending US military power that are insufficiently connected to the national interest. In contrast "Jacksonians are fundamentally dubious of the ability of law to order relations in an international community that is strikingly reminiscent of a lawless Western frontier town." Adopting these competing belief types in his analysis allows Bederman to emphasise that US resistance to IL stems from forms of ideology that are "irreconcilable in their underlying attitudes and policy prescriptions."²²⁴ Bederman also applies this framework to consider the issue of human rights litigation in American courts, where Hamiltonians and Jeffersonians have been split over the desirability of shifts in political power from the executive to private plaintiffs.²²⁵

A comparable effort is made by Philippe Lagassé to set out the elements of Walter McDougall's ideologies of "exceptionalism, unilateralism and Wilsonianism" in considering US policy toward the ICC.²²⁶ Like the foregoing authors, Lagassé's argument is that characterisations of US IL policy as hypocritical are misplaced to the extent that they overlook basic philosophical conflicts within foreign policy. McDougall's exceptionalists mirror Jeffersonians in their rejection of any fetter on US sovereignty in the form of qualifications on the system of constitutional government and its absolute protection of individual liberty.²²⁷ Ratification of the Rome Statute conflicts with the constitutionally guaranteed right to a trial by jury, protection against double jeopardy and the status of the US Supreme Court as the truly supreme judicial body of the US legal system.²²⁸ Unilateralists reflect the concerns of both Jacksonians and Hamiltonians in rejecting constraints the ICC places on the full defence of US national security.²²⁹ This belief type recognises the political agenda of states wishing to constrain American hegemony, which has been institutionalised in the ICC structure. Of particular concern are the jurisdictional claims of the ICC, which cover all crimes committed in signatory states, even where the perpetrators are from a non-signatory state, and the undefined and inherently political "crime of aggression."²³⁰ Finally Wilsonians support the ICC as a key element of an overarching

²²¹ Bederman, David J., 'Globalization, International Law and United States Foreign Policy' (2001) 50 *Emory Law Journal* 717

²²² *Ibid* at 721

²²³ *Ibid* at 735

²²⁴ *Ibid* at 722

²²⁵ Bederman, David J., 'Constructivism, Positivism, and Empiricism in International Law' (2000) 89 *Georgetown Law Journal* 469. Prophetically Bederman has previously criticised legal scholarship attempting an interdisciplinary approach as prone to insufficiently rigorous analysis: Bederman, David J., 'I Hate International Law Scholarship (Sort of)' (2000) 1 *Chicago Journal of International Law* 75 at 81-2

²²⁶ Lagassé, Phillippe, 'The International Criminal Court and the Foreign Policies of the United States' (2004) 59 *International Journal* 433. See McDougall, Walter A., *Promised Land, Crusader State: The American Encounter with the World since 1776* (Houghton Mifflin, 1997)

²²⁷ McDougall, Walter A., *Promised Land, Crusader State: The American Encounter with the World since 1776* (Houghton Mifflin, 1997) at 37-38

²²⁸ Lagassé, Phillippe, 'The International Criminal Court and the Foreign Policies of the United States' (2004) 59 *International Journal* 433 at 436

²²⁹ McDougall, Walter A., *Promised Land, Crusader State: The American Encounter with the World since 1776* (Houghton Mifflin, 1997) at 40

²³⁰ Lagassé, Phillippe, 'The International Criminal Court and the Foreign Policies of the United States' (2004) 59 *International Journal* 433 at 437

desire to promote international legal structures for advancing rule of law principles.²³¹ Lagassé concludes: “Were American foreign policy consistent and unified in its aspirations,...[accusations of hypocrisy] might be accurate. American foreign policy, however, is not driven by a single philosophy.”²³²

THE STRUCTURE OF AMERICAN INTERNATIONAL LAW POLICY

Reviewing legal scholarship on the influence of foreign policy ideology produces two main conclusions. The first is that this arena of inquiry is a fruitful avenue for bridging the gap between existing scholarship and explanations for contradictions within American IL policy. The second is that the literature presents an opportunity for further development, including adopting insights from political science to refine the elements of IL policy drawn from ideological types.

On the basis of this review there is a strong case for synthesising the inductive WHR typology with the deductive typologies drawn from diplomatic history to establish an analytical model of four ideal types of American IL policy. The attraction of adopting Mead’s and similar typologies for this purpose is that they present the complex conclusions from political science in a form that can be easily digested by legal scholars wanting to avoid specialised political science methodology. This has the advantage of providing a parsimonious analytical framework that still illustrates the basic connection between ideological commitments and conceptions of IL. Moreover, understanding the ideas of each of the WHR types is artificially limited if disconnected from their historical underpinnings. The drawback, evident in applications of Mead’s typology, is the conflating effect of focussing simply on named types. The objectives of legal scholars applying Mead’s typology will be better met by reintroducing the empirical foundations and rigour of the dimensions that structure general foreign policy ideology.

With this object in mind, the WHR typology and variants informed by diplomatic history can be synthesised according to the intersection of an *internationalist-nationalist* jurisdictional dimension and a *liberal-illiberal* values dimension to form four ideal type IL policies: *Liberal Internationalism*, *Illiberal Internationalism*, *Liberal Nationalism* and *Illiberal Nationalism*.²³³

	Liberal	Illiberal
Internationalist	Liberal Internationalist (<i>Accommodationists</i>)* (<i>Wilsonians</i>)†	Illiberal Internationalist (<i>Internationalists</i>)* (<i>Hamiltonians</i>)†
Nationalist	Liberal Nationalist (<i>Isolationists</i>)* (<i>Jeffersonians</i>)†	Illiberal Nationalist (<i>Nationalists</i>)* (<i>Jacksonians</i>)†

* Wittkopf’s terminology (1981)

† Mead’s terminology (2002)

²³¹ *Ibid* at 431; McDougall, Walter A., *Promised Land, Crusader State: The American Encounter with the World since 1776* (Houghton Mifflin, 1997) at 136

²³² Lagassé, Phillippe, ‘The International Criminal Court and the Foreign Policies of the United States’ (2004) 59 *International Journal* 433 at 442

²³³ To avoid coining unnecessary terminology I have simply labelled each type by combining dimension headings. Dueck’s schema is also useful, but he confusingly labels those in Wittkopf’s “accommodationists” cell as “internationalists,” and those in Wittkopf’s “internationalists” cell as “realists”

1. *Internationalist-Nationalist Jurisdictional Dimension*

Parsimonious explanations from political power predict that a powerful state will tend to “oscillate between two poles: instrumentalization of and withdrawal from international law.”²³⁴ This dynamic has been reproduced in a jurisdictional ideological dimension that measures US commitment to advancing foreign policy interests through the international legal system. Legal policymakers have at times demonstrated a belief that American national security is enhanced by actively engaging to develop the architecture of international legal rules and institutions. In this view American interests and security are dependent on the nature of the world beyond national borders, with the international legal order being a meaningful determinant of how that world looks. This stance is expressed through a diversity of values and rationales, but there is evidence of a persistent belief in the strategic advantages of upholding and working through a system of IL.

Alternatively legal policymakers have identified the national interest in decreasing American enmeshment in international institutions and law. On this view law and institutions located at the national level remain sufficient to meet American foreign policy interests, which should therefore be shielded from increasing entanglement in international legal obligations. In particular policymakers with a nationalist commitment are concerned with how certain IL policies “will best advance the kind of *domestic* policies and order they wish to promote.”²³⁵ The jurisdictional dimension thus encompasses the WHR “support CI-oppose CI” dimension, Mandelbaum and Schneider’s “internationalist-isolationist” dimension, and the internationalist-nationalist dimension evident in diplomatic history.²³⁶

2. *Liberal-Illiberal Values Dimension*

The second dimension concerns the values informing American IL policy. At one end are American legal policymakers who identify the legitimacy of IL in its support for the liberal values of universal rights and freedoms of natural persons. Liberalism expresses the Lockean principle that law should rationally advance the liberty of citizens to pursue their own conception of “the good” – as prominently encapsulated in the US Declaration of Independence.²³⁷ Liberalism in IL policy is accordingly a bottom-up designation that natural persons rather than states or classes of people are the fundamental subjects of international law.²³⁸ To this end liberal conceptions have tied the status of IL to questions of its compatibility with democratic government and the municipal rule of law.

Conversely IL policy has been motivated by illiberal values – being any values other than those that treat the defence of personal liberty as the primary object of IL. Specifically these include strengthening national security, using foreign policy to maintain a particular balance of global power, and upholding non-universal cultural values. Illiberal approaches to IL policy reject the principle of

²³⁴ Krisch, Nico, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’ (2005) 16 *European Journal of International Law* 369 at 379

²³⁵ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 176. Emphasis added

²³⁶ “Internationalist-nationalist” has been adopted as a label for this dimension to avoid the historically loaded meanings associated with the term “isolationist”

²³⁷ Most obviously in the second and third sentences: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”

²³⁸ See Moravcsik, Andrew, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’ (1997) 51 *International Organization* 513 at 516-517

promoting universal values, focussing instead on guarding uniquely American values and interests. As such, there is an equally strong case that the values dimension captures the “oppose MI-support MI” dimension, Mandelbaum and Schneider’s “liberal-conservative” dimension, and the liberal-illiberal dimension evident in diplomatic history.²³⁹

As in the original typology, these cells represent a comprehensive account of mutually exclusive ideal types. Cells can be treated as mutually exclusive in the sense that each ideal type is more than simply the sum total of two dimensions: policy implications of each dimension are given their meaning by the intersecting dimension. For example a foundation in liberalism has starkly divergent implications depending on whether or not policymakers think in terms of America’s global role. Whereas Liberal Internationalism seeks to bolster American democracy by replicating its values globally, Liberal Nationalism seeks the same objective by protecting liberal freedoms against the corrupting influence of global entanglement. Thus, although each of these ideal types is situated at the liberal end of the values dimension, “liberalism” acquires entirely different strategic implications.

There is some passing similarity between this typology and an earlier typology of four conceptions of IL identified by Wolfgang Friedman.²⁴⁰ In respective order to that presented here they were “a genuine belief in the supremacy of international legal order over national sovereignty”; “the use of international law as rhetorical argument”; “limited respect for the ‘live and let live’ rules of international law as an appropriate guide to the conduct of nations, subject to the overriding national interests of States”; and an “attitude of open contempt for international law as incompatible with the nature of man, which is controlled by the survival of the fittest, and the destiny of nations, which is realised in constant struggle and war.”²⁴¹ Although this typology is an imperfect fit,²⁴² Friedman draws the same conclusion that “much depends on the Legal Adviser’s conception of the appropriate role for international legal considerations in the formulation of foreign policy.”²⁴³ The promise of both Friedman’s approach and that developed here is that the idiosyncrasies and contradictions in American IL policy will be revealed as the consequence of ideology structuring IL policy in ways that are quite predictable and internally coherent.

CHAPTER CONCLUSION

The evidence from both empirical analysis and American diplomatic history is that foreign policy ideology is all pervasive in structuring conceptions of IL. In this respect it is misplaced to treat power based accounts such as Goldsmith and Posner’s *Limits of International Law* as “stripping away the

²³⁹ As with the first dimension “liberal-illiberal” has been adopted as a label to avoid the multifarious meanings of “conservative,” which is not necessarily the opposite end of a dimension measuring liberalism

²⁴⁰ Friedmann, Wolfgang, ‘The Reality of International Law - A Reappraisal’ (1971) 10 *Columbia Journal of Transnational Law* 46. For an application of this typology to the State Department Legal Adviser see Tompkins, Tamara L., ‘Theory of Ethical Conduct for the Legal Advisor to the State Department: Applied for a Fresh Look at Abraham Sofaer and the ABM Treaty Reinterpretation Debacle, A’ (1993) 7 *Georgetown Journal of Legal Ethics* 523 at 543-546

²⁴¹ Friedmann, Wolfgang, ‘The Reality of International Law - A Reappraisal’ (1971) 10 *Columbia Journal of Transnational Law* 46 at 46-51

²⁴² Apart from a lack of dimensionality, his types are also historically bounded to specific examples drawn from the Second World War, during which he had fled Nazi Germany, and from the Cold War during which he was writing

²⁴³ Tompkins, Tamara L., ‘Theory of Ethical Conduct for the Legal Advisor to the State Department: Applied for a Fresh Look at Abraham Sofaer and the ABM Treaty Reinterpretation Debacle, A’ (1993) 7 *Georgetown Journal of Legal Ethics* 523 at 546

veil of ideology.”²⁴⁴ Their Illiberal Internationalist account is shaped by a particular ideology in the same way that the Liberal Internationalist approaches they critique entail a particular conception of power and interests. The same proviso applies to Sands’ criticism of a legal advice rendered by Goldsmith to the US government; that “ideology infects the content of the actual advice, bending it to support a particular conclusion.”²⁴⁵ The “international rule of law” advocated by Sands is itself constituted by ideology, and thus the contention is really about the merits of competing ideologies structuring law. This chapter has sought to make these connections explicit by explaining precisely how power, jurisprudence and political culture are related through the concept of foreign policy ideology.

It is important to highlight the distinction between the present rationale for developing a typology of four American foreign policy ideologies and Cohen’s justification for undertaking a comparable exercise. He makes the normative argument that, because IL is best understood as a policy process, the content of that policy therefore *ought* to be constructed upon the “parochial ideas” of American foreign policy ideology.²⁴⁶ That argument is quite different from arguing that American IL policy already *is* shaped by these beliefs, and therefore identifying ideal belief types is necessary to provide a framework for understanding contradictions and continuity. The reason for elaborating here on the content of ideal types is not to advocate further institutionalisation of particularistic American interests, but rather to provide an analytical model for understanding unique conceptions of IL already guiding legal policymakers. Accordingly the purpose of the following chapter, and remaining task in Part I of this thesis, is applying the theorised structure of foreign policy ideology to define competing meanings of the “rule of IL.” Identifying divergent logics internal to law promises to provide an alternative and more compelling explanation for the observed contradictions in American policy at the heart of this study.

²⁴⁴ Anderson, Kenneth, ‘Remarks by an Idealist on the Realism of the Limits of International Law’ (2005) 34 *Georgia Journal of International and Comparative Law* 253 at 257. Reviewing Goldsmith, Jack L. & Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005)

²⁴⁵ Sands, Philippe, ‘Poodles and Bulldogs: The United States, Britain, and the International Rule of Law’ (2009) 84 *Indiana Law Journal* 1357 at 1364

²⁴⁶ Cohen, Harlan G., ‘The American Challenge to International Law: A Tentative Framework for Debate’ (2003) 28 *Yale Journal of International Law* 551 at 574 *supra*

COMPETING CONCEPTIONS OF THE RULE OF INTERNATIONAL LAW

This final section of Part I integrates the explanations for contradictory American legal policy from Chapter Two into the structure of ideology identified in Chapter Three to develop a model of competing conceptions of the rule of IL. As a first step this chapter seeks a working definition of the “rule of IL” drawn from classic formulations in Anglo-American jurisprudence consisting of three elements. Translated to the global level, three questions must be answered to constitute an analytically useful definition, albeit without claiming to be exhaustive: How should IL be developed to advance non-arbitrary global governance? What is the meaning of equality under IL? What is the proper ordering of international legal power? A set of beliefs providing a coherent answer to each of these questions will constitute a distinct ideologically informed meaning of the rule of IL.

Through this approach the chapter moves beyond any attempt to find a universal and fixed definition of *the* rule of IL by instead identifying various “received” conceptions of the rule of law which exist in the minds of identified legal policymakers. The first of these ideal type conceptions is the “legalism” evident in the scholarship and practice of states, NGOs and individuals who have challenged American IL policy. The elements of this conception are that the rule of IL requires formalised development of global governance; a commitment to the sovereign equality of states; and, the separation of international legal powers between state subjects of IL and international legal institutions. The approach of this thesis is to argue that opposition to US policy has converged sufficiently around legalist principles for this to constitute a meaningful ideal type, without denying that each state may hold its own idiosyncratic conception of law.

Turning to the conceptions of American legal policymakers, the constitutive elements of four rule of law conceptions are identified according to the underlying dimensions and ideal types of general foreign policy ideology. Liberal Internationalism is centred on America’s global mission to promote the liberty of natural persons through IL. The principles of this conception are: the transnational development of IL; the promotion of liberal over sovereign equality; and, democratic checks and balances on the separation of powers. Illiberal Internationalism is focussed on preserving national security by maintaining the capacity to project global power through law. This translates into principles of: pragmatic development of IL; maintaining hegemonic privilege; and, consent as the basis for ordering international legal powers. For Liberal Nationalism the core of the rule of IL is guarding liberal protections afforded by American constitutional government against external corruption. The resulting rule of law principles are: the defensive development of IL as a shield; upholding the inviolability of national sovereignty; and, a vertical separation between international and municipal legal powers. Finally Illiberal Nationalism minimises the influence of IL as a threat to America’s national security and distinctive cultural identity. This translates into principles of: permissively developing IL to maximise US autonomy; the relativity of state sovereignty; and, upholding the supremacy of municipal over international legal powers. The meaning of “coherence” in American IL policy becomes that a legal

policymaker's stance on any one of the three rule of IL elements is a reliable indicator of positions taken on remaining elements.

THE INDETERMINACY OF THE RULE OF INTERNATIONAL LAW

Ambiguity in the meaning of American policymakers' commitment to "the rule of international law" is symptomatic of a long standing but inconclusive wider debate about the meaning of the concept. References are ubiquitous by both international legal scholars and practitioners, reflecting the centrality of the ideal to the western legal tradition.¹ The concept forms the primary focus for treatments of IL policy, with increasing references in works both supportive and dismissive of its analytical worth.² The UN *Rule of Law Coordination and Resource Group* emphasised that the "rule of law is at the very heart of the United Nations' mission."³ This followed the reaffirmation by states at the 2005 UN World Summit of their "universal adherence to and implementation of the rule of law at both the national and international levels,"⁴ and in 2012 their "commitment to the rule of law and its fundamental importance for political dialogue and cooperation among all States."⁵

This apparent consensus dissolves however when attention shifts to specifying the substantive meaning of the aspiration in the design and development of IL. Even in relation to municipal law Raz warned that "promiscuous use" threatened to reduce the concept to a procrustean "slogan" justifying almost any exercise of government power.⁶ Judith Shklar characterised the contemporary concept as:

meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.⁷

The force of criticism aimed at the municipal rule of law only multiplies when aimed at any notion of the rule of *international* law, including scepticism about whether and how the concept applies to IL at

¹ See Gosalbo-Bono, Ricardo 'The Significance of the Rule of Law and Its Implications for the European Union and the United States' (2010) 72 *University of Pittsburgh Law Review* 229 at 232-240

² See Peerenboom, Randall P., 'Human Rights and Rule of Law: What's the Relationship?' (2004) 36 *Georgetown Journal of International Law* 809; Murphy, John F., *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004); Waldron, Jeremy, 'The Rule of International Law' (2006) 30 *Harvard Journal of Law & Public Policy* 15; *ibid.*, Georgiev, Dencho, 'Politics of Rule of Law: Deconstruction and Legitimacy in International Law' (1993) 4 *European Journal of International Law* 1; Buchanan, Allen, 'Democracy and the Commitment to International Law' (2006) 34 *Georgia Journal of International and Comparative Law* 463; Quigley, John, 'Prospects for the International Rule of Law' (1991) 5 *Emory International Law Review* 311; Nardin, Terry, 'Theorising the International Rule of Law' (2008) 34 *Review of International Studies* 385; Cogan, Jacob Katz, 'Noncompliance and the International Rule of Law' (2006) 31 *Yale Journal of International Law* 189

³ See UN, *United Nations Rule of Law* <<http://www.unrol.org/>>

⁴ UN, *United Nations Rule of Law Website and Document Repository* <http://www.unrol.org/article.aspx?article_id=4>; UNGA, A/RES/60/1, *2005 World Summit Outcome* (24 October, 2005) <<http://www.unrol.org/files/2005%20World%20Summit%20Outcome.pdf>> At 2, par.11

⁵ UNGA, A/67/L.1, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (19 September, 2012) <<http://www.unrol.org/files/Official%20Draft%20Resolution.pdf>>

⁶ Raz, Joseph, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) at 210-211. Reproduced from Raz, Joseph, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195

⁷ Shklar, Judith N., 'Political Theory and the Rule of Law' in Stanley Hoffmann (ed), *Political Thought and Political Thinkers* (University of Chicago Press, 1998) at 21

all.⁸ Simon Chesterman suggests that widespread support for the concept in institutions such as the UN is largely symptomatic of the lack of definitional agreement.⁹

A prominent account of the impact of American foreign policy on the rule of IL is John Murphy's *The United States and the Rule of Law in International Affairs*.¹⁰ The focus of the work is the contradiction that, despite being the key proponent of the major twentieth century international institutions, the US has itself found it "increasingly difficult to adhere to the rule of law in international affairs."¹¹ Murphy's insights are limited however by a lack of precision in the meaning of the central concept. He commences by declaring that, although he is prepared to "join the nearly universal support for the rule of law as an ideal," he does "not intend to join the debate over its precise meaning."¹² It is problematic that a work seeking to evaluate American adherence to the rule of IL does not set up any definition of what that would mean.¹³ Murphy's elusion corroborates Tamahana's observation that, where the concept is raised, "everyone is for it, but have contrasting convictions about what it is."¹⁴ Goldsmith and Posner point out, in responding to a review of *The Limits of International Law*,¹⁵ that exhortations to promote the rule of law remain incoherent in the absence of a clear definition:

...what, then, is the international rule of law? Is it the idea that international law should apply to states generally and impartially? Regardless of their relative power, or domestic form of governance? Are states supposed to engage in principled deliberation in designing international institutions? Does this mean that relative power and self-interest should be off the table in international negotiations? How, in a decentralized world of necessarily quite different nation-states...are we supposed to establish this international rule of law?¹⁶

Goldsmith and Posner conclude that: "*Limits* does not address the ideal of the international rule of law...because the ideal is inadequately defined – in...[the book review in question] and more generally."¹⁷ Yet despite this criticism, the concept remains an important one, with even Goldsmith acknowledging that the frequent invocation of "rule-of-law rhetoric" is "not empty and is not irrelevant to international law and politics. It often genuinely reflects the values and commitments of the nations uttering it."¹⁸

⁸ Crawford, James, 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review* 3 at 5. For a sceptical view see Koskenniemi, Martti, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4

⁹ Chesterman, Simon, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331 at 332. See also Peerenboom, Randall P., 'Human Rights and Rule of Law: What's the Relationship?' (2004) 36 *Georgetown Journal of International Law* 809 at 826

¹⁰ Murphy, John F., *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004). Murphy is himself a former legal policymaker, having worked as an attorney in the State Department's Office of the Legal Adviser during the Johnson administration: See Villanova University School of Law, *John F. Murphy* <<http://www1.villanova.edu/villanova/law/academics/faculty/Facultyprofiles/JohnFMurphy.html>>

¹¹ Murphy, John F., *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004) at 4 & 349

¹² *Ibid* at 1

¹³ See for example the assertion in relation to the 2003 Iraq War that "the United States closely followed the rule of law, even though it was ultimately unsuccessful in this endeavour": *ibid* at 353

¹⁴ Tamahana, Brian Z., *On the Rule of Law* (Cambridge University Press, 2004) at 3

¹⁵ Goldsmith, Jack L. & Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005)

¹⁶ Goldsmith, Jack L. & Eric A. Posner, 'The New International Law Scholarship' (2006) 34 *Georgia Journal of International and Comparative Law* 463 at 480. See also Carr, Edward Hallett, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (Macmillan & Co Ltd, 1939) at 170

¹⁷ Goldsmith, Jack L. & Eric A. Posner, 'The New International Law Scholarship' (2006) 34 *Georgia Journal of International and Comparative Law* 463 at 480

¹⁸ Goldsmith, Jack L., 'The Self-Defeating International Criminal Court' (2003) *The University of Chicago Law Review* 89 at 104

A Working Definition of the *Rule of International Law*

Despite imprecision and overuse of the term, there remains great value in the “rule of law” as more than a mere “synonym for ‘law.’”¹⁹ At the most elementary level the concept encompasses the principle that arbitrary self-judging should be substituted with a “pre-agreed, principled procedure for decision-making.”²⁰ However, where the concept is applied to the design and development of an actual legal system, some justification is required for a necessarily subjective definition of its core elements.²¹ Without denying classic municipal formulations,²² there is a strong case for proceeding from British Jurist A.V. Dicey as the earliest and most frequently cited in Anglo-American jurisprudence. Dicey emphasised “the supremacy of law” over arbitrary power as a defining element of the English and American constitutions,²³ “equality before the law” for rulers and the ruled alike; and, the determination of rights through judicial power.²⁴ The reason for drawing on this formulation is that it has formed the starting point for every major analysis of the concept and therefore a commonly understood entry point according to both its strengths and weaknesses. More particularly, key modern theorists including Chesterman,²⁵ Beaulac²⁶ and Higgins²⁷ have externalised Dicey’s three municipal elements by analogy to the global level.²⁸ Beaulac adopts Dicey’s formulation on the basis that it “is well known and largely accepted; it has also been analysed and criticised from a variety of angles, thus adding to the credibility of his formulation.”²⁹ In Chesterman’s report *The UN Security Council*

¹⁹ Nardin, Terry, ‘Theorising the International Rule of Law’ (2008) 34 *Review of International Studies* 385 at 397; Crawford, James, ‘International Law and the Rule of Law’ (2003) 24 *Adelaide Law Review* 3 at 4

²⁰ Cosnard, Michel, ‘Sovereign Equality - “The Wimbledon Sails On”’ in Michael Byers and Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 146

²¹ For various formulations see Briery, J. L., ‘The Rule of Law in International Society’ (1936) 7 *Nordisk Tidsskrift for International Ret* 3; Fitzmaurice, Gerald G., ‘The United Nations and the Rule of Law’ (1952) 38 *Transactions of the Grotius Society* 135 at 135-136; Bishop, William W., ‘The International Rule of Law’ (1961) 59 *Michigan Journal of International Law* 553 at 553-554; Crawford, James, ‘International Law and the Rule of Law’ (2003) 24 *Adelaide Law Review* 3; Kumm, Matthias, ‘International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model’ (2003) 44 *Virginia Journal of International Law* 19 at 22; Broomhall, Bruce, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2003) at 54-62; Shearer, Ivan, ‘Australia, The United States and The Rule of Law in International Affairs: Comparisons and Contracts’ (2005) 26 *Adelaide Law Review* 191; Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331; Gosalbo-Bono, Ricardo ‘The Significance of the Rule of Law and Its Implications for the European Union and the United States’ (2010) 72 *University of Pittsburgh Law Review* 229 at 296-299

²² See Raz, Joseph, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) at 214-218; Fuller, Lon L., ‘The Morality of Law’ in Lord Lloyd of Hampstead & M.D.A. Freeman (ed), *Lloyd’s Introduction to Jurisprudence* (Stevens, 1985); Fallon, Richard H. Jr., ‘“The Rule of Law” as a Concept in Constitutional Discourse’ (1997) 97 *Columbia Law Review* 1 at 7-9

²³ Citing De Tocqueville: Dicey, Albert.V., *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan & Co, 1st ed, 1885) at 172-176. See especially Chapter IV. On Dicey see Beaulac, Stéphane, ‘The Rule of Law in International Law Today’ in G. Palombella & N. Walker (ed), *Relocating the Rule of Law* (Hart Publishing, 2009) at 198-200

²⁴ Dicey, Albert.V., *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan & Co, 1st ed, 1885) at 180-184

²⁵ Chesterman, Simon, *The UN Security Council and the Rule of Law* (Federal Ministry for European and International Affairs, 2008). See also Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331

²⁶ Beaulac, Stéphane, ‘The Rule of Law in International Law Today’ in G. Palombella & N. Walker (ed), *Relocating the Rule of Law* (Hart Publishing, 2009)

²⁷ See Higgins, Rosalyn, ‘The ICJ, the United Nations System, and the Rule of Law,’ *London School of Economics and Political Science* (13 November, 2006) <www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061113_Higgins.pdf>; Higgins, Rosalyn, *Speech by H.E. Judge Rosalyn Higgins, President of The International Court Of Justice, At The United Nations University on “The ICJ And The Rule Of Law”* (11 April, 2007)

<http://archive.unu.edu/events/files/2007/20070411_Higgins_speech.pdf>. Followed approvingly by Gosalbo-Bono, Ricardo ‘The Significance of the Rule of Law and Its Implications for the European Union and the United States’ (2010) 72 *University of Pittsburgh Law Review* 229 at 290

²⁸ See also Allain, Jean, *A Century of International Adjudication: The Rule of Law and its Limits* (T.M.C. Asser Press, 2000) at 3-5

²⁹ Beaulac, Stéphane, ‘The Rule of Law in International Law Today’ in G. Palombella & N. Walker (ed), *Relocating the Rule of Law* (Hart Publishing, 2009) at 198

and the Rule of Law³⁰ the common understanding of the “international rule of law” is identified as the “application of these rule of law principles to relations between States” and other legal subjects.³¹

Due to the gap between the ideal and the realities of global relations, Chesterman characterises each of his principles and the rule of law itself as more a “political ideal” than a legal reality, with closer adherence to ideals remaining a means rather than an end.³² Higgins and Beaulac concur that evidence of the approximation of each element demonstrates, at most, an emergent rule of IL.³³ For Beaulac in particular these principles only apply *mutatis mutandis* to the extent that international law diverges from municipal law. The key differences are that “there is no one formal norm-creating authority on the international level; states (not individuals) remain the principal legal actors and there is no enforcement mechanism.”³⁴ Higgins concludes that, although “the phrase ‘rule of law’ is today very much in vogue in international relations,” the “domestic rule of law model does not easily transpose to international relations in the world we live in.”³⁵

The tripartite definition nevertheless remains sufficient for the defined purpose of directly comparing commitment to rule of law ideals across competing IL policies. The definition that emerges is a “functionalist” one in the sense that it is concerned with “how and why the rule of law is used—as distinct from the formal understanding of what it means.”³⁶ Here Chesterman means that the term is articulated at the global level within a political context: “as a tool with which to protect human rights, promote development, and sustain peace.”³⁷ This also responds to the warning of a former State Department Legal Adviser not to attribute a “talismanic meaning to the phrase ‘rule of law.’”³⁸ Dicey’s formulation can be usefully adopted to analyse legal policy without refuting well-known criticisms,³⁹ or claiming to exhaustively capture the meaning of the term. A clear and coherent answer to three questions emerging from the formulation amounts to a distinct conception of the rule of IL:

1. *How should IL be developed to advance non-arbitrary global governance?*

For Chesterman the first element of the rule of IL is that there be “a government of laws.”⁴⁰ At the international level the concept of “global governance” is more apt for encompassing the idea of

³⁰ Chesterman, Simon, *The UN Security Council and the Rule of Law* (Federal Ministry for European and International Affairs, 2008). See also Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331

³¹ Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331 at 355-356. See also Higgins, Rosalyn, *Speech by H.E. Judge Rosalyn Higgins, President of The International Court Of Justice, At The United Nations University on “The ICJ And The Rule Of Law”* (11 April, 2007) <http://archive.unu.edu/events/files/2007/20070411_Higgins_speech.pdf> at 2

³² Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331 at 360-361

³³ Higgins, Rosalyn, ‘The ICJ, the United Nations System, and the Rule of Law,’ *London School of Economics and Political Science* (13 November, 2006) <www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061113_Higgins.pdf> at 15; Beaulac, Stéphane, ‘The Rule of Law in International Law Today’ in G. Palombella & N. Walker (ed), *Relocating the Rule of Law* (Hart Publishing, 2009) at 220-221. Crawford similarly concludes that “we have only enclaves of the rule of law in international affairs”: Crawford, James, ‘International Law and the Rule of Law’ (2003) 24 *Adelaide Law Review* 3 at 12

³⁴ Beaulac, Stéphane, ‘The Rule of Law in International Law Today’ in G. Palombella & N. Walker (ed), *Relocating the Rule of Law* (Hart Publishing, 2009) at 204

³⁵ Higgins, Rosalyn, ‘The ICJ, the United Nations System, and the Rule of Law,’ *London School of Economics and Political Science* (13 November, 2006) <www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061113_Higgins.pdf> at 6

³⁶ Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331 at 333 & 358-359

³⁷ *Ibid* at 333 & 358-359

³⁸ Matheson, Michael J., *Interview with Author* (19 October, 2011)

³⁹ See Raz, Joseph, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195; Crawford, James, ‘International Law and the Rule of Law’ (2003) 24 *Adelaide Law Review* 3 at 5

⁴⁰ Chesterman, Simon, *The UN Security Council and the Rule of Law* (Federal Ministry for European and International Affairs, 2008) at 4, original emphasis; Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331 at 342

“governance in the absence of formal government.”⁴¹ This is a broader concept than government “concerned with purposive acts, not tacit arrangements. It emphasizes what is done rather than the constitutional basis for doing it.”⁴² Applying Chesterman’s principle, this is the requirement of “non-arbitrariness in the exercise of power” through: increasing codification of law, greater uniformity in its rules, and eliminating the distinction between “legality” and self-judging standards of “legitimacy.”⁴³ Beaulac similarly focuses on “the existence of principled legal normativity on the international plane.”⁴⁴ This translates into the development of IL sufficient to ensure “*certainty, predictability, and stability*” while eliminating “*arbitrary power*.”⁴⁵ Finally Higgins identifies the first principle of the rule of IL by analogy from “an executive reflecting popular choice, taking non-arbitrary decisions applicable to all, for the most part judicially-reviewable for constitutionality.”⁴⁶ In these formulations the common focus is the question of the proper role of IL in developing non-arbitrary forms of global governance.⁴⁷ The rule of IL will be advanced to the extent that international legal rules and institutions facilitate global “systems of rule” consistently with this principle.⁴⁸

2. *What is the meaning of equality under IL?*

The second element of the rule of IL is described by Chesterman as “*equality before the law*.”⁴⁹ This entails a “more general and consistent application of international law to States and other entities,” with less regard to disparities in power.⁵⁰ Beaulac describes equality as a “primordial value of the rule of law” recognised by all key theorists.⁵¹ His variation is a question of “how these norms are made and are applicable equally to all legal subjects.”⁵² Finally, in Higgins’ analysis, Dicey’s second element requires that there be “laws known to all, applied equally to all.”⁵³ Despite the apparent simplicity of these accounts, the principle of “equality” is far from clear-cut in practice, since a key meaning of equality is not merely identical treatment but “treating like cases alike.”⁵⁴ Indeterminacy is immediately introduced when distinguishing between different cases, since external criteria are required to

⁴¹ Rosenau, James N., ‘Governance, Order, and Change in World Politics’ in James N. & Ernst-Otto Czempiel Rosenau (ed), *Governance without Government: Order and Change in World Politics* (Cambridge University Press, 1992)

⁴² Finkelstein, Lawrence S., ‘What is Global Governance?’ (1995) *Global Governance* 367 at 369; Rosenau, James N., ‘Governance in the Twenty-First Century’ (1995) 1 *Global Governance* 13 at 13; Krisch, Nico, ‘More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law’ in Michael Byers & Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 171-173

⁴³ Chesterman, Simon, *The UN Security Council and the Rule of Law* (Federal Ministry for European and International Affairs, 2008) at 4

⁴⁴ Beaulac, Stéphane, ‘The Rule of Law in International Law Today’ in G. Palombella & N. Walker (ed), *Relocating the Rule of Law* (Hart Publishing, 2009) at 204

⁴⁵ *Ibid* at 206. Original emphasis

⁴⁶ See Higgins, Rosalyn, ‘The ICJ, the United Nations System, and the Rule of Law,’ *London School of Economics and Political Science* (13 November, 2006) <www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061113_Higgins.pdf> at 1

⁴⁷ See also Crawford, James, ‘International Law and the Rule of Law’ (2003) 24 *Adelaide Law Review* 3 at 4 & 10-11

⁴⁸ Rosenau, James N., ‘Governance in the Twenty-First Century’ (1995) 1 *Global Governance* 13 at 13

⁴⁹ Chesterman, Simon, *The UN Security Council and the Rule of Law* (Federal Ministry for European and International Affairs, 2008) at 4, original emphasis; Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331 at 342

⁵⁰ Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331 at 360-361

⁵¹ Beaulac, Stéphane, ‘The Rule of Law in International Law Today’ in G. Palombella & N. Walker (ed), *Relocating the Rule of Law* (Hart Publishing, 2009) at 210

⁵² *Ibid* at 204

⁵³ See Higgins, Rosalyn, ‘The ICJ, the United Nations System, and the Rule of Law,’ *London School of Economics and Political Science* (13 November, 2006) <www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061113_Higgins.pdf> at 1

⁵⁴ Hart, Herbert Lionel Adolphus, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593 at 623-624; Cryer, Robert, ‘Sudan, Resolution 1593, and International Criminal Justice’ (2006) 19 *Leiden Journal of International Law* 195 at 215, n.110

measure what is “alike” and what is “unlike.”⁵⁵ As Beaulac concedes, equality “cannot mean that all legal norms apply to every state in the same way; some of them may only apply to certain states because of their situations.” Thus the principle “entails similarly situated states being treated in the same way by international law, with no discriminatory treatment tolerated by the system.”⁵⁶ E.H. Carr’s earlier formulation was that there be an “absence of discrimination for reasons which are felt to be irrelevant.”⁵⁷ In applying this principle “equality” *simpliciter* is shown to be “an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act.”⁵⁸ Thus “equality” as an element of the rule of IL is not a self-contained “organising principle” for sovereign states,⁵⁹ but rather a question of the proper criteria for defining who is alike under IL, and how to achieve correspondingly equal rights and duties.

3. *What is the proper ordering of international legal power?*

The final element is described by Chesterman as “the *supremacy* of the law” which “distinguishes the rule of law from rule *by* law.”⁶⁰ The meaning of this principle in Dicey’s and Chesterman’s formulation is “privileging judicial process”⁶¹ sufficient to provide “determinative answers to legal questions.”⁶² This will be achieved through increasing acceptance of the jurisdiction of international courts and tribunals, and the deference to law by political institutions.⁶³ Likewise Beaulac looks to “the way in which normativity is enforced through adjudication.”⁶⁴ For Beaulac the clear deficiencies of judicial power at the “institutional level”⁶⁵ present “what is without doubt the most difficult set of formal values associated with the rule of law.”⁶⁶ Finally Higgins notes that Dicey’s third element requires “independent courts to resolve legal disputes and to hold accountable violations of criminal law, itself applying the governing legal rules in a consistent manner.”⁶⁷

What is evident from these formulations is that this rule of law element requires significant modification when externalised to the international level. The stipulation that legal subjects must be able to determine legal *rights* matched by correlative *duties* assumes that judicial power can establish a stable conception of the content of the right, and furthermore, that non-performance of the

⁵⁵ Westen, Peter, ‘The Empty Idea of Equality’ (1982) 95 *Harvard Law Review* 537 at 540

⁵⁶ Beaulac, Stéphane, ‘The Rule of Law in International Law Today’ in G. Palombella & N. Walker (ed), *Relocating the Rule of Law* (Hart Publishing, 2009) at 211

⁵⁷ Carr, Edward Hallett, *The Twenty Years’ Crisis, 1919-1939: An Introduction to the Study of International Relations* (Macmillan & Co Ltd, 1939) at 163

⁵⁸ Westen, Peter, ‘The Empty Idea of Equality’ (1982) 95 *Harvard Law Review* 537 at 547. For a critical response see Burton, Steven J., ‘Comment on “Empty Ideas”: Logical Positivist Analyses of Equality and Rules’ (1982) 91 *Yale Law Journal* 1136

⁵⁹ Simpson, Gerry J., *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004) at 41

⁶⁰ Chesterman, Simon, *The UN Security Council and the Rule of Law* (Federal Ministry for European and International Affairs, 2008) at 4, original emphasis; Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331 at 342

⁶¹ Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331 at 336

⁶² *Ibid* at 360-361. See also Crawford, James, ‘International Law and the Rule of Law’ (2003) 24 *Adelaide Law Review* 3 at 4 & 11

⁶³ Chesterman, Simon, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331 at 360-361

⁶⁴ Beaulac, Stéphane, ‘The Rule of Law in International Law Today’ in G. Palombella & N. Walker (ed), *Relocating the Rule of Law* (Hart Publishing, 2009) at 204

⁶⁵ *Ibid* at 221

⁶⁶ *Ibid* at 212

⁶⁷ See Higgins, Rosalyn, ‘The ICJ, the United Nations System, and the Rule of Law,’ *London School of Economics and Political Science* (13 November, 2006) <www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061113_Higgins.pdf> at 1

correlative duty can be vindicated through executive power.⁶⁸ As Chief Justice Marshall of the US Supreme Court noted in *Marbury v Madison*, the rule of law will be destroyed if “laws furnish no remedy for the violation of a vested legal right.”⁶⁹ The challenge is the severely limited institutionalisation of judicial power at the international level. This is not equivalent to the *absence* of these powers however, but rather that states (and the US in particular)⁷⁰ underwrite the international legal system by directly exercising or delegating powers variously resembling the “executive,” “legislative” and “judicial” powers comprising municipal legal systems. The consequence is a weak separation of powers, since it is the legal subjects of the system who determine when and how legal powers are exercised: in creating legal rules, interpreting them, or executing them. The repercussion of power being so diffused is that all three “legal” powers are exercised concurrently by each member state, through a variety of institutions, and with no entity wielding supreme authority.⁷¹ The establishment of “supremacy of the law” becomes a question of how to properly order and separate these various international legal powers between states and global institutions. The rule of IL requires a principle for determining what international judicial functions remain with states, and what functions should be separated into international courts and tribunals.

RECEIVED CONCEPTIONS OF THE RULE OF INTERNATIONAL LAW

The central theme of this work has been the vital role of foreign policy ideology in structuring the reception of law by legal policymakers. In this context the quest for a universal and fixed meaning of the rule of law is explicitly set aside as chimerical. Scott alludes to such a meaning in arguing that the “ultimate source of the influence of international law is arguably the ideal of an international rule of law.”⁷² This assumes an authoritative meaning to the “ideal of international law” as promoted by the US that embodies “the concept of the rule of law, which suggests that all are equal before the law, and presents international law as an objective, apolitical body of rules.”⁷³ Yet the evidence that no such unified ideal may exist emerges even in Scott identifying a gap “between what the United States says about an international rule of law and what it does in specific scenarios.”⁷⁴ Rather, this study suggests that what appears to be commitment to a unified ideal of the rule of law is instead to divergent interpretations of rule of law elements as informed by ideological beliefs.⁷⁵

⁶⁸ Drawing upon Hohfeld’s well known formulation: Hohfeld, Wesley N., ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913-14) 23 *Yale Law Journal* 16; Hohfeld, Wesley N., ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 *Yale Law Journal* 710

⁶⁹ *William Marbury v. James Madison, Secretary of State of the United States* (1803) 5 U.S. 137 at par. 61

⁷⁰ Krisch, Nico, ‘More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law’ in Michael Byers & Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 169

⁷¹ For a similar characterisation see: Cheng, Tai-Heng., *When International Law Works* (Oxford University Press, 2012) at 81-82; Johnstone, Ian, ‘Security Council Deliberations: The Power of the Better Argument’ (2003) 14 *European Journal of International Law* 437 at 448

⁷² Scott, Shirley V., *International Law, US Power: The United States’ Quest for Legal Security* (Cambridge University Press, 2012) at 16, citing Scott, Shirley V., ‘International Law as Ideology: Theorising the Relationship between International Law and International Politics’ (1994) 5 *European Journal of International Law* 313

⁷³ Scott, Shirley V., *International Law, US Power: The United States’ Quest for Legal Security* (Cambridge University Press, 2012) at 235

⁷⁴ *Ibid* at 2

⁷⁵ For analysis in these terms see Gosalbo-Bono, Ricardo ‘The Significance of the Rule of Law and Its Implications for the European Union and the United States’ (2010) 72 *University of Pittsburgh Law Review* 229 at 351-353

The conception of the rule of IL as a site for political contestation is espoused by Koskenniemi, who describes the ideal as a “reformulation of the liberal impulse to escape politics.”⁷⁶ Accordingly it is simplistic to characterise divergent legal conceptions as necessarily demonstrating uneven commitment to the rule of IL. Rather, it is “impossible to make substantive decisions within the law which would imply no political choice...: in the end, legitimising or criticising state behaviour is not a matter of applying formally neutral rules but depends on what one regards as politically right, or just.”⁷⁷ Foreign policy ideology informs this choice by setting out the values and interests constituting law for an identified political community. Crossing the structure of four ideal type American conceptions of IL from Chapter Three with the foregoing three questions produces the following model of competing conceptions of the rule of IL:

	Developing Non-Arbitrary Global Governance	Meaning of Equality under International Law	Ordering International Legal Power
Legalism	Formalised Development	Sovereign Equality	Separation of Powers
Liberal Internationalism	Transnational Development	Liberal Equality	Democratic Checks and Balances
Illiberal Internationalism	Pragmatic Development	Hegemonic Privilege	Consent Based Division of Powers
Liberal Nationalism	Defensive Development	Inviolable Sovereignty	Vertical Separation of Powers
Illiberal Nationalism	Permissive Development	Relative Sovereignty	Municipal Supremacy

A threshold objection to categorising these types as conceptions of the “rule of law” is that integrating political understandings into the central concept is contrary to the many definitions that turn directly on the exclusion of political interests from law. In Nardin’s view the claim “that law is both indeterminate and policy-driven erases law as a distinct mode of human relationship.”⁷⁸ He instead separates the ideal from observed reality to define the rule of IL as “no more than that states conduct their relations within a framework of non-instrumental law.”⁷⁹ To the extent that IL includes rules that encompass power based interests “such rules do not express, and are in fact antithetical to, the rule of law.”⁸⁰ At the level of abstract theorising this is a constructive contribution to understanding basic rule of IL ideals. However, this thesis adopts the position that the rule of IL cannot realistically require the exclusion of politics, but rather entails an ongoing commitment to reconciling policy with processes of the international legal system.⁸¹ The interesting question for present purposes remains how named states have demonstrated commitment to each element of the rule of IL as received through the lens of foreign policy ideology.

⁷⁶ Koskenniemi, Martti, *The Politics of International Law* (Hart Publishing, 2011) at 37

⁷⁷ *Ibid* at 61

⁷⁸ Nardin, Terry, ‘Theorising the International Rule of Law’ (2008) 34 *Review of International Studies* 385 at 401

⁷⁹ *Ibid* at 399; Nardin, Terry, ‘International Pluralism and the Rule of Law’ (2000) 26 *Review of International Studies* 95 at 104

⁸⁰ Nardin, Terry, ‘International Pluralism and the Rule of Law’ (2000) 26 *Review of International Studies* 95 at 97

⁸¹ See Georgiev, Dencho, ‘Politics of Rule of Law: Deconstruction and Legitimacy in International Law’ (1993) 4 *European Journal of International Law* 1 at 2-4

Legalism

It would be contradictory to interpret American international legal policy through divergent foreign policy ideologies and yet treat all other states as holding an undifferentiated conception of law. That is certainly not the case, with legal policymakers in each state undoubtedly interpreting IL through the lens of their own foreign policy ideologies.⁸² The claim being made here is the narrower one that opposition to US IL policy has converged around the beliefs of “legalism,” irrespective of culturally specific conceptions of the rule of IL.⁸³ Apart from evidence of culturally entrenched commitments to legalism by certain states,⁸⁴ there are good reasons to accept that there is a common interest among America’s global counterparts to diminish the advantages of preponderant power through law. Growing popularity for the rule of IL has been attributed in part to its perceived “utility in challenging American exceptionalism, which threatens...the legitimacy of the international legal order based on the principle of the legal equality of all states.”⁸⁵ Koskenniemi identifies the power as lying behind “the juxtaposition between European constitutional formalism and the ‘imperial’ challenge to international institutions by the United States.”⁸⁶ The suggestion that commitment to legalist interpretations “would be an automatically progressive choice is no less crude a directive to policy than the belief that law needs to be streamlined for the attainment of imperial preference.”⁸⁷ There are compelling reasons for treating legalism as an ideal type legal conception structuring opposition to US policy.

The legalist approach has been best defined by Judith Shklar as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”⁸⁸ In the context of IL specifically Cheng defines the concept as “a *claim* to apply prescriptions, through a process of reasoning and logic, neutrally to facts in an international problem.”⁸⁹ These conceptions draw on the methodology of “doctrinalism,” which “simply describes doctrine or that assesses doctrine based solely on formalistic grounds having to do with the logic of its internal structure,”⁹⁰ and that identifies the ‘black letter law’ of international law in any given domain, independent of actual behaviours.”⁹¹ The methodology is conspicuously less dominant in US IL scholarship, with the significant number of social science PhD qualifications within the faculties of American law schools reflecting a preference for multidisciplinary approaches.⁹² This is both a product

⁸² See for example Gelter, Martin and Kristoffel Grechenig, ‘The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism’ (2008) 31 *Hastings International and Comparative Law Review* 295; Bradford, Anu & Eric A. Posner, ‘Universal Exceptionalism in International Law’ (2011) 52 *Harvard International Law Journal* 1

⁸³ For comparable application of the term see Alvarez, José E, ‘Contemporary International Law: An Empire of Law or the Law of Empire’ (2008) 24 *American University International Law Review* 811 at 817-818

⁸⁴ See Bethlehem, Daniel, ‘A Transatlantic View of International Law and Lawyers: Cooperation and Conflict in Hard Times’ (2009) 103 *American Society of International Law Proceedings* 455 citing the legal consequences of Henry Kissinger’s distinction between Europe’s “balance-of power system” and America’s “self appointed mission of global reform” at 463-464; Wippman, David, ‘The International Criminal Court’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) at 160-164

⁸⁵ Peerenboom, Randall P., ‘Human Rights and Rule of Law: What’s the Relationship?’ (2004) 36 *Georgetown Journal of International Law* 809 at 935-939

⁸⁶ Koskenniemi, Martti, *The Politics of International Law* (Hart Publishing, 2011) at 73

⁸⁷ *Ibid* at 73

⁸⁸ Shklar, Judith N., *Legalism* (Harvard University Press, 1964) at 1

⁸⁹ Cheng, Tai-Heng., *When International Law Works* (Oxford University Press, 2012) at 83. Original emphasis

⁹⁰ Elhauge, Einer, *The Death of Doctrinalism and Its Implications for the Entry-Level Job Market at Law Schools* (23 May, 2007) <http://www.volokh.com/archives/archive_2007_05_20-2007_05_26.shtml#1179757913>

⁹¹ Goldsmith, Jack L. & Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005) at 15

⁹² See Gestel, Rob & Hans-Wolfgang Micklitz, ‘Why Methods Matter in European Legal Scholarship’ (2014) 20 *European Law Journal* 292 at 294. The authors pointedly commence with the question: “Is doctrinal research dead in the United States?” at 292

of and reinforces the more general attention within American jurisprudence to the context and social effects of the law.

Accounts have focussed predominantly on legalism at the municipal level, but remain no less relevant due to the tendency of international legal policymakers to externalise legalist principles via a “domestic analogy.”⁹³ In the European context Koskenniemi identifies the strength of a “domestic analogy that persuades us – contrary to all evidence – that the international world is like the national so that legal institutions may work as they do in our European societies.”⁹⁴ The rhetorical attraction of contesting American international legal power in these terms lies in the claim to a “depoliticised”⁹⁵ conception of law:

Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies. Justice is thus not only the policy of legalism, it is treated as a policy superior to and unlike any other.⁹⁶

In this view, “the appeal of a global rule of law lies in the promise of protection against the pathologies of internal domestic politics.”⁹⁷ These beliefs nevertheless constitute “a political ideology which comes into conflict with other policies” no less than do specifically American conceptions.⁹⁸ Such “deliberate isolation of the legal system—the treatment of law as a neutral social entity—is itself a refined political ideology, the expression of a preference.”⁹⁹ Moreover, Shklar suggests that conceptions of international (as opposed to municipal) law are “perhaps the most striking manifestation of legalistic ideology. Its ideological character is especially discernible because the principles of international law are not supported by effective institutions.”¹⁰⁰

The “legalism” appellation has more often been employed from a critical perspective to challenge those who oppose American legal policy. Posner defines legalism as “the view that law and legal institutions can keep order and solve policy disputes. It manifests itself in powerful courts, a dominant class of lawyers, and reliance on legalistic procedures in policymaking bodies.”¹⁰¹ In the externalised form of “global legalism,” the concept is defined pejoratively as “an excessive faith in the efficacy of international law.”¹⁰² Nevertheless, in the present work adoption of the legalist rubric is for analytical purposes only, avoiding any strong normative implications. It is merely “intended to express social facts about a specialized mode of interaction in the process of decision-making in international

⁹³ See Kahn, Paul W., ‘From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law’ (1987) 12 *Yale Journal of International Law* 1 at 30-36; Wippman, David, ‘The International Criminal Court’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) at 163

⁹⁴ Koskenniemi, Martti, ‘International Law in Europe: Between Tradition and Renewal’ (2005) 16 *European Journal of International Law* 113 at 122; Koskenniemi, Martti, *The Gentle Civilizer of Nations 1870-1960* (Cambridge University Press, 2001) at 361

⁹⁵ Kahn, Paul W., ‘American Exceptionalism, Popular Sovereignty, and the Rule of Law’ in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) at 198-199; Cheng, Tai-Heng., *When International Law Works* (Oxford University Press, 2012) at 83-84

⁹⁶ Shklar, Judith N., *Legalism* (Harvard University Press, 1964) at 111. See similarly Carr, Edward Hallett, *The Twenty Years’ Crisis, 1919-1939: An Introduction to the Study of International Relations* (Macmillan & Co Ltd, 1939) at 170

⁹⁷ Kahn, Paul W., ‘American Exceptionalism, Popular Sovereignty, and the Rule of Law’ in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) at 198-199

⁹⁸ Shklar, Judith N., *Legalism* (Harvard University Press, 1964) at 3

⁹⁹ *Ibid* at 34

¹⁰⁰ *Ibid* at 129

¹⁰¹ Posner, Eric A., *The Perils of Global Legalism* (University of Chicago Press, 2009) at 21. See also Krauthammer, Charles, ‘The Curse of Legalism’ (1989) 201 *New Republic* 44

¹⁰² Posner, Eric A., *The Perils of Global Legalism* (University of Chicago Press, 2009) at xii. See also Pildes, Richard H., ‘Conflicts Between American and European Views of Law: The Dark Side of Legalism’ (2003) 44 *Virginia Journal of International Law* 145

problems, without engaging in unnecessary conceptual debates about whether or not this mode of interaction is actually ‘law.’”¹⁰³ This use in no way excludes the possibility of employing legalism to advocate policy as morally or politically superior. Importantly Shklar wrote not to defeat legalism, but to harness its potential to advance liberal values.¹⁰⁴ In these terms she noted the “great paradox” that “legalism as an ideology is too inflexible to recognize the enormous potentialities of legalism as a creative policy, but exhausts itself in intoning traditional pieties and principles which are incapable of realization.”¹⁰⁵ As Moyn argues, Shklar’s primary objective was “to save legalism for liberal politics by showing central liberal ideas like the rule of law to be useful ideologies.”¹⁰⁶ Her criticism was directed only at “those of its traditional adherents who, in their determination to preserve law from politics, fail to recognize that they too have made a choice among political values” and the “attendant belief that law is not only separate from political life but that it is a mode of social action superior to mere politics.”¹⁰⁷

It is instructive to compare how legalist conceptions of IL align with the jurisdictional and values dimensions structuring American IL policy. At the risk of stating the obvious, the legalist conception is internationalist, in the sense that it advocates the creation and management of global legal architecture. In particular, legalist conceptions envision national security decisions about war and peace being transferred from municipal governments to the international level.¹⁰⁸ The location of legalism on the values dimension is less straightforward in contrast, with formalist and cosmopolitan principles pulling in different directions in relation to liberalism. Legalist arguments necessarily draw upon cosmopolitan values as an impartial source of legitimacy separate from partial state interests. Koskenniemi details the “cosmopolitan ethos” in modern IL, which flows from the aspiration in the wider project of modernity for more than normatively agnostic rules of international order.¹⁰⁹ Cosmopolitanism requires that the rule of law uphold “non-instrumental” rules that treat persons as ends, and not merely as means for satisfying political objectives.¹¹⁰ The effect of these beliefs is to displace the necessary role of democratic accountability so central to American legal conceptions. Consistently with this idea a number of authors have identified the norms underpinning IL with “universal values,”¹¹¹ and an “international value system.”¹¹² The effect of a belief in universally valid principles has the same effect as faith in American exceptionalism, which is the tendency toward a “messianic” IL policy.¹¹³

It is important to note that included among legalist advocates are prominent American individuals and organisations. The theorised IL policy typology does not encompass all policies

¹⁰³ Cheng, Tai-Heng., *When International Law Works* (Oxford University Press, 2012) at 80-81

¹⁰⁴ Shklar, Judith N., *Legalism* (Harvard University Press, 1964) at 5

¹⁰⁵ *Ibid* at 112

¹⁰⁶ Moyn, Samuel, ‘Judith Shklar versus the International Criminal Court’ (2013) 4 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 473 at 475

¹⁰⁷ Shklar, Judith N., *Legalism* (Harvard University Press, 1964) at 8

¹⁰⁸ Posner, Eric A., *The Perils of Global Legalism* (University of Chicago Press, 2009) at 25

¹⁰⁹ Koskenniemi, Martti, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70 *The Modern Law Review* 1 at 2-3. See also Kingsbury, Benedict, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’ (1998) 19 *Michigan Journal of International Law* 345 at 361

¹¹⁰ Nardin, Terry, ‘International Pluralism and the Rule of Law’ (2000) 26 *Review of International Studies* 95

¹¹¹ Dupuy, Pierre-Marie, ‘Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi’ (2005) 16 *European Journal of International Law* 131

¹¹² De Wet, Erika ‘The International Constitutional Order’ (2006) 55 *International and Comparative Law Quarterly* 51;

¹¹³ Bianchi, Andrea, ‘Human Rights and the Magic of Jus Cogens’ (2008) 19 *European Journal of International Law* 491 at 495

capable of being recognised by American citizens, but only those influential among American legal policymakers. George Kennan identified an attachment to “moralistic-legalistic” beliefs as an affliction on American foreign policy itself.¹¹⁴ However the attachment to legal rules and solutions as described by Kennan is largely encompassed by the Liberal Internationalist type, and remains distinct from legalism as that term is used here.¹¹⁵ Although Americans other than legal policymakers can and have vocally advocated a range of policies in legalist terms (especially within NGOs),¹¹⁶ that fact does not falsify the typology unless such positions are accepted by and structure American IL policy.

Formalised Development of International Law

The first element of the legalist rule of IL is that the primary and secondary rules¹¹⁷ of the international legal system should be progressively formalised as binding legal obligations. The attainment of the rule of law at the municipal level is not a static condition, but a process of progressively adapting and extending the law to achieve a complete legal system.¹¹⁸ The attainment of the rule of law in the common law world was achieved when the English Bill of rights removed the monarch’s prerogative to suspend the operation of the law or its application to certain categories of people. International legal scholarship has maintained a strong presumption against declaring a *non liquet* in which the law remains silent on rights and duties.¹¹⁹ This idea traces back to the “Grotian tradition” of IL which envisioned the “subjection of the totality of international relations to the rule of law.”¹²⁰ The rationale behind the sometimes “unrealistic” presumption is “to ‘tame’ state sovereignty and to subject states to the rule of law.”¹²¹ That principle is recognised in the UN Charter, and as the central purpose of the International Law Commission in promoting “the progressive development of international law and its codification.”¹²²

For advocates of legalism the case for displacing global politics with global law focuses on the principle of “formalism,” which for Shklar is the idea of law as “a self-contained system of norms that is ‘there,’ identifiable without reference to the content, aim, and development of the rules that compose it.”¹²³ Evidence of this principle can be seen in Kagan’s observed distinction between American and European references to “multilateralism.” The American meaning is simply any foreign policy that has

¹¹⁴ Kennan, George F., *American Diplomacy* (University of Chicago Press, 1984) at 101-102

¹¹⁵ Use of the term here can also be distinguished from Abebe and Posner’s “foreign affairs legalism” on the same basis: Abebe, Daniel & Eric A. Posner, ‘The Flaws of Foreign Affairs Legalism’ (2010) 51 *Virginia Journal of International Law* 507

¹¹⁶ See Chayes, Abram & Anne-Marie Slaughter, ‘The ICC and the Future of the Global Legal System’ in Sarah B. Sewell & Carl Kaysen (ed), *The United States and the International Criminal Court: National Security and International Law* (Rowman & Littlefield Publishers, 2000) at 242

¹¹⁷ On this distinction see Hart, Herbert L.A., *The Concept of Law* (Clarendon Press, 1961)

¹¹⁸ Duffy, Helen, *The “War on Terror” and the Framework of International Law* (Cambridge University Press, 2005) at 9

¹¹⁹ Literally that the law “is not clear”: See Reisman, Michael W., ‘International Non-Liquet: Recrudescence and Transformation’ (1968) 3 *International Lawyer* 770 at 771; Weil, Prosper, ‘The Court Cannot Conclude Definitively... Non Liquet Revisited’ (1998) 36 *Columbia Journal of Transnational Law* 109; Aznar-Gomez, Mariano J, ‘The 1996 Nuclear Weapons Advisory Opinion and Non Liquet in International Law’ (1999) 48 *International and Comparative Law Quarterly* 3 at 7-13. For a contrary view see the discussion of *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226 in Aznar-Gomez, Mariano J, ‘The 1996 Nuclear Weapons Advisory Opinion and Non Liquet in International Law’ (1999) 48 *International and Comparative Law Quarterly* 3 at 17

¹²⁰ Lauterpacht, Hersch, ‘The Grotian Tradition in International Law’ (1946) 23 *British Yearbook of International Law* 1 at 19;

Murphy Jr, Cornelius F., ‘The Grotian Vision of World Order’ (1982) 76 *American Journal of International Law* 477 at 482

¹²¹ Weil, Prosper, ‘The Court Cannot Conclude Definitively... Non Liquet Revisited’ (1998) 36 *Columbia Journal of Transnational Law* 109 at 113

¹²² *Charter of the United Nations* (1945), Art.13(1)(a); *Statute of the International Law Commission* (1947), Art.1(1). See generally Lauterpacht, Hersch, ‘Codification and Development of International Law’ (1955) 49 *American Journal of International Law* 16

¹²³ Shklar, Judith N., *Legalism* (Harvard University Press, 1964) at 33

garnered broad allied support, with formal cooperation through bodies such as the UNSC having no necessary advantage over informal arrangements. In contrast European use of the term “has a much more formal and legalistic cast” requiring “legitimate sanction from duly constituted international bodies.”¹²⁴ This in part explains strident objections to the concept of “coalitions of the willing” as the preferred form of multilateral cooperation during the Bush 43 administration.¹²⁵ For legalism, policy will be legitimate for complying with formalised sources of authority rather than mere congruence with policy objectives.

What sustains the claim that legal rules and institutions represent political neutrality is that they are derived through a process of “autogenesis.”¹²⁶ Shklar interprets Hans Kelsen’s own retreat into “formalism” as facilitated by his positivist jurisprudence, which saw law as “its own creation,” with rules progressively derived from his *gründnorm*.¹²⁷ This theory seeks to establish legal rules “without the ideological bias or the historical and cultural myopia” that a non-formal approach entails.¹²⁸ The presumption of autogenesis has further lain behind the belief that: “Custom, usage, conventions, and treaties provide a complete system of law, analogous to municipal law.”¹²⁹ The consequence for Morgenthau is the claim to a “logically coherent system which virtually contains, and through a mere process of logical deduction will actually produce, all rules necessary for the decision of all possible cases.”¹³⁰ These factors allow for a high degree of norm precision as the distinguishing feature of legal rules when compared to other normative systems.¹³¹ The treatment of rules as clear, comprehensive and internally consistent becomes the necessary presumption for the central legalist claim “that following rules impartially is a virtue.”¹³²

Sovereign Equality

The principle by which US IL policy has been most forcefully challenged is that all states must accede to international rules and institutions according to equal rights and duties. The principle flows from the centrality of equality before the law to municipal law, which Dicey described as the “universal subjugation of all classes, to one law.”¹³³ Legalism extends that defining principle to the rights and duties of states as IL’s primary subjects, irrespective of external influence or internal character.¹³⁴ For Simpson this has meant “formal equality” according to “the principle that in *judicial settings* states

¹²⁴ Kagan, Robert, *Of Paradise and Power* (Vintage Books, 2004) at 144

¹²⁵ *Ibid* at 148

¹²⁶ Shklar, Judith N., *Legalism* (Harvard University Press, 1964) at 131

¹²⁷ *Ibid* at 131. Citing Kelsen, Hans, *General Theory of Law and State* (Russell & Russell, 1961, c1945)

¹²⁸ Shklar, Judith N., *Legalism* (Harvard University Press, 1964) at 33

¹²⁹ *Ibid* at 136

¹³⁰ Morgenthau, Hans Joachim, ‘Positivism, Functionalism, and International Law’ (1940) 34 *American Journal of International Law* 260 at 262. See also Shklar, Judith N., *Legalism: Law, Morals, and Political Trials* (Harvard University Press, 2nd ed, 1986) at 9

¹³¹ Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, ‘The Concept of Legalization’ (2000) 54 *International Organization* 401. at 412-413

¹³² Shklar, Judith N., *Legalism* (Harvard University Press, 1964) at 113

¹³³ Dicey, Albert V., *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan & Co, 1st ed, 1885) at 178

¹³⁴ See Crawford, James, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th ed, 2012) at 448-449; van der Vyver, Johan D., ‘American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness’ (2001) 50 *Emory Law Journal* 775 at 803-804. See also Crawford, James, ‘International Law and the Rule of Law’ (2003) 24 *Adelaide Law Review* 3 at 4 & 11

have equality in the vindication and 'exercise of rights.'¹³⁵ This conception of sovereign equality constitutes a "basic rule of law notion."¹³⁶

The very purpose of the rule of IL in the legalist approach is to minimise the significance of power disparities when determining legal rights and duties. The structure of the international system remains an "association of independent and diverse political communities, each devoted to its own ends and its own conception of the good."¹³⁷ Such an arrangement necessitates common constraints for respecting one another's autonomy.¹³⁸ "Sovereign equality" thus becomes the constitutional principle on which the international legal system is constructed.¹³⁹ "Equality" in this sense is a legal fiction, but a necessary one to establish legal rights not dependent on the reality of inequality.¹⁴⁰ To derive rights from actual distributions of power would result in a world with states at the periphery lacking legal personality, and a "corresponding gradation of rights."¹⁴¹ The rule of law in these terms protects the structure of the international order without reference to the idiosyncratic beliefs and cultural commitments of particular states.

In modern incarnations this legalist rule of law element has increasingly been held out as extending beyond a mere constraint to respect territorial integrity to a positive obligation to engage with multilateral treaties having near universal membership. A US claim to significant treaty reservations, or exemption entirely from treaties such as the Ottawa Landmines convention or Kyoto Protocol, "seems now to require some justification if it deviates from the stance of the great majority of states." In this sense "freedom of contract plays an ever-decreasing role when it comes to law-like treaties."¹⁴²

Separation of Powers

Closely related to sovereign equality is the argument for separating the legal powers of global governance such that judicial power can independently determine rights and duties. The two principles complement each other to insulate the integrity of legal rules from overweening power. No domestic legal system based on the rule of law would vest executive control over the judiciary, nor would it allow citizens to determine the legality of their own actions under the state's civil or criminal jurisdiction. Likewise the supremacy of IL excludes the possibility that states can determine the scope of their own global privileges and obligations. Externalising the municipal separation of powers

¹³⁵ Simpson, Gerry J., *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004) at 43. Original emphasis

¹³⁶ *Ibid* at 43

¹³⁷ Nardin, Terry, *Law, Morality, and the Relations of States* (Princeton University Press, 1983) at 19. The "good" is used here in the Aristotelian sense

¹³⁸ *Ibid* at 9 & 11

¹³⁹ See *Charter of the United Nations* (1945), Art. 2(1): "The Organization is based on the principle of the sovereign equality of all its Members." Bull, Hedley, *The Anarchical Society* (Macmillan Press, 2nd ed, 1995); Cosnard, Michel, 'Sovereign Equality - "The Wimbledon Sails On"' in Michael Byers and Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 118; Glennon, Michael J., *Limits of Law, Prerogatives of Power* (Palgrave, 2001) at 148

¹⁴⁰ Schreuer, Christoph, 'The Warning of the Sovereign State: Towards a New Paradigm for International Law' (1993) 4 *European Journal of International Law* 447 at 449; Cosnard, Michel, 'Sovereign Equality - "The Wimbledon Sails On"' in Michael Byers and Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 119; Dupuy, Pierre-Marie, 'Comments on Chapters 4 and 5' in Michael Byers and Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 178

¹⁴¹ Krisch, Nico, 'More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law' in Michael Byers & Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 147

¹⁴² *Ibid* at 151

principle is supported by Koskenniemi's observation that, compared to Americans, Europeans tend to "read international law in the image of our domestic legalism: multilateral treaties as legislation, international courts as an independent judiciary, the Security Council as the police."¹⁴³ Thus states, which continue to exercise the key "legislative" and "executive" functions of global governance, cannot also be the final arbiters in international judicial matters.

Shklar notes that legalism generally supports policies "promoting the institutionalization of the administration of justice."¹⁴⁴ The objective of resolving "as many social conflicts by judicial means as possible"¹⁴⁵ provides the rationale for separating international legal powers and institutionalising judicial power in independent courts. This turns equally on the legalist presumption in municipal law that judges "lie outside politics; they resolve cases impartially by appealing to the rules."¹⁴⁶ At the international level this translates into supremacy of institutionalised judicial power as the only form of legal power independent of national politics.¹⁴⁷ Article 20 of the ICJ Statute reflects the ideal that judges of that court must solemnly declare that they will exercise their powers "impartially and conscientiously." For former ICJ President Roslyn Higgins this constitutes "a proper separation of powers."¹⁴⁸ Executive power in the international system is approximated in the UNSC and so, apart from its distortion of sovereign equality, its control cannot properly extend over an international court. This principle was reflected in the separate opinion of Judge Simma in *The Armed Activities Case*¹⁴⁹ in reference to the role of the ICJ as the UN's "principal *judicial* organ." It followed that the court had a duty "to arrive at decisions based on law and nothing but law" reflecting the "division of labour between the Court and the political organs of the United Nations."¹⁵⁰

Liberal Internationalism

Of the four ideal American policy types, Liberal Internationalism is the most important for understanding the beliefs of American policymakers strongly committed to international legal order. This conception identifies the rule of IL in the externalisation of American constitutional government to establish a seamless system of law, with international and national legal systems reinforcing universal liberal values. Self-identified Liberal Internationalist Anne-Marie Slaughter¹⁵¹ defines the essence of the rule of law as "ordered liberty."¹⁵² At the international level however, that ideal involves a "continual tension between the requirement under international law that we respect *nations*, meaning governments, and our own democratic value of respecting all *peoples*."¹⁵³ It is here that Slaughter reveals her Liberal Internationalist beliefs that the reason for establishing the rule of law is identical at

¹⁴³ Koskenniemi, Martti, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *European Journal of International Law* 113 at 117

¹⁴⁴ Shklar, Judith N., *Legalism* (Harvard University Press, 1964) at 117

¹⁴⁵ *Ibid* at 117

¹⁴⁶ Posner, Eric A., *The Perils of Global Legalism* (University of Chicago Press, 2009) at 19

¹⁴⁷ *Ibid* at 25

¹⁴⁸ Higgins, Rosalyn, 'The ICJ, the United Nations System, and the Rule of Law,' *London School of Economics and Political Science* (13 November, 2006) <www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061113_Higgins.pdf> at 3

¹⁴⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* [2005] ICJ Rep 168

¹⁵⁰ *Ibid* at Par.3. Original emphasis

¹⁵¹ Washington Monthly, 'The Monthly Interview,' *Washington Monthly* (January/February, 2014) <http://www.washingtonmonthly.com/magazine/january_february_2014/ten_miles_square/the_monthly_interview_1048352.php>

¹⁵² Slaughter, Anne-Marie, *The Idea That Is America: Keeping Faith With Our Values in a Dangerous World* (Basic Books, 2007) at 36

¹⁵³ *Ibid* at 190. Original emphasis

both the municipal and international level: to achieve “a steady progression toward greater freedom of conscience, choice and country—first within America and then beyond our borders.”¹⁵⁴ This is the foundational principle of a Liberal Internationalist conception of IL:

At the most fundamental level, an image of the world as a projection of the United States means that international order, like domestic order, requires the rule of law. From this perspective multilateralism is nothing more than the internationalization of the liberal conception of the rule of law.¹⁵⁵

General accounts of “Wilsonianism,” as an equivalent tradition of thought, have focussed on democracy promotion as the “first principle,”¹⁵⁶ “most essential ingredient”¹⁵⁷ and “keystone”¹⁵⁸ of the tradition. Liberal Internationalism identifies democracy promotion as the conduit between the enjoyment of liberty by natural persons and an international system of law. In 1917 Elihu Root wrote that: “The world cannot be half democratic and half autocratic... If it is democratic, international law honored and observed may well be expected as a natural development of the principles which make democratic self-government possible.”¹⁵⁹ Adherents of all American ideal types recognise a national interest in the increasing democratisation of the globe, albeit with starkly divergent implications. However Liberal Internationalism is distinctive for democracy being constitutive of the rule of IL itself. Slaughter pithily asserts the central belief of Liberal Internationalism as being that: “the global rule of law depends on the domestic rule of law.”¹⁶⁰ Her belief is that liberal states adhere more consistently to the rule of law at both the national and international level in their relations with other liberal states.¹⁶¹ The conception is thus a utopian one for envisioning the creation of a world of liberal states mutually enforcing respect for IL.

The vision of taming global politics through law constitutes a common ground with the legalist conception of IL. Both positions are internationalist in the intention to create an ever deeper framework of international institutions governing global politics. However, this conception diverges significantly in identifying the role of American power and values as central to the project. Ikenberry advocates the establishment of “American ‘rule’” through “the provisioning of international rules and institutions and its willingness to operate within them.” In short: “Liberal order building is America’s distinctive contribution to world politics.”¹⁶² Constructing the legal system from this foundation ensures that IL is grounded in the hard won political bargains that have established American constitutional government.

¹⁵⁴ *Ibid* at 36

¹⁵⁵ Burley, Anne-Marie, ‘Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State’ in John Gerard Ruggie (ed), *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (Columbia University Press, 1993) at 144. See also Ikenberry, G. John, ‘Liberal Internationalism 3.0: America and the Dilemmas of Liberal World Order’ (2009) 7 *Perspectives on Politics* 71 at 71

¹⁵⁶ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 162

¹⁵⁷ Smith, Tony, ‘Wilsonianism After Iraq’ in G. John Ikenberry, Thomas J. Knock, Anne-Marie Slaughter & Tony Smith (ed), *The Crisis of American Foreign Policy: Wilsonianism in the Twenty-first Century* (Princeton University Press, 2009) at 58

¹⁵⁸ Slaughter, Anne-Marie, ‘Wilsonianism in the Twenty-first Century’ in G. John Ikenberry, Thomas J. Knock, Anne-Marie Slaughter & Tony Smith (ed), *The Crisis of American Foreign Policy: Wilsonianism in the Twenty-first Century* (Princeton University Press, 2009) at 97

¹⁵⁹ Root, Elihu, ‘The Effect of Democracy on International Law’ (1917) 11 *Proceedings of the Annual Meeting (American Society of International Law)* 2 at 166-167

¹⁶⁰ Slaughter at 246

¹⁶¹ Slaughter at 91. This is a variant of the much debated “democratic peace theory”: see Russett, Bruce, Christopher Layne, David E. Spiro & Michael W. Doyle, ‘The Democratic Peace’ (1995) 19 *International Security* 164

¹⁶² Ikenberry, G. John, ‘Liberal Order Building’ in Melvyn P. Leffler & Jeffrey W. Legro (ed), *To Lead the World: American Strategy after the Bush Doctrine* (Oxford University Press, 2008) at 86

Transnational Development of Global Governance

What unites legalism and Liberal Internationalism is a commitment to closing gaps in the law. The very notion that effective legal regimes *can* and *should* be crafted to respond to global challenges is “shaped by a liberal conception of the rule of law.”¹⁶³ What distinguishes Liberal Internationalism is the role of formalised legal authority in achieving that outcome. Whereas legalism preferences the codification of all internationally related legal rights at a global level, Liberal Internationalism turns to the “transnational legal processes” by which international standards are integrated and enforced at the level of US municipal law. For Harold Koh legal compliance is determined by a process whereby “public and private actors, including nation states, ...interact in a variety of fora to interpret, enforce, and ultimately internalize, rules of international law.”¹⁶⁴ In this view increasing establishment of non-arbitrary global governance is achieved through formal and informal processes by which “domestic decision-making becomes ‘enmeshed’ with international legal norms.”¹⁶⁵ A defining element of Liberal Internationalism that distinguishes it from legalism and every other American conception becomes the high value attached to symbolic support for IL short of formal accession to legal obligations – what one US legal policymaker has termed “dexterous multilateralism.”¹⁶⁶ For legalism this degrades IL by permitting deformed obligations, while for each of the alternative American conceptions it falsely suggests legal constraints beyond what the US is actually willing and able to accept.¹⁶⁷

Liberal Internationalism also welcomes the penetration of foreign and international legal decisions through American courts, even to the extent of interpreting the US constitution in light of universal liberal standards.¹⁶⁸ In terms of the policy goal of ensuring uniform compliance with IL, it will be preferable to limit the development of supranational legal authority where transnational processes provide a more effective form of global governance. The rule of IL requires that the US progressively works to close gaps in the doctrines and enforcement of IL through the full range of national and international processes that make law work. This deep commitment to the development of IL has often led Liberal Internationalists to view all alternative American conceptions as undifferentiated “IL sceptics” or what Spiro memorably called “new sovereigntists.”¹⁶⁹

Liberal Equality

The second rule of IL principle is that the equal access of natural persons to universal liberal freedoms trumps the formal equality of states as juridical legal persons. For Liberal Internationalism the purpose of IL is to uphold basic rights of “citizens rather than states as subjects,” which is “the

¹⁶³ Burley, Anne-Marie, ‘Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State’ in John Gerard Ruggie (ed), *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (Columbia University Press, 1993) at 145

¹⁶⁴ Koh, Harold H., ‘Jefferson Memorial Lecture: Transnational Legal Process after September 11th’ (2004) 22 *Berkeley Journal of International Law* 337 at 339; Koh, Harold H., ‘Is there a “New” New Haven School of International Law?’ (2007) 32 *Yale Journal of International Law* 559 at 567-569

¹⁶⁵ Koh, Harold H., ‘Trasnational Legal Process’ (1996) 75 *Nebraska Law Review* 181 at 204

¹⁶⁶ Schwartz, Eric P., ‘The United States and the International Criminal Court: The Case for Dexterous Multilateralism’ (2003) 4 *Chicago Journal of International Law* 223

¹⁶⁷ See criticism along these lines see: Lester, Simon, ‘Should the United States Use Treaties to Make the World “More Like Us”?’ (2013) 54 *Virginia Journal of International Law Digest* 1 at 8

¹⁶⁸ See Spiro, Peter J., ‘Treaties, International Law, and Constitutional Rights’ (2003) 55 *Stanford Law Review* 1999 at 2021-2025

¹⁶⁹ Spiro, Peter J., ‘The New Sovereigntists: American Exceptionalism and its False Prophets’ (2000) *Foreign Affairs* 9. See also Ohlin, Jens David, *The Assault on International Law* (Oxford University Press, 2014)

hallmark of a new and distinctively liberal conception of a world under law.”¹⁷⁰ To realise this principle, a distinction is drawn between the sovereignty of states who uphold liberal norms through democratic processes and those who do not. The principle of sovereign equality treats states as the legal persons of IL, and in so doing is “at least one remove, and often at two removes” from actual individuals.¹⁷¹ Accordingly states should be treated equally to the extent that their municipal law protects the liberal freedoms of their own citizens, but otherwise forfeit an equal claim to their sovereign integrity.¹⁷²

The classic demonstration of this principle is the 1999 NATO led Kosovo intervention, spearheaded by the Clinton administration absent UNSC authorisation. Although generally treated as a case of humanitarian intervention, the US never proffered this justification, nor accepted the establishment of such a legal doctrine.¹⁷³ However the action to prevent a “humanitarian catastrophe” revealed a willingness to displace the sovereign right of Yugoslavia (as it then was) to equally enjoy territorial integrity to the right of its threatened ethnic Albanian population to enjoy equality in basic human rights. In the *Princeton Project* Slaughter and Ikenberry recommended the principle of a “supermajority” of democratic states overriding the positive obligations of the UNSC where it “prevented free nations from keeping faith” with liberal principles.¹⁷⁴ On this basis multilateral institutions such as NATO could legitimately override UNSC decisions on the authorisation of force.¹⁷⁵ Slaughter later became a strong advocate for American intervention against Syrian President Bashar al-Assad following his alleged use of chemical weapons in the country’s civil war. In that case she externalised ideas drawn from Thomas Jefferson and the US Declaration of Independence to argue that the concept of sovereignty must include the duty of a government to serve its people.¹⁷⁶ By not doing so the “world would see Syrian civilians rolling on the ground, foaming at the mouth, dying by the thousands while the United States stands by.”¹⁷⁷ The “rejection of legalism” and attendant principle of sovereign equality reveals the greater commitment to IL founded in liberal equality.¹⁷⁸ In all of these cases exceptionalist beliefs reinforce confidence that the proven resilience of American

¹⁷⁰ Burley, Anne-Marie, ‘Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State’ in John Gerard Ruggie (ed), *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (Columbia University Press, 1993) at 146

¹⁷¹ Slaughter, Anne-Marie & Jose E. Alvarez, ‘A Liberal Theory of International Law’ (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 240 at 245

¹⁷² On the Kantian roots of this idea see: Desch, Michael C., ‘America’s Liberal Illiberalism: The Ideological Origins of Overreaction in US Foreign Policy’ (2008) 32 *International Security* 7 at 13

¹⁷³ For an account of the administration’s uncertainty over the applicable legal framework see Scharf, Michael P. & 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) at 166-167

¹⁷⁴ Slaughter, Anne-Marie & G. John Ikenberry, *Forging a World of Liberty Under Law: U.S. National Security in the 21st Century* (The Woodrow Wilson School of Public and International Affairs, 27 September, 2006) at 26. See the authors’ “Appendix A” for a draft charter for the Concert at 61 that proposes a two-thirds majority to authorise the use of force

¹⁷⁵ Slaughter, Anne-Marie, *The Idea That Is America: Keeping Faith With Our Values in a Dangerous World* (Basic Books, 2007) at 41 & 190-191

¹⁷⁶ Slaughter, Anne-Marie, ‘How the World Could—and Maybe Should—Intervene in Syria,’ *The Atlantic* (23 January, 2012)

¹⁷⁷ Slaughter, Anne-Marie, ‘Obama Should Remember Rwanda as He Weighs Action in Syria,’ *Washington Post* (28 April, 2013)

¹⁷⁸ Falk, Richard A., ‘Kosovo, World Order, and the Future of International Law’ (1999) 93 *American Journal of International Law* 847 at 852-853; Slaughter, Anne-Marie & G. John Ikenberry, *Forging a World of Liberty Under Law: U.S. National Security in the 21st Century* (The Woodrow Wilson School of Public and International Affairs, 27 September, 2006) at 24; Krisch, Nico, ‘More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law’ in Michael Byers & Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 142. For a contrary interpretation see Henkin, Louis, ‘Kosovo and the Law of “Humanitarian Intervention”’ (1999) 93 *American Journal of International Law* 824 at 824-825

constitutional democracy and its global role promoting these values is a stable foundation for equality in the international legal order.¹⁷⁹

Democratic Checks and Balances

The central role of democracy means that the integrity of IL depends far more on the effective separation of powers at the municipal rather than international level. There is no mechanism in the international legal system itself to ensure that international courts determine rights and duties solely on a judicial basis. The liberty guaranteed in American constitutional government is achieved not merely through the good faith of its participants, but by ensuring that: “Ambition must be made to counteract ambition.”¹⁸⁰ The primitive structure of the international legal system remains incapable of sustaining a design that ensures an effective separation of powers. This means that the replication of organs at the international level exercising the executive, legislative and judicial power of global governance is *not* sufficient to realise the rule of IL.¹⁸¹ Rather the pivotal role of the domestic rule of law provides a basis for democratic checks and balances on international judicial institutions to counter their inherent political weaknesses. The rule of IL is achieved by structuring legal power to be responsive to deficiencies in the international legal order.

In some formulations of a liberal legal order the legislative and judicial institutions establishing the domestic rule of law are projected onto the international plane.¹⁸² This was the legalist view of Wilson’s contemporaries, including Elihu Root in designing the PCIJ as the judicial body attached to the League of Nations. However the politically influential variant of Liberal Internationalism does not conceive of IL as centralised in these institutions, but rather as existing foremost at the state level, and only secondarily in international bodies. The modern Liberal Internationalist emphasis on transnational legal process relies on domestic courts internalising the liberal principles of IL and enforcing them domestically.¹⁸³ The surest strategy for promoting liberal values is to influence municipal law to uphold human rights law as the “core” of IL.¹⁸⁴

Because a primary focus of Liberal Internationalism is enhancing the municipal rule of law, it is always preferable that IL supports the capacity for upholding international legal standards in domestic courts first. International institutions should therefore only fulfil this role in a “backstopping” capacity when municipal law fails to uphold basic liberal values.¹⁸⁵ That is primarily where a state’s own legal institutions are incompatible with the rule of law, whether by design, or due to disruption in

¹⁷⁹ Slaughter, Anne-Marie, *The Idea That Is America: Keeping Faith With Our Values in a Dangerous World* (Basic Books, 2007) at 7-8

¹⁸⁰ Madison, James (1788) *Federalist No. 51*, cited in Mowle, Thomas S., *Allies at Odds?: The United States and the European Union* (Palgrave Macmillan, 2004) at 94

¹⁸¹ Mills, Alex & Tim Stephens, ‘Challenging the Role of Judges in Slaughter’s Liberal Theory of International Law’ (2005) 18 *Leiden Journal of International Law* 1 at 12-14

¹⁸² See *ibid* at 4-5

¹⁸³ See Koh, Harold H., ‘Jefferson Memorial Lecture: Transnational Legal Process after September 11th’ (2004) 22 *Berkeley Journal of International Law* 337

¹⁸⁴ Slaughter, Anne-Marie & Jose E. Alvarez, ‘A Liberal Theory of International Law’ (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 240 at 246

¹⁸⁵ The terminology of “backstopping” in IL is from Slaughter, who applies it specifically to describe the ICC complementarity regime: See Slaughter, Anne-Marie & William Burke-White, ‘The Future of International Law Is Domestic (or, the European Way of Law)’ (2006) 47 *Harvard International Law Journal* 327 at 339-340. See also Burke-White, William W., ‘A Community of Courts: Toward a System of International Criminal Law Enforcement’ (2002) 24 *Michigan Journal of International Law* 1. This follows the ordinary meaning of “something that is kept so that it can be used if it is needed”: Merriam-Webster, *Merriam-Webster Online: Dictionary and Thesaurus* <<http://www.merriam-webster.com/dictionary/backstop>>

the case of conflict. Slaughter describes the first part of this role as the “provision of a second line of defense when national institutions fail.” The second is “the ability of the international process to catalyze action at the national level.”¹⁸⁶ The political costs of IL intervening in a domestic legal matter are high enough that there is an incentive for states to bring municipal law into line with international obligations. This strengthens the rule of IL without needing to separate international legal power into formal institutions.

Illiberal Internationalism

Illiberal Internationalism actively engages with global rules and institutions to facilitate foreign policy objectives, but does so for the overriding purpose of strengthening US national security. The rule of law for Illiberal Internationalists means an effective framework of legal institutions facilitating US strategic autonomy and permitting it to diplomatically justify foreign policy according to flexible rules. The absence of a concern for the moral purpose of states has parallels with the *Realpolitik* and balance of power politics of Continental Europe.¹⁸⁷ In particular this preserves IL as a diplomatic tool between states rather than a means for vindicating the legal rights of natural persons. Former US Attorney General John Ashcroft rejected the legitimacy of the US Supreme Court holding that litigants had rights against the US government under the Geneva Conventions in *Hamdan v. Rumsfeld*.¹⁸⁸ Consistent with a rule of IL centred on sovereign states, Ashcroft responded that “most of those treaties within themselves have provisions which limit the parties that can raise them and enforce them to the high contracting parties, not to the citizens of various nations.”¹⁸⁹ This yields a fundamentally illiberal conception, addressing the interests of individual citizens only indirectly and in the aggregate through the principal focus on national security. This is distinct from Liberal Internationalism, which sees national security being indirectly served through a long term strategy of using law to foster a global environment that reproduces liberal values. The illiberal approach rejects this utopian vision, instead engaging with IL to manage rather than overcome security threats.

The conception is also distinguished by a clear separation between the illiberalism of international legal policy and national political values, with no necessary consistency between them. Indeed the primary importance of promoting American interests abroad has translated into a greater willingness to suppress liberal values at home where deemed necessary. The conception justifies greater deference to executive power to make IL policy decisions, unimpeded by the institutional oversight that is otherwise integral to protecting liberty at home.¹⁹⁰

¹⁸⁶ Slaughter, Anne-Marie & William Burke-White, ‘The Future of International Law Is Domestic (or, the European Way of Law)’ (2006) 47 *Harvard International Law Journal* 327 at 341

¹⁸⁷ It is on this basis that Dueck labels adherents of his equivalent set of beliefs as “American realists”: Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 33

¹⁸⁸ Referring to Article 75 of Protocol I to the Geneva Conventions of 1949: *Hamdan v. Rumsfeld* (2006) 548 U.S. 557 at 70-71 per Stevens J

¹⁸⁹ Responding to a question posed by the author: Ashcroft, John, ‘The Constitution and the Common Defense: Who Ensures America’s National Security?’, *Preserve the Constitution* (11 October, 2011)

<http://thf_media.s3.amazonaws.com/2011/mp3/2011-10-11-Constitution%20and%20the%20Common%20Defense.mp3> at 45:55-49:19. See also Kyl, Jon, Douglas J. Feith & John Fonte, ‘The War of Law: How New International Law Undermines Democratic Sovereignty’ (2013) 92 *Foreign Affairs* 115 at 118

¹⁹⁰ See Yoo, John C., *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (University of Chicago Press, 2005); Ku, Julian & John Yoo, *Taming Globalization: International Law, the US Constitution, and the New World Order* (Oxford University Press, 2012) at 113-149

Pragmatic Development of International Law

The Illiberal Internationalist preference is for a contingent international legal framework within which the US pragmatically determines the limits of IL. Contrary to both legalism and Liberal Internationalism, this approach embraces potential gaps and ambiguities in IL for enhancing discretion to exercise effective diplomatic power as a part of law itself. Michael Glennon has sought to define a “pragmatist” method that treats the development of IL as “a multifaceted method of problem-solving rather than a formula for finding a single, correct solution.”¹⁹¹ The first distinguishing belief is that “reliance upon formal legalist categories masks the decision-making process that actually occurs, which is situationally contingent.”¹⁹² Applying this principle to the vexed question of whether the Geneva Conventions applied to Al-Qaeda and Taliban detainees during the 2001 War in Afghanistan, Glennon considers the full range of factors including negative reactions of US allies, and the status of US prisoners of war seeking reciprocal protections. For Glennon “[w]hether such factors are, strictly speaking, legal or political is, to the pragmatist lawyer, beside the point: in the real world, these are, to varying degrees, the kinds of factors that international lawyers do take into account.”¹⁹³ This approach doesn’t however “open the door to a law-free zone,” since it relies on the default principle that “in the absence of a rule a State is deemed free to act.”¹⁹⁴ In this sense the “formalists are, perversely...right that there are no gaps in the international legal order.”¹⁹⁵ Anderson characterises this approach as the legal system “formalizing its pragmatism.”¹⁹⁶ In so doing pragmatism “serves to protect international law from itself,” which is threatened by formalism to become “ever more internally “pure” but ever more disconnected from the world of international politics where, ultimately, it must live.”¹⁹⁷ Using national security interests to clearly demarcate the sphere in which the US accepts the development of IL, and where it does not, becomes the only consistent and non-arbitrary basis for developing IL. The US is especially resistant to the value of signing treaties as a symbolic act without an intention to be bound by them, since this blurs the boundaries of the reach of IL. The US demonstrates fidelity to the rule of IL in the sense of complying with carefully adapted legal obligations, thereby reaping the advantages of operating according to law rather than naked power.

Pragmatic development approaches IL as a valuable tool used for arranging the relations between states, but otherwise lacking autonomous institutional force. Former Deputy Secretary of State Robert Zoellick argued that IL “can facilitate bargaining, recognise common interests, and resolve differences cooperatively. But international law, unlike domestic law, merely codifies an already agreed-upon cooperation.”¹⁹⁸ A specific example of this principle in action was a practice in the Pentagon during the early days of the ICTY of withholding images of the Srebrenica Massacre that would have provided crucial evidence in criminal trials. The rationale was that to do so could

¹⁹¹ Glennon, Michael J., *The Fog of Law: Pragmatism, Security, and International Law* (Woodrow Wilson Center Press, 2010) at 2

¹⁹² *Ibid* at 3

¹⁹³ *Ibid* at 20

¹⁹⁴ Applying the “freedom principle” from S.S. *Lotus*, *The (France v. Turkey)* (1927) No. 10 PCIJ Ser A at 44

¹⁹⁵ Glennon, Michael J., ‘The Road Ahead: Gaps, Leaks and Drips’ (2013) 89 *International Law Studies* 362 at 373

¹⁹⁶ Anderson, Kenneth, ‘Readings: Michael Glennon on the “Incompleteness” of International Law Governing the Use of Force,’ *Lawfare* (13 May, 2013) <<http://www.lawfareblog.com/2013/05/readings-michael-glennon-on-the-incompleteness-of-international-law-governing-the-use-of-force/>>

¹⁹⁷ *Ibid*

¹⁹⁸ Zoellick, Robert B., ‘A Republican Foreign Policy’ (2000) 79 *Foreign Affairs* 63 at 69

cause a political backlash within Bosnia and Herzegovina.¹⁹⁹ In other words legal policy was to support the tribunal pragmatically, but to resist the strict terms of its authority according to non-legal considerations for re-establishing peace and security. Similarly John Bellinger has endorsed a developing UNSC practice of altering formal treaty provisions on an ad hoc basis to address threats to international peace and security. Bellinger welcomes the “significant development” of “tailoring a specialized body of international law to better work in a specific set of circumstances.”²⁰⁰ Talmon responds critically within a legalist rubric that “adaptation” here is merely a euphemism for “abrogation” of formal treaty provisions pursuant to “a culture of exceptionalism” among Council members.²⁰¹ The practice accordingly “raises serious concerns from the point of view of the rule of law.”²⁰² From the Illiberal Internationalist perspective, however, such practice is entirely consistent with identifying the rule of IL in pragmatic developments that take account of underlying objectives and dynamics of the international legal system.

Hegemonic Privilege

The fact of American power preponderance precludes any international legal arrangement that presumes to level political power according to a robust form of sovereign equality. Rather the guiding principle is that IL should achieve either de jure or de facto privileges that acknowledge the reality of American power preponderance. Of the four ideal legal conceptions, exceptionalist beliefs remain weakest in this variant, and so any such privileges are grounded in the prudence of integrating preponderant power rather than a normative defence of American political culture. Prior to his tenure as Secretary of Defence, Chuck Hagel argued that “long-term security interests” are strengthened where international legal institutions are developed “as extensions of our influence, not as constraints on our power.”²⁰³ The rule of law will never be more than an idealistic aspiration if it requires powerful states to submit to the interests of weaker states as sovereign equals. Neither will it be effective where powerful states have an incentive to remain outside of the law. Rather IL should take a realistic approach to global power relations, and seek to structure them without shifting the balance of that power. In a sense equality means according states privileges commensurate to their unequal role in upholding the international legal order.²⁰⁴

The thinking is evident in Cogan’s concept of “operational noncompliance,” defined as noncompliance with parts of IL for the purpose of upholding the system as a whole through “bridging

¹⁹⁹ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 43

²⁰⁰ Bellinger III, John B., *Legal Adviser address to International Institute of Humanitarian Law in San Remo* (9 September, 2005) <<http://www.state.gov/s/l/2005/87240.htm>>. This power is authorised under *Charter of the United Nations* (1945), Art. 103: See Alvarez, José E., ‘Contemporary International Law: An Empire of Law or the Law of Empire’ (2008) 24 *American University International Law Review* 811 at 821

²⁰¹ Talmon, Stefan, ‘Adaptation of Treaties by the Security Council and the Rule of Law’ (2009) 103 *Proceedings of the Annual Meeting (American Society of International Law)* 249 at 249

²⁰² *Ibid* at 251

²⁰³ Hagel, Chuck, ‘A Republican Foreign Policy’ (2004) 83 *Foreign Affairs* 64 at 68

²⁰⁴ This has parallels to the International Relations theory of “hegemonic stability” which posits that “hegemony will lead to openness and stable regimes”: See Mastanduno, Michael, David A. Lake & G. John Ikenberry, ‘Toward a Realist Theory of State Action’ (1989) *International Studies Quarterly* 457 at 461; Snidal, Duncan, ‘The Limits of Hegemonic Stability Theory’ (1985) 39 *International Organization* 579

the enforcement gap created by inadequate community mechanisms of control.”²⁰⁵ The primitive nature of the international legal system weakens the integrity of law,²⁰⁶ mandating formally illegal actions of “law making and law termination”²⁰⁷ to make the system work. This principle becomes a defence for granting unequal legal privileges to the US in answering the question of the proper relationship between sovereign states. Cogan emphasises that “law is the congruence of policy, authority, and control, and, thus, without power there is no law.” Accordingly “international lawyers should acknowledge and take account of the special responsibilities of the powerful.”²⁰⁸ Exceptionalist beliefs are relevant to the extent that checks against the abuse of operational noncompliance are ultimately provided by the US itself as a state with “acculturation” consistent with rule of law values.²⁰⁹

Consent Based Division of Powers

Both legalist and Liberal Internationalist rule of IL conceptions turn to a general principle for ordering international legal powers. In the former case it is to separate powers and institutionalise independent judicial power, and in the latter case it is to exercise those powers at the domestic level where possible, and at the global level subject to democratic checks and balances where necessary. In the case of Illiberal Internationalism the configuration of powers is not predetermined, but is instead subject to the general principle that states are free to consent to international legal constraints, but cannot otherwise be bound.²¹⁰ The privileging of state sovereignty means that no obligations can be created except as strictly agreed to by the US government and ratified by constitutional procedures. Resistance to non-consensual legal authority reflects scepticism toward the idea that there are separate types of legal power exercised at the global level. The claim by international courts to be exercising independent “judicial” power is merely the act of real policymakers who represent states equally interested in protecting their relative power.²¹¹ Any reliance on the separation of powers to prevent abuse of power at the global level will itself pose a threat to US security. The principle extends to municipal courts directly exercising international judicial powers via “universal jurisdiction” which eliminates the requirement of consent.²¹²

The emphasis on consent has manifested in significant resistance by Illiberal Internationalism to the penetration of IL through domestic courts. Policymakers influenced by this conception have placed a heightened emphasis on the distinction between “self-executing” and “non-self-executing treaties.”²¹³ Under this doctrine the President’s constitutional power to enter into treaties does not

²⁰⁵ Cogan, Jacob Katz, ‘Noncompliance and the International Rule of Law’ (2006) 31 *Yale Journal of International Law* 189 at 191. This is clearly distinguished from “capacity-based” or “intentional” noncompliance based only on a “wilful decision to violate the law...based on the State’s calculation of its interests”: at 194

²⁰⁶ *Ibid* at 193

²⁰⁷ *Ibid* at 196

²⁰⁸ *Ibid* at 207

²⁰⁹ *Ibid* at 194

²¹⁰ Abebe, Daniel & Eric A. Posner, ‘The Flaws of Foreign Affairs Legalism’ (2010) 51 *Virginia Journal of International Law* 507 at 545

²¹¹ For an argument that greater independence *reduces* the effectiveness of international adjudication see Posner, Eric A. & Yoo, John C., ‘Judicial Independence in International Tribunals’ (2005) 93 *California Law Review* 1

²¹² See generally Crawford, James, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th ed, 2012) at 467. This objection has been equally applied to reject the legitimacy of US courts claiming a form of universal jurisdiction over other states under the *Alien Tort Statute* 28 U.S.C. § 1350: Bellinger III, John B., ‘The U.S. Can’t Be the World’s Court,’ *Wall Street Journal* (27 May, 2009) <<http://www.wsj.com/articles/SB124338378610356591>>

²¹³ The distinction was first established in *Foster v. Neilson* (1829) 27 U.S. 253. See Ku, Julian & John Yoo, *Taming Globalization: International Law, the US Constitution, and the New World Order* (Oxford University Press, 2012) at 87-112. This

create rights enforceable in US courts unless the treaty is designated as “self-executing” and thereby effective by its own force. Treaties deemed “non-self-executing” may not be invoked in the courts unless implemented through legislation passed by the US Congress. The distinction is an elementary principle in American law, but one subject to ongoing disagreement as to the indices of a self-executing treaty, and whether the supremacy clause of the US constitution creates a presumption that treaties are self-executing.²¹⁴ The Illiberal Internationalist approach favours a narrow interpretation of the doctrine, and even the reverse presumption that generally legislative consent must be given before treaty obligations agreed at the international level become enforceable in domestic courts.²¹⁵

Resistance to the non-consensual incorporation of IL into domestic legal rights is evident in Henry Kissinger’s characterisation of international adjudication as “being pushed to extremes which risk substituting the tyranny of judges for that of government.”²¹⁶ One expression is rejection of the otherwise settled principle that customary IL automatically forms part of the US federal common law.²¹⁷ Ashcroft disapprovingly cites reasoning in *Hamdan* that the US is bound by a customary legal obligation contained in a treaty it has declined to ratify.²¹⁸ For Ashcroft it was:

strange that a justice of the United States Supreme Court basically is arguing there are only two kinds of international treaties that ought to be appropriate to shape our behaviour: the ones that we have signed and the ones we haven’t signed. I think that carries the international law situation far beyond what is prudent and in the interests of the country.²¹⁹

Likewise Ku and Yoo reject judicial consideration of IL as undemocratic, and potentially a challenge to US sovereignty. They argue that “NGOs have used creative and effective litigation strategies to develop and enforce global governance regimes via the U.S. court system. Such litigation can result, and has resulted, in the adoption of an interpretation of international law over the opposition of the government’s chief foreign policy organ: the executive branch.”²²⁰ The penetration of IL may be rarely accepted where it is necessary to demonstrate a credible commitment to previous US consent,²²¹ but remains unlikely where national security is at stake.²²²

was evident across consecutive research interviews conducted by the author with legal policymakers who demonstrated Illiberal Internationalist ideas

²¹⁴ Bradley, Curtis A., *International Law in the U.S. Legal System* (Oxford University Press, 2nd ed., 2015) at 41-44. See especially the debate that followed the decision in *Medellín v. Texas* (2008) 491 U.S. 552: Bradley, Curtis A., ‘Agora: Medellín: Intent, Presumptions, and Non-Self-Executing Treaties’ (2008) 102 *American Journal of International Law* 540

²¹⁵ Yoo, John C., ‘Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution’ (1999) 99 *Columbia Law Review* 2210 at 2254-2257. Sloss draws the relevant distinction in a related way as being between “nationalists” who favour non-self-execution and “transnationalists” who favour self-execution: See Sloss, David L., ‘Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties’ (2012) 53 *Harvard International Law Journal* 135 at 137

²¹⁶ Kissinger, Henry, *Does America Need a Foreign Policy?: Toward a Diplomacy for the 21st Century* (Simon and Schuster, 2002) at 273

²¹⁷ Bradley, Curtis A. & Jack L. Goldsmith, ‘Customary International Law as Federal Common Law: A Critique of the Modern Position’ (1997) 110 *Harvard Law Review* 815. For the contrary interpretation see Henkin, Louis, ‘International Law as Law in the United States’ (1983) 82 *Michigan Law Review* 1555 at 1561

²¹⁸ Referring to Article 75 of Protocol I to the Geneva Conventions of 1949: *Hamdan v. Rumsfeld* (2006) 548 U.S. 557 at 70-71 per Stevens J

²¹⁹ Responding to a question posed by the author: Ashcroft, John, ‘The Constitution and the Common Defense: Who Ensures America’s National Security?’, *Preserve the Constitution* (11 October, 2011) <http://thf_media.s3.amazonaws.com/2011/mp3/2011-10-11-Constitution%20and%20the%20Common%20Defense.mp3> at 45:55-49:19

²²⁰ Ku, Julian & John Yoo, *Taming Globalization: International Law, the US Constitution, and the New World Order* (Oxford University Press, 2012) at 3-4

²²¹ The Bush 43 administration’s reaction to the ruling in *Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Rep 12 represents a key example of Illiberal Internationalist IL policy making concessions within municipal law for international institutional gains. The administration’s policy was however ultimately struck down by the Supreme Court in *Medellín v. Texas* (2008) 491 U.S. 552

²²² Guzman, Andrew T., ‘A Compliance-Based Theory of International Law’ (2002) 90 *California Law Review* 1823

Liberal Nationalism

Liberal *Internationalist* policy is founded on a belief that the surest guarantor of liberal values is fostering an international environment that complements hard-won freedoms at home. This turns on faith that the liberal norms comprising US constitutional government always prevail when set against the potentially illiberal influences of foreign and international law.²²³ Scepticism toward that claim is the basis for Liberal Nationalist legal policy, which honours liberalism by narrowly guarding American constitutional government against global governance. Whereas Liberal Internationalists believe a greater US role in international governance will strengthen democracy, Liberal Nationalists often see democracy and IL as being in opposition to one another.²²⁴ IL itself has a “democratic deficit,”²²⁵ so that to the extent of any conflict, IL should be subordinated to domestic laws with democratic legitimacy. This belief establishes a preference for elevating the role of the US Congress as a form of direct democratic accountability over the executive government’s control of IL policymaking. The Liberal Internationalist approach is therefore to disengage as far as possible from the positive obligations created by international legal rules and institutions, and to frame them as relevant only to the relations between other states. The rule of IL is realised through a legal system that remains faithful to legal positivist principles of state consent and the inviolability of sovereignty.

Consistent with the theorised weakness of this ideal type, few contemporary legal policymakers have advocated an American IL policy primarily in these terms. The ideology has a long tradition, however, extending back to the founding fathers’ beliefs that the US represented a break from the European “old order of diplomacy.”²²⁶ The outlier status of Liberal Nationalism is demonstrated in the wary reception toward 2012 Presidential candidate and then Congressman Ron Paul and his son Senator Rand Paul, each of whom has been categorised according to equivalent belief types.²²⁷ Both have cast themselves as “libertarian” candidates, and for this reason oppose US government intervention domestically and internationally as equally a threat to liberal values.²²⁸ The UN in particular is a threat for drawing the President to engage internationally, while providing authority to bypass congressional authority to force domestic compliance with UN standards.²²⁹ On this basis Ron Paul repeatedly presented a bill to the House of Representatives to end US membership of the UN for threatening American values “from the beginning,”²³⁰ while his son has made similar gestures in the Senate.²³¹

This legal conception frequently aligns with the two illiberal American conceptions, with all united by a scepticism toward the utopian vision of legalism and Liberal Internationalism. Legal policymakers advocating quite illiberal policies have accordingly tended to justify municipal

²²³ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 183

²²⁴ See Rubinfeld, Jed, ‘Commentary: Unilateralism and Constitutionalism’ (2004) 79 *New York University Law Review* 1971 at 2007

²²⁵ Kyl, Jon, Douglas J. Feith & John Fonte, ‘The War of Law: How New International Law Undermines Democratic Sovereignty’ (2013) 92 *Foreign Affairs* 115 at 121, citing German Foreign Minister Joschka Fischer (2000)

²²⁶ Varg, Paul A., *Foreign Policies of the Founding Fathers* (Penguin Books Inc, 1970) at 3

²²⁷ Mead, Walter R., ‘The Tea Party and American Foreign Policy - What Populism Means for Globalism’ (2011) 90 *Foreign Affairs* 28 at 40; Dueck, Colin, ‘The Rand Paul Bubble,’ *Foreign Affairs* (29 January, 2014)

<<http://www.foreignaffairs.com/articles/140697/colin-dueck/the-rand-paul-bubble?nocache=1>>

²²⁸ Paul, Ron, *A Foreign Policy of Freedom* (Ludwig von Mises Institute, 2007) at i

²²⁹ *Ibid* at 131-132

²³⁰ See also *American Sovereignty Restoration Act of 2009*, H.R. 1146 (2009), introduced 24 February, 2009; Paul, Ron, *A Foreign Policy of Freedom* (Ludwig von Mises Institute, 2007) at 133

²³¹ See S.Amdt.381 to S.Con.Res.8 (2014)

consequences of their positions consistently with Liberal Nationalism. Bradley and Goldsmith have strongly supported pragmatic US engagement with IL, yet argue that the automatic incorporation of customary IL into American municipal law “is in tension with basic notions of American representative democracy.”²³² The danger is that law derived from the “views and practices of the international community” is “neither representative of the American political community nor responsive to it.”²³³ Similarly Ku and Yoo warn that the pressure to conform to international legal obligations “could undermine the existing balance of powers” between the three branches of US federal government.²³⁴ In these cases Illiberal Internationalism is treated as complementary rather than in competition to Liberal Nationalism, since each has a different jurisdictional focus.

The status of Liberal Nationalism as a discrete set of beliefs is apparent however in cases where it is incompatible with illiberal values. Somewhat incongruously, the centrality of liberal values leads adherents of this conception to emphasize IL as a *constraint* where it corrects US government actions seen to erode liberty.²³⁵ During the 2012 Presidential campaign Ron Paul notably made one of the only supportive statements about IL during the series of Republican candidate debates. Contrary to other leading candidates, he spoke out against the Bush 43 administration’s practice of waterboarding, which he labelled as “torture.”²³⁶ His reasoning was that it was “illegal under international law and under our law...and is really un-American to accept on principle that we will torture people that we capture.”²³⁷ This perhaps seems contradictory given Paul’s strong stance against the UN, but logical when read as an implication of Paul’s own conception of the rule of IL as grounded in liberty. Conversely, otherwise illiberal policymakers who have drawn upon Liberal Nationalist arguments to defend American sovereignty have been among the strongest advocates of the legal right to engage in forms of torture.²³⁸

Defensive Development of International Law

The key interest of Liberal Nationalism is limiting the reach of IL so that it does not encroach on the integrity of American constitutional government. IL is supported primarily as a defensive framework that allows states to operate as autonomous political units. The rule of IL is therefore advanced by developing non-arbitrary legal rules necessary to uphold the stability of global relations, but not with any view to shifting the legal rights and obligations of American citizens. This creates scepticism toward institutions of global governance, which necessarily take up functions otherwise left to states themselves. Rubinfeld’s scepticism of IL as a challenge to US constitutional government is claimed

²³² Bradley, Curtis A. & Jack L. Goldsmith, ‘Customary International Law as Federal Common Law: A Critique of the Modern Position’ (1997) 110 *Harvard Law Review* 815 at 857

²³³ *Ibid* at 857. See also Yoo, John C., ‘Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution’ (1999) 99 *Columbia Law Review* 2210 at 2231; Danchin, Peter G., ‘Beyond Rationalism and Instrumentalism: The Case for Rethinking US Engagement with International Law and Organization’ (2008) 28 *SAIS Review* 79 at 81

²³⁴ Ku, Julian & John Yoo, *Taming Globalization: International Law, the US Constitution, and the New World Order* (Oxford University Press, 2012) at 4

²³⁵ The support of some members of the Bush Administration for the decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) requiring compliance with the Geneva Conventions is arguably a case of Liberal Nationalist support for the penetration of IL to correct illiberal federal government actions: Taft IV, William H., *Interview with Author* (22 November, 2011)

²³⁶ Council on Foreign Relations, ‘Republican Debate Transcript, South Carolina, November 2011,’ *Campaign 2012* (12 November, 2011) <<http://www.cfr.org/united-states/republican-debate-transcript-south-carolina-november-2011/p26540>>

²³⁷ *Ibid*

²³⁸ See Yoo, John C., *War by Other Means: An Insider’s Account of the War on Terror* (Atlantic Monthly Press, 2006) at 155-187

not to be a “categorical” rejection of law.²³⁹ Rather he accepts the legitimacy of the US making treaties provided “the agreement is narrow in scope, and when it creates no third-party, supranational entities empowered to supervise U.S. policy or to make, interpret or apply U.S. law.”²⁴⁰ In its strongest form, a Liberal Nationalist policy would entail isolating the US from negotiations to establish international institutions and treaty regimes, and engage only to oppose any attempts to encroach on US autonomy.

Inviolable Sovereignty

The principle of sovereign equality as a shield is central to the Liberal Nationalist rule of law. It is precisely the absence of political and normative equality between sovereign states that necessitates a framework of international legal rules to maintain political separation. IL should uphold sovereign equality in the limited sense of reciprocal rights and duties by America and its global counterparts not to interfere in one another’s affairs. Because the US system is *sui generis* this equality does not however extend to a positive obligation to be an equal participant in multilateral institutions. In this sense claims that the US is an outlier for electing to stay outside of the landmines convention and Kyoto protocol do not breach the conception of sovereign equality. Rather equality is expressed only as a negative obligation to respect the inviolability of US sovereignty.

The logic of this principle extends outward to constrain the US itself in breaching the sovereignty of other states. Perennial third-party Presidential candidate Ralph Nader²⁴¹ has levelled strident criticism at President Obama for taking actions that “violate international law because they infringe upon national sovereignties with deadly drones, flyovers and secret forays by soldiers.”²⁴² In an analysis by Ron Paul’s own think tank, Flynt and Leverett criticise the Obama administration’s argument that under the Nuclear Non-proliferation Treatyw Iran has no legal right to enrich uranium, even for civilian purposes. That interpretation creates a basis for constraining Iran through IL for breaching purported obligations. Flynt and Leverett disagree, arguing that “the right to indigenous technological development — including nuclear fuel-cycle capabilities, should a state choose to pursue them — is a sovereign right.”²⁴³ No breach of IL has therefore occurred allowing the US to intervene internationally. These arguments contradict the assumption of hegemonic international law and realist political scholarship that the US will always seek to shape IL to enhance its autonomy. For Nader interpreting sovereignty as a constraint on US action draws back to a demand that “the United States comply with international law, and our constitution on the way to ending the American Empire’s

²³⁹ Rubinfeld, Jed, ‘Commentary: Unilateralism and Constitutionalism’ (2004) 79 *New York University Law Review* 1971 at 2021

²⁴⁰ *Ibid* at 2023-2024

²⁴¹ Mead and Dueck both identify Nader with their equivalent belief type: Mead, Walter R., ‘Do Jeffersonians Exist?’, *The American Interest* (8 January, 2010) <<http://www.the-american-interest.com/2010/01/08/do-jeffersonians-exist/>>; Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 32

²⁴² Nader, Ralph, ‘Obama to Putin: Do as I Say Not as I Do,’ *The Nader Page* (21 March, 2014) <<https://blog.nader.org/2014/03/21/obama-putin-say/>>

²⁴³ Leverett, Flynt & Hillary M. Leverett, ‘America’s Lead Iran Negotiator Misrepresents U.S. Policy (and International Law) to Congress,’ *Ron Paul Institute for Peace and Prosperity* (5 November, 2013) <<http://ronpaulinstitute.org/archives/featured-articles/2013/november/05/america%E2%80%99s-lead-iran-negotiator-misrepresents-us-policy-%28and-international-law%29-to-congress.aspx>>. For a full treatment see Leverett, Flynt, ‘The Iranian Nuclear Issue, the End of the American Century, and the Future of International Order’ (2013) 2 *Penn State Journal of Law & International Affairs* 240

interventions worldwide.”²⁴⁴ Paul’s institute seeks to constrain US foreign policy by denying the Obama administration’s “main motive” of seeking “to maximize America’s freedom of unilateral military initiative and, in the Middle East, that of Israel.”²⁴⁵ In both cases states are treated as sovereign equals in law precisely to protect the integrity of the American polity against foreign entanglement.

Vertical Separation of Powers

For Liberal Nationalism international and municipal law exist as two separate realms of legal authority, and therefore should not conflict as a matter of course. IL governs the relations between states, while municipal law governs the relations between natural persons. The Liberal Nationalist rule of IL entails a vertical separation between international and domestic judicial power, rather than a horizontal separation between international executive, legislative and judicial powers. Legalist conceptions emphasise the separation and institutionalisation of international judicial power, while vertically integrating international judicial power as a check on domestic courts. Liberal Nationalism will in contrast strongly resist a design purporting to fuse the judicial power of international courts to American law. The constraints of IL are ultimately set by real policymakers who represent particularistic state interests and political values foreign to the traditions defining US constitutional government. At the same time the nationalist stance of this conception resists the legitimacy of any legal design capable of drawing the US into international processes. To the suggestion that the US could democratically elect to submit to such constraints Rubinfeld provocatively warns that the “crucial transition to beware is the moment when international cooperation shifts to international governance... A person can sell himself into slavery voluntarily, but he will still be a slave thereafter.”²⁴⁶ In this way IL continues to operate as a framework for the basic structure of global relations without unsettling constitutionally guaranteed liberal values at the national level.

Illiberal Nationalism

Finally Illiberal Nationalism rejects the strategic value of a freestanding body of IL altogether, engaging only to defend national security, and to protect non-universal cultural values. More than any of the other ideal types, Illiberal Nationalists are defined by a minimalist conception of IL, and opposition to the creation of international judicial power specifically. In this tradition former US Ambassador to the UN John Bolton asserted that any submission to IL “is the first step to abandoning the United States of America. International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law.”²⁴⁷ The conception is influenced by pre-enlightenment worldviews

²⁴⁴ Nader, Ralph, ‘Obama to Putin: Do as I Say Not as I Do,’ *The Nader Page* (21 March, 2014)

<<https://blog.nader.org/2014/03/21/obama-putin-say/>>

²⁴⁵ Leverett, Flynt & Hillary M. Leverett, ‘America’s Lead Iran Negotiator Misrepresents U.S. Policy (and International Law) to Congress,’ *Ron Paul Institute for Peace and Prosperity* (5 November, 2013) <<http://ronpaulinstitute.org/archives/featured-articles/2013/november/05/america%E2%80%99s-lead-iran-negotiator-misrepresents-us-policy-%28and-international-law%29-to-congress.aspx>>

²⁴⁶ Rubinfeld, Jed, ‘Commentary: Unilateralism and Constitutionalism’ (2004) 79 *New York University Law Review* 1971 at 2022-2023

²⁴⁷ Bolton, John R., ‘Is There Really “Law” in International Affairs?’ (2000) 10 *Transnational Law & Contemporary Problems* 1 at 48; Bolton, John R., *Surrender Is Not an Option: Defending America at the United Nations* (Simon & Schuster, 2007) at 86

of order based on folk wisdom and tradition.²⁴⁸ Adherents of Mead's equivalent belief type maintain a fundamental preference for the "rule of custom" over the international rule of law.²⁴⁹ Former acting US Attorney-General and federal judge Robert Bork criticised purported international legal rules and institutions as an expression of global anti-Americanism aimed at eroding both American moral standing and national security.²⁵⁰ IL enthusiasts are characterised as liberal elites who, consistent with legalism and Liberal Internationalism, are in search of "transcendent principles and universalistic ideals."²⁵¹ He identified both himself and the "great mass of citizens" with a contrary conception centred on "particularity—respect for difference, circumstance, tradition, history, and the irreducible complexity of human beings and human societies."²⁵² These values form the populist heart of Illiberal Nationalism which is incompatible with the intentionally elitist objective in utopian legal conceptions of removing popular passions from foreign policy.²⁵³

The conception is distinct from Illiberal Internationalism to the extent that it interprets IL through substantive cultural values at all. Particularistic values also distinguish the conception from Liberal Nationalism and its grounding in liberal American government. Ignatieff observes that Senator Jesse Helms and Southern senators generally have made the US unique among its peers for having "a strong domestic political constituency opposed to international human rights law on issues of family and sexual morality."²⁵⁴ Bork specifically criticised the transformation of modern IL into "a body of rules about the rights of individuals against their own nations."²⁵⁵ He rejected the legitimacy of courts reading contemporary "universal" values into the constitution in order to strike down traditional moral prohibitions.²⁵⁶ Doing so may ensure "we are all more free" but would be the improper freedom "to act in ways that most of us had decided were unacceptable."²⁵⁷ Ultimately there "can be no authentic rule of law among nations until they have a common political morality or are under a common sovereignty," neither of which is at hand.²⁵⁸ Illiberal Nationalist IL policy is therefore prepared to act against "short-term interest" in order to diminish the role of IL as a device which threatens to "constrict the United States."²⁵⁹

Paul Wolfowitz, Deputy Security of Defence under President Bush 43, has expressed views which ultimately deny the status of IL as a uniquely authoritative approach to international politics.²⁶⁰ In a discussion of the 2003 Iraq War he perceived a "flaw in public understanding today, to

²⁴⁸ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 227

²⁴⁹ *Ibid* at 246

²⁵⁰ Bork, Robert H, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003) at 15 & 21; Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 245

²⁵¹ Bork, Robert H, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003) at 3

²⁵² *Ibid* at 3-4

²⁵³ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 225-226. See also Rabkin, Jeremy A., *Law without Nations?: Why Constitutional Government requires Sovereign States* (Princeton University Press, 2005) at 248-250

²⁵⁴ Ignatieff, Michael, 'Introduction: American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) at 19-20

²⁵⁵ Bork, Robert H, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003) at 31 & 50

²⁵⁶ Such as those relating to homosexuality, abortion rights and women's rights: See *ibid* at 5

²⁵⁷ *Ibid* at 12

²⁵⁸ *Ibid* at 47

²⁵⁹ Bolton, John R., cited in United States Senate, Committee on Foreign Relations, *The nomination of John R. Bolton to be U.S. Representative to the United Nations with rank of ambassador and U.S. Representative to the United Nations Security Council and U.S. Representative to sessions of the United Nations General Assembly during his tenure of service as U.S. Representative to the United Nations*, 1st Session 109th Congress (2005) at 53

²⁶⁰ Mead identifies Wolfowitz as advancing ideas that "resonate strongly" with his equivalent belief type: Mead, Walter R., 'Email from Walter Russell Mead to James Fallows,' *The Atlantic* (27 December, 2001) <<https://www.theatlantic.com/past/docs/unbound/fallows/jf2001-12-06/mead3.htm>>

characterise anything that's not multilateralism to the nth degree, as unilateralism...which is very often, I would say almost invariably, ineffective." In this context "multilateralism to the nth degree" referred to laws on the use of force, about which he wondered "why we're so pleased that we had a UN resolution" when a strategic rationale existed independently of legal authorisation.²⁶¹ He dismissed current rules as "going to the United Nations, or previously the League of Nations, to get a unanimous vote to do nothing, or whatever it is that those organisations do."²⁶² When probed about the inconsistency of this argument with US legal obligations Wolfowitz reiterated that legality is simply a form of "multilateralism," and therefore "if you believe that unless 140 countries are participating it's not multilateral, then I just have to take strong exception to that definition of multilateralism."²⁶³

Permissive Development of International Law

For Illiberal Nationalism the development of global governance represents growing suppression of American sovereignty and its exceptional political culture. The desire to progressively develop IL is primarily a strategy of global adversaries to constrain the US by dictating international rights and duties without legitimate authority. In Bork's view IL is part of a "transnational culture war" in which liberal elites seek to circumvent popular will as expressed in democratic institutions.²⁶⁴ Illiberal Nationalists aggressively oppose any claim to constrain US global autonomy through IL, particularly in areas such as military policy where the US maintains a material advantage. Here Bork argued that it was one of the "great deceptions practiced by proponents of international law that there is something deserving the name of 'law' by which the use of armed force between nations can be controlled."²⁶⁵ Illiberal Nationalists diverge from Illiberal Internationalists in being willing to incur the short term diplomatic and strategic costs of conspicuously opposing IL. In this regard Bodansky noted that Bork was clearly distinguished from Goldsmith and Posner for viewing IL as foremost a constraint rather than tool for American foreign policy.²⁶⁶

Where Illiberal Nationalists do engage with IL they seek to interpret IL permissively to deny that it has any possible constraining effect on American foreign and domestic policy. The view that IL is "infinitely flexible and indeterminate"²⁶⁷ sustains a strategy of engaging with the rhetorical form and language of IL, while rejecting accepted conventions of international legal reasoning drawn from non-American sources. The presumptively arbitrary constraints of IL are thereby neutralised through permissive interpretations that privilege national interests. In relation to treaties this does not mean flagrant breach of obligations, but rather that Illiberal Nationalists "hesitate to ratify a treaty if they felt that at a later date the treaty would either limit American freedom of action or put the US in the position of having to break its freely given word to achieve some necessary goal."²⁶⁸ Equally however adherents will "insist on being the sole and final judge of whether they had kept or broken their

²⁶¹ Here referring specifically to the UN authorised intervention in Libya commencing 19 March, 2011

²⁶² Wolfowitz, Paul, *In Uncertain Times: American Foreign Policy after the Berlin Wall and 9/11* (13 October, 2011) <<http://www.wilsoncenter.org/event/uncertain-times-american-foreign-policy-after-the-berlin-wall-and-911>> at [41:30]

²⁶³ In response to a question posed by the author: *ibid* at [1:32:14-1:35:17]

²⁶⁴ Bork, Robert H, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003) at 5-6 & 11

²⁶⁵ *Ibid* at 38

²⁶⁶ Bodansky, Daniel, 'International Law in Black and White' (2006) 34 *Georgia Journal of International and Comparative Law* 6 at 291-292

²⁶⁷ Bork, Robert H, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003) at 44

²⁶⁸ Mead, Walter R., *Personal Communication with Author* (19 January, 2015)

word,”²⁶⁹ thereby leaving little in the law capable of constraining ambition. President George W. Bush sought to redefine UN powers in entirely permissive terms in 2002 by labelling it “irrelevant” unless it sanctioned an otherwise illegal use of force in Iraq.²⁷⁰ Likewise the notorious “torture memos” sought to alter a well settled definition of “torture” by adopting legalistic phrasing from an unrelated healthcare law to conclude that the prohibited infliction of “severe pain” was only that associated with “death, organ failure, or serious impairment of body functions.”²⁷¹ This was rejected by Illiberal Internationalist lawyers such as Jack Goldsmith, among other senior legal policymakers, for failing to follow any accepted international conventions for interpretation.²⁷² Nevertheless, each of these cases remained consistent with the principle of permissively developing IL to remove any possible encumbrance on American foreign policy

Relative Sovereignty

For Illiberal Nationalists the principle of sovereign equality is foremost an attempt to artificially reduce the legitimate advantages afforded by US power. The mischief is to create what Bork refers to as a false “moral equivalence” that prevents the US from distinguishing between democratic and tyrannous regimes.²⁷³ Phyllis Schlafly colourfully denounced President Clinton’s enthusiasm for international treaties by invoking Saint Paul’s Second Letter to the Corinthians: “Be ye not unequally yoked together with unbelievers, for what fellowship hath righteousness with unrighteousness?”²⁷⁴ This belief is the foundation of relative sovereignty, where IL should be developed to recognise degrees of sovereignty based on the threat states pose to US national security and cultural values. Ronald Reagan’s Ambassador to the UN Jeane Kirkpatrick declared, in relation to the rule of IL, that “we are as committed to that proposition today as ever in our history.”²⁷⁵ Her defence of US intervention in Nicaragua was expressed in Illiberal Nationalist terms however, according to which the principle of “equal application of the law” was flawed for assuming that “all parties want the same thing, that what they really want is peace.” In circumstances where Nicaragua was seen to defy that assumption, the US could not “feel bound to unilateral compliance with obligations which do in fact exist under the [UN] Charter, but are renounced by others. This is not what the rule of law is all about.”²⁷⁶

The idea of states enjoying sovereignty only commensurate to their global standing has been expressed more recently in the concept of “rogue states.”²⁷⁷ The *National Security Strategy 2002* defined the attributes of “rogue states,” including that they “display no regard for international

²⁶⁹ *Ibid*

²⁷⁰ Bush, George W., *President’s Remarks at the United Nations General Assembly* (12 September, 2002) <<http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>>

²⁷¹ See Bybee, Jay S., ‘Re. Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A,’ *Memorandum for Alberto R. Gonzales, Counsel to the President* (1 August, 2002) <<http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf>>

²⁷² Goldsmith, Jack L., *The Terror Presidency: Law and Judgment inside the Bush Administration* (W.W. Norton & Co, 2007) at 165-166; Taft IV, William H., ‘Memorandum from William H. Taft, IV to Alberto R. Gonzales (2 February, 2002)’ in Karen J. Greenberg & Joshua L. Dratel (ed), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005)

²⁷³ Bork, Robert H, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003) at 46

²⁷⁴ Schlafly, Phyllis (1998), cited in Lieven, Anatol, *America Right or Wrong: An Anatomy of American Nationalism* (Oxford University Press, 1st paperback ed, 2005) at 16

²⁷⁵ Kirkpatrick, Jean J., ‘Law and Reciprocity’ (1984) 78 *Proceedings of the Annual Meeting (American Society of International Law)* 59 at 67

²⁷⁶ *Ibid* at 67

²⁷⁷ Miles, Alex, *US Foreign Policy and the Rogue State Doctrine* (Routledge, 2013) at 113; Cosnard, Michel, ‘Sovereign Equality - “The Wimbledon Sails On”’ in Michael Byers and Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 126-127

law...and callously violate international treaties to which they are party” and that they “reject basic human values and hate the United States and everything for which it stands.”²⁷⁸ Despite being couched in terms of IL the rogue state concept provided the rationale for the so-called “Bush Doctrine” of a right to “pre-emptive” self defence, contrary to any generally accepted legal interpretation.²⁷⁹ The heart of the doctrine can be interpreted as a claim that states exhibiting proscribed attributes were “unlike” the US, and therefore enjoyed a relative diminution in sovereignty. Benvenisti suggests that the doctrine upholds the principle of “reciprocity” in relation to states who fail to mutually honour foundational obligations of the international legal system.²⁸⁰

The notion of relative sovereignty has clear parallels with Nazi era legal theorist Carl Schmitt, who envisioned a bifurcation of legal personality between the full rights enjoyed by “civilised” European states and the lesser rights of states deemed otherwise.²⁸¹ Scheuerman’s review of the Bush 43 response to the “War on Terror” goes so far as to suggest that “anyone familiar with Schmitt’s work on international law occasionally finds herself wondering whether the White House playbook for foreign policy might not have been written by Schmitt or at least by one of his followers.”²⁸² This is consistent with Simpson’s observation that states have long been “differentiated in law according to their moral nature, material and intellectual power, ideological disposition or cultural attributes.”²⁸³ Powerful states have adopted a stance of “anti-pluralism” to reduce the sovereign rights of “outlaw states” deemed “mad, bad or dangerous.”²⁸⁴ In a sense all such determinations by Illiberal Nationalism become a claim to respect sovereignty under IL in proportions equal to the threat each state poses to US national security and values.

Municipal Supremacy

The straightforward ordering principle for Illiberal Nationalism is supremacy of municipal over international legal powers. In a 2000 address to the UNSC Senator Helms declared: “We abide by our treaty obligations because they are the domestic law of our land, and because our domestic leaders have judged that the agreement serves our national interest. But no treaty or law can ever supersede the one document that all Americans hold sacred: the U.S. Constitution.”²⁸⁵ A nationalist focus translates into recognition of municipal authority as the only valid source of legal obligation, and IL only to the extent that it is transformed to effectively become domestic legal authority. All actions taken by states at a global level are ultimately self-interested exercises of power, however dressed up in legal terminology or procedures. The rule of IL is therefore not advanced through attempts to

²⁷⁸ The White House, *The National Security Strategy of the United States of America 2002*, The White House (2002) at 14

²⁷⁹ *Ibid* at 15; Meiertöns, Heiko, *The Doctrines of US Security Policy: An Evaluation under International Law* (Cambridge University Press, 2010) at 179-224

²⁸⁰ Benvenisti, Eyal, ‘The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies’ (2004) 15 *European Journal of International Law* 677 at 694-695

²⁸¹ See Schmitt, Carl, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press Publishing, 2003) at 94-95 & 292. For a sample list of publications analysing the legal framework of the “War on Terror” in these terms see: Ralph, Jason, ‘The Laws of War and the State of the American Exception’ (2009) 35 *Review of International Studies* 631 at 631, n.1

²⁸² Scheuerman, William E., ‘International Law as Historical Myth’ (2004) 11 *Constellations* 537 at 537

²⁸³ Simpson, Gerry J., *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004) at 6

²⁸⁴ *Ibid* at xi-xii

²⁸⁵ Cited in Helms, Jesse, *Here’s Where I Stand: A Memoir* (Random House, 2005) at 298. See Krisch, Nico, ‘More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law’ in Michael Byers & Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 165-166

differentiate and separate forms of power and then exercise them through independent international institutions. Rather American interests are best served by continuing to conduct foreign policy solely through national institutions. For Illiberal Nationalists the “insidious appeal of internationalism”²⁸⁶ is that IL advocates have sought to have “liberal views adopted abroad and then imposed in the United States.”²⁸⁷ The role of international courts in this process is aimed at “the wholesale reconstruction of American society” according to views antithetical to the traditions that define the American people.²⁸⁸ The proper policy approach toward institutionalised global judicial power is therefore to progressively restrict its influence over American government, and ultimately its relevance to questions of international politics.

CHAPTER CONCLUSION

What unifies the four American conceptions of the rule of IL is the belief that the US is *not* a like case in international legal matters. Each of the ideal type conceptions in some way draws upon exceptionalist beliefs that justify greater autonomy and unequal treatment as a principled position for the US within the international legal system. The legalist principle of sovereign equality – that all states enjoy equal legal personality without reference to their international power – is itself founded on a conscious legal fiction that all states are “like cases.” Yet for that reason the presumption is inconsistent with conceptions of law that incorporate policy considerations about America’s role in the operation of the legal system itself. Krisch concluded that “the hierarchical superiority of the United States is either inconsistent with sovereign equality, or – if one wants to defend hierarchy – sovereign equality has to be abandoned as a principle of international law.”²⁸⁹ Any belief in the unequal normative status of the US entails the fiction of sovereign equality falling away in order to advance the rule of IL. Likewise a belief in the unequal American contribution to upholding the system requires that this fact be reflected in the foundations of IL.²⁹⁰ In these ways the principle that “like cases are treated alike” is filtered through American foreign policy ideology to reconcile the rule of IL with defending legal privilege.

Each of the competing conceptions entails a distinctive definition of American national interests, and a strategic formulation for advancing them through law. O’Connell defends her Liberal Internationalism by challenging the Illiberal Internationalism of Goldsmith and Posner, not because they err doctrinally, but because “if the authors of this and other attacks on international law believe they are acting in the interest of the United States, or any state, they are mistaken.”²⁹¹ National interests underpinning the concept of law remain contested, and in a way structured by foreign policy ideology. Each formulation set out in this chapter is founded on an alternative understanding of the

²⁸⁶ Bork, Robert H, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003) at 22

²⁸⁷ *Ibid* at 16

²⁸⁸ Nisbet, Robert (1982), cited in *ibid* at 10

²⁸⁹ Krisch, Nico, ‘More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law’ in Michael Byers & Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) at 174

²⁹⁰ See Byers, Michael & Georg Nolte, *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003)

²⁹¹ O’Connell, Mary Ellen, *The Power and Purpose of International Law* (Oxford University Press, 2008) at 14. See Goldsmith, Jack L. & Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005)

purpose of IL in relation to American foreign policy, and can therefore only be understood in these terms. Disaggregating competing conceptions of the rule of IL into constitutive elements provides a model for testing the coherence or otherwise of American IL policy.

The meaning of “coherence” in the ICC case that follows becomes that a legal policymaker’s stance on any one of the rule of IL elements is a reliable indicator of positions taken on the remaining two elements. Identifying an administration’s commitment to pragmatic development of the ICC’s design and powers, for example, will suggest a corresponding commitment to hegemonic privilege and a division of international powers according to consent. Actual policy outcomes within each observation may well demonstrate contradictions due to compromises between competing ideologies, but tracing decision-making processes can be expected to reveal ideological coherence in legal conceptions of the ICC as held by identified American policymakers.

Part II: Contesting Global Legal Power through the ICC

CLINTON ADMINISTRATION 1993-2000

The two terms of President Bill Clinton coincided with the most decisive years for the ICC as the project progressed from a preliminary ILC report in 1992¹ to a foundational treaty signed by 139 countries by the end of 2000.² In 1993 the project consisted merely of provisional agreements by the Bush 41 administration to advance the court's establishment. The central task for the new administration was accordingly to negotiate with other states to finalise the ICC's function and design. These years were also notable for persistent allegations of contradictory policy: that the US was most prominent ICC advocate in the early years; conspicuously voted against the final treaty concluded in 1998; then ultimately signed while warning against Senate ratification.³ This therefore raises the central question of how legal scholarship can best interpret these apparent contradictions in American IL policy.

International opposition to US policy was expressed in clear legalist terms by NGOs, who occupied a uniquely influential and officially sanctioned position in developing the court.⁴ Since the earliest days the peak body for these NGOs has been *The Coalition for the International Criminal Court* ("CICC"), which has dedicated itself to achieving US ratification of the Rome Statute.⁵ Based in New York, the particular significance of the CICC has been the extent to which it was directly involved in challenging US policy from the negotiations at Rome through to the present day. At its founding the CICC established core principles for a court developed in accordance with the rule of IL that included:

1. A court that would be fair to all, not with one system for the strong (i.e. the Permanent Members of the Security Council) and another for others;
2. A court that would be effective, not hampered by the veto power set forth in Article 27, 3 of the UN Charter; and
3. Guaranteed independence from the Security Council for both the court and the prosecutor.⁶

These principles represented the core elements of a legalist conception of the ICC as it structured global challenges to the integrity of US policy.

There was of course significant divergence *between* states opposing US ICC policy in this period, with positions during the Rome Conference ranging from a robustly legalist conception by Germany,⁷ to a French position reflecting many of the American preferences. Nevertheless, although P-5 UNSC members maintained a loose coalition for much of the negotiations, the UK eventually

¹ International Law Commission, *Report of the International Law Commission on the Work of its 44th Session*, 47th Sess. UN GAOR, Supp. 10, U.N. Doc. A/47/10 (4 May-24 July, 1992)

² *Rome Statute of the International Criminal Court* (1998)

³ *United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court*. See UNGA, *Establishment of an International Criminal Court*, UN Doc A/RES/51/207 (1997)

⁴ See Bassiouni, M. Cherif, *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) at 74-75

⁵ The CICC was formed in 1995 by Convener Bill Pace and includes 2,500 civil society organisations in 150 different countries: See CICC, 'Coalition for the International Criminal Court,' <<http://www.iccnw.org/>>; Benedetti, Fanny, Karine Bonneau, et al., *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Martinus Nijhoff Publishers, 2013) at 68

⁶ Welch, Claude E. Jr. & Ashley F. Watkins, 'Extending Enforcement: The Coalition for the International Criminal Court' (2011) 33 *Human Rights Quarterly* 927 at 967

⁷ See Dutton, Yvonne, *Rules, Politics, and the International Criminal Court: Committing to the Court* (Routledge, 2013) at 70-71

broke away, and France and Russia ultimately approved the statute after obtaining last minute concessions.⁸ France in particular thereafter defended its altered position against US demands as “a matter of principle.”⁹ The assumption of a largely united approach opposing US policy is corroborated by the close alignment between the ICC policy of the European Union (EU), CICC, and the bloc of over 60 countries comprising the so called “Like Minded States” (“LMS”).¹⁰ The LMS included every member of the EU (with the notable exception of France) along with middle powers such as Australia and Canada, and were always “sympathetic” to the position taken by NGOs at the Rome conference.¹¹ Moreover, the Council of the EU cited the CICC as playing a central role coordinating policy between the three groups.¹²

It is clear that US IL policy diverged significantly from legalist principles. Struett notes that, despite the Clinton administration’s apparent support, “the court that was promoted by the U.S. government is not the one whose charter was adopted in Rome in 1998.”¹³ There were high expectations by some that US involvement in treaty negotiations was undertaken with the intention of ultimately joining the court.¹⁴ The subsequent experience therefore elicited disappointment as the US rejected the final treaty on the very basis that it included principles central to the legalist rule of IL – including its formalised obligations, substantial equality between the US and other court members, and a separation of international legal powers. The policy that emerged of supporting the principle but not design of the ICC appeared to contravene core elements of the rule of IL as understood by the majority of participants at Rome.

This chapter analyses decision-making processes to demonstrate that US policy did not accept these ideals, but rather was structured by the theorised, ideologically-informed, conceptions of the rule of IL. This framework reveals that the administration’s approach often aligned with that of global court advocates in the commitment to ending international criminal impunity, but diverged on the ideal form of global governance for achieving that objective. The administration’s position crucially diverged in resisting a regime based on sovereign equality, instead arguing for legal recognition of exceptional global responsibilities and unique global power. The administration additionally insisted that the court’s judicial and prosecutorial powers be subjected to US checks and balances. For each of these elements US interests were crystallised in conceptions of law itself, which structured US decision-making to the exclusion of legalist principles advocated by every other major participant.

⁸ Specifically a seven year “opt-out provision” against prosecution: Lietzau, William K., ‘International Criminal Law after Rome: Concerns from a US Military Perspective’ (2001) 64 *Law and Contemporary Problems* 119 at 131; Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 189

⁹ Fehl, Caroline, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford University Press, 2012) at 103 & 108

¹⁰ See Krisch QC, Philippe & Darryl Robinson, ‘Reaching Agreement at the Rome Conference’ in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 70-71; Fehl, Caroline, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford University Press, 2012) at 85. Also termed the “Like-Minded Group” in some accounts

¹¹ van Boven, Theo, ‘The European Union and the International Criminal Court’ (1998) 5 *Maastricht Journal of European and Comparative Law* 325 at 325. See Krisch QC, Philippe & Darryl Robinson, ‘Reaching Agreement at the Rome Conference’ in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 70-71

¹² Council of the European Union, *The European Union and the International Criminal Court* (February, 2008)

<http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf> at 29

¹³ Struett, Michael J., *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, 2008) at 70-71

¹⁴ *Ibid* at 70-71

Inherited ICC Policy: Bush 41 Administration

The Clinton administration did not instigate US engagement with the ICC, but rather faced the choice between adopting policies set in place by the Bush 41 administration, or of forging a new path. The Bush administration had reacted to the issue only as it arose partway through its term, and largely as a second order issue, but its response exhibited the relatively clear ideological structure evident in its IL policy more generally. Malawer described a “Reagan Corollary” to IL consisting of “the assertion of unilateral state action and a broad right of self-defense, less reliance on international institutions such as the United Nations, and an emphasis on a state’s right to pursue its national interests.”¹⁵ This was no mere “careless disregard” for law, but rather “an attempt to pressure the international legal system into changing in a manner beneficial to United States interests.”¹⁶ Struett reviewed interactions with the ICJ across both the Reagan and Bush 41 administrations to find “an entirely strategic attitude” in which each administration “sought to use that international court as one instrument to obtain its strategic objectives.”¹⁷

This analysis is corroborated by the account of Michael Scharf who, as Attorney-Adviser at the Office of the Legal Adviser was tasked with implementing much of US ICC policy during the period from the 1989 UN General Assembly recommitment to the project until the end of the Bush 41 administration.¹⁸ Although Scharf cited his “personal support for the concept of an ICC” he described the policy direction as one of “‘cautious scepticism’ about the feasibility and desirability of establishing an ICC.”¹⁹ That translated into engaging diplomatically with ICC advocates, but pragmatically opposing their agenda. The misgivings of State and Justice Department officials led the administration to consistently cite problems with UN proposals as a strategy for stalling progress. As a whole the establishment of the ICC “never received serious consideration by top officials.”²⁰

The administration’s policy revealed an illiberalism in prioritising development of the law to enhance American national security interests, over and above the court’s stated purpose of addressing human rights violations. Crimes were only relevant to this IL policy to the extent that they impacted directly on American security, with the administration concerned primarily with the legal

¹⁵ Malawer, Stuart S., ‘Reagan’s Law and Foreign Policy, 1981-1987: The “Reagan Corollary” of International Law’ (1988) 29 *Harvard International Law Journal* 85 at 85. See also Kreisberg, Paul H., ‘Does the U.S Government Think That International Law Is Important?’ (1986) 11 *Yale Journal of International Law* 479; Weston, Burns H., ‘The Reagan Administration Versus International Law’ (1987) 19 *Case Western Reserve Journal of International Law* 296

¹⁶ Malawer, Stuart S., ‘Reagan’s Law and Foreign Policy, 1981-1987: The “Reagan Corollary” of International Law’ (1988) 29 *Harvard International Law Journal* 85 at 85. For critical reviews of the Bush 41 administration’s commitment to the rule of IL see: Quigley, John, ‘Prospects for the International Rule of Law’ (1991) 5 *Emory International Law Review* 311; Quigley, John, ‘The New World Order and the Rule of Law’ (1992) 18 *Syracuse Journal of International Law and Commerce* 75

¹⁷ Struett, Michael J., *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, 2008) at 68. See also Malawer, Stuart S., ‘Reagan’s Law and Foreign Policy, 1981-1987: The “Reagan Corollary” of International Law’ (1988) 29 *Harvard International Law Journal* 85 at 97-98

¹⁸ Ferencz, Benjamin B., ‘International Criminal Code and Court: Where They Stand and Where They’re Going’ (1992) 30 *Columbia Journal of Transnational Law* 375 at 388. Scharf himself characterises his role as “really more of wordsmith, marshalling legal arguments to further policy directives from higher level officials at the State Department and the department of Justice”: Scharf, Michael P., ‘Getting Serious About an International Criminal Court’ (1994) 6 *Pace International Law Review* 103 at 103

¹⁹ Scharf, Michael P., ‘Getting Serious About an International Criminal Court’ (1994) 6 *Pace International Law Review* 103 at 103-104; Scharf, Michael P., *Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg* (Carolina Academic Press, 1997) at 15-17

²⁰ Scharf, Michael P., ‘Getting Serious About an International Criminal Court’ (1994) 6 *Pace International Law Review* 103 at 105

regime governing terrorism and international drug trafficking.²¹ It is notable that the administration's strongest support was tied to the specific context of American preparation for the 1991 Persian Gulf War. Secretary of State James Baker and Under Secretary of State Robert Kimmitt both suggested they were open to the idea of an international court to prosecute Saddam Hussein when framed as part of overall military action.²² The administration nevertheless remained resistant to the idea, causing former Nuremberg prosecutor Professor Ferencz to express incomprehension given the atrocities being committed in Iraq.²³ However the apparently contradictory policy cohered to an Illiberal Internationalist rule of IL that embraced legal architecture with a limited jurisdiction to facilitate narrowly defined security interests.²⁴ This is distinct from supporting the court with a view to vindicating breaches of human rights perpetrated by Hussein as an end in itself, as would be the objective according to a legalist or Liberal Internationalist policy. Support for a tribunal advancing clearly defined strategic objectives in the aftermath of a war can be distinguished from general support for a standing judicial institution.

An internationalist outlook was also evident in the administration's concern for maintaining the existing framework governing international criminal law comprised of a loose network of treaties and extradition agreements. Pursuant to the General Assembly resolution of 1989, the ILC submitted a report on the scope and feasibility of establishing international criminal jurisdiction.²⁵ The US representative to the UN Sixth Committee John Knox²⁶ responded that, in the area of criminal law, there were already "effective national and international systems in place," and as such it was "not clear to us that the court would contribute to the existing system."²⁷ A formalised court structure was seen as a threat to existing legal relations between national courts and treaty regimes.²⁸ In essence the proposed court would derogate from the rule of IL as established by existing legal arrangements that enabled rather than constrained the pragmatic pursuit of national interests.

The intersection of illiberal and internationalist beliefs was most clearly demonstrated in the administration's response to policymakers advocating competing IL policies. A key initiative of Bush's opponents, led principally by Senator Arlen Specter,²⁹ was the passage of legislation through the US House of Representatives in October 1990 calling for the President and US Judicial Conference to

²¹ See Scharf, Michael P., 'The Jury Is Still Out on the Need for an International Criminal Court' (1991) 1 *Duke Journal of Comparative and International Law* 135 at 149-154; Mullins, Janet G., *Letter from Assistant Secretary Mullins to Dante B. Fascell, Chairman, Committee of Foreign Affairs, House of Representatives* (11 December, 1990) at 3

²² Bassiouni, M. Cherif, 'The Time Has Come for an International Criminal Court' (1991) 1 *Indiana International and Comparative Law Review* 1 at 42; Deming, Stuart H., 'War Crimes and International Criminal Law' (1994) 28 *Akron Law Review* 421 at 422; Scharf, Michael P., 'The Jury Is Still Out on the Need for an International Criminal Court' (1991) 1 *Duke Journal of Comparative and International Law* 135 at 143

²³ Ferencz, Benjamin B., 'International Criminal Code and Court: Where They Stand and Where They're Going' (1992) 30 *Columbia Journal of Transnational Law* 375 at 385-386

²⁴ Mullins, Janet G., *Letter from Assistant Secretary Mullins to Dante B. Fascell, Chairman, Committee of Foreign Affairs, House of Representatives* (11 December, 1990) at 2

²⁵ International Law Commission, *Report of the International Law Commission on the Work of its Forty-Second Session*, UN Doc. A/CN.4/SER.A/1990 (1990)

²⁶ The Sixth Committee is the primary forum for the consideration of legal questions in the General Assembly: See UN, 'Sixth Committee (Legal)', *General Assembly of the United Nations* <<http://www.un.org/en/ga/sixth/>>

²⁷ Office of the Legal Adviser, Department of State, in Margaret S. Pickering, Sally J. Cummins & David P. Stewart (ed), *Digest of United States Practice in International Law: 1989-1990* (International Law Institute, 2003) at 134

²⁸ Scharf, Michael P., 'Getting Serious About an International Criminal Court' (1994) 6 *Pace International Law Review* 103 at 105; Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 168; Ferencz, Benjamin B., 'International Criminal Code and Court: Where They Stand and Where They're Going' (1992) 30 *Columbia Journal of Transnational Law* 375 at 387-388

²⁹ See Bassiouni, M. Cherif, 'The Time Has Come for an International Criminal Court' (1991) 1 *Indiana International and Comparative Law Review* 1 at 14-15

explore the establishment of an international court and report their findings back to Congress.³⁰ The initial bill was ultimately amended to take into account the administration's concerns, expressed through Assistant Secretary of State for Legislative Affairs Janet G. Mullins. She wrote to the chairman of the House Committee on Foreign Affairs that "it would be premature and unwise for the Congress to go on record" supporting the court. Reasons cited included that the proposal would potentially "divert attention and resources away from more practical and readily achievable means for combating international criminal activities." An internationalist stance was affirmed by emphasising means that included strengthening "international organisations..., modernising extradition treaties, negotiating Mutual Legal Assistance Treaties" and "devising new international agreements."³¹ At the same time the policy toward the court was constructed upon an illiberal view of IL as a political tool employed by states to further non-universal security interests. Foremost among reasons for scepticism were risks that the court "could develop into a politicised body, in which case we might find the court interpreting crimes in unhelpful ways."³² The inevitable politicisation of an international court was a concern raised repeatedly, with the State Department previously warning the House Foreign Affairs Committee of a court "acting contrary to US interests on a whole range of issues or contrary to US notions of governing international law and fundamental fairness."³³ Further reasons for scepticism were the more "general reluctance of states to submit themselves or their nationals to the jurisdiction of an international authority," and finally an extensive list of potential disagreements flowing from "the divergence of opinion among the international community on various aspects of international criminal law."³⁴

The overall Bush 41 policy was summed up by Scharf who, following careful consideration of each of Mullins' criticisms, found these to be well founded. His recommendation during the closing months of the administration was that the US should continue engaging with the court to advance national interests, but do so while preserving strategic autonomy. Although joining the court as a member "might be of little utility to the United States," it was unavoidable that the court would affect US interests. American policy should therefore be to influence the "structure, procedures, and substance" of the court, while avoiding its most ambitious claims.³⁵ Doing so became the Illiberal Internationalist IL policy inherited by the Clinton administration when it entered office in 1993.

³⁰ Ultimately passed by both houses as *Foreign Operations, Export Financing, and Related Programs Appropriations Act*, Pub L 101-513 (1991), s. 599E. On the Judicial conference generally see: Administrative Office of the U.S. Courts, *Judicial Conference of the United States* <<http://www.uscourts.gov/Federalcourts/JudicialConference.aspx>>

³¹ Mullins, Janet G., *Letter from Assistant Secretary Mullins to Dante B. Fascell, Chairman, Committee of Foreign Affairs, House of Representatives* (11 December, 1990) at 3. See also Scharf, Michael P., 'The Jury Is Still Out on the Need for an International Criminal Court' (1991) 1 *Duke Journal of Comparative and International Law* 135 at 149

³² Mullins, Janet G., *Letter from Assistant Secretary Mullins to Dante B. Fascell, Chairman, Committee of Foreign Affairs, House of Representatives* (11 December, 1990) at 2

³³ Office of the Legal Adviser, Department of State, in Margaret S. Pickering, Sally J. Cummins & David P. Stewart (ed), *Digest of United States Practice in International Law: 1989-1990* (International Law Institute, 2003) at 128

³⁴ Mullins, Janet G., *Letter from Assistant Secretary Mullins to Dante B. Fascell, Chairman, Committee of Foreign Affairs, House of Representatives* (11 December, 1990) at 2

³⁵ Scharf, Michael P., 'The Jury Is Still Out on the Need for an International Criminal Court' (1991) 1 *Duke Journal of Comparative and International Law* 135 at 168. See also Edwin Williamson who as legal adviser to the State Department under the Bush 41 administration remained engaged with the ICC debate, condemning it as a "bad idea" a decade after leaving office: See Williamson, Edwin D., 'Realism Versus Legalism in International Relations' (2002) 96 *Proceedings of the Annual Meeting (American Society of International Law)* 262

DOMINANT FOREIGN POLICY IDEOLOGY

The general foreign policy worldview of the Clinton administration has been characterised as strongly internationalist, and more inclined toward liberal values.³⁶ Daalder and Lindsay described the Clinton presidency and its initial advocacy for the ICC as “a continuation of the traditional Wilsonian approach of building a world order based on the rule of law.”³⁷ Dueck highlighted that Clinton drew upon liberal internationalism to criticise the Bush 41 foreign policy during the 1992 Presidential election. Clinton pointed to conflicts in the former Yugoslavia, Haiti and Somalia, and to the 1989 Tiananmen Square protests, to argue that “the [Bush 41] administration is turning its back on the violations of basic human rights and our democratic values.”³⁸ Clinton’s first Secretary of State Warren Christopher noted that it was from this period that Clinton identified democracy promotion as a “core tenet of his foreign policy.”³⁹ Mead saw this as flowing from Clinton’s desire “to use the window of the ‘democratic spring’ [following the end of the Cold War] to strengthen the role of international judicial and political institutions, to usher in an era of law-based international relations.”⁴⁰ In Clinton’s own words:

[P]romoting democracy does more than advance our ideals. It reinforces our interests. Where the rule of law prevails, where governments are held accountable, where ideas and information flow freely, economic development and political stability are more likely to take hold and human rights are more likely to thrive. History teaches us that democracies are less likely to go to war, less likely to traffic in terrorism and more likely to stand against the forces of hatred and destruction, more likely to become good partners in diplomacy and trade. So promoting democracy and defending human rights is good for the world and good for America.⁴¹

This formulation of democracy promotion combines liberalism and internationalism as directly structuring the design and development of IL. The central importance of international legal institutions remained connected to a view that this would spread liberal values of respect for democracy and human rights, bolstering these values at home, and thereby US interests.⁴²

Warren Christopher equally subscribed to core Liberal Internationalist beliefs about the connection between the municipal and international rule of law. US support for democracy and human rights in Asia flowed from the belief that “states that respect the rule of law at home are more likely to observe the rule of international law abroad.”⁴³ This support was couched in the belief of the universal validity of liberal American values and the exceptional American role in realising these values internationally. In this policy the US was “not imposing an American model; we are supporting a universal impulse for freedom.” Moreover, American “involvement is essential to regional peace,

³⁶ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 282-296; Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 128-137. See however criticism by political opponents that the administration lacked clearly defined policy principles: See Zoellick, Robert B., ‘A Republican Foreign Policy’ (2000) 79 *Foreign Affairs* 63

³⁷ Daalder, Ivo H. & Lindsay, James M., *America Unbound: The Bush Revolution in Foreign Policy* (Brookings Institution Press, 2003) at 12

³⁸ Cited in Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 128

³⁹ Christopher, Warren, *In the Stream of History: Shaping Foreign Policy for a New Era* (Stanford University Press, 1998) at 63, n.2

⁴⁰ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 284

⁴¹ Clinton, William J., ‘Remarks at the University of Connecticut in Storrs,’ *The American Presidency Project* (15 October, 1995) <<http://www.presidency.ucsb.edu/ws/?pid=50655>>

⁴² Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 130-131

⁴³ Christopher, Warren, *In the Stream of History: Shaping Foreign Policy for a New Era* (Stanford University Press, 1998) at 159

prosperity, and the promotion of freedom...the universal values we embody—freedom, democracy, and the rule of law—make us a beacon for all the peoples of the region.”⁴⁴

The historical record also indicates that the administration was influenced more generally by internationalist principles spanning both ends of the liberal-illiberal dimension. Clinton’s second Secretary of State Madeleine Albright appeared mindful of straddling competing variants of internationalism when saying:

I hoped never again to hear foreign policy described as a debate between Wilsonian idealists and geopolitical realists. In our era, no President or Secretary of State could manage events without combining the two. Under President Clinton we were determined to do the right thing but in a tough-minded way.⁴⁵

Albright’s rendering of these traditions is something of a strawman argument in that few policymakers would advocate the pure idealism or amoral realism that she claimed to reject. Nevertheless her characterisation does recognise the influence of beliefs underpinning the two variants of internationalism: promoting democracy internationally at the same time as working with nondemocratic states, and of defending human rights but being prepared to subordinate them to national security issues.⁴⁶

The ideological context of these beliefs is evident in Albright’s exceptionalist portrayal of the US as “the indispensable nation.”⁴⁷ Her explanation of the phrase is revealing for both the meaning and legal impact of her beliefs. Albright acknowledges that the claim could be seen as “arrogant,” but asserts that it refers primarily to “the reality that most large-scale initiatives required at least some input from the United States if they were to succeed.” If this were all Albright meant it would not demonstrate exceptionalist thought per se, but merely an awareness of uniquely preponderant global power. Her more ideologically informed meaning is evident in the belief that America is “an exceptional country, but that is because we have led in creating standards that work for everyone, not because we are an exception to the rules.”⁴⁸ Such rhetoric could create an impression that the US recognised a rule of IL ideal in legalist terms. Referring to the US obligation to promote liberal values through international legal rules Albright continued that: “If we attempt to put ourselves above or outside of the international system, we invite everyone else to do so as well. Then moral clarity is lost, the foundation of our leadership becomes suspect, the cohesive pull of law is weakened, and those who do not share our values find openings to exploit.”⁴⁹ These statements go to the meaning of equality under IL, which is tested in this portion of the case study to determine whether the theorised framework of legal conceptions is necessary to properly understand Albright’s beliefs.

⁴⁴ *Ibid* at 159. See also at 560 on Christopher’s internationalism. Notably Christopher fails to mention the ICC in either of his two memoirs – each focussing primarily on American foreign policy – and only discusses IL in passing: Christopher, Warren, *Chances of a Lifetime: A Memoir* (Simon and Schuster, 2001). Scheffer notes the same omission in the memoir of Christopher’s successor Madeleine Albright: Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 230

⁴⁵ Albright, Madeleine K., *Madam Secretary: A Memoir* (Macmillan, 2003) at 505

⁴⁶ *Ibid* at 505

⁴⁷ Albright attributes the phrase to President Clinton from the period when she served as UN Ambassador: *ibid* at 506

⁴⁸ *Ibid* at 506

⁴⁹ *Ibid* at 506

The most consequential figure for US ICC policy through this period was David Scheffer, who worked under Albright as the first Ambassador at Large for War Crimes.⁵⁰ The very creation of this role was significant in signalling US commitment to addressing war crimes as a central component of its IL policy.⁵¹ Scheffer's memoir is a valuable account of his conception of the court and the political machinations that contributed to the final shape of American policy. His support for the ICC was in furtherance of an obligation to make credible the Clinton administration's principled claim that it "took the rule of law seriously."⁵² Scheffer's own beliefs are unequivocal in the American obligation to engage internationally through IL to uphold liberal values.⁵³ Yet his memoir and public statements make it equally clear that no single set of ideas captures the logic of US IL policy during the period. In particular his account demonstrates that competing internationalist legal conceptions were not as compatible as Albright claims. Albright herself testified to the House of Representatives that any US position was subject to the restriction that, in relation to the Departments of Defence and Justice, "the key agencies have to feel comfortable."⁵⁴ For Scheffer the administration's "commitment to international justice made a significant difference," yet he conceded that through the influence of competing beliefs leading figures were "sometimes weakened in their resolve."⁵⁵ Explaining the specific legal positions taken by the US therefore requires an account that disaggregates competing policymaking voices to reveal the role of structured beliefs about the rule of IL in decision-making processes.

DEVELOPING NON-ARBITRARY GLOBAL GOVERNANCE

The explicit shift away from the Bush 41 administration's obstruction to actively supporting the ICC's establishment was interpreted as renewed commitment to the rule of IL – both by America's global counterparts and by domestic court advocates. Van der Vyver shared these expectations in citing statements by President Clinton and the US Senate as evidence of an intention to "greatly strengthen the rule of law."⁵⁶ It is thus relevant to ask whether the preferred American policy of negotiating a treaty binding on all parties, including itself, was evidence that US policymakers shared a common understanding of the requirements for developing non-arbitrary global governance. If so, the eventual refusal to endorse a court design greatly strengthening the formal structure of global governance would suggest erosion of the legal ideal by interests extraneous to law.

An alternative explanation is that US policy was always structured by a particular conception of the rule of IL in which formalised development was only one possible means for developing a system of non-arbitrary governance over international criminal law. The Liberal Internationalism evident in the administration's legal policy more generally would encompass formalised obligations

⁵⁰ Described by Albright as the "father of the war crimes tribunals": Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 8-9; Benedetti, Fanny, Karine Bonneau, et al., *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Martinus Nijhoff Publishers, 2013) at 106-109

⁵¹ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 3

⁵² *Ibid* at 172

⁵³ See *ibid* at 2

⁵⁴ *Ibid* at 178-179

⁵⁵ *Ibid* at 7

⁵⁶ van der Vyver, Johan D., *The International Criminal Court: American Responses to the Rome Conference and the Role of the European Union* (Inst. für Rechtspolitik, 2003) at 3

only as a means for achieving this end, but not a necessary one. The more consequential requirement for realising the rule of IL would be effective transnational processes to promote the integrity of law. If US policy is shown to be structured by these ideologically informed conceptions, then there will be robust evidence that legalist beliefs were external to American decision-making processes.

Legalist Policy

Global advocates for the ICC framed the project as a natural evolution to close gaps in the governance of international criminal law. At the time of its negotiation then UN Secretary General Kofi Annan described the ICC as “a missing link in the international legal system.”⁵⁷ This perspective accepted that any gap in defining and enforcing rights and duties in the international legal system would necessarily be filled by discretionary decisions of states, and was thereby *ipso facto* inconsistent with the rule of IL. The task of developing non-arbitrary forms of global governance translated into granting the ICC broad jurisdiction, as far as possible, to eliminate the scope for states to respond to the subject matter of international criminal law through extralegal discretion. That principle was demonstrated most clearly in opposition to granting amnesties from international prosecutions as part of negotiated peace settlements. Hafner *et al.* argued that, in order to eliminate arbitrariness in global governance, it was imperative that the ICC exclude recognition of amnesties “irrespective of the political implications of the situation.”⁵⁸ In light of the goal of eliminating impunity any such recognition would “run counter to the basic objectives of the United Nations.”⁵⁹ Legalist advocates reached these conclusions by applying a doctrinal analysis to the formal “legal effect” of the Rome Statute crimes, which were held to establish an *erga omnes* duty to prosecute.⁶⁰ The case for removing such discretion from states was based on their view that: “Unlike the horizontal relations in extradition and judicial assistance, the relation between the ICC and states parties is a vertical one.”⁶¹ Realising the rule of IL thus required universal accession to the court’s founding statute, and the substitution of the court’s formal authority for political discretion in global governance.⁶²

Beliefs of American Legal Policymakers

The Exceptionalist Foundation of Liberal Internationalist Support

Scharf, who continued in his role as Attorney-Adviser during the transition to the Clinton administration, cited a “major policy reversal” taking place from October 1993.⁶³ At that time State Department Legal Adviser Conrad Harper announced to the UN that the new administration had

⁵⁷ Cited Podgers, James, ‘Praised and Prodded: U.N. Conferees Urge Lawyers to Build on Past Efforts to Bolster Human Rights’ (1998) 84 *ABA Journal* 92 at 92

⁵⁸ Hafner, Gerhard, Kristen Boon, Anne Rübesame & Jonathan Huston, ‘A Response to the American View as Presented by Ruth Wedgwood’ (1999) 10 *European Journal of International Law* 108 at 109

⁵⁹ *Ibid* at 111

⁶⁰ *Ibid* at 112. A category of laws so fundamental that they create universal jurisdiction, empowering all states with standing to enforce them: See Bassiouni, M. Cherif, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’ (1996) 59 *Law and Contemporary Problems* 63; *Barcelona Traction, Light and Power Co Ltd (Belgium v. Spain)* [1970] ICJ Rep 3 at 32

⁶¹ Hafner, Gerhard, Kristen Boon, Anne Rübesame & Jonathan Huston, ‘A Response to the American View as Presented by Ruth Wedgwood’ (1999) 10 *European Journal of International Law* 108 at 112

⁶² Struett, Michael J., *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, 2008) at 71

⁶³ Scharf, Michael P., ‘Getting Serious About an International Criminal Court’ (1994) 6 *Pace International Law Review* 103 at 103

“decided to take a fresh look” at supporting the court, accepting that the project was “a serious and important effort which should be continued, and we intend to be actively and constructively involved.”⁶⁴ According to Scheffer on up to six occasions leading up to the Rome Conference the President himself expressed his personal belief that “before this decade and this century end, we should establish a permanent international court to prosecute crimes against humanity.”⁶⁵ The US Senate fortified this stance by stating that the ICC “would greatly strengthen the international rule of law” and thereby “serve the interests of the United States and the world community.”⁶⁶ However closer examination reveals that, despite a common desire to end impunity under the law, the administration’s strong support always remained distinct from that of global partners.

The commitment to developing global governance through IL was evident in the 1993 Senate confirmation hearings of Warren Christopher. Chairman Claiborne Pell opened by framing the immediate post-Cold War world in internationalist terms as one where “we face the task of devising or revising mechanisms to deal with new circumstances. In particular, we have an opportunity to reclaim the dream of the U.N. as an effective agent for world peace.”⁶⁷ The Chairman concluded his remarks by reminding the nominee that “you will take office at a time when you can truly reshape the world.”⁶⁸ The specific issue of the ICC was raised by Senator Christopher Dodd, who lamented that IL policy under the Reagan and Bush 41 administrations “robbed us of the moral authority to be the standard bearer of the rule of law internationally.”⁶⁹ Dodd’s own father had been deputy prosecutor at the Nuremberg trials,⁷⁰ with the vision of both father and son cited by Clinton as contributing to his ultimate support for the permanent court.⁷¹ In the nomination hearing Dodd recognised a “tremendous opportunity for this country to help rewrite the rules of international law,” and specifically to “strengthen international institutions that can then act as impartial guardians of this new world order.”⁷² In this context Dodd continued that:

...despite opposition in the past by the Bush Administration, I am firmly convinced that the time is particularly auspicious for the United States to call for the establishment of a permanent international crimes tribunal... Recent events suggest that a crimes tribunal is a critical element to restoring and maintaining the international rule of law.⁷³

It was clear even from this point that the project was understood in terms of a special US role, and moreover, one likely to challenge a formalised design excluding policy considerations. Dodd emphasised that “it will never happen, in my view, unless the United States takes the leadership role

⁶⁴ *Ibid* at 109

⁶⁵ Scheffer, David J., ‘The United States and the International Criminal Court’ (1999) 93 *American Journal of International Law* 12 at 13; Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 178. See Clinton, William J., ‘Remarks in New York City Commemorating the 50th Anniversary of the Universal Declaration of Human Rights,’ *The American Presidency Project* (9 December, 1997) <<http://www.presidency.ucsb.edu/ws/?pid=53684>>

⁶⁶ *Foreign Relations Authorization Act, Fiscal Year 1994 and 1995*, Pub L 103-236 (1994)

⁶⁷ United States Senate, Committee on Foreign Relations, *Nomination of Warren M. Christopher to be Secretary of State: Hearing before the Committee on Foreign Relations United States Senate*, 1st Session 103rd Congress (1993) at 1

⁶⁸ *Ibid* at 2

⁶⁹ *Ibid* at 13

⁷⁰ See Dodd, Christopher, *Letters from Nuremberg: My Father’s Narrative of a Quest for Justice* (Random House Digital, Inc., 2008)

⁷¹ Clinton, William J., *My Life* (Hutchinson, 2004) at 674

⁷² United States Senate, Committee on Foreign Relations, *Nomination of Warren M. Christopher to be Secretary of State: Hearing before the Committee on Foreign Relations United States Senate*, 1st Session 103rd Congress (1993) at 13

⁷³ *Ibid* at 13

in this issue.”⁷⁴ Warren Christopher concurred in rejecting the Bush 41 policy as “fairly abysmal,” while framing the court as realising rather than superseding American exceptionalism:

In the International Court of Justice, our refusing to cede or grant jurisdiction and our retaining the right of unilateral withdrawal is one of the things that sets back the entire enterprise. If the leading nation in the world feels that when it does not want to risk a bad outcome it simply picks up its marbles and goes home, that is a very unsatisfactory result... I think the United States, as the leading power in the world now, has special responsibilities that we ought to undertake to carry out.⁷⁵

The distinction from legalism matters, since this exchange supported a conception of the rule of IL in which the global role of the US became more important than the perceived fiction of impartial formalised rules. Liberal Internationalist commitments were to transnational processes of legal governance in which the US could preserve its unique role advancing the non-arbitrary values and mechanisms that made law work.

This more policy oriented understanding of the ICC was reiterated by Christopher’s successor Madeleine Albright, who tied US support to a broader Liberal Internationalist vision of “building a more integrated, stable, and democratic world, with increased security for all who respect the interests and rights of others.”⁷⁶ That understanding again emphasised perceived connections between international criminal law and democracy when promoting the liberal freedoms of real people. It was the court’s capacity to strengthen these institutions and values that mattered, more so than formalising the design of the court in a binding treaty, and obtaining as close to universal membership as possible. Institutionalising formal obligations remained the optimal preference for the administration, but not a necessary one.

Pragmatic Development of the ICC

Although Liberal Internationalist beliefs dominated in this period they competed throughout with alternative ideologically informed conceptions of IL. In particular, legal policymakers from the Department of Defence strongly emphasised a more pragmatic approach to developing institutions of global governance. Immediately before the Rome Conference the Pentagon issued a cable to the military representatives of over 100 states setting out concerns that advocates were expanding crimes within the court’s statute beyond their current state of development. The cable warned that the ICC “must not be used to push the envelope of international law.”⁷⁷

The most detailed account of military views can be found in the jurisprudence of Major William Lietzau, who joined the US delegation to Rome in his capacity as Deputy Legal Counsel to the Office of the Chairman of the Joint Chiefs of Staff.⁷⁸ Following the Conference he went on to prepare the draft elements of crimes relied on at the Preparatory Commission for the Establishment of an

⁷⁴ *Ibid* at 72

⁷⁵ *Ibid* at 72-73

⁷⁶ Albright, Madeleine K., *Madam Secretary: A Memoir* (Macmillan, 2003) at 504-505. Perhaps because Albright makes only this single reference to a “permanent international criminal tribunal” Scheffer in his memoir pointedly notes her complete omission of the subject: Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 230

⁷⁷ Dated 31 March, 1998 and reproduced as “Appendix C” in Grigorian, Ellen, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns* (Congressional Research Service, 6 January, 1999) at 32

⁷⁸ United States Department of Defense, *William K. Lietzau: Deputy Assistant Secretary of Defense (Rule of Law and Detainee Policy)* <<http://www.defense.gov/bios/biographydetail.aspx?biographyid=246>>

International Criminal Court between 1999-2002.⁷⁹ Scheffer described Lietzau as “instrumental” in persuading participants at Rome and the Preparatory Commission of the need to explicitly define the elements of crimes falling under the court’s jurisdiction rather than leaving them to judicial discretion.⁸⁰

Lietzau’s jurisprudence was firmly internationalist in advocating global institution building and in opposing the Rome Statute for threatening American international engagement.⁸¹ His position along the values dimension was somewhat mixed, but he primarily emphasised the illiberal concern of maximising American strategic autonomy for national security purposes. He did acknowledge the broader context of the court as a means for addressing atrocities,⁸² but this liberal concern was addressed by advocating a rule of IL maximising US strategic autonomy rather than through the formalised authority of a court. Broadly, he advocated an IL policy balancing liberal concerns of attaining justice on the one hand with “preservation of state sovereignty and current practices that promote international peace and security on the other.”⁸³

What is notable about Lietzau’s recollections of and proposals for the court is that he framed them as pivoting around the principle that “the rule of law must itself be preeminent.”⁸⁴ This became a touchstone in Lietzau’s criticism of the ICC design and informed his argument against US accession. He expressed apprehension at the “paradigm” guiding court proponents “that international humanitarian law progresses in a linear fashion, with progress equalling more law.”⁸⁵ The process of establishing the municipal rule of law necessitates the taming of political power by closing gaps in the legal framework regulating citizens’ rights and duties. Lietzau rejected this translation of municipal legal doctrine to the international level as not only misguided, but a threat to the realisation of the rule of IL itself. Contrary to the proposition that law would overcome politics through the court, he identified the greatest threat posed by the court as the constraint of American foreign policy through “politically-motivated charges.”⁸⁶ This view was no less focussed on the idea of the rule of IL than the dominant approach within the administration, but eschewed the central focus on liberalism, which was promoted only indirectly through emphasising pragmatic considerations of national security.

The pragmatic approach was also evident in the concern among some US legal policymakers to preserve the flexibility to exclude the role of IL altogether where strictures of enforcing international criminal law were seen to impede peace agreements.⁸⁷ This initiative was led in part by the then national security adviser Sandy Berger, with specific reference to the 1994 amnesty given to coup

⁷⁹ See UN, ‘Preparatory Commission for the International Criminal Court,’ *Rome Statute of the International Criminal Court* (1999-2002) <<http://legal.un.org/icc/prepcomm/prepfra.htm>>

⁸⁰ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 231-232

⁸¹ Lietzau, William K., ‘International Criminal Law after Rome: Concerns from a US Military Perspective’ (2001) 64 *Law and Contemporary Problems* 119 at 126

⁸² *Ibid* at 129

⁸³ *Ibid* at 139

⁸⁴ *Ibid* at 139. See also Lietzau, William K., ‘Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court’ (1999) 32 *Cornell International Law Journal* 477 at 488

⁸⁵ Lietzau, William K., ‘Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court’ (1999) 32 *Cornell International Law Journal* 477 at 487

⁸⁶ Lietzau, William K., ‘Comments to the Panel on the International Criminal Court: Contemporary Perspectives and Prospects for Ratification’ (2000) 16 *New York Law School Journal of Human Rights* 512 at 516; Lietzau, William K., ‘Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court’ (1999) 32 *Cornell International Law Journal* 477 at 484

⁸⁷ See Wedgwood, Ruth, ‘The International Criminal Court: An American View’ (1999) 10 *European Journal of International Law* 93 at 95-97

leaders in Haiti to facilitate the return of ousted President Jean-Bertrand Aristide.⁸⁸ Notably, Scheffer acknowledged that the very idea that the court's jurisdiction should be limited by amnesties "seemingly flew in the face of the entire purpose" of the ICC.⁸⁹ This is certainly the case according to a view that IL should progressively exclude political exceptions.⁹⁰ Czarnetzky and Rychlak observed that the ICC jurisdictional regime was "intended to make clear that a *purely* juridical model is the only appropriate method for dealing with human rights violations."⁹¹ However, in Illiberal Internationalist terms, this did not equate to advancing the rule of IL. Rather the ideal was attained through pragmatically defining exceptions to law's proper reach. Doing so would eliminate arbitrariness by prospectively and clearly defining these exceptions consistent with a stable legal system.⁹²

Nationalist Objections

Parallel to these competing internationalist conceptions was forceful nationalist opposition to the very concept of the court and its contribution to the enlargement of the international legal system. Scheffer encountered in principle objections to the court from key voices within the administration from the earliest discussions in 1994. Reasons cited included the inherent politicisation of the court as a ploy to degrade both America's existing legal frameworks and global moral standing.⁹³ At a 1998 US Senate hearing to review the Rome Conference, Chairman Senator Grams expressed opposition according to a Liberal Nationalist view that IL's proper role was as a shield for the integrity of US constitutional government. Key criticisms included that the court's jurisdiction came at the expense of US constitutional protections, and that judges might be selected from undemocratic countries that did not protect the rule of law at home.⁹⁴ He concluded with the plea that the court "shares the same fate as the League of Nations and collapses without U.S. support for this court truly I believe is the monster and it is the monster that we need to slay."⁹⁵

The key voice of opposition however was Senator Jesse Helms through his role as Chairman of the Senate Committee on Foreign Relations from 1995-2001. Both Mead and Dueck classify Helms as a strong proponent of their equivalents to Illiberal Nationalism.⁹⁶ In an open letter to Secretary Albright he declared himself to be "unalterably opposed to the creation of a permanent U.N. criminal

⁸⁸ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 177 & 183; Scharf, Michael P., 'Justice versus Peace' in Sarah B. Sewell & Carl Kaysen (ed), *The United States and the International Criminal Court: National Security and International Law* (Rowman & Littlefield Publishers, 2000) at 180

⁸⁹ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 183

⁹⁰ Similar issues arise in relation to truth and reconciliation commissions as an alternative to prosecution: See Bassiouni, M. Cherif, *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) at 133-134

⁹¹ Czarnetzky, John M. & Ronald J. Rychlak, 'An Empire of Law: Legalism and the International Criminal Court' (2003) 79 *Notre Dame Law Review* 55 at 94. Original emphasis

⁹² This exception was indirectly included in *Rome Statute of the International Criminal Court* (1998) Art.53 in circumstances where an investigation or prosecution is not in "the interests of justice."

⁹³ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 172

⁹⁴ United States Senate, Committee on Foreign Relations, *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) at 2-3

⁹⁵ *Ibid* at 4

⁹⁶ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 268; Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 32

court," which would be "dead-on-arrival" in the Senate unless "a clear U.S. veto" was provided for.⁹⁷ Scheffer took the "veto" demand to mean total UNSC control, which equated the legitimacy of the court with its development as a permissive institution enabling but not constraining US power.⁹⁸ In the absence of this unlikely design Scheffer concluded that Helms' singular intention became "to kill the court and any American role in it."⁹⁹ For these reasons Scheffer described feeling only "soiled" when Helms later congratulated him for ultimately rejecting the Rome Statute.¹⁰⁰ In these examples legal policymakers demonstrated adherence to nationalist beliefs that diverged from legalism, but also from internationalist American policymakers equally opposing the final agreement at Rome.

Conclusion

US policy toward developing global governance has been perceived as the high-water mark of contradictions in its ICC policy. The US situated itself as a champion of the ICC, rejected the court's founding treaty at Rome, signed it more than two years later on the last day possible after significant internal lobbying,¹⁰¹ but did so while advising against future US membership of the court. At the point of signing President Clinton declared:

I believe that a properly constituted and structured International Criminal court would make a profound contribution in deterring egregious human rights abuses worldwide, and that signature increases the chances for productive discussions with other governments to advance these goals in the months and years ahead.¹⁰²

Clinton later recalled of this statement that: "I had been among the first world leaders to call for an International War Crimes Tribunal, and I thought the United States should support it."¹⁰³ The outcome is incoherent from a legalist perspective, combining commitment to the rule of law with an explicit refusal to submit to the formal obligations of the Rome Statute, and preserving discretionary approaches to international criminal justice.

Yet the policy of securing an exceptional US role while standing outside formal treaty obligations comes closer to the legal ideals evident within the administration than submitting to the treaty on its own terms. Clinton's Acting State Department Legal Adviser Michael Matheson later argued that the "critical question" was not whether the US ratified the Rome Statute, but rather, that the US sought to "be helpful, to facilitate, to cooperate, to pursue common aims...that's much more important than the technical question of whether the US is a party."¹⁰⁴ Scheffer was well aware that the distance between American policy and the legalist position created the impression that the US was "opposed to the whole concept" of the ICC. That view was however "simply false, as I had the task of trying to build the court on an alternative foundation."¹⁰⁵ This claim is consistent with the

⁹⁷ Helms, Jesse, 'Helms Vows To Make War On U.N. Court,' (27 March, 1998)

<<http://www.nytimes.com/1998/03/27/world/helms-vows-to-make-war-on-un-court.html>>Letter dated 26 March 1998

⁹⁸ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 186

⁹⁹ *Ibid* at 188

¹⁰⁰ *Ibid* at 231

¹⁰¹ Scheffer describes the lobbying process in detail: *ibid* at 234-243

¹⁰² BBC, 'Clinton's Statement on War Crimes Court,' *BBC News* (31 December, 2000)

<<http://news.bbc.co.uk/2/hi/1095580.stm>>

¹⁰³ Clinton, William J., *My Life* (Hutchinson, 2004) at 942-943

¹⁰⁴ Matheson, Michael J., *Interview with Author* (19 October, 2011)

¹⁰⁵ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 217

evidence of a genuine commitment by key US legal policymakers to design and develop a court that could be joined as a full member, but subject to established ideological commitments.¹⁰⁶ The “alternative foundation” identified by Scheffer was formed by the competition between a dominant Liberal Internationalist commitment to transnational legal processes and countervailing beliefs structured by illiberal and nationalist American foreign policy ideologies. Accordingly, senior figures in the Clinton Administration, including the President himself, demonstrated clear support for the goal of reducing impunity in the international legal system through the ICC, but did so according to competing conceptions of the rule of IL, none of which encompassed legalism.

DEFINING EQUALITY UNDER INTERNATIONAL LAW

During this period of designing and establishing the ICC the legalist principle articulated as indispensable by US opponents was sovereign equality. From the view of legalism a court that did not accord equal rights and duties to all states parties would, for that very reason, be inconsistent with the rule of IL. The policy outcome for the Clinton administration was, in contrast, insistence on a design that acknowledged and facilitated the unequal role of the US in undertaking global military operations. The US position translated into insistence that the ICC be structured around the UNSC and the unequal veto power of its five permanent members (“P-5”). Scheffer, who advocated this policy, conceded that the proposal amounted to a “means of carving out an exceptionalist enclave for the United States.”¹⁰⁷ The beliefs of US legal policymakers about the connection between sovereign equality and the rule of IL are therefore central to the question of whether and how distinct legal conceptions explain the divergent US position.

Legalist Policy

Michael Scharf noted that a key factor in moving from reliance on the UNSC to create ad hoc criminal tribunals to a permanent court was a majority of UN members wanting to eliminate unfair P-5 privileges. A shared feature of both the Yugoslav and Rwanda tribunals was being creatures of the UNSC, and therefore subject to the veto of the P-5, including the US.¹⁰⁸ Replicating this design would thus result in a court that had “lost its political independence and compromised its impartiality and equal application of the law to all concerned.”¹⁰⁹ Van der Vyver compared explicit commitments to the rule of law by President Clinton and the US Senate to argue that US policy outcomes amounted to “insistence on an international legal regime deprived of the rule of law and equal justice for all.”¹¹⁰ This is corroborated in Fehl’s finding that delegates at Rome saw US demands as “conflicting with the

¹⁰⁶ Scheffer, David J., ‘U.S. Policy and the Proposed Permanent International Criminal Court’ (1997) 8 *U.S. Department of State Dispatch* 20 at 22; Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 166

¹⁰⁷ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 233

¹⁰⁸ ICTY, UN Doc S/Res/827 (1993); ICTR, UN Doc S/Res/955 (1994)

¹⁰⁹ Bassiouni, M. Cherif, *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) at 156

¹¹⁰ van der Vyver, Johan D., ‘American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness’ (2001) 50 *Emory Law Journal* 775 at 777; van der Vyver, Johan D., *The International Criminal Court: American Responses to the Rome Conference and the Role of the European Union* (Inst. für Rechtspolitik, 2003) at 3. See also Du Plessis, Max, ‘Seeking an International International Criminal Court - Some Reflections on the United States Opposition to the ICC’ (2002) 15 *South African Journal of Criminal Justice* 301

principles of state equality and judicial fairness, and thus detrimental to the court's legitimacy."¹¹¹ Unsurprisingly, the push to separate the ICC design from the UNSC was supported most forcefully by larger states, including Germany and countries of the Non-Aligned-Movement such as India, for whom UNSC powers were a distortion of the post-WWII distribution of international power.¹¹² For non-permanent members, establishing sovereign equality was always a key element of an ICC design consistent with the rule of IL.¹¹³ The case for a design based on state party rather than UNSC referral gained traction in the years leading up to the conference and largely prevailed in the Rome Statute.¹¹⁴ Through this "palace revolution"¹¹⁵ all states parties came to enjoy a degree of equality before the law in rights and duties established through the ICC.

Beliefs of American Legal Policymakers

Achieving Liberal Equality

At the level of general legal principles Scheffer affirmed "two basic building blocks" of IL that appeared to align with legalism but diverged when applied by US policymakers. These were "reciprocity" in the rights and duties exercised between states, and "equality of nations" under international treaties.¹¹⁶ Prima facie these principles meant that "no nation and no people have superior rights or exceptional privileges in the realm of international law." Applied to the specific case of crimes falling within ICC jurisdiction however, this specifically meant that "no perpetrator of atrocity crimes should be able to avoid justice."¹¹⁷ In Scheffer's move from the general to the particular there is a subtle shift from the legalist treatment of states as the principle subjects of IL, to seeing natural persons as the primary perpetrators and victims of international crimes. This distinction matters for the many scenarios in which upholding sovereign equality is a practical barrier to prosecuting perpetrators of international crimes.¹¹⁸

Scheffer's own conception demonstrated the internationalist belief that has been the main source of hypocrisy accusations: that the US faced "the paradox of being a leader for international justice but at the same time a leader for international peace and security."¹¹⁹ Scheffer emphasised the tension that existed if a conception of IL based on sovereign equality was applied at the global level. Justice under the ICC depended on the equal application of the law, but as with any effective system of justice, the court existed within a framework of effective enforcement mechanisms. For Liberal

¹¹¹ Fehl, Caroline, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford University Press, 2012) at 102

¹¹² Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* (Transnational Publishers, 2005) at 179; Rabkin, Jeremy A., *Law without Nations?: Why Constitutional Government requires Sovereign States* (Princeton University Press, 2005) at 151-152

¹¹³ Scharf, Michael P., *Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg* (Carolina Academic Press, 1997) at 228; Anderson, Kenneth, 'The Rise of International Criminal Law: Intended and Unintended Consequences' (2009) 20 *European Journal of International Law* 331 at 355

¹¹⁴ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 176

¹¹⁵ Wedgwood, Ruth, 'The International Criminal Court: An American View' (1999) 10 *European Journal of International Law* 93 at 97

¹¹⁶ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 165-166

¹¹⁷ *Ibid* at 166

¹¹⁸ See also the "Nuremberg Principles" which enshrine this notion of individual international criminal responsibility: UN, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (1950) <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf>

¹¹⁹ Lippman, Thomas W., 'U.S. Caught in Bind on War Crimes,' *The International Herald Tribune* (1998)

Internationalists, the US has historically played an exceptional role in deploying power to uphold international norms. Thus the ICC must not “handcuff governments that take risks to promote peace and security and undertake humanitarian missions.” This was more explicitly pursuant to a belief that the “US military, in particular, is called upon to carry out mandates of the Security Council” in combination with other further responsibilities that advance liberal equality.¹²⁰ Scheffer’s paradox was that, to achieve equal justice, it may sometimes be necessary to recognise inequality in American responsibilities before the law.

Murphy explained the Clinton administration’s contradictory policies toward the ICC as the consequence of a belief that “global responsibilities for maintaining the peace” should exempt US military personnel and civilians from appearing before the court.¹²¹ In Liberal Internationalist terms, this is pursuant to using IL to vindicate human rights in accordance with long established messianic beliefs. A design that reduced the status of the US to a single voice among many would thereby be contrary to advancing the rule of IL. It is notable that Scheffer’s reflections on the Rome Conference attributed significant blame, not to US insistence that its disproportionate military role be recognised through unequal legal protections, but on the failure to explain its unique contributions to global peacekeeping and humanitarian interests. The problem was a “disconnect between our military commanders and those of other nations because they were not confronting atrocity crimes with the same understandings.”¹²² This “disconnect” is evident in Richard Goldstone’s retort that: “What the US is saying is, ‘In order to be peacekeepers...we have to commit war crimes.’ That’s what the policy boils down to.”¹²³ The suggestion of hypocrisy recedes only when the US position is seen as drawn from beliefs in America’s exceptional global role in promoting liberty.

In the context of the existing post-Cold War legal architecture, the clearest way to recognise this status was to graft the ICC onto the structure of the UNSC and US veto power therein. Doing so equally aligned with alternative American legal conceptions, including most especially in the conferral of hegemonic privileges consistent with Illiberal Internationalism. But the liberal justification for this design can be clearly identified within the beliefs of key legal policymakers. It is significant that Warren Christopher’s guarded support for the ICC at his Senate confirmation hearing was at all times framed as an extension of the “U.N. system” to be achieved through “leadership at the U.N.”¹²⁴ Read in the context of US beliefs about its role promoting liberal equality, insistence on UNSC privileges was most consistent with a conception of the rule of law structured by Liberal Internationalism. The effect was the subordination of sovereign to liberal equality to uphold the rule of IL, but contrary to the proposed design and expectation of legalist advocates at Rome.

¹²⁰ See Scheffer’s 1997 statement: Office of the Legal Adviser, Department of State, in Sally J. Cummins & David P. Stewart (ed), *Digest of United States Practice in International Law: 1991-1999* (International Law Institute, 2005) at 626; Wedgwood, Ruth, ‘The International Criminal Court: An American View’ (1999) 10 *European Journal of International Law* 93 at 106

¹²¹ Murphy, John F., *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004) at 7

¹²² Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 228

¹²³ Goldstone, Richard, ‘US Stance Contradictory, former UN Prosecutor Says,’ *Terra Viva* (17 June, 1998)

<<http://www.ips.org/icc/tv170602.htm>>

¹²⁴ United States Senate, Committee on Foreign Relations, *Nomination of Warren M. Christopher to be Secretary of State: Hearing before the Committee on Foreign Relations United States Senate*, 1st Session 103rd Congress (1993) at 71-72

Institutionalising Hegemonic Privilege

The outcomes of Liberal Internationalist beliefs converged neatly with Illiberal Internationalist policymakers who sought an institutional design preserving hegemonic privileges. The Pentagon made it clear from the beginning that its support for the ICC required a design where crimes were only referred by the UNSC.¹²⁵ This in part reflected a belief that an effective rule of IL required acknowledging realities of international power as already reflected in US permanent membership on the UNSC. Toward the end of 1997 Scheffer was told by a Pentagon representative that the sheer global responsibilities of the US, including 200,000 troops deployed in forty countries, “had to mean something in the negotiations.”¹²⁶ A design that completely divorced the ICC design from the realities of international power could never be a realistic proposal for an effective international legal system.

Lietzau was sceptical about the fixation on sovereign equality and any assumption that the court could be treated as an apolitical judicial body.¹²⁷ His conception required an awareness of “unique and vital national security responsibilities” of the US in maintaining international peace and security.¹²⁸ By way of example, it was noted that the design of the UN itself integrated power relations that did not reflect sovereign equality – “‘fairness’ has never been the talisman of international peace and security.”¹²⁹ It is for that reason however that the UN system, through its integration of American political power, had been more effective at actually achieving the order envisioned by legalist advocates.¹³⁰ For Lietzau deference to the principle of sovereign equality actually sat in opposition to the rule of IL established by existing legal processes spanning municipal and international jurisdiction.¹³¹ Looking at the evidence from decision-making it would therefore be inaccurate to say that Defence Department lawyers disregarded legal principles for political expediency. Rather policy was structured by a set of coherent beliefs about the rule of IL that rejected sovereign equality as necessary or even compatible with advancing the rule of IL.

At the same time it is important not to conflate the two variants of internationalist thinking. Despite Scheffer’s insistence on a central UNSC role, he believed that the Defence approach “made little sense,” since it insisted on immunity for US forces while denying it to others.¹³² Once again, however, the contradiction can be understood in the light of competing views on the proper legal relationship to be established between states. From a liberal perspective, the special US status in the UNSC allowed for the extension of constitutional values into the international arena, which could be applied in principle to US forces who fell short of them globally. From the illiberal perspective, the fact of US global preponderance required recognition within the law of absolute privileges for US forces. Doing so was necessary to achieve a realistic institutional design that recognised US power, yet set out global relations according to predetermined legal principles. Throughout the Rome negotiations

¹²⁵ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 171

¹²⁶ *Ibid* at 184

¹²⁷ Lietzau, William K., ‘Comments to the Panel on the International Criminal Court: Contemporary Perspectives and Prospects for Ratification’ (2000) 16 *New York Law School Journal of Human Rights* 512 at 548

¹²⁸ Lietzau, William K., ‘International Criminal Law after Rome: Concerns from a US Military Perspective’ (2001) 64 *Law and Contemporary Problems* 119 at 126 & 138-139

¹²⁹ *Ibid* at 135

¹³⁰ *Ibid* at 133

¹³¹ See *ibid* at 121

¹³² Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 184

Scheffer had long sought a compromise on Pentagon demands that the US would only join the ICC if it could withhold consent to the prosecution of its military personnel. The compromise was ultimately to require consent only for *non*-parties to the statute in an attempt to reach a middle ground between Liberal Internationalist resistance to a design establishing sovereignty as a shield against criminal liability, and the Illiberal Internationalist demand that the law take account of America's hegemonic status. Both positions were nevertheless rejected outright by other negotiating parties for the inequality in international legal obligations they would create.¹³³

Conclusion

Scheffer's characterisation of a "paradox" in the US position cannot be understood separately from the context of exceptionalist beliefs about the US role vindicating liberal rights. The question of the proper relationship between sovereign states was framed in terms of the principle of liberal equality, and the need to facilitate US power to vindicate the rights of natural persons. For both variants of internationalism the privileged UNSC role was seen as consistent with the rule of IL, either because of the exceptional political role played by the US in promoting human rights globally, or because the rule of law couldn't be divorced from the realities of US global military power. Through these positions US policy directly contradicted the central legalist tenet of sovereign equality before the law. The director of Human Rights Watch's ICC campaign Richard Dicker rejected the compatibility of this conception with the rule of law: "The Defense Department insisted on a 100 percent foolproof mechanism [to protect US troops against prosecution]. To get that, they essentially needed to cut the heart out of equal application of the law to all who came before it."¹³⁴

To the extent that there was legal incoherence in US policy toward the issue of equality, this reflected the compromise between competing American conceptions, rather than an unstructured compromise with legalist principles. Van der Vyver recognised the importance of the belief among US policymakers that their nation responds to "almost all international 911 calls" as "the major or only peace-keeping force of our times."¹³⁵ He concluded however that, due to competing internal positions on the ICC, American policy was "not a matter of principle or of self-interest but internal political expedience."¹³⁶ This distinction and his reference to the campaign led by Senator Helms¹³⁷ merely beg the question however, since it does not explain what principles guided the individuals and constituencies internally opposing the ICC. The most persuasive explanation remains that the meaning of equality in US ICC policy was defined by competing legal principles, each of which expressed a coherent logic when viewed on its own terms. The dynamic is therefore not the competition between legal principle and political expediency, but rather of divisions internal to IL itself.

¹³³ See the position of UK legal adviser Frank Berman: *ibid* at 211-212

¹³⁴ Lippman, Thomas W., 'U.S. Caught in Bind on War Crimes,' *The International Herald Tribune* (1998)

¹³⁵ van der Vyver, Johan D., 'American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness' (2001) 50 *Emory Law Journal* 775 at 804

¹³⁶ *Ibid* at 796

¹³⁷ *Ibid* at 796

ORDERING INTERNATIONAL LEGAL POWER

Throughout the Rome negotiations legalist advocates insisted on a design achieving a high degree of separation between the ICC's judicial and prosecutorial powers and parallel legal powers exercised by states parties and established international institutions. This reflected a view that formally separating powers remained as necessary to the ICC as in municipal legal systems. These proposals ultimately turned on a claim that it was possible to construct a court exercising powers independently from the political interests of member states.¹³⁸ On that basis, legalist proposals called for ICC powers that overrode inconsistent state legal systems, and for clearly separating the court's judicial powers from UNSC "executive" functions.

In contrast, from an early stage, the Clinton administration settled on an institutional design that strictly circumscribed the court's exercise of jurisdiction, and located primary referral power within the UNSC.¹³⁹ These principles were incorporated into a 1994 draft statute supported by the US, which had introduced the novel principle of "complementarity" privileging national over international enforcement of Rome Statute crimes, and had required state consent or a UNSC referral for the ICC to exercise jurisdiction.¹⁴⁰ That modest design avoided any claims to true universal jurisdiction, or the necessity of separating and institutionalising independent judicial power.¹⁴¹ Thus the question is whether US preferences to dilute judicial independence represented a tactical attempt to erode the rule of IL, or whether it was ideals of law itself being contested.

Legalist Policy

Legalist policy toward ordering international power entailed claims that it was both desirable and possible to institutionalise judicial power in an independent global court. Du Plessis identified "a growing conceptual awareness that because individuals live under the international legal system, they must necessarily have rights and obligations flowing from it."¹⁴² This is an argument for the merits of an ICC operating separately from national governments and courts implementing criminal law. Du Plessis went on to cite the precedent of the post-WWII war crimes tribunals as providing a model with "defining characteristics that draw their inspiration from the rule of law" including "independent prosecutors and judges."¹⁴³ For advocates, the independence of the court became a necessary element of the "adequate safeguards built into the ICC system of criminal justice to protect nationals of all states against frivolous investigations and prosecutions."¹⁴⁴

The legalist position was set forth in 1999 by executive director of Human Rights Watch Kenneth Roth, as a key member of the CICC. At a point where the US had rejected the ordering of legal powers in the Rome Statute, Roth demanded the US sign "to reaffirm America's commitment to

¹³⁸ For a review of statements see: Czarnetzky, John M. & Ronald J. Rychlak, 'An Empire of Law: Legalism and the International Criminal Court' (2003) 79 *Notre Dame Law Review* 55 at 59, n.13

¹³⁹ Scheffer, David J., 'The United States and the International Criminal Court' (1999) 93 *American Journal of International Law* 12 at 12-13

¹⁴⁰ Crawford, James, 'The Work of the International Law Commission' in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 25-26

¹⁴¹ *Ibid* at 26-28

¹⁴² Du Plessis, Max, 'Seeking an International International Criminal Court - Some Reflections on the United States Opposition to the ICC' (2002) 15 *South African Journal of Criminal Justice* 301 at 304

¹⁴³ *Ibid* at 303

¹⁴⁴ van der Vyver, Johan D., 'American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness' (2001) 50 *Emory Law Journal* 775 at 825

justice and the rule of law.”¹⁴⁵ Responding to US scepticism about the plausibility of a depoliticised international court, Roth argued it was “not a political body, such as the United Nations, or even a tribunal to resolve political disputes between states, such as the International Court of Justice.” Rather the ICC “will have the fact-specific task of determining whether evidence exists to investigate or prosecute a particular suspect for a specific crime.”¹⁴⁶ In other words the court would uphold the rule of IL through maintaining a clear separation of its judicial power from other powers of international governance. This was reinforced by a design that ensured the court’s primary and secondary rules were separately determined by a “‘legislature’—the governments that join the court.”¹⁴⁷

Faith in the capacity of the court to transcend political interests was identified in a variety of sources. Bassiouni argued that it was “international civil society” who had “finally reached the limits of its tolerance for impunity and now demands some modicum of justice.”¹⁴⁸ For the LMS it was found in their own absence of great power aspirations, leading to a self-perception of being:

depoliticized in an important sense: they lacked strong political interests and strategic entanglements in many parts of the world. Because they were not global powers, they thought of themselves as more able to construct international architecture that would be perceived as fair and legitimate by the rest of the world.¹⁴⁹

French jurist Robert Badinter elegantly summarised the source of judicial independence in his vision of a court “composed of judges independent from their home States”:

In practice, these judges will derive their whole authority from the Treaty, and thus will only be responsible for their decisions before their own conscience and before humanity, that entity so abstract and yet so present in these times. Rarely has a higher mission or a heavier responsibility been placed on judges. How may States, so proud of their sovereignty and their leaders, so caught up in the difficulties and complexity of their tasks, be brought not only to recognize this new judicial power, but also to aid it in its mission, without which the court will not be able fully to play its role?¹⁵⁰

Badinter’s answer, which was the final statement in the lengthy and influential Oxford University Press ICC commentary,¹⁵¹ is that depoliticisation will be upheld by “NGO’s dedicated to humanitarian action” and “public opinion.”¹⁵² Through these related formulations legalist advocates resisted any design that divided the ICC’s jurisdictional competence with states and international bodies as contrary to the rule of IL.

¹⁴⁵ Roth, Kenneth, ‘Speech One: Endorse the International Criminal Court’ in Alton Frye (ed), *Toward an International Criminal Court?: Three Options Presented As Presidential Speeches* (Council on Foreign Relations, 1999) at 19

¹⁴⁶ *Ibid* at 28

¹⁴⁷ *Ibid* at 29

¹⁴⁸ Bassiouni, M. Cherif, *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) at 44

¹⁴⁹ Bosco, David, *Rough Justice: The International Criminal Court’s Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 39

¹⁵⁰ Badinter, Robert, ‘International Criminal Justice: From Darkness to Light’ in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 1934

¹⁵¹ Cassese, Antonio, Paola Gaeta & John R.W.D. Jones (eds). *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002). See Paulus, Andreas L., ‘Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Court’ (2003) 14 *European Journal of International Law* 843

¹⁵² Badinter, Robert, ‘International Criminal Justice: From Darkness to Light’ in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 1934

Beliefs of American Legal Policymakers

Democratic Foundations of International Judicial Power

It is telling that Bassiouni defended the possibility of ICC independence by drawing an analogy between its seemingly idealistic judicial aspirations and the initially ineffective separation of powers in the US.¹⁵³ He referred to the famous 1831 retort of President Andrew Jackson dismissing the Chief Justice of the Supreme Court: “John Marshall has made his decision, now let him enforce it.”¹⁵⁴ With the authority of US judicial power only realised over time, Bassiouni suggested that likewise with the ICC “its moral authority will be established, and great expectations will be realized.”¹⁵⁵ What this claim overlooked however is the central role of democratic legitimacy to Liberal Internationalism. “Moral authority” in US municipal law is sustained by the continuous operation of democratic checks and balances on judicial power. It did not follow therefore that the same legitimacy would attach to the ICC simply by the fact of its existence and operation. Bassiouni’s claim assumed the possibility of constructing an apolitical ICC based on a foundation of cosmopolitan values.

Lietzau’s internationalist stance encompassed liberal values that sought to establish IL on the tangible foundation of American constitutional government. He argued that, even though the ICC was likely to be governed by a judiciary adhering to the highest standards of competence and integrity, this was inherently inferior to American safeguards.¹⁵⁶ In his view “Americans, for good reason, are not culturally disposed toward such ‘trust’ of an institution.” Confidence was however provided by the separation of powers enshrined in the US constitution that were simply “not as evident in other democratic governments.”¹⁵⁷ “American legal culture” was accordingly defined by a belief that judicial power must ultimately be tied to citizens’ democratic control.¹⁵⁸ On this basis the “changes sought by the United States should be implemented not just because U.S. participation is key to an effective, functioning court, but because enacting them promotes the rule of law and is therefore the right thing to do.”¹⁵⁹ Likewise Scheffer argued that the US “could not negotiate as if certain risks could be easily dismissed or certain procedures of the permanent court would be infallible.”¹⁶⁰ These legal ideals remained central to US challenges to ICC jurisdictional and prosecutorial independence.

Complementarity as a Check on ICC Independence

The legalist preference for ordering international judicial power was the principle of ICC “primacy” over domestic law following the precedent of the ICTY and ICTR.¹⁶¹ The US challenged that design

¹⁵³ In his introduction to what remains the most authoritative legislative history of the court: See Bassiouni, M. Cherif, *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) as the first of three volumes

¹⁵⁴ Responding to the decision in *Worcester v. Georgia* (1832) 31 U.S. (6 Pet.) 515

¹⁵⁵ Bassiouni, M. Cherif, *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) at xx

¹⁵⁶ Lietzau, William K., ‘Comments to the Panel on the International Criminal Court: Contemporary Perspectives and Prospects for Ratification’ (2000) 16 *New York Law School Journal of Human Rights* 512 at 548

¹⁵⁷ Lietzau, William K., ‘International Criminal Law after Rome: Concerns from a US Military Perspective’ (2001) 64 *Law and Contemporary Problems* 119 at 136

¹⁵⁸ Lietzau, William K., ‘Comments to the Panel on the International Criminal Court: Contemporary Perspectives and Prospects for Ratification’ (2000) 16 *New York Law School Journal of Human Rights* 512 at 548-549

¹⁵⁹ Lietzau, William K., ‘International Criminal Law after Rome: Concerns from a US Military Perspective’ (2001) 64 *Law and Contemporary Problems* 119 at 136

¹⁶⁰ See Scheffer’s 1999 statement: Office of the Legal Adviser, Department of State, in Sally J. Cummins & David P. Stewart (ed), *Digest of United States Practice in International Law: 1991-1999* (International Law Institute, 2005) at 637

¹⁶¹ Brown, Bartram S., ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’ (1998) 23 *Yale Journal of International Law* 383 at 385; Schabas, William, *An Introduction to the International*

from an early stage, proposing a court based on the novel principle of “complementarity.” This principle reserved the primary prosecutorial obligation to states, with ICC jurisdiction enlivened only when the state was deemed “unwilling or unable genuinely to carry out the investigation or prosecution.”¹⁶² The principle expressed Liberal Internationalist preferences for international legal development that strengthens the municipal rule of law. For Scheffer the principle pressured states to “prosecute nationally, or risk international prosecution.”¹⁶³ For Slaughter and Burke-White, complementarity was the quintessential example of IL playing a backstopping role, thereby breaking down any sharp distinction between municipal and international legal order.¹⁶⁴ Complementarity appeared to offer a genuine reconciliation between US and legalist preferences by preserving municipal legal processes while also retaining the overarching authority of IL, with both jurisdictions assumed to be “guided by the same objectives.”¹⁶⁵ However the record demonstrates that parties remained divided on whether the principle derogated from the integrity of the court, or strengthened it.

Adriaan Bos served as Chairman of both the UN Ad Hoc Committee, which was tasked with primary responsibility for reviewing the draft statute throughout 1995, and of the Preparatory Committee on the Establishment of an International Criminal Court.¹⁶⁶ Bos noted that, although states largely accepted the principle of complementarity, many remained wary of its undefined nature. The concern was that fracturing international judicial power would allow states to shield perpetrators through sham investigations. Some saw complementarity as chiefly a compromise to accommodate political interests,¹⁶⁷ and therefore incapable of ensuring ICC integrity in its own terms. Indeed Scheffer noted that the principle was seized upon by other participants in Rome largely because they assumed it would secure US support for the treaty.¹⁶⁸ For these policymakers the necessary counterbalance to complementarity was that the court must be given “its own discretionary power to determine its jurisdiction.”¹⁶⁹ Advocates accordingly insisted on granting the ICC prosecutor *proprio motu* powers: the independent power to initiate an investigation and bring a case before the court.¹⁷⁰ Germany reasoned that such power had the attraction of “depoliticizing the process of initiating

Criminal Court (Cambridge University Press, 4th ed, 2011) at 191; Bos, Adriaan, ‘From the International Law Commission to the Rome Conference (1994-1998)’ in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 44

¹⁶² *Rome Statute of the International Criminal Court* (1998), Art 17(1)(a). See generally Schabas, William, *An Introduction to the International Criminal Court* (Cambridge University Press, 4th ed, 2011) at 190-199; Brown, Bartram S., ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’ (1998) 23 *Yale Journal of International Law* 383

¹⁶³ Scheffer, David J., ‘Challenges Confronting International Justice’ (1998) 9 *Department of State Dispatch* 19 at 22

¹⁶⁴ Slaughter, Anne-Marie & William Burke-White, ‘The Future of International Law Is Domestic (or, the European Way of Law)’ (2006) 47 *Harvard International Law Journal* 327 at 340

¹⁶⁵ Bos, Adriaan, ‘From the International Law Commission to the Rome Conference (1994-1998)’ in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 44

¹⁶⁶ In his capacity as former Legal Adviser to the Ministry of Foreign affairs of the Netherlands.

¹⁶⁷ Crawford, James, ‘The Work of the International Law Commission’ in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 25; Bassiouni, M. Cherif, *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) at 63

¹⁶⁸ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 175

¹⁶⁹ Bos, Adriaan, ‘From the International Law Commission to the Rome Conference (1994-1998)’ in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 44-45; Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 201

¹⁷⁰ Bassiouni, M. Cherif, *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) at 128 & 166; See *Rome Statute of the International Criminal Court* (1998), Arts. 13(c), 15 & 53(1)

investigations.”¹⁷¹ Prosecutorial independence was thus institutionalised in the ICC design as a necessary check to ensure complementarity remained consistent with the rule of IL.

The response from US policymakers made clear that this solution was even more objectionable than the original perceived mischief. Jamison Borek, Deputy Legal Adviser to the State Department, argued that “bona fide national investigations and prosecutions will always be preferable” to those of the ICC. Reversing the onus would entail the fraught judgment that “a functioning national system is not bona fide.”¹⁷² The US preference was thus for a narrow conception of complementarity consistent with the 1996 Preparatory Committee Report:

[I]t is not a question of the court having primary or even concurrent jurisdiction. Rather, its jurisdiction should be understood as having an *exceptional* character...as long as the relevant national system was investigating or prosecuting a case in good faith, according to this view, the court’s jurisdiction should not come into operation.¹⁷³

To ensure that outcome, US negotiators insisted on various measures to favour domestic processes, including requiring a supermajority of judges before domestic investigations could be overridden, and a requirement that states be notified of potential ICC jurisdiction in any case where a state or the prosecutor intended to refer a matter to the court.¹⁷⁴

In this context the US rejected proposals for an independent prosecutor as “utopian” and thereby at risk of “rejection of the Draft by States.”¹⁷⁵ For the US the nature of prosecutorial power is somewhat contentious even at the level of municipal law. It is nominally an extension of executive functions, yet the task of prosecution requires a degree of independence from executive direction. Executive control nevertheless remains crucial to ensure democratic accountability against “frivolous or vindictive prosecutions.”¹⁷⁶ For American legal policymakers of all stripes this principle did not recede merely because prosecutorial power was being exercised at the level of global governance. The legalist view of an independent prosecutor guaranteeing ICC independence directly contradicted the view of American policymakers, who saw the prosecutor “making difficult public policy decisions” and therefore eroding both the appearance and reality of prosecutorial impartiality.¹⁷⁷

Former chief prosecutor of the Yugoslav and Rwandan Tribunals Justice Louise Arbour responded to US opposition by arguing:

there is more to fear from an impotent than from an overreaching Prosecutor...an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith for improper

¹⁷¹ Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* (Transnational Publishers, 2005) at 175-176

¹⁷² Borek, Jamison S., *Agenda Item 142: Establishment Of An International Criminal Court* (1 November, 1995) <<http://www.state.gov/documents/organization/65827.pdf>> at 3

¹⁷³ UN, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc A/51/22 (1996) at Par.154; Brown, Bartram S., ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’ (1998) 23 *Yale Journal of International Law* 383 at 425-426. Emphasis added

¹⁷⁴ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 178, 187 & 202. See *Rome Statute of the International Criminal Court* (1998), Art.18

¹⁷⁵ Crawford, James, ‘The Work of the International Law Commission’ in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 33-34

¹⁷⁶ Harriger, Katy J., ‘The Law: Executive Power and Prosecution: Lessons from the Libby Trial and the US Attorney Firings’ (2008) 38 *Presidential Studies Quarterly* 491 at 493; See *Morrison v. Olson* (1988) 487 U.S. 654

¹⁷⁷ Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* (Transnational Publishers, 2005) at 172-173

purposes...the powers of the Prosecutor, and of the court itself, should be designed in a manner consistent with the effective enforcement of the statute.¹⁷⁸

However the division over prosecutorial independence demonstrated that, even on the apparent consensus over complementarity, divergence in ideology crystallised in incompatible proposals for the court. Parties adopted contradictory positions whereby complementarity was seen either as a democratic check on the court's independence, or as a compromise itself requiring checking by an independent prosecutor. In both cases policy was defended as a good faith commitment to the rule of IL.

Delegated Jurisdiction

The mechanism by which the ICC sought to establish its jurisdiction opened up a clear division between legalist and US advocates over the lawfulness of "delegating" jurisdiction.¹⁷⁹ At earlier stages of negotiation there had been calls from key states and voices within the LMS and CICC for a form of universal jurisdiction.¹⁸⁰ This expansive claim was rejected by the US for being "in conflict with certain fundamental principles of international law."¹⁸¹ The final outcome under Article 12 was instead a regime based primarily on states granting consent to jurisdiction by virtue of court membership, but the extension of jurisdiction over all crimes committed in the territory of member states – irrespective of whether an accused was a national of a member state.¹⁸² Territorial jurisdiction became the dividing line between a forceful legalist defence and equal resistance by US policymakers as the "single most problematic part of the Rome Treaty."¹⁸³

It was largely agreed that the right to exercise jurisdiction over crimes committed in a state's own territory had been established as "fundamental" since at least the landmark *Lotus Case*.¹⁸⁴ Furthermore, that right extended to transferring jurisdiction to a third state via extradition. On this basis Bassiouni claimed a right "to transfer jurisdiction to another state that has jurisdiction over an accused, or to an international adjudicating body."¹⁸⁵ The ICC's claimed right was therefore an analogous "delegation" of territorial jurisdiction to an international court that did not turn on state

¹⁷⁸ Arbour, Louise, *The Prosecutor of the International Tribunals for the former Yugoslavia and for Rwanda, that the International Permanent Court "be strong and well equipped to operate as an authoritative mechanism"* (8 December, 1997) <<http://www.icty.org/sid/7434>>

¹⁷⁹ Alternatively "ceded jurisdiction": Danilenko, Gennady M., 'ICC Statute and Third States' in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 1881

¹⁸⁰ See for example the "German proposal" and Korean proposals: Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* (Transnational Publishers, 2005) at 144 & 146

¹⁸¹ Borek, Jamison S., *Agenda Item 142: Establishment Of An International Criminal Court* (1 November, 1995) <<http://www.state.gov/documents/organization/65827.pdf>> at 4; Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* (Transnational Publishers, 2005) at 161 & 309. The US did however support a form of universal jurisdiction over the crime of genocide

¹⁸² *Rome Statute of the International Criminal Court* (1998), Art.12(2)(a)

¹⁸³ Scheffer, David J., 'The International Criminal Court: The Challenge of Jurisdiction' (1999) 93 *Proceedings of the Annual Meeting (American Society of International Law)* 68 at 69

¹⁸⁴ See S.S. *Lotus, The (France v. Turkey)* (1927) No. 10 PCIJ Ser A at 20. For earlier consideration of this principle by the US Supreme Court see: *The Schooner Exchange v. M'Faddon & Others* (1812) 11 U.S. 116

¹⁸⁵ Bassiouni, M. Cherif, *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) at 136. Emphasis added

consent anymore than did the accepted territorial doctrine.¹⁸⁶ Alternatively Germany defended the provision on the basis of *universal* jurisdiction, arguing that, because the ICC crimes were owed *erga omnes*,¹⁸⁷ states could exercise jurisdiction irrespective of nationality or territoriality. Therefore: “Since the contracting parties to the Statute could individually exercise universal jurisdiction for the core crimes, they could also, by ratifying the Statute, vest the Court with a similar power to exercise such universal criminal jurisdiction on their behalf.”¹⁸⁸ In both cases states again referred to the *Lotus* principle that: “Restrictions upon the independence of States cannot therefore be presumed.”¹⁸⁹ In the absence of a specific rule against delegation it remained presumptively legal.

The US rejected the legality of delegated jurisdiction from the beginning, and did so from a position said to be “grounded in law.”¹⁹⁰ For David Scheffer the legalist position assumed a right under customary IL to the effect that states have a right to delegate territorial (or universal) jurisdiction to an international court. He “lit a firestorm among international law scholars” by responding that, although it was “indisputable” that municipal courts could exercise jurisdiction in such cases, customary IL did not yet recognise the equal status of an international court.¹⁹¹ For Scheffer, a state exercising territorial jurisdiction over a US national has “no legal right to extradite” to a third state “which has no connection to the crime or the suspect...for the sake of political expediency.” Therefore neither did that right exist in relation to the ICC absent “the consent of the non-party state.”¹⁹² The difference thus came down the question of whether national courts and the ICC were analogous for the purposes of delegating jurisdiction, or whether they should be distinguished.

Former legal adviser and counsel to the US government Madeline Morris rejected the legalist analogy in a position endorsed by Scheffer.¹⁹³ In Morris’ view it was “perilous” to allow a third party removed from a dispute to determine states’ legal rights; ICC decisions would be “more authoritative” than national courts with a “power to create law in a manner disproportionate to that of any state;” and decisions would not be reversible by legislative processes.¹⁹⁴ The fact that the court represented many states capable of cancelling out parochial interests gave no reassurance, since territorial

¹⁸⁶ Cassese, Antonio, Paola Gaeta & John R.W.D. Jones, ‘The Rome Statute: A Tentative Assessment’ in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 1911; Bassiouni, M. Cherif, *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) at 136; See Germany’s statements: Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* (Transnational Publishers, 2005) at 146

¹⁸⁷ Obligations owed “towards all.” See *Barcelona Traction, Light and Power Co Ltd (Belgium v. Spain)* [1970] ICJ Rep 3 at 32

¹⁸⁸ Kaul, Hans-Peter (Head of German Delegation), cited in Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* (Transnational Publishers, 2005) at 145-146

¹⁸⁹ See *S.S. Lotus, The (France v. Turkey)* (1927) No. 10 PCIJ Ser A at 18; Hafner, Gerhard, Kristen Boon, Anne Rübesame & Jonathan Huston, ‘A Response to the American View as Presented by Ruth Wedgwood’ (1999) 10 *European Journal of International Law* 108 at 117; Mégret, Frédéric, ‘Epilogue to an Endless Debate: The International Criminal Court’s Third Party Jurisdiction and the Looming Revolution of International Law’ (2001) 12 *European Journal of International Law* 247 at 252

¹⁹⁰ See Scheffer’s 1999 statement: Office of the Legal Adviser, Department of State, in Sally J. Cummins & David P. Stewart (ed), *Digest of United States Practice in International Law: 1991-1999* (International Law Institute, 2005) at 635 & 638; Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 234

¹⁹¹ Scheffer’s 1999 statement: Office of the Legal Adviser, Department of State, in Sally J. Cummins & David P. Stewart (ed), *Digest of United States Practice in International Law: 1991-1999* (International Law Institute, 2005) at 635 & 638; Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 234

¹⁹² Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 234

¹⁹³ See Morris, Madeline, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Party States’ (2000) 6 *ILSA Journal of International & Comparative Law* 363 at 365. Cited approvingly by Scheffer at Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 478, n.13

¹⁹⁴ See Morris, Madeline, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Party States’ (2000) 6 *ILSA Journal of International & Comparative Law* 363 at 365; Scheffer, David J., ‘The International Criminal Court: The Challenge of Jurisdiction’ (1999) 93 *Proceedings of the Annual Meeting (American Society of International Law)* 68; Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 478, n.13

jurisdiction could “be treated as a form of negotiable instrument” by states working in political factions.¹⁹⁵ Crucially, Morris argued that these concerns could not be dismissed as irrelevant to the legality of delegation, since the legality of customary obligations is itself constituted by consistent state practice that takes account of policy.¹⁹⁶ Thus these were “not ‘mere policy concerns’ but are, in fact, of fundamental legal significance.”¹⁹⁷ The division opened by US policy represented “a genuine dilemma—not excuses or pretexts, but legitimate concerns on each side.”¹⁹⁸

One explanation for contradictory US policy is that Scheffer and Morris understood the ideal of the rule of IL in the terms set by legalism but, due to countervailing political pressures, sought to compromise between that ideal and US national interests. Cassese suggested as much in his response to the US case that as “a legal objection, this is easily dismissed.”¹⁹⁹ Sands was more forceful, rejecting the “absurd notion that it is contrary to international law for the ICC to exercise jurisdiction over Americans who commit international crimes on the territory of countries that have joined the ICC.”²⁰⁰ Yet it is striking that Morris’ explanation for why the ICC jurisdictional regime *contradicts* the rule of IL entails precisely the factors that legalist advocates would cite as evidence that it *conforms* to it. Those concerns could equally be framed as the advantages of an international separation of powers: impartial third party adjudication; unique legal authority derived from separation from national courts; and the integrity of judicial power unaffected by parochial legal actions.²⁰¹

Foreign policy ideology provides a more plausible explanation for these divisions: that legalist and US policy were structured by competing conceptions of IL and remained coherent in these terms. Wippman argues that, as between the US and its opponents, “the dispute was framed as a disagreement over competing legal values.” These were respectively “accountability” and “independence and impartiality,” upon which “[e]ach side claimed the legal high ground.”²⁰² Legalist arguments for jurisdiction over non-state parties were motivated not by black-letter doctrinal interpretation, but by an underlying belief that the rule of IL required the ICC to wield independent judicial power to the exclusion of parallel powers in wayward states.²⁰³ The beliefs underpinning US ICC policy in contrast distinguished the ICC from national courts for lacking any form of democratic checks and balances. Consistent with the expectations of Liberal Internationalism, the ICC was supported so far as it was a backstop to the municipal rule of law, but was illegitimate where it aspired to displace it. The evidence also points to lawyers representing the US Defence and Justice Departments drawing upon Illiberal Internationalist objections to non-consensual legal obligations. Here the legalist claim was rejected as inconsistent with the basic principle of treaty law that “a treaty

¹⁹⁵ Morris, Madeline, ‘High Crimes and Misconceptions: The ICC and Non-Party States’ (2001) 64 *Law and Contemporary Problems* 13 at 47

¹⁹⁶ Morris, Madeline, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Party States’ (2000) 6 *ILSA Journal of International & Comparative Law* 363 at 366

¹⁹⁷ *Ibid* at 366. Original emphasis

¹⁹⁸ *Ibid* at 369

¹⁹⁹ Cassese, Antonio, Paola Gaeta & John R.W.D. Jones, ‘The Rome Statute: A Tentative Assessment’ in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 1911

²⁰⁰ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at 244

²⁰¹ For a rebuttal along these lines see Akande, Dapo, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’ (2003) 1 *Journal of International Criminal Justice* 618 at 625-634

²⁰² Wippman, David, ‘The International Criminal Court’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) at 173

²⁰³ See Morris, Madeline, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Party States’ (2000) 6 *ILSA Journal of International & Comparative Law* 363 at 364

does not create either obligations or rights for a third State...without the consent of that State.”²⁰⁴ Scheffer’s position was consistent with both approaches in arguing that “the establishment of, and a state’s participation in, an international criminal court are not derived from custom but, rather, from the requirements of treaty law.”²⁰⁵ In practice the outcome for each of these policies was identical, but the evidence is clear that American ICC policy followed the theorised structure of foreign policy ideologies, with no evidence that US policymakers recognised legalist ideals for the rule of IL.

Consent Based Division of Powers

As with the policy toward equality under IL, US policymakers continued to assert the necessity of UNSC control to ensure fidelity to the rule of IL. For legalist advocates this formed a basis additional to sovereign equality for rejecting US arguments that the UNSC should be granted control over ICC prosecutions. Bassiouni warned that such a design “cannot be reconciled with the principles of judicial independence and judicial impartiality.”²⁰⁶ Borek rejected Bassiouni’s premise of ICC independence, arguing that the collective will of the Council would be less prone to politicisation than a design allowing states parties to independently initiate prosecutions.²⁰⁷ The UNSC role “can be defined so that it in no way undermines the judicial independence of the court, its judges and its prosecutor, but rather strengthens the court in addressing the important cases that would be part of its mandate.”²⁰⁸ The proposed design to achieve this end included measures such as limiting the UNSC to only referring “over-all situations” to the prosecutor, while the prosecutor retained the sole power to determine which individuals to then indict.²⁰⁹ What is implicit in this argument is that UNSC members, and the US in particular, would remain faithful to rule of law principles necessary to provide checks on the court’s powers.

Demands for UNSC control were voiced most strongly by US legal policymakers influenced by an Illiberal Internationalist conception of IL. The Liberal Internationalist position did not demand a design explicitly guaranteeing 100 percent protection against the prosecution of American citizens before the court, but rather one that depended on the robustness of American constitutional values to ensure that outcome. Scheffer demonstrated this faith in supporting a design that theoretically allowed for the prosecution of US nationals if the justice system proved incapable of investigating and prosecuting a suspect of atrocity crimes: “Either we are the United States of America committed to the rule of law, or we have transformed into another kind of nation.”²¹⁰ In essence, a well-designed court incorporating the protections of America’s exceptional constitutional values would be protection enough against ICC interference.

²⁰⁴ *Vienna Convention on the Law of Treaties* (1969), Art.34: “General rule regarding third States and third organizations”

²⁰⁵ Scheffer’s 1999 statement: Office of the Legal Adviser, Department of State, in Sally J. Cummins & David P. Stewart (ed), *Digest of United States Practice in International Law: 1991-1999* (International Law Institute, 2005) at 635 & 638

²⁰⁶ Bassiouni, M. Cherif, *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) at 156

²⁰⁷ See also Scheffer’s 1997 statement to the same effect: Office of the Legal Adviser, Department of State, in Sally J. Cummins & David P. Stewart (ed), *Digest of United States Practice in International Law: 1991-1999* (International Law Institute, 2005) at 618

²⁰⁸ Borek, Jamison S., *Agenda Item 142: Establishment Of An International Criminal Court* (1 November, 1995) <<http://www.state.gov/documents/organization/65827.pdf>> at 5

²⁰⁹ See Scheffer’s 1997 statement: Office of the Legal Adviser, Department of State, in Sally J. Cummins & David P. Stewart (ed), *Digest of United States Practice in International Law: 1991-1999* (International Law Institute, 2005) at 616

²¹⁰ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 201

The policy position from both the Departments of Justice and Defence sharply diverged on preferred institutional design, but each adhered to the principle that the court's jurisdictional reach must be strictly subject to US consent. In terms of the method for referring cases to the ICC, Justice advocated UNSC control alone, while Defence additionally demanded consent of the state of nationality.²¹¹ The Pentagon position made it clear at the early stages of the ILC draft statute that primary responsibility for referring crimes to the ICC should lie with the UNSC.²¹² Borek for the State Department also set out the basis on which US policy rejected the separation of powers as inconsistent with the rule of IL. She noted the criticism that a central UNSC role would have the effect of "unduly tainting the independence of a judicial body." In response she contended that, under legalist proposals, "the initiation of cases would be subject to whatever political agenda a particular State may have, rather than a collective decision by the Council that in fact would be less likely to reflect a political bias than that of an individual State."²¹³ This was not merely a rejection of the specific draft design, but of the very compatibility of a legalist institutional design with the rule of IL. Yet support for the UNSC centred proposal was already waning among other states in the years leading up to the Rome conference.²¹⁴ Specifically the insistence by the Justice Department that this be the sole method of referral was described as being "toxic" in the eyes of "almost the entire world."²¹⁵

Even so, UNSC control was seen as an inadequate protection by Pentagon officials, who argued (also consistently with maintaining hegemonic privileges) that it was necessary to insulate US military personnel from prosecution to uphold international policing duties. The Pentagon insisted that US consent be required for any prosecution of its nationals – a position accepted by the President on repeated occasions.²¹⁶ Leading up to the Rome conference, the Washington Post reported on the extent that Pentagon pressure, in conjunction with congressional support, was significantly shaping the US position. Explanations for the strength of the position included that defence leaders:

vividly remember when foes of U.S. policy in Vietnam during the 1960s and 1970s and Central America in the 1980s called for prosecution of American officials and servicemen as war criminals. They now fear that without very stringent and specific safeguards, an international court could be used by present-day adversaries such as Iraq or Libya to make similar charges.²¹⁷

Such historical precedents when viewed through the lens of Illiberal Internationalism bolstered a view that an international court was only possible pursuant to a strict consent based division of international powers. Scheffer admonished the Pentagon for failing to recognise "how impractical their insistence on the alleged war criminal's government consenting to his prosecution sounded to the rest of the world."²¹⁸ US insistence on this effective veto, in the case that the ICC Appeals chamber

²¹¹ *Ibid* at 181

²¹² *Ibid* at 171

²¹³ Borek, Jamison S., *Agenda Item 142: Establishment Of An International Criminal Court* (1 November, 1995)

<<http://www.state.gov/documents/organization/65827.pdf>> at 3

²¹⁴ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 176

²¹⁵ *Ibid* at 181

²¹⁶ *Ibid* at 197 & 201-202

²¹⁷ Goshko, John M., 'U.S. Proposes Limit on Global Court: Critics Fear Curb Would Paralyze Prosecution of War Crimes,' *Washington Post* (26 March, 1998) A29

²¹⁸ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 181

overrode a national prosecution, was presented at the Rome conference and entirely rejected by other delegations, who saw it as contrary to the court's very purpose.²¹⁹

Conclusion

US policy towards the ICC at the end of this period rejected any design granting unencumbered judicial or prosecutorial independence to the court. Certainly some compromise was achieved between delegates at Rome, including that the UNSC had the right to suspend ICC investigations, but not control the referral process.²²⁰ The US also constrained the judicial independence of the court by exercising its "legislative" function in defining the elements of crimes rather than leaving it to the court's discretion.²²¹ However, US policy was fundamentally rejected on the issues of an independent prosecutor as a check on complementarity, the legality of delegated jurisdiction, and the controlling role of the UNSC. Krisch and Robinson applauded the success of finalising a founding statute that was "much stronger" than the initial ILC draft, thereby demonstrating the success of NGOs and the LMS in altering "perceptions of the international community as to what was achievable and indeed, necessary." Yet they conceded that, in light of this success, "it is particularly regrettable that the United States could not support the Rome Statute."²²² The evidence is that American legal policymaker's legal ideals in the ICC had remained unmoved. US policy throughout revealed the strong influence of an internationalist ideological stance, expressed across both ends of the liberal-illiberal dimension. At no point however did evidence point to the recognition by US legal policymakers that the legalist principle of separating international powers was an ideal compatible with realising the rule of IL.

CHAPTER CONCLUSION

Throughout the Clinton administration there were various claims, even among US officials, of a contest "between the ideal of an international criminal court and the reality of the world today."²²³ Borek warned in 1995 that the entire enterprise would be futile if states "approach the court from an academically pure perspective, without regard for political realities and what States are willing to participate in and fund."²²⁴ Such statements are consistent with the interpretation that contradictions flowed from a contest between a universal concept of the rule of IL and US political interests.

²¹⁹ Bassiouni, M. Cherif, *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) at 89 & 90, n.199

²²⁰ Pursuant to a final negotiating position approved by Clinton: Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 209

²²¹ See Lietzau, William K., 'International Criminal Law after Rome: Concerns from a US Military Perspective' (2001) 64 *Law and Contemporary Problems* 119; Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* (Transnational Publishers, 2005) at 274; Bos, Adriaan, 'From the International Law Commission to the Rome Conference (1994-1998)' in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 42-43

²²² Krisch QC, Philippe & Darryl Robinson, 'Reaching Agreement at the Rome Conference' in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 89

²²³ Rubin, James, 'US: Go for Real, not Ideal, Court,' *Terra Viva* (17 June, 1998) <<http://www.ips.org/icc/tv160605.htm>>; Crawford, James, 'The Work of the International Law Commission' in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 25

²²⁴ Borek, Jamison S., *Agenda Item 142: Establishment Of An International Criminal Court* (1 November, 1995) <<http://www.state.gov/documents/organization/65827.pdf>> at 5

Reviewing the extensive evidence from this period leads to a more persuasive account, however, in which these forces intertwined through the role of foreign policy ideology. The administration acknowledged from the beginning that joining the ICC as a member state would give it influence to ensure its design and operation remained in line with US interests.²²⁵ Yet the evidence is clear that the very definition of these interests came to be incorporated in conceptions of IL itself.

The implication is that legalist insistence on formalised development, sovereign equality and independent judicial power were inherently limited as a basis for reaching common agreement with the US on ICC design and development. The dominance of Liberal Internationalism combined with competing Illiberal Internationalist pressures led to insistence on a flexible US role to develop international criminal law, including the preservation of amnesties as a limitation on the reach of formal legal obligations. American ICC support was always premised on a form of UNSC control, which was framed both as principled commitment to liberal values and as necessary recognition of relative global power. Finally US policymakers rejected the compatibility of ICC independence with the rule of IL, disagreeing in particular about the legitimacy of delegating core state functions to an international court.

Bassiouni noted the frustration of the LMS who felt they “had bent over backwards to accommodate the US.” The perception was that the US was being held back by “completely unrelated domestic political reasons.”²²⁶ Yet this characterisation begs the question as to how the persons and agencies applying domestic interests perceived US legal obligations and formulated competing positions. US rejection of the Rome Statute on the basis that it met every key element of the legalist rule of IL was indeed destined to rouse claims of hypocrisy and contradiction. Yet a close reading of the evidence from this period reveals that US policy hewed closely to competing and internally coherent sets of beliefs about the very meaning of the rule of IL. Strident criticism of Clinton’s persistent Liberal Internationalist IL policy in following years only corroborates evidence that the period 1993-2000 exhibited an underlying legal coherence.

²²⁵ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 167

²²⁶ Bassiouni, M. Cherif, *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) at 88

BUSH 43 ADMINISTRATION 2000-2004

The administration of President George W. Bush was presented with an ICC design largely settled during the Clinton years, and on the cusp of exercising far-reaching powers with the Rome Statute coming 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 This 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 status of the ICC as an institution of global governance. That entailed continued efforts to deepen and broaden acceptance of the ICC's formal status and authority. There was also an objective of ensuring that the increasingly prominent relationship between the ICC and UNSC did not institutionalise legal inequality, which had been fought against so hard during the 1998 negotiation phase. Finally court advocates continued pushing for the institutional independence of the court and the supremacy of its judicial power.

In contrast, the US implemented a series of policies designed to impede the realisation of the ICC project. First, the administration "unsigned" the Rome Statute to demonstrate it did not intend to be bound by the regime in any form. Secondly, through the UNSC, the US sought and obtained immunity from ICC prosecution for all US military personnel involved in peacekeeping operations. Thirdly, the administration sought and obtained bilateral 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 and formed the basis for characterisations of US policy as contrary to the rule of IL itself. This chapter seeks to refine otherwise persuasive arguments that the Bush 43 administration sought a diminished role for IL by demonstrating that, in doing so, US legal policymakers adhered to well established illiberal and nationalist legal conceptions. The theorised role of foreign policy ideology is thus applied in this chapter to explain the contradiction that legal policymakers sought to dismantle the ICC, yet continued to defend US actions by reference to upholding international legal obligations.

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 5 *supra*; United States Senate, Committee on Foreign Relations, *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)

DOMINANT FOREIGN POLICY IDEOLOGY

President Clinton perceived that Bush and Vice President Dick Cheney “saw the world very differently from the way I did,” and in particular would adopt a more unilateral IL policy opposing key international institutions.³ This is consistent with what Curtis Bradley sceptically described as the “standard view” of the Bush era IL policy:

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 in the perceived value of advancing foreign policy interests through law. Although the administration maintained engagement with key international institutions, they were primarily valued to the extent that “they served immediate, concrete American interests.”⁵ This is consistent with Kagan’s 2002 thesis said to resonate with senior policymakers.⁶ Kagan claimed that, in contrast to European conceptions of IL, Americans continued to perceive a “Hobbesian world where 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.”⁷

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.”⁸ 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.⁹ 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.”¹⁰ The concept became popular among the administration’s legal policymakers,¹¹ with Secretary of Defence Donald Rumsfeld in particular

³ Clinton, William J., *My Life* (Hutchinson, 2004) at 951

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

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

⁶ Goldsmith, Jack L., *The Terror Presidency: Law and Judgment inside the Bush Administration* (W.W. Norton & Co, 2007) at 126-127. It is cited approvingly by former Deputy Assistant U.S. Attorney General in the Office of Legal Counsel, Department of Justice during the Bush 43 administration: Yoo, John C., *War by Other Means: An Insider’s Account of the War on Terror* (Atlantic Monthly Press, 2006) at 47

⁷ Kagan, Robert, ‘Power and Weakness’ (2002) June-July *Policy Review* 3 at 3. See Chapter 2 *supra*

⁸ See Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 417-418. For a sceptical response see: Scheffer, David J., ‘Whose Lawfare is It, Anyway’ (2010) 43 *Case Western Reserve Journal of International Law* 215

⁹ Dunlap Jr., Charles J., ‘Lawfare Today: A Perspective’ (2008) 3 *Yale Journal of International Affairs* 146 at 146; Dunlap Jr., Charles J., *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 D.C., 29 November, 2001) at 5; See also for a useful discussion: Wittes, Benjamin et.al., ‘About Lawfare: A Brief History of the Term and the Site,’ *Lawfare: Hard National Security Choices* (2010) <<https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site>>

¹⁰ Dunlap Jr., Charles J., *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 D.C., 29 November, 2001) at 6

¹¹ Many of whom now contribute to a blog with the same title: Wittes, Benjamin et.al., *Lawfare: Hard National Security Choices* (2010) <www.lawfareblog.com>. For an example of the term’s use see Bolton, John R., ‘Israel’s Increasing Vulnerability,’ *Washington Times* (3 May, 2011) <<http://www.washingtontimes.com/news/2011/may/3/israels-increasing-vulnerability/>>; See

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.”¹² 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.¹³ The adoption of the lawfare moniker thereby encapsulated the idea that legalist conceptions of the rule of law had the capacity to contradict the very principles that underpinned true fidelity to the rule of IL.

The evidence of Bush’s personal beliefs about the rule of IL suggests the thin conception entailed in Illiberal Nationalism.¹⁴ Bush demonstrated this ideology in his more general foreign policy, through a more forceful stance against American enemies, and in his preference for military over diplomatic pressure to achieve US interests.¹⁵ Dueck identifies that, following the 11 September 2001 terrorist attacks, “liberal humanitarian concerns would henceforth take a back seat to considerations of US self-interest.”¹⁶ In legal terms, Bush’s overriding belief was that the US should aim to consolidate hegemonic power “into a more durable system,” but that unlike his predecessors, this would not be achieved by strengthening complementary institutions of IL.¹⁷

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.¹⁸ 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.”¹⁹ Subsequent military action seeking democratisation in Afghanistan and Iraq does indeed appear to exemplify a form of “Wilsonianism with boots.”²⁰ 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.²¹ There is no evidence that the Bush administration ever adopted a strategy to strengthen democracy as a constitutive element of the rule of IL, or a belief that

Goldsmith, Jack L., *The Terror Presidency: Law and Judgment inside the Bush Administration* (W.W. Norton & Co, 2007) at 53-64

¹² Rumsfeld, Donald, *Known and Unknown: A Memoir* (Penguin, 2011) at 629

¹³ *Ibid* at 629

¹⁴ See Rice, Condoleezza, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC, 2011) at 158-159; Mead, Walter R., ‘The Tea Party and American Foreign Policy - What Populism Means for Globalism’ (2011) 90 *Foreign Affairs* 28

¹⁵ See Bush, George W. & Herskowitz, Michael, *A Charge to Keep* (Morrow, 1999) at 239; Foley, Michael, ‘President Bush, The War on Terror, and the Populist Tradition’ (2007) 44 *International Politics* 666 at 683

¹⁶ Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 150

¹⁷ See Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 307

¹⁸ See Smith, Tony, ‘Wilsonianism After Iraq’ in G. John Ikenberry, Thomas J. Knock, Anne-Marie Slaughter & Tony Smith (ed), *The Crisis of American Foreign Policy: Wilsonianism in the Twenty-first Century* (Princeton University Press, 2009); Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 148; Hoff, Joan, *A Faustian Foreign Policy/ From Woodrow Wilson to George W. Bush: Dreams of Perfectibility* (Cambridge University Press, 2008) at 9-12

¹⁹ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Colin L. Powell to be Secretary of State*, 1st Session 107th Congress (2001) at 17

²⁰ Hassner, Pierre & Nicole Gnesotto, ‘The United States: The Empire of Force or the Force of Empire’ (2002) 54 *Chaillot Papers* 5 at 43

²¹ Slaughter, Anne-Marie, ‘Wilsonianism in the Twenty-first Century’ in G. John Ikenberry, Thomas J. Knock, Anne-Marie Slaughter & Tony Smith (ed), *The Crisis of American Foreign Policy: Wilsonianism in the Twenty-first Century* (Princeton University Press, 2009); Knock, Thomas J., ‘“Playing for a Hundred Years Hence”’ in G. John Ikenberry, Thomas J. Knock, Anne-Marie Slaughter & Tony Smith (ed), *The Crisis of American Foreign Policy: Wilsonianism in the Twenty-first Century* (Princeton University Press, 2009)

IL would in turn strengthen democratic norms. Without these elements the Bush policy is distinguished from core elements of Liberal Internationalist IL policy: "Clinton, not Bush, therefore was the true Wilsonian of our time."²²

More broadly, the administration rejected the internationalist consensus of the Bush 41-Clinton years in which global legal institutions had been actively developed for a combination of liberal and illiberal purposes.²³ Rather the Bush 43 administration explicitly rejected the desirability of international legal frameworks as a tool for advancing national security interests. The jurisdictional location of IL policy shifted to a nationalist stance in the sense used here of emphasising the sufficiency of municipal legal power for upholding American interests. At the same time this was done for illiberal purposes of enhancing national security interests, and to preserve non-universal cultural values threatened by purported cosmopolitan values of IL. Thus, although the administration repeatedly expressed its faith in the strategic advantages of global democratisation, this did not structure key legal policymaker's 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.²⁴

The most well known demonstration of the administration's IL policy was in the 2002 *National Security Strategy of the US* ("NSS 2002") which referred to IL only twice.²⁵ The first reference was to "rogue states" who "display no regard for international law," therefore justifying the legal principle of relative sovereignty that facilitated much of the administration's military policy in Afghanistan and Iraq.²⁶ The second reference to IL was in the context of developing the so-called "Bush Doctrine."²⁷ This was expressed by Bush in a 2002 WestPoint speech outlining a new US strategic policy to "confront the worst threats before they emerge."²⁸ In the NSS 2002 the doctrine was elaborated as a policy for meeting the threat of weapons of mass destruction, requiring that the US "adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."²⁹ By removing any of the conventional constraints on self defence requiring "imminence,"³⁰ the administration sought to develop law permissively, as an enabling framework rather than one capable of constraining US policy.

At the same time, alternative conceptions of IL competed for influence throughout the first Bush 43 term. Mead characterises Colin Powell as the leading proponent of Liberal Nationalist beliefs

²² Lieven, Anatol, *America Right or Wrong: An Anatomy of American Nationalism* (Oxford University Press, 1st paperback ed, 2005) at 12. Alternatively Hoff draws a distinction between "good" and "bad" Wilsonianism, with the Bush 43 administration falling into the latter category: Hoff, Joan, *A Faustian Foreign Policy/ From Woodrow Wilson to George W. Bush: Dreams of Perfectibility* (Cambridge University Press, 2008) at 9-12

²³ See Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 176

²⁴ Mead, Walter R., 'The Carter Syndrome,' *Foreign Policy* (4 January, 2010)

<http://www.foreignpolicy.com/articles/2010/01/04/the_carter_syndrome>

²⁵ See Rojas, Federico, 'Obama's Pledge to International Law: A Look at the First Sixteen Months in Office' (2009) 2 *Amsterdam LF* 23 at 24

²⁶ The White House, *The National Security Strategy of the United States of America 2002*, The White House (2002) at 14

²⁷ *Ibid*; Taubman, Jarrett, 'Towards a Theory of Democratic Compliance: Security Council Legitimacy and Effectiveness after Iraq' (2004) 37 *International Law and Politics* 161 at 162. See generally Meiertöns, Heiko, *The Doctrines of US Security Policy: An Evaluation under International Law* (Cambridge University Press, 2010) at 179-224

²⁸ Bush, George W., *Graduation Speech at West Point* (1 June, 2002) <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>>; The White House, *The National Security Strategy of the United States of America 2002*, The White House (2002) at ii

²⁹ The White House, *The National Security Strategy of the United States of America 2002*, The White House (2002) at 15

³⁰ See Crawford, James, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) at 750-752

within the administration.³¹ This constituted a rejection of the Clinton administration's Liberal Internationalist "overreaching" in favour of conserving the status quo of US power and global alliances.³² 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 41.³³ The preferable approach is to place Powell's beliefs about IL somewhere between these characterisations. 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.³⁴ 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.³⁵ That combination of beliefs provided a basis for Powell to support the principle of the rule of IL, but in particularistic terms. Powell explicitly distinguished his cautious approach from Helms' opposition to even basic principles of international legal doctrine, including the status of customary international law 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?³⁶

In response Powell fully accepted that the *Vienna Convention on the Law of Treaties* expressed the US obligation to "refrain from acts which would defeat the object and purpose of a treaty."³⁷ 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 US.³⁸

Powell's beliefs were reflected in positions adopted by his State Department Legal Adviser William Taft IV, who has cited his attraction to Powell's "commitment to the rule of law."³⁹ Taft explicitly identified American interests in a strategy "to promote and strengthen international law and international institutions." Motives for this 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."⁴⁰ At the same time Taft has emphasised that IL remained primarily a consent based order so that "a state is not subject to international law unless it

³¹ In the form of his equivalent "Jeffersonian" tradition

³² Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 307-308; Daalder, Ivo H. & Lindsay, James M., *America Unbound: The Bush Revolution in Foreign Policy* (Brookings Institution Press, 2003) at 45-46

³³ In the form of his equivalent "Realist" tradition: Dueck, Colin, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) at 150 & 152. See Chapter 5 *supra*

³⁴ Woodward, Bob, *Bush at War* (Simon & Schuster, 2003) at 332-336; Mann, James, *Rise of the Vulcans: The History of Bush's War Cabinet* (Viking, 2004) at 351

³⁵ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Colin L. Powell to be Secretary of State*, 1st Session 107th Congress (2001) at 88. See *infra*

³⁶ *Ibid* at 104

³⁷ See *Vienna Convention on the Law of Treaties* (1969), Art. 18

³⁸ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Colin L. Powell to be Secretary of State*, 1st Session 107th Congress (2001) at 104

³⁹ Scharf, Michael P. & 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) at 32

⁴⁰ Taft IV, William H., *Interview with Author* (22 November, 2011)

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.”⁴¹

The figure representing the most dominant approach to US ICC policy during the first term however, was then Under Secretary of State for Arms Control and International Security John Bolton, who had an influence over the administration beyond his designated office.⁴² Taft has explained 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.”⁴³ 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.⁴⁴ In academic writings predating his appointment, Bolton attacked not only the ICC but the “agenda’ of constraining the US through international law.”⁴⁵ Reviewing the previous administration specifically, Bolton charged that Clinton “forgot that the UN was an instrument to be used to advance America’s foreign policy interests, not to engage in international social work and ivory-tower chattering.”⁴⁶ Bolton often adopted legal outcomes consistent with Illiberal Internationalism, but his views are most consistent with the same Illiberal Nationalist beliefs as 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.”⁴⁷ Significantly Bolton’s legal conception ultimately prevailed in key administration decisions central to establishing the rule of IL.

DEVELOPING NON-ARBITRARY GLOBAL GOVERNANCE

Following the 1998 Rome Conference, states and NGOs who had advocated a legalist ICC design continued to emphasise the formalised development of global governance as necessary to establishing the rule of IL. US policy, however, appeared to reverse entirely from the Clinton years by explicitly opposing the further development of the ICC 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.”⁴⁸ Most notoriously Bolton “unsigned” the *Rome Statute* in 2002, describing it as “the happiest moment of my government service.”⁴⁹ No legal policymakers within the Bush administration demonstrated any commitment to the Liberal

⁴¹ *Ibid.* For a report on US ICC policy that Taft sees as closely aligning with his own views see: Taft IV, William H. & Patricia M. Wald, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement* (The American Society of International Law, 2009)

⁴² Cerone, John P., ‘Dynamic Equilibrium: The Evolution of US Attitudes Toward International Criminal Courts and Tribunals’ (2007) 18 *European Journal of International Law* 277 at 293

⁴³ Taft IV, William H., *Interview with Author* (22 November, 2011)

⁴⁴ Rice, Condoleezza, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC, 2011) at 158. Bolton plays down this distinction but agrees that he and Powell held different “philosophies”: Bolton, John R., *Surrender Is Not an Option: Defending America at the United Nations* (Simon & Schuster, 2007) at 58 & 60

⁴⁵ Bolton, John R., ‘Is There Really “Law” in International Affairs?’ (2000) 10 *Transnational Law & Contemporary Problems* 1 at 48

⁴⁶ Bolton, John R., ‘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) at 51

⁴⁷ Cited in Blumenthal, Sidney, *How Bush Rules: Chronicles of a Radical Regime* (Princeton University Press, 2006) at 151

⁴⁸ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Colin L. Powell to be Secretary of State*, 1st Session 107th Congress (2001) at 89

⁴⁹ Bolton, John R., *Surrender Is Not an Option: Defending America at the United Nations* (Simon & Schuster, 2007) at 95

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 there was the perception that the rule of law itself had been rejected. Yet, through this period, American legal policymakers consistently emphasised US compliance with international legal obligations, thereby creating grounds for accusations of hypocrisy. The issue considered here is, accordingly, whether US legal policymakers recognised the rule of IL in the legalist terms articulated by global counterparts, or alternatively whether legal conceptions were always those drawn from American foreign policy ideology.

Legalist Policy

The policy of formalising a global institution governing international criminal law was expressed in a 2003 EU common position and subsequent 2005 cooperation treaty with the ICC, each confirming the goal of “consolidation of the rule of law and respect for human rights.”⁵⁰ 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.”⁵¹ 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.”⁵² Article 2(1) of the common position set 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.”⁵³ This conception of the rule of IL focussed on formalised and universal obligations provides the context for understanding EU expression of “disappointment and regret” when the US publically “unsigned” the Rome Statute in May 2002.⁵⁴ The action was characterised as having “undesirable consequences on multilateral treaty-making and generally on the rule of law in international relations.”⁵⁵ In particular, the action was perceived as contradictory for the “potentially negative effect” of US policy on a cause “which the United States shows itself strongly committed.”⁵⁶ These statements revealed an understanding of the rule IL as requiring the progressive extension of global governance to eliminate the right of states to take discretionary actions in lieu of formalised rules and authority.

⁵⁰ 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 at 67; Council of the European Union, *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance* (6 December, 2005), at preamble. See also Council of the European Union, *Action Plan to Follow-Up on the Common Position on the International Criminal Court* (February, 2004) <<http://www.consilium.europa.eu/uedocs/cmsUpload/ICC48EN.pdf>>

⁵¹ 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 at 67; Council of the European Union, *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance* (6 December, 2005), at preamble

⁵² 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 at 67

⁵³ *Ibid* at 68

⁵⁴ 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) at 1

⁵⁵ *Ibid* at 2

⁵⁶ *Ibid* at 4

Beliefs of American Legal Policymakers

Rejection of Internationalism

A report prepared for the US Congress in this period identified the “main issue” to be determined as “the level of cooperation to allow between the United States and the ICC.”⁵⁷ The 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.”⁵⁸ 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 possibilities.

The Illiberal Nationalist preference of the Bush 43 administration highlighted a growing distinction with the Illiberal *Internationalism* that had characterised the Bush 41 ICC policy.⁵⁹ 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 hostile outsider.”⁶⁰ For Scharf, the hostility of figures such as Senator Helms epitomised the “hostile outsider” strategy which would “transform American exceptionalism into unilateralism and/or isolationism” through disengaging US contribution to international institutions and processes. Moreover, it would “erode the moral legitimacy” of the US that had facilitated concrete military and economic interests.⁶¹ This was a criticism of Illiberal Nationalism and its rejection of any strategy for advancing US interests through global legal integration. Because the ICC was already a confirmed reality of the international system, Scharf concluded that the US could only really sustain its policy by hostility against the international order itself. That possibility sharply divided internationalist and nationalist forms of illiberalism, with Scharf summarising his Illiberal Internationalist intervention as a “detached” analysis “based on *realpolitik* considerations.”⁶² This made clear that apparently similar policy outcomes across consecutive periods masked ideological divisions between internationalist and nationalist ICC scepticism.

The rejection of Liberal Internationalism was already evident in the weeks leading up to Clinton’s decision to sign the Rome Statute when Helms objected that “the President has effectively given his approval to this unprecedented assault on American sovereignty.”⁶³ This view of American interests saw global governance as an existential threat that would ultimately erode the sovereignty underwriting national security and the preservation of American cultural values. 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

⁵⁷ Elsea, Jennifer, *U.S. Policy Regarding the International Criminal Court* (Congressional Research Service, 9 July, 2002) at 3

⁵⁸ *Ibid* at 3

⁵⁹ See Chapter 5 *supra*

⁶⁰ Scharf, Michael P., ‘The United States and the International Criminal Court: A Recommendation for the Bush Administration’ (2000) 7 *ILSA Journal of International & Comparative Law* 385 at 386

⁶¹ *Ibid* at 386-387

⁶² *Ibid* at 388

⁶³ Helms, Jesse, ‘Helms Opposes Clinton’s Approval of the ICC Treaty’ *Washington File* (1 February, 2001) <<http://wfile.ait.org.tw/wf-archive/2001/010102/epf206.htm>>

and one nation state in particular.”⁶⁴ Rather than interpreting IL in terms of universal values as recognised by liberalism, Bolton adopted the prism of particularistic American values, dismissing overwhelming support of European allies by saying “that is a major reason why they are Europeans and we are not.”⁶⁵ The attitude was shared by Bolton’s former professor and colleague Robert Bork⁶⁶ 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.”⁶⁷ These statements signalled the trend away from the internationalist worldview prevailing since the end of the Cold-War toward beliefs that domestic laws and institutions were sufficient to advance American foreign policy interests.

Once appointed as Under Secretary for Arms Control and International Security, 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.”⁶⁸ 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 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.”⁶⁹ Where the US 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.”⁷⁰ This went beyond mere criticism of the ICC’s particular design and instead sought to severely constrict global governance in addressing international crimes. Bork again concurred, attributing “great credit” to Bush for withdrawing from the treaty regime.⁷¹ He substantiated his claim that the court was intertwined with anti-American sentiment by interpreting the “cheers and rhythmic stomping” at the conclusion of the Rome conference as directed at the US’ defeat in the final vote.⁷²

Compatibility of US Policy with the Rule of International Law

Rejection of the ICC as a constraint on US foreign policy did not however constitute a denial of the reality of IL as an institutional structure with which the US must engage. Throughout his campaign

⁶⁴ United States Senate, Committee on Foreign Relations, *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) at 28

⁶⁵ *Ibid* at 31

⁶⁶ Bolton, John R., ‘In memoriam: Robert H. Bork,’ *American Enterprise Institute* (19 December, 2012) <<http://www.aei.org/publication/in-memoriam-robert-h-bork/>>

⁶⁷ Bork, Robert H, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003) at 20-21

⁶⁸ Bolton, John R., *Remarks at the American Enterprise Institute: American Justice and the International Criminal Court* (3 November, 2003) <<http://2001-2009.state.gov/t/us/rm/25818.htm>>

⁶⁹ Bolton, John R., *Surrender Is Not an Option: Defending America at the United Nations* (Simon & Schuster, 2007) at 359-360

⁷⁰ Bolton, John R., *Remarks at the American Enterprise Institute: American Justice and the International Criminal Court* (3 November, 2003) <<http://2001-2009.state.gov/t/us/rm/25818.htm>>

⁷¹ Bork, Robert H, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003) at 35

⁷² *Ibid* at 35

against the ICC, Bolton emphasised that US policy remained in accordance with existing legal obligations.⁷³ In particular Bolton noted the problem that, although the Bush campaign had removed any question of US support, the continued presence of its signature left some room for ambiguity.⁷⁴ For this reason Bolton was “determined to establish the precedent, and to remove any vestigial argument that America’s signature had any continuing effect.”⁷⁵ 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.”⁷⁶ 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.⁷⁷ Rather the Bush position shifted to the idea that “the benefits of flexibility far outweigh the diplomatic costs of declining to participate in international agreements that are popular with friends and allies.”⁷⁸ More particularly this aligned with the Illiberal Nationalist belief that IL should be developed as a permissive framework, and that the US should avoid signing any treaties suggesting otherwise.

The ultimate “unsigning” of the Rome Statute was achieved against the wishes of the State Department, but with the urging of the Secretary of Defence⁷⁹ and support of the President.⁸⁰ 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.”⁸¹ 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.”⁸² A May 2002 letter to the UN Secretary General from Bolton relevantly communicated that the US had no intention to become a party to the treaty and therefore had “no legal obligations arising from its signature.”⁸³ This act renounced the legal obligation that arose with Clinton’s 2000 signature that the US not engage in actions inconsistent with the Rome Statute “until it shall have made its intention clear not to become a party to the treaty.”⁸⁴ In following this procedure Bolton emphasised that the US had complied with “legitimate mechanisms provided for in the *Rome Statute* itself.”⁸⁵

On the day of the unsigning Under Secretary of State for Political Affairs Marc Grossman set out the beliefs structuring the Bush ICC policy, with a commitment to “justice and the rule of law”

⁷³ See Noyes, John E., ‘American Hegemony, U.S. Political Leaders, and General International Law’ (2004) 19 *Connecticut Journal of International Law* 293 at 299

⁷⁴ Bolton, John R., *Surrender Is Not an Option: Defending America at the United Nations* (Simon & Schuster, 2007) at 95

⁷⁵ *Ibid* at 95

⁷⁶ Daalder, Ivo H. & Lindsay, James M., *America Unbound: The Bush Revolution in Foreign Policy* (Brookings Institution Press, 2003) at 45

⁷⁷ See *Vienna Convention on the Law of Treaties* (1969), Art. 18: “Obligation not to defeat the object and purpose of a treaty prior to its entry into force”

⁷⁸ Daalder, Ivo H. & Lindsay, James M., *America Unbound: The Bush Revolution in Foreign Policy* (Brookings Institution Press, 2003) at 45

⁷⁹ Rumsfeld, Donald, *Known and Unknown: A Memoir* (Penguin, 2011) at 632

⁸⁰ Bolton, John R., *Surrender Is Not an Option: Defending America at the United Nations* (Simon & Schuster, 2007) at 95

⁸¹ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Colin L. Powell to be Secretary of State*, 1st Session 107th Congress (2001) at 61

⁸² *Ibid* at 61

⁸³ Bolton, John R., ‘International Criminal Court: Letter to UN Secretary General Kofi Annan,’ *U.S. Department of State: Archive* (6 May, 2002) <<http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>>

⁸⁴ *Vienna Convention on the Law of Treaties* (1969), Art. 18

⁸⁵ Bolton, John R., *Remarks at the American Enterprise Institute: American Justice and the International Criminal Court* (3 November, 2003) <<http://2001-2009.state.gov/t/us/rm/25818.htm>>. This correctness of this legal conclusion has generally been supported: See Swaine, Edward T., ‘Unsigning’ (2003) 55 *Stanford Law Review* 2061

being foremost. Also listed, 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.⁸⁶ The crux of Grossman’s argument was that the US was compelled to unsign the statute precisely to uphold its “leadership role in the promotion of international justice and the rule of law.” Grossman’s reasoning reflected elements of Liberal Nationalist beliefs – about the sufficiency of municipal law for upholding democratic rights, and the corrosive effect of IL on these rights. No US legal policymaker advocated a pure form of “isolationism,” which would entail structuring IL to achieve a complete separation between the US and global affairs. Liberal Internationalism does however reflect elements of isolationist sentiments in seeking to define US legal interests in terms of the self-contained character of states. Grossman defined US commitment to “promotion of the rule of law” as the privileging of independent states that accept “the challenges and responsibilities associated with enforcing the rule of law.” Limiting global governance in this way was seen to provide a more effective barrier to impunity than the ICC, and therefore legal responsibilities “should not be taken away from states.” Grossman’s argument shared much with a Liberal Internationalist policy in focussing on “self-governing democracies” as the foundation of the rule of law, but remained distinct through an emphasis on the defensive development of IL rather than its role in *strengthening* transnational connections.⁸⁷

Former Bush 43 State Department counsellor on international law, Curtis Bradley, defended the compatibility of the Bush policy with the rule of IL by arguing that at no point did the administration’s actions amount to “repudiations of international law.”⁸⁸ In this respect he concurred that “unsigned” the Rome Statute was entirely consistent with Article 18 of the Vienna Convention to make “its intention clear not to become a party to the treaty.”⁸⁹ The central point for Bradley was that the administration “did not contravene or disregard international law; rather it carefully followed international law governing ‘unsigned.’”⁹⁰ However, this argument only refutes claims that US policy eroded the rule of IL if one understands Bradley’s own legal conception. His arguments were consistent with Illiberal Internationalism and the commitment to pragmatically developing IL by clearly identifying limitations to the reach of global governance. In this Bradley noted that the worldview of US critics “assumes that having more, and more expansive, international rules is always better for the world.”⁹¹ Bradley’s position both preserved hegemonic privileges secured by remaining outside of legal constraints, and ultimately turned on consent as the lynchpin of international legal power. For the actual legalist critics cited by Bradley, these elements each fall short of demonstrating affinity for the rule of IL. The act of unsigned directly repudiated the formal development of global governance – not just the particular design of the ICC. Conformity to Vienna Convention obligations was therefore no answer to legalist criticisms.

⁸⁶ Grossman, Marc, ‘Remarks to the Center for Strategic and International Studies,’ *American Foreign Policy and the International Criminal Court* (6 May, 2002) <<http://2001-2009.state.gov/p/us/rm/9949.htm>>

⁸⁷ *Ibid*

⁸⁸ Bradley, Curtis A., ‘The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy’ (2009) 4 *Duke Journal of Constitutional Law & Public Policy* 57 at 59

⁸⁹ *Ibid* at 61-62; see *Vienna Convention on the Law of Treaties* (1969), Art.18(a)

⁹⁰ Bradley, Curtis A., ‘The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy’ (2009) 4 *Duke Journal of Constitutional Law & Public Policy* 57 at 62

⁹¹ *Ibid* at 72

Bradley's argument is less persuasive in his conclusion 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."⁹² This conclusion flows from an analysis at the level of IL policy outcomes – according to which there are broad similarities between successive administrations. But disaggregating the apparent beliefs of legal policymakers reveals a distinction between the two administrations comprised of a shift from competition between Liberal and Illiberal Internationalist preferences in the previous era, to the primary contest between Illiberal Nationalism and Internationalism in the latter. Bradley readily conceded that Bolton was "openly hostile" toward the UN, but without considering the degree to which that hostility was constitutive of the content of IL. Key positions influencing the Bush administration were antagonistic toward a formalised status for the ICC, and in a way quite distinct from the previous era. Unsurprisingly broad continuities can be identified in policy outcome, but the decision-making process was marked by a meaningful ideological shift.

Conclusion

The meaning of developing non-arbitrary forms of global governance remained contested throughout this period between legalism and competing American foreign policy ideologies. Legalist policy remained committed to the formalised development of the ICC 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 what were considered arbitrary constraints on US autonomy. 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."⁹³ Such selective development did indeed reflect the view of key US legal policymakers, but this does not support the further conclusion that the rule of IL 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 policy maintained fidelity to long established nationalist conceptions of legal obligation that rejected the legitimacy of an expansive formalised rule of IL. Rather US legal policymakers operated according to a structure of beliefs in which the permissive development of ICC obligations was necessary to uphold, not merely US interests, but legal principle.

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 capture the attention of parties was the increasingly prominent, but largely undefined, relationship between the ICC and UNSC, with debate turning to the legal privileges of the P-5. From the outset, the legalist position insisted on equality before the law in the form of equal rights and duties of all signatories to

⁹² *Ibid* at 62

⁹³ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at 60

the Rome Statute. In particular limits were established on the power of the P-5 to approve ICC investigations and prosecutions. The US resisted these arguments from the time of the Clinton administration onward, consistently pushing for varying degrees 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 Resolution 1422 of 2002, renewed as Resolution 1487 in 2003.⁹⁴ As such, the issue arises of whether and how US legal policymakers squared legal privileges with equality as an element of the rule of IL.

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 US was “quite right to point to its special global responsibilities,” equally “European nations also have peacekeeping responsibilities, but see no threat to these from the Court.” Solana thus made an appeal to the US 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.”⁹⁵ 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.⁹⁶

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?”⁹⁷ Bassiouni and Sands’ characterisation of US policy disregarding the rule of IL turned in large measure on its inconsistency with the principle of sovereign equality. Although the resolutions did not single out named states, the intent and effect was clearly to establish unequal legal rights for the US. The critiques makes clear that the primary charge against the US was of pitting political interest against legal principle, with the triumph of the former.

Beliefs of American Legal Policymakers

Hegemonic Privileges through UNSC Control

Murphy argued that securing exemption from ICC prosecution for US peacekeeping personnel revealed the American belief “that it is the exceptional, indeed ‘indispensable,’ nation entitled to the benefit of special rules.”⁹⁸ More evidence is required however to specify the structure of those beliefs along ideological dimensions, and therefore what they meant for defining “equality” under IL. The

⁹⁴ SC Res 1422, UN Doc S/RES/1422 (12 July, 2002); SC Res 1487, UN Doc S/RES/1487 (12 June, 2003)

⁹⁵ Solana, Javier, ‘The Intertwining Of Security and Economics in Transatlantic Politics,’ *Speech at the Bertelsmann Foundation Transatlantic Strategy Group, Berlin* (11 July, 2002) <http://eu-un.europa.eu/articles/en/article_1517_en.htm>

⁹⁶ Bassiouni, M. Cherif, *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) at 144

⁹⁷ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at 58

⁹⁸ Murphy, John F., *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004) at 191

evidence from this period points to a combination of beliefs informing IL policy drawn from Illiberal Internationalism and variants of nationalism. Of these the only meaningful support for the court came from Illiberal Internationalist policymakers, with the exemplar being Jack Goldsmith as legal adviser in the Department of Defence 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 particularistic conception of the rule of IL.

Goldsmith recognised that at the heart of ICC disagreement was a conflict between sovereign equality as the core of an ICC consistent with the rule of IL, and a countervailing belief that hegemonic privilege was the necessary guarantor of international justice. Here he adopted Kagan's 2002 argument 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."⁹⁹ 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 international criminal law" viewed by other states as a necessary element of the "rule of law."¹⁰⁰

To this claim he 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."¹⁰¹ 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.¹⁰²

This was an argument for granting hegemonic privileges as a necessary element for realising the rule of IL. Consistent with Kagan's argument, Goldsmith noted that the outcome of the Rome Conference was "dominated by weak and middle powers" as well as NGOs.¹⁰³ That pointed observation fitted within a broader conception of IL as requiring a foundation not in high-minded aspirations, but in effective political power. As an illustration he observed that 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 "U.S. military, diplomatic, and financial might."¹⁰⁴ This reads as 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.¹⁰⁵ For Goldsmith there was a "perversity" in the ICC design for its

⁹⁹ Goldsmith, Jack L., 'The Self-Defeating International Criminal Court' (2003) *The University of Chicago Law Review* 89 at 101, n.50. Citing Kagan, Robert, 'Power and Weakness' (2002) *June-July Policy Review* 3 at 11. For a critical response to Goldsmith see Brilmayer, Lea, 'Super Sovereign,' *Lecture Delivered at the Federal Court of Australia, Sydney* (16 September, 2010)

¹⁰⁰ Goldsmith, Jack L., 'The Self-Defeating International Criminal Court' (2003) *The University of Chicago Law Review* 89 at 99. However his own conclusion was that an explanation focussed on political interests remained more persuasive

¹⁰¹ *Ibid* at 89

¹⁰² *Ibid* at 89

¹⁰³ *Ibid* at 90

¹⁰⁴ *Ibid* at 93

¹⁰⁵ See Koh, Harold H., 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599 at 2634

potential “chilling effect” on America’s “unique international policing responsibilities” to uphold human rights.¹⁰⁶ In circumstances where the US 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.”¹⁰⁷ Contrastingly, states which breached international criminal law, but were not globally engaged, would largely avoid the reach of the court.

The argument was thus one for institutionalising American hegemonic privilege as a core element of the rule of IL. The unstated belief that squared this account was that equality under IL meant according rights equal to the *unequal* duties performed by each state in upholding the integrity of the system. Goldsmith certainly did not characterise his position in this way, and in fact conceded that he was arguing for a “benign hypocrisy that appears to reconcile rule-of-law values with the enforcement asymmetries of international politics.”¹⁰⁸ In other words, he stated his position in terms of the null hypothesis of this thesis: that the rule of IL had a unified meaning, but that US policy must necessarily erode the ideal according to political interests. The power of ideology as defined here however is in structuring the beliefs of adherents without any necessary consciousness of a culturally shared worldview. The clear structure of Goldsmith’s beliefs is congruent with ideas about IL long established by Illiberal Internationalist ideology. The clear implication of Goldsmith’s argument is that the idealism of a court constructed upon the principle of sovereign equality was not problematic merely because it diminished American political influence: it diminished the rule of IL itself.

The influence of exceptionalist beliefs on US legal policymakers flowed into the substantive content of resolutions 1422 and 1487. The resolutions noted the differential legal position of states depending on whether or not they were parties to the Rome Statute – which in itself granted no privileged status to non-parties. However, in this context, the resolutions then emphasised the guiding principle 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.”¹⁰⁹ This understanding set up the basis for tailoring special immunity rights to facilitate continued US international engagement. This outcome was consistent more generally with a policy orientated view of IL in which US responsibilities upholding effective international peace and security were recognised within law – to the exclusion of formal sovereign equality. The influence of these legal beliefs was further evident in the way the resolutions ordered international legal 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.”¹¹⁰ The influence of Illiberal Internationalism was consistent in dividing international legal powers according foremost to state consent.

The Illiberal Internationalist policy advocated by Goldsmith and others frequently melded with more nationalist legal conceptions in this period, but did remain distinct from them through a focus on maintaining America’s global legal presence. From an Illiberal Nationalist perspective states should

¹⁰⁶ Goldsmith, Jack L., ‘The Self-Defeating International Criminal Court’ (2003) *The University of Chicago Law Review* 89 at 95

¹⁰⁷ *Ibid* at 98-99

¹⁰⁸ *Ibid* at 104

¹⁰⁹ SC Res 1422, UN Doc S/RES/1422 (12 July, 2002)

¹¹⁰ *Ibid*

possess a relative sovereignty depending on their alignment with American values and national security. Any design which granted equal legal status irrespective of character would thus be contrary to this conception of IL. Jesse Helms warned of “a court run amok,” that should be resisted for being controlled by states that included “dictatorships.”¹¹¹ This problem was acute where the ICC remained “immune to a U.S. veto” through the UNSC due to the success of legalist principles. Complete UNSC control was equally consistent with the Illiberal Nationalist view that the ICC should be designed to preserve legal hierarchies with hostile states.

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 and inflexible requirement for upholding the rule of IL. A later UNSC debate about the ICC and the rule of IL 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.”¹¹² In contrast, the strength of Illiberal Internationalist conceptions within the administration translated into a belief that institutional recognition of American hegemonic privilege was a necessary element of an effective rule of IL. Goldsmith unapologetically asserted that:

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.¹¹³

In these circumstances, ideology set hard limits to reaching a united position on the proper development of states’ rights and duties before the court, with political preferences crystallised in competing meanings of “equality” as a necessary element of the rule of IL.

ORDERING INTERNATIONAL LEGAL POWER

Through the early years of the court’s operation, advocates of a legalist policy continued demanding a clear separation in international legal powers, with judicial power isolated in the ICC and clearly distinguished from the executive and legislative influence of states. This policy assumed the independence of the ICC, and therefore legitimacy of the supremacy of its judicial power. In contrast the Bush administration supported domestic legislation intended to reverse that relationship and subordinate the court’s powers to US municipal legal authority.¹¹⁴

The *American Service-Members’ Protection Act (2002)* (“ASPA”) – colloquially known as the “Hague Invasion Act” – represented a clear shift from the Clinton administration, which had opposed

¹¹¹ Helms, Jesse, *Congressional Record, 107th Congress*, (2 October, 2001) at S10042

¹¹² UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012) at 2 per the Liechtenstein delegate

¹¹³ Goldsmith, Jack L., ‘The Self-Defeating International Criminal Court’ (2003) *The University of Chicago Law Review* 89 at 103

¹¹⁴ See Human Rights Watch, ‘U.S.: ‘Hague Invasion Act’ Becomes Law,’ *Human Rights Watch* (4 August, 2002)

<<http://www.hrw.org/en/news/2002/08/03/us-hague-invasion-act-becomes-law>>

the bill in 2000.¹¹⁵ The effect of 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.¹¹⁶ 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.¹¹⁷ These policies contradicted legalist principles of a separation of powers, which therefore cast US policy as contradicting the rule of IL itself.

Legalist Policy

In this period Donald Rumsfeld rejected the Rome Statute on the basis that: the court lacked adequate checks and balances on its power; diluted the authority of the UNSC; and opened the door to politicised prosecutions of American nationals. To this Sands responded that what Rumsfeld really rejected was “that the rules will not allow the United States or other countries to use political power to control the proceedings.”¹¹⁸ 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 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.”¹¹⁹

Following the passage of ASPA, the European Parliament declared that the Act “goes well beyond the exercise of the US’s 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.”¹²⁰ In legal terms this was a criticism of US policies that aimed to reclaim elements of the court’s judicial power which 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 in circumstances where both the US and EU “uphold freedom, democracy, human rights and the principles of the rule of law.”¹²¹ Then German Foreign Minister Joschka Fischer corresponded personally with Secretary Powell to warn against the “rift” that 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.”¹²² This is really the core of the legalist case for demanding a separation of powers in the ICC: That a multilateral global institution exercising judicial power independently of political interests is both desirable and feasible.

¹¹⁵ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 198; Schabas Schabas, William, *An Introduction to the International Criminal Court* (Cambridge University Press, 4th ed, 2011) at 31

¹¹⁶ *American Service Members’ Protection Act*, Pub L 107–206, 116 Stat 82 (2002), sec.2008(a)

¹¹⁷ Younge, Gary & Ian Black, ‘War Crime Vote Fuels US Anger at Europe,’ *The Guardian* (11 June, 2003) <<http://www.theguardian.com/world/2003/jun/11/usa.eu>>

¹¹⁸ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at 48

¹¹⁹ *Ibid* at 61

¹²⁰ European Parliament, ‘Consequences for Transatlantic Relations of Law on the Protection of US Personnel,’ *Texts Adopted at the sitting of Thursday 4 July 2002: Part One* (4 July, 2002) <http://www.amicc.org/docs/EPres7_4_02.pdf>

¹²¹ Haarder, Bertel, *Consequences for transatlantic relations of the law on the protection of US personnel: Debate in European Parliament* (3 July, 2002) <http://www.amicc.org/docs/EP_ASPAdebate.pdf>

¹²² Fischer, Joschka, *Text of letter from German Foreign Minister to Secretary of State Colin Powell Dated October 24, 2001, delivered on October 31* (24 October, 2001) <http://www.amicc.org/docs/GerPowell10_24_01.pdf>

The Council of the EU ultimately responded to the Article 98 campaign by setting out guiding principles stipulating that only persons sent by the US government in an official capacity were to be covered.¹²³ 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. The Council reached this position by reluctantly conceding¹²⁴ that limited privileges could be reserved to the US in cases where officials were accused of crimes within the court's jurisdiction. The compromise, spearheaded by British diplomats, was criticised by Amnesty International for allowing "the US to shift the terms of the debate from legal principle to political opportunism."¹²⁵ 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 US where the objective was "developing effective and *impartial* international criminal justice."¹²⁶ This fortified the underlying commitment to a separation of powers and independent court as a defining element of the rule of IL.

Beliefs of American Legal Policymakers

The Threat of an Independent Court

The authoritative US position on the ICC's legal powers was set out in the NSS 2002 in a section entitled "Transform America's National Security Institutions to Meet the Challenges and Opportunities of the Twenty-First Century."¹²⁷ The section starts with the principle that the US must "reaffirm the essential role of American military strength. We must build and maintain our defenses beyond challenge." In this context the 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.¹²⁸

These sentiments replicated statements 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."¹²⁹ These interpretations of international jurisdiction dealt directly with the proper ordering of international legal powers exercised by the ICC, which came to be defined by opposition both to legalist arguments for a fully independent court, but also Liberal Internationalist policy that supported a court with independent powers subject to democratic checks and balances.

¹²³ Council of the European Union, *Council Conclusions on the International Criminal Court* (30 September, 2002) <<https://www.consilium.europa.eu/uedocs/cmsUpload/ICC34EN.pdf>>

¹²⁴ The guidelines maintain that the agreements as then drafted remained "inconsistent with ICC States Parties' obligations with regard to the ICC statute": See *ibid*

¹²⁵ Black, Ian, 'Britain Accused of Sacrificing New Court,' *The Guardian* (1 October, 2002)

<<http://www.theguardian.com/world/2002/oct/01/usa.ianblack>>. See Dutton, Yvonne, *Rules, Politics, and the International Criminal Court: Committing to the Court* (Routledge, 2013) at 92

¹²⁶ 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) at 6. Emphasis added

¹²⁷ The White House, *The National Security Strategy of the United States of America 2002*, The White House (2002) at 29

¹²⁸ *Ibid* at 31

¹²⁹ Bush, George W., *Remarks to the 10th Mountain Division at Fort Drum, New York* (19 July, 2002)

<<http://www.presidency.ucsb.edu/ws/index.php?pid=73067&st=&st1>>

The underlying contention with the ICC's structure of legal power was the implausibility of separating purely judicial power, with the court exercising a form of political power by definition. The root of objections was the belief that preponderant power made the US a permanent target for political attacks, including through legal institutions. On this basis Bolton characterised the ICC as "an unaccountable prosecutor, possibly politically motivated, posing grave risks for the United States and its political and military leaders."¹³⁰ For Rumsfeld the ICC constituted "a potential lawfare weapon against the United States."¹³¹ 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. Drawing equally on a claim for hegemonic privilege 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."¹³²

In the same 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.¹³³ 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."¹³⁴ Chief among the reasons given was that "one of the most established principles of international law is that a state cannot be bound by treaties to which it has not consented." Where the US had "withdrawn its signature from the agreement" the US could not "be bound by the provisions of the ICC Treaty nor can U.S. nationals be subject to ICC prosecution."¹³⁵ 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 a "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."¹³⁶ 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."¹³⁷ Sands described these as "extreme views on the ICC" and Yoo's memorandum of advice as "error-ridden."¹³⁸ The arguments from both Rumsfeld and Yoo however were consistent with 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 rule of IL.

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

¹³⁰ Bolton, John R., *Surrender Is Not an Option: Defending America at the United Nations* (Simon & Schuster, 2007) at 95

¹³¹ Rumsfeld, Donald, *Known and Unknown: A Memoir* (Penguin, 2011) at 632

¹³² *Ibid* at 633

¹³³ Widely considered to be a form of torture: See Darmer, M. Katherine B., 'Waterboarding and the Legacy of the Bybeeoo Torture and Power Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist' (2008) 12 *Chapman Law Review* 639; Waldron, Jeremy, 'Torture and positive law: jurisprudence for the White House' (2005) 105 *Columbia Law Review* 1681-1750

¹³⁴ Yoo, John C., *Letter from Office of the Deputy Assistant Attorney General to Alberto R. Gonzales, Counsel to the President* (1 August, 2002) <<http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf>> at 1

¹³⁵ *Ibid* at 5

¹³⁶ *Ibid* at 6

¹³⁷ Posner, Eric A. & Yoo, John C., 'Judicial Independence in International Tribunals' (2005) 93 *California Law Review* 1 at 69

¹³⁸ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at 248

alternative to the ICC.¹³⁹ In testimony before the House International Relations Committee, Prosper reiterated the administration's commitment to be a leader in "efforts to end impunity by holding perpetrators of war crimes accountable." His testimony rejected a central role for the ICC in favour of "lasting initiatives, especially securing the rule of law." The US would not abdicate its responsibilities to this task as part of the "international community," but nor "should that responsibility be taken away" from states through international courts.¹⁴⁰ Elsewhere Prosper elaborated that a strengthened ICC threatened to "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 allow resolution of conflicts through non-binding measures such as truth and reconciliation commissions. Such would ultimately be more likely to create "a lasting benefit to the rule of law."¹⁴¹ 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 US commitments to accountability in Sudan and to the rule of law more generally.¹⁴² This was ultimately a conception that was opposed to the institutionalisation of international legal power outside of national courts for being contrary to the rule of IL.

Reordering International Judicial Power through the ASPA

The failure of American negotiators to achieve an ICC design matching its ideological preferences led to efforts during the Bush administration to block what were considered to be illegitimate powers of the court through the ASPA; legislation that engaged the influence of all four American ideological conceptions. In its preamble ASPA warned against exposure of American citizens to international judicial power in terms consistent with the principle of a vertical separation of powers central to Liberal Nationalism. 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."¹⁴³ 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 US.¹⁴⁴ 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 consent by binding the US as a non-treaty member.¹⁴⁵

There was a great deal of convergence between Liberal and Illiberal Nationalist legal conceptions, with distinct sets of beliefs equally supporting the outcome of domestic legislation

¹³⁹ See Bosco, David, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 111

¹⁴⁰ Prosper, Pierre-Richard, 'Confronting, Ending, and Preventing War Crimes in Africa,' *Testimony before the House International Relations Committee, Subcommittee on Africa* (24 June, 2004) <http://2001-2009.state.gov/s/wci/us_releases/rm/33934.htm>. See also Office of the Legal Adviser, Department of State, in Sally J. Cummins (ed), *Digest of United States Practice in International Law: 2004* (International Law Institute, 2006) at 180

¹⁴¹ Office of the Legal Adviser, Department of State, in Sally J. Cummins (ed), *Digest of United States Practice in International Law: 2004* (International Law Institute, 2006) at 180-181

¹⁴² Prosper, Pierre-Richard, 'War Crimes in the 21st Century,' *Remarks at Pepperdine University* (26 October, 2004) <http://2001-2009.state.gov/s/wci/us_releases/rm/38309.htm>

¹⁴³ *American Service Members' Protection Act*, Pub L 107-206, 116 Stat 82 (2002), sec.2002(7). See Rabkin, Jeremy A., *Law without Nations?: Why Constitutional Government requires Sovereign States* (Princeton University Press, 2005) at 21-22

¹⁴⁴ *American Service Members' Protection Act*, Pub L 107-206, 116 Stat 82 (2002), sec.2002(8)-(9)

¹⁴⁵ *Ibid*, sec.2002(10)-(11)

constraining ICC jurisdiction. Illiberal Nationalist conceptions remained dominant in shaping policy nevertheless, especially as they opposed legalist and Liberal Internationalist policy. Introducing the ASPA was one of Helm's final victories over the ICC through the prohibition it created against US legal authorities cooperating with the court.¹⁴⁶ During congressional debate Helms made clear that the ASPA was a response to the failure to secure a preferred court design, describing it as 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."¹⁴⁷ Without intervention there was a real threat that US military and civilian personnel would become "the subject of second-guessing by United Nations judicial bodies."¹⁴⁸ The beliefs underpinning this Illiberal Nationalist stance were not seen as a call for the impunity of American citizens, but as a measure to reverse the legalist ordering of powers and ensure the supremacy of American judicial power in international criminal matters.

The influence of Liberal Nationalist beliefs over ICC policy 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 the dangers it could pose to liberties established by the American constitution:

it 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 understanding of the obligations we had to those youngsters and to their families.¹⁴⁹

This returned to the principle of maintaining a vertical separation of powers whereby an international court could legitimately exercise judicial power, but only in a way clearly separated from that exercised under the US constitution. This reflected both liberal values in seeking to structure IL to preserve basic rights, and a nationalist position that defined American interests in terms of the sufficiency of municipal law.

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."¹⁵⁰ 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."¹⁵¹ The resolution focussed centrally on the impermissibility of "a supranational court that would exercise the judicial power constitutionally reserved only to the United States."¹⁵² In

¹⁴⁶ *Ibid*, sec.2004

¹⁴⁷ Helms, Jesse, *Congressional Record*, 107th Congress, (2 October, 2001) at S10042

¹⁴⁸ *Ibid* at S10042

¹⁴⁹ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Colin L. Powell to be Secretary of State*, 1st Session 107th Congress (2001) at 88

¹⁵⁰ Paul, Ron, 'A Court of No Authority,' *Texas Straight Talk* (8 April, 2002)

<<http://www.house.gov/paul/tst/tst2002/tst040802.htm>>

¹⁵¹ Paul, Ron 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)

¹⁵² Including specifically access to "the rights and protections that the United States Constitution guarantees, including trial by a jury of one's peers, protection from double jeopardy, the right to know the evidence brought against one, the right to confront one's accusers, and the right to a speedy trial."

particular this offended the Liberal Nationalist principle that international and municipal law govern separate spheres, with the ICC exercising jurisdiction “within the legislative and judicial authority of the United States.” Importantly the resolution relied on the authority of IL itself to demonstrate the illegality of the court, rebutting the suggestion that policymakers in this period were simply IL sceptics. Paul’s resolution emphasised that the ICC design contravened the principle of sovereign inviolability, with specific reference to consent requirements under the Vienna Convention,¹⁵³ and “accepted norms of international law” that a treaty cannot extend jurisdiction over “nationals of countries that do not sign and ratify the treaty.”¹⁵⁴ For sponsors of the congressional resolution the rule of IL meant upholding the minimum and agreed framework within which domestic jurisdictions exist, and allowing states to continue exercising full judicial powers, including over the subject matter of international criminal law.

The contours of these illiberal and nationalist approaches became clearest when contrasted with the persistence of Liberal Internationalist beliefs as a minority position during the Bush 43 administration. Senator Dodd remained the leading US senator championing the ICC cause arguing that, since the time of the Founding Fathers, the “long-term security needs of the Nation” had been strengthened by globally extending “inalienable rights” established by the US constitution. That principle, when combined with unrivalled power, created a leadership responsibility in the US to establish a system of international criminal justice.¹⁵⁵ Dodd recognised that his acceptance of the reality and advantages of US engagement in international legal institutions was incompatible with nationalist attempts to “become a gated community and retreat from international agreements.”¹⁵⁶ With the establishment of the ICC, and its broad jurisdictional regime a political inevitability, the ASPA would have the effect 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.” On that basis Dodd concluded that the US should remain committed to staying “at the table to try to work it out so that it becomes a viable product which we can support and gather behind.”¹⁵⁷

The disjunct between these competing approaches led Dodd to readily accept the existence of a fundamental division in US IL policy. The intention to minimise international legal institutions in the immediate aftermath of the September 11 terrorist attacks was “stunning,” with the US traversing from once leading the creation of the UN system to now “shirking its international duty.”¹⁵⁸ More acutely, it was contradictory for the US to call for greater international solidarity against terrorism, yet at the same time signal an intention to act unilaterally through the ASPA provisions.¹⁵⁹ These Liberal Internationalist beliefs were ultimately legislated in the “Dodd Amendment,” which made an exception to prohibitions against US cooperation with the ICC where the US could provide “Assistance to International Efforts” in advancing criminal justice.¹⁶⁰

¹⁵³ *Vienna Convention on the Law of Treaties* (1969)

¹⁵⁴ Paul, Ron 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)

¹⁵⁵ Dodd, Christopher, *Congressional Record*, 107th Congress, (26 September, 2001) at S9861-S9862

¹⁵⁶ *Ibid* at S9861

¹⁵⁷ *Ibid* at S9860

¹⁵⁸ *Ibid* at S9860

¹⁵⁹ *Ibid* at S9861

¹⁶⁰ *American Service Members’ Protection Act*, Pub L 107–206, 116 Stat 82 (2002), sec.2015

These observations certainly confirm a form of political incoherence in US policy, with competing definitions of US interests leading to inconsistent IL policies over time. However the shifts identified by Dodd also reveal that each distinct policy is coherent when interpreted according to the influence of the identified structure of foreign policy ideology. Dodd's own position emphasised the importance of ideological context, with his confirmation that, as the Rome Statute stood in 2001, he "would vote against it because it is a flawed agreement." That appeared equally contradictory from a legalist standpoint, but was consistent with scepticism about the legal integrity of an international court lacking adequate democratic checks and balances.¹⁶¹ As such, even this most forceful American advocate contradicted legalist rule of law principles, but remained faithful to his 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 at the Defence Department made clear that they would give in principle support for the ICC provided it was designed as "subordinate" to and "strictly an adjunct to national prosecutions."¹⁶² This was significant evidence that defence officials were prepared to support some form of the court and were not motivated by in principle opposition. 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 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.¹⁶³ Equally the Department of Justice insisted on a design that allowed municipal legal processes to prevail over those of an international court.¹⁶⁴ In both cases the relevant legal advisers expressed a form of commitment to IL, yet did so according to restrictions rejecting legalist proposals for the separation and privileging of the ICC's international judicial power. Through US insistence, this 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.¹⁶⁵

The US seized upon the provision to conclude over 100 "Article 98 agreements" in which global allies pledged to honour this form of ICC immunity.¹⁶⁶ The strategy was fortified by congressional support in the APSA, which mandated that military assistance be cut-off to states that failed to sign such agreements.¹⁶⁷ Scheffer argued that the agreements were inconsistent with the

¹⁶¹ Dodd, Christopher, *Congressional Record*, 107th Congress, (26 September, 2001) at S9860

¹⁶² Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 169

¹⁶³ *Ibid* at 171 & 175

¹⁶⁴ *Ibid* at 171

¹⁶⁵ *Rome Statute of the International Criminal Court* (1998), Art.98:

"Cooperation with respect to waiver of immunity and consent to surrender

...

(2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

¹⁶⁶ For an representative sample of the agreement see the understanding attached to the Luxembourg extradition treaty: Office of the Legal Adviser, Department of State, in Sally J. Cummins & David P. Stewart (ed), *Digest of United States Practice in International Law: 1991-1999* (International Law Institute, 2005) at 640-641

¹⁶⁷ Bolton, John R., *Surrender Is Not an Option: Defending America at the United Nations* (Simon & Schuster, 2007) at 95

strict interpretation of the statute in accordance with established principles of law.¹⁶⁸ Rather the original intent of the provision has been to cover official US personnel from ICC jurisdiction, but not individuals acting in a private capacity.¹⁶⁹ This avoided the appearance of asking for blanket immunity for all Americans, while still addressing Illiberal Internationalist concerns being raised at the time. Importantly, the narrower immunity also remained consistent with Scheffer's own Liberal Internationalist conception of the proper relationship between sovereign states under the ICC regime. The principle of liberal equality required that IL be structured so as to permit states to exercise international executive powers in enforcing rights afforded by international criminal law. From the perspective of Liberal Internationalism, this principle justified a degree of immunity for military personnel and diplomatic staff carrying out these functions, as argued for in the final years of the Clinton administration.¹⁷⁰ Such a rationale for protecting US citizens would not thereby justify extending immunity to non-government representatives, who did not perform any legally relevant actions.

This conception of Article 98 immunities was clearly distinguished from the Illiberal Nationalist conception evident in the initiative as spearheaded by John Bolton. The Bolton position was to seek immunity for every American through the agreements: "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."¹⁷¹ 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 and its foundation in exceptionalist beliefs. He made reference to the unparalleled global engagement of American citizens and the exceptional functions of the US upholding the international legal system, emphasising that: "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."¹⁷² The bureau was ultimately animated by the perception of an existential threat to all Americans, thereby justifying the structuring of IL to ensure the supremacy of American courts. In circumstances where the ICC was seen to lack checks against politicisation, and the US was said to have a demonstrated record of prosecuting international crimes, granting blanket immunity for US citizens became defensible as necessary to the integrity of IL.¹⁷³

¹⁶⁸ See Scheffer's reference to the obligation under the *Vienna Convention on the Law of Treaties* (1969) (Articles 31 and 32) to interpret the treaty "in good faith in accordance with the ordinary meaning" of its terms, and in particular, the obligation to take into account various supplementary materials as evidence of intent: Scheffer, David J., 'Article 98 (2) of the Rome Statute: America's Original Intent' (2005) 3 *Journal of International Criminal Justice* 333 at 334

¹⁶⁹ Scheffer, David J., 'Article 98 (2) of the Rome Statute: America's Original Intent' (2005) 3 *Journal of International Criminal Justice* 333 at 338-339

¹⁷⁰ *Ibid* at 341

¹⁷¹ Bolton, John R., *Surrender Is Not an Option: Defending America at the United Nations* (Simon & Schuster, 2007) at 96

¹⁷² Bloomfield, Jr, Lincoln P., '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)

<<http://iipdigital.usembassy.gov/st/english/texttrans/2003/09/20030917172946samohjtj0.8693201.html#ixzz3BT1ofebT>>

¹⁷³ See *ibid*

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. Their argument was that, at the municipal level: “Political negotiations are essential to building a nation where the rule of law can be established and human rights can be respected.”¹⁷⁴ All American legal conceptions shaping the Bush 43 policy challenged the ICC for instead relying merely on the good faith exercise of judicial power.¹⁷⁵ By the end of the period, US policy toward ordering ICC legal powers was most consistent with both ideological variants of nationalism. American policymakers from all four ideological conceptions rejected the claim that a court exercising independent judicial power was necessary or compatible with the rule of IL. The process of developing and promoting the ASPA as a response to the ICC design was supported most forcefully by an Illiberal Nationalist commitment to the supremacy of municipal legal power. The Article 98 agreements had “almost nil” practical effect on ICC operations,¹⁷⁶ emphasising the degree to which they represented a principled stand by administration officials. The inconsistency of the court’s agenda with perceived US interests, and the inability of the US to tailor its consent to its jurisdiction, excluded the possibility of American support for the design set out in the Rome Statute. Judicial arrangements confirmed at the municipal level were thus held out by American legal policymakers as effective and enforceable against the world. In a complementary way, ASPA was also supported by Liberal Nationalist preferences for developing IL to ensure a vertical separation between the judicial power of the court and municipal judicial power. Rejecting the separation of powers and ICC independence thereby directly contradicted the legalist position, but followed well-defined conceptions of the rule of IL drawn from American foreign policy ideology.

CHAPTER CONCLUSION

The first term of the Bush 43 administration was marked by a clear rejection of legalist interpretations of an ICC based on the rule of IL, but also by 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 that separated the ICC’s international judicial powers from competing legal and political institutions. American ICC policy in contrast lacked the direction of a single conception of the rule of IL and yet, among the ideologies that did compete for influence among US legal policymakers, the legalist formulation never gained any serious recognition. The evidence surveyed in this chapter thus does not support the claim that American policy outcomes were formed by tactical political calculations compromising commonly held legal ideals. Even in the dramatic act of “unsigned” the Rome Statute, US policymakers showed deference to the conventions

¹⁷⁴ Czarnetzky, John M. & Ronald J. Rychlak, ‘An Empire of Law: Legalism and the International Criminal Court’ (2003) 79 *Notre Dame Law Review* 55 at 116

¹⁷⁵ Bolton has said in this context “I don’t take anything this serious on faith”: cited in Paris, Erna, *The Sun Climbs Slow: The International Criminal Court and the Struggle for Justice* (Seven Stories Press, 2009) at 85

¹⁷⁶ Fehl, Caroline, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford University Press, 2012) at 98

of IL and the legality of opposing the court for its perceived failure to advance a form of non-arbitrary global governance. In arguing for privileges through the UNSC, policymakers adhered to beliefs in America's unique global role and exceptional character as the basis for rejecting the principle of sovereign equality. Finally, policymakers variously justified the ASPA by reference to the principle of ordering the court's judicial power according to US consent, of maintaining a vertical separation from municipal law, or simply 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."¹⁷⁷ 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 expansive aspirations of legalism and Liberal Internationalism. The Bush administration's aggressive ICC opposition represented not merely a clash in politics, but the hardening of ideological divisions in the concept of the rule of IL. That uncompromising stance meant that, even as the first term came to an end, legal policymakers within the administration had begun to question the success of Illiberal Nationalist IL policy as a strategy for advancing national interests, and whether a shift in legal conceptions was merited.

¹⁷⁷ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at 60

BUSH 43 ADMINISTRATION 2004-2008

The generally held view among legal commentators is that ICC policy shifted significantly between the first and second terms of the Bush 43 administration. Whereas US ICC policy during the first term was one of aggressive opposition, the second term saw a more pragmatic engagement and even tacit endorsement of the court. The *Wall Street Journal* reported this shift in 2006, observing the turn from a preference “that countries apply their own versions of international law in their own courts” to acknowledging the legitimacy of international prosecutions in defined circumstances.¹ The perception that US diplomatic influence was being eroded was confirmed by incoming Secretary of State Condoleezza Rice when she described Ambassador Bolton’s antagonistic ICC policy as “shooting ourselves in the foot.”²

The shift in policy fuelled optimism among global court advocates that the US was taking greater account of 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. Apparent softening of attitudes to the ICC did indeed more closely resemble elements of legalism in acknowledging a role for the ICC in global governance. However, despite adopting a more tempered rhetoric, the US 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 dealt with in the second term was adjusting to an internationalist conception of law. Despite the administration’s previous “unsigned” of the Rome Statute, allowing it as a matter of IL to act contrary to the objects and purposes of the treaty, the administration moved to support the treaty both directly and indirectly. Demands for further renewal of UNSC immunity as a precondition to military support for peacekeeping operations were also removed. The ASPA was modified to allow for greater cooperation with US allies and the “Article 98” campaign was wound down and eventually halted. The US thus rejected 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.

Despite these various acts of re-engagement, the US continued to make clear its intention not to join the ICC as a state party and to forcefully 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 a prima facie case of a shift between competing ideologically informed conceptions of the rule of IL,

¹ Bravin, Jess, ‘U.S. Warms to Hague Tribunal,’ *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; Bosco, David, *Rough Justice: The International Criminal Court’s Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 123

² Rice, Condoleezza, ‘En Route to San Juan, Puerto Rico, March 10, 2006,’ *Trip Briefing* (2006) <<http://2001-2009.state.gov/secretary/rm/2006/63001.htm>>

none of which aligned with dominant beliefs expressed by global counterparts. This chapter enters the debate to argue that the ICC policy outcome is best explained through the role of predominantly Illiberal Internationalist principles structuring legal beliefs, rather than as a tactical political approximation of legalist ideals.

DOMINANT FOREIGN POLICY IDEOLOGY

There was a large degree of continuity in beliefs about IL 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...it’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 entering the second term, which “allowed room for the pragmatists to assume a greater role” in shifting policy back toward a more internationalist and therefore accommodating stance toward the court.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 first key 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 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 criticism is of legal policy structured by liberal values of “humanitarian interests” or a notion of an “international community.” At the same time she did support the development of “multilateral agreements and institutions,” but where 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 stated that IL “is critical to the proper function of international diplomacy... We depend on a world in which there is some international legal order.” The explanation revealed the extent to which IL was 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 order, legal order, we depend on norms of behavior in international politics.” On that basis Rice declared 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

³ Bush, George W., ‘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 Cerone, John P., ‘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) at 304

⁵ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at xix

⁶ Rice, Condoleezza, ‘Promoting the National Interest’ (2000) 79 *Foreign Affairs* 45 at 47

⁷ *Ibid* at 47-48

international treaties.”⁸ Notably these statements were interpreted by outsiders as evidence of US “commitment to the international rule of law.”⁹

The simultaneous influence of Illiberal Nationalist ideology is arguably evident in Rice’s stated beliefs, although to a lesser degree. In an illuminating exchange during her confirmation hearings Senator Chris Dodd set his Liberal Internationalist conception of IL, expressed since the time of the Clinton administration, against Rice’s role in developing detainee policy during the first term. Rice described her own understanding of her legal policymaking role as National Security Adviser, which was not to give legal advice to the President, but to consider independent legal advice “in a policy context.”¹⁰ Rice asserted 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 rule of IL 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.”¹² In discussing the establishment of international criminal justice specifically, the Senator argued that what matters is, not “legalisms” but rather, developing an IL policy expressing the principle that America was “very, very different not just in terms of our economic plans and political plans, but how we viewed mankind.”¹³ In taking that view, Dodd identified the legitimacy of IL in the extension outward of the liberal values at the heart of American constitutional democracy.

In contrast, Rice emphasised the extent to which illiberal national security values overrode the idea that IL must always give effect to universal liberal principles. She readily accepted the proposition 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.”¹⁴ Yet in resisting Dodd’s argument that Americans and non-Americans alike must be granted liberal equality,¹⁵ Rice 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.”¹⁶ Here the nominee sought to remove the assumption that IL would apply equally to all natural persons, while emphasising US commitment to a rule of law that permitted forms of inequality. This revealed a nationalist strand of illiberalism in addition to the otherwise internationalist outlook of Rice. 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” and that those who violate it, “who commit terrorist acts against innocent civilians” for example, “forfeit its

⁸ Rice, Condoleezza, *Remarks at Town Hall Meeting, Dean Acheson Auditorium, Washington, DC* (31 January, 2005) <<http://2001-2009.state.gov/secretary/rm/2005/41414.htm>>

⁹ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at 240

¹⁰ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Dr. Condoleezza Rice to be Secretary of State*, 1st Session 109th Congress (2005) at 117

¹¹ *Ibid* at 118; Rice, Condoleezza, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC, 2011) at 117, 121 & 497

¹² United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Dr. Condoleezza Rice to be Secretary of State*, 1st Session 109th Congress (2005) at 146

¹³ *Ibid* at 146

¹⁴ *Ibid* at 147

¹⁵ See Dodd’s argument for the application of the Geneva conventions without discrimination as to nationality *ibid* at 118-119

¹⁶ *Ibid* at 147

protection.”¹⁷ The limitation 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 defended the President for reaching an understanding of the law 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.”¹⁸ This is inconsistent with either legalist or Liberal Internationalist conceptions of law, which resist the sanctioning of gaps in the legal framework determining basic rights. In contrast, the idea that the US could designate gradations of legal rights based on the character of adversaries is entirely in line with illiberal conceptions of law. Through this understanding Rice was led to conclude that increasingly strained transatlantic relations stemmed from “the mistaken perception that the United States’ detention and interrogation policies operated outside the bounds of international law.”¹⁹ Certainly, despite some misgivings about Bolton’s clashes with Powell,²⁰ Rice had some sympathy for his hardline views against IL. She supported his nomination as UN ambassador in this period 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.”²¹

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 shift in ICC policy in this period.²² Yoo observed that Bellinger “often shared Taft’s accommodating attitude toward international law,” thereby resisting Illiberal Nationalist impulses within the government.²³ Rice had a longstanding close working relationship with Bellinger, characterising his worldview as being “neither a skeptic nor an unthinking proponent of the international community’s supposed code of conduct.”²⁴ 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.”²⁵ He appeared to accept Robert Kagan’s thesis,²⁶ 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.”²⁷ Yet, as head of the Legal Advisor’s office, 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.”²⁸

¹⁷ Mead, Walter R., *Special Providence: American Foreign Policy and How it Changed the World* (Routledge, 2002) at 246

¹⁸ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Dr. Condoleezza Rice to be Secretary of State*, 1st Session 109th Congress (2005) at 117

¹⁹ Rice, Condoleezza, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC, 2011) at 497

²⁰ Paris, Erna, *The Sun Climbs Slow: The International Criminal Court and the Struggle for Justice* (Seven Stories Press, 2009) at 60

²¹ Rice, Condoleezza, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC, 2011) at 306

²² Scharf, Michael P. & 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) at 137; Feinstein, Lee & Tod Lindberg, *Means to an End: U.S. Interest in the International Criminal Court* (Brookings Institution Press, 2009) at 52

²³ Yoo, John C., *War by Other Means: An Insider’s Account of the War on Terror* (Atlantic Monthly Press, 2006) at 41-42

²⁴ Rice, Condoleezza, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC, 2011) at 303

²⁵ Bellinger III, John B., *Interview with Author* (12 January, 2012)

²⁶ Kagan, Robert, ‘Power and Weakness’ (2002) June-July *Policy Review* 3. See Chapter 2 *supra*

²⁷ Bellinger III, John B., *Interview with Author* (12 January, 2012)

²⁸ *Ibid*

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 previous marginalisation of State Department lawyers had eroded national interests.²⁹ Under Bellinger there was a renewed commitment to "international legal diplomacy" as a guiding principle for IL policy.³⁰ This is consistent with the Illiberal Internationalist view of IL as a diplomatic tool to facilitate hegemonic power. In an interview for the International Bar Association Bellinger also revealed the influence of his exceptionalist beliefs in addressing charges of US "hypocrisy." This he defined as the charge of wanting "justice for others but not for the US." His reply treated exceptionalism as constitutive of IL: "The problem is that the US really *is* differently situated and...we are uniquely called upon to be the policeman around the world."³¹ The US 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."³² These sets of beliefs about the rule of law became pivotal to the increasingly internationalist policies that came to define the second term.

DEVELOPING NON-ARBITRARY GLOBAL GOVERNANCE

The ongoing vision of legalist court advocates remained the consolidation of the ICC as a core component of the architecture of global governance. That entailed measures to formally integrate the ICC into established governance frameworks to ensure uniformity in the application of international criminal law. For its part the US continued strongly expressing support for the principle of international criminal accountability, and shifted 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 limited the reach of global governance. The seeming legal inconsistency in the US position again raises the question of what role ideological beliefs about the rule of IL played in decision-making processes that produced such divergent outcomes.

Legalist Policy

During this period the ICC concluded agreements with the UN and EU to consolidate its role in existing networks of global governance.³³ The preamble to the UN agreement affirmed that "the International Criminal Court is established as an independent permanent institution in relationship with the United Nations system." Article 2(1) confirmed that the UN "recognizes the Court as an independent permanent judicial institution" possessing "international legal personality." The EU agreement specifically set out in its preamble that the formalisation of relations with the ICC was

²⁹ Scharf, Michael P. & 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) at 136

³⁰ *Ibid* at 137

³¹ Bellinger III, John B., 'Interview with John Bellinger,' *International Bar Association* (2011) <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=37f4f087-bc3a-4c21-a108-92f15391785c>>. Emphasis added

³² Bellinger III, John B., '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) <<http://2001-2009.state.gov/s/l/rls/104053.htm>>

³³ *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* (2004); *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance* (2006)

pursuant to “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.” In recognising the ICC’s role in global governance, the EU further reaffirmed its 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, UN and EU) toward the development of a form of global governance.³⁴ The intention to entrench the authority of the ICC did not escape the attention of the US State Department, as communicated by America’s UN ambassador John Danforth in classified communications. Danforth warned that the EU was regularly succeeding in incorporating language in UN resolutions that “treats the ICC as an integral part of the international landscape.”³⁵ In this process the European conception of the court remained consistent with a legalist conception requiring the formalised development of global governance.

Legalist advocates clearly set themselves against any design that attempted to address the subject matter of international criminal law through institutional arrangements derogating from formalised global governance. In 2004 the UNSC commissioned the *International Commission of Inquiry on Darfur* to investigate alleged atrocities in Sudan and to recommend appropriate accountability measures.³⁶ 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.”³⁷ In reaching that conclusion the commission rejected US preferences to strengthen criminal accountability through non-global institutional arrangements. Here the commission made reference to the legal flaws in permitting areas 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.” In contrast the implementation of IL through a formalised institution constituted at the global level would ensure uniformity in legal rights and duties: “the 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.”³⁸ The realisation of the rule of IL was seen to require the formalised development of global governance to ensure that international rights and duties were determined as widely as possible by predetermined and universal legal rules. This was not merely a matter of practical justice but went to the heart of the meaning of an established rule of IL.

Beliefs of American Legal Policymakers

Acknowledging the Court’s Authority subject to Pragmatic Limits

The re-emergence of Illiberal Internationalism was most succinctly contained in the statements of John Bellinger, who contended that the administration’s “general approach to international courts and tribunals is pragmatic.” International courts were foremost “potential tools to advance shared

³⁴ *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

³⁵ Danforth, John C., *Peace and Accountability: A Way Forward* (7 January, 2005)

³⁶ Pursuant to SC Res 1564, UN Doc S/RES/1564 (18 September, 2004)

³⁷ Cassese, Antonio, 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) at 146; SC Res 1593, UN Doc S/RES/1593 (31 March, 2005)

³⁸ Cassese, Antonio, 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) at 147

international interests in developing and promoting the rule of law, ensuring justice and accountability, and solving legal disputes.”³⁹ That attitude did not equate to the role for the court recognised in the UN and EU ICC agreements however. There the court was given a privileged status as the embodiment of the progressive development of global governance in the domain of criminal law. The Illiberal Internationalist conception advocated by Bellinger instead maintained that US accession to the Rome Statute would not have demonstrated “deeper commitment to the rule of law and proved us to be better 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.”⁴⁰ 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 only assigned to the ICC to the extent that it complemented American national security interests, with the US otherwise seeking to clearly demarcate the pragmatic limits of a strict legal regime.

Although Bellinger acknowledged that the ICC “has a role to play in the overall system of international justice,”⁴¹ he did so seeking to “agree to disagree” – favouring the term “*modus vivendi*” to describe the new position.⁴² The principle underlying this approach was that the shared ends of “promoting international criminal justice” remained “far more important than the means by which we seek them.”⁴³ 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 of securing universal membership of the court was expressed in the EU agreement with the ICC as a path to establishing unchallenged court authority. Holding that hope out however was characterised as “counterproductive” by Bellinger where it impeded a practical working relationship with the US. Rather “ICC supporters will ultimately have to decide which they value more: hewing to an idealistic commitment to universality or pursuing practical efforts to build an effective court.”⁴⁴ Provided the US then complied with these predetermined obligations, the conception remained consistent with a form of non-arbitrary global governance.

The documented shift in US legal policy clearly illustrated that the theorised conceptions of IL played a significant role in structuring distinct policy outcomes. Analysis at the level of legal beliefs is particularly important where officials have focussed on policy outcomes to make the case for continuity. Bellinger has consistently argued, both during his time in office and subsequently, that US ICC policy has been essentially unchanged – across and within US administrations.⁴⁵ In his view Presidents and Congresses have differed according to “the tone and means” by which they express

³⁹ Bellinger III, John B., ‘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) at 2

⁴⁰ Bellinger III, John B., ‘Reflections on Transatlantic Approaches to International Law’ (2007) 17 *Duke Journal of Comparative and International Law* 513 at 520

⁴¹ Bravin, Jess, ‘U.S. Warms to Hague Tribunal,’ *Wall Street Journal* (14 June, 2006) <<http://online.wsj.com/articles/SB115024503087679549>>

⁴² Bellinger III, John B., *Interview with Author* (12 January, 2012); Bellinger III, John B., ‘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) <<http://2001-2009.state.gov/s/l/rls/104053.htm>>

⁴³ Bellinger III, John B., ‘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) <<http://2001-2009.state.gov/s/l/rls/104053.htm>>

⁴⁴ *Ibid*

⁴⁵ *Ibid*

concerns, but there is otherwise a “relatively straight line” running through US ICC opposition.⁴⁶ Focussing at the level of competing ideologies however reveals the extent of policy discontinuity, even between the first and second terms. Bellinger argued that “people misread the Bolton letter” (notifying the decision to unsign the Rome Statute) as evidence of a deeply conflicted US attitude toward the ICC. The letter has been treated as expressing “in aggressive or confrontational terms U.S. rejection of the ICC,” whereas Bellinger saw it as merely an attempt to clarify the nature of US obligations in conformity with treaty law.⁴⁷ Nevertheless, Bellinger’s own stance on the ICC’s role in global governance does reveal a shift to the principle of pragmatic development, whereby the US should readily support global institutions so far as they advance national security interests, while clearly indentifying areas that remain the domain of diplomatic or other 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.⁴⁸ This policy toward the ICC reflected a categorical shift in the understanding of American interests in IL in a way that was inconsistent with legal beliefs structuring decision-making processes in the first term of the Bush administration.

At the level of analysing legal conceptions, Bolton’s permissive interpretation of ICC obligations drawn from Illiberal Nationalist beliefs *were* intended to be “aggressive or confrontational.” Bolton had been nominated as UN ambassador at a time when the US had shifted from unyielding ICC opposition to allowing the UNSC to refer an investigation into alleged crimes in Darfur, Sudan. Behind the scenes Bolton strongly rejected the very principle of responding to the Darfur situation by international legal means, dismissing EU advocates as frivolously “getting out their wig boxes and preparing to go to court.”⁴⁹ 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 US “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.⁵⁰ Bolton was guided by a belief that IL should develop permissively to enlarge US autonomy, which was distinct from the pragmatic development advocated by Bellinger.

The predominant strategic conclusion by this period was that aggressive opposition to the ICC was harming American interests. Ambassador Danforth warned that the US position of actively opposing the ICC was forcing it to abstain or vote against any UN resolutions mentioning the court, even where they advanced international legal accountability consistent with US interests. On this basis he recommended that the US pass an “agreement to disagree” resolution that would allow the US to avoid voting against its interests.⁵¹ The central feature of the proposed resolution was to 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 commitment to accountability for international crimes “in accordance with international standards of justice, fairness and due process of

⁴⁶ *Ibid*

⁴⁷ *Ibid*

⁴⁸ *Ibid*

⁴⁹ Bolton, John R., *Surrender Is Not an Option: Defending America at the United Nations* (Simon & Schuster, 2007) at 360-361

⁵⁰ *Ibid* at 360-361

⁵¹ Danforth, John C., *Peace and Accountability: A Way Forward* (7 January, 2005)

law.”⁵² This reasoning revealed that the shift in strategy represented not merely a change in political calculation, but a shift in US policymakers’ conception of the principles necessary to advance fidelity to law. 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 being most consistent with an effective international legal system.

The new attitude was seen in US responses to the 2004 negotiated agreement between the ICC and the UN and its objective of consolidating the place of the ICC in global governance.⁵³ Deputy Legal Adviser to the US Mission to the UN, Eric Rosand, addressed the General Assembly, reiterating that the ICC “is not part of the UN Charter System” and as such should not be treated as having an equivalent status.⁵⁴ Most significantly in his address Rosand reiterated the “U.S. commitment to accountability for war crimes, genocide, and crimes against humanity,” but in a form contrary to the progressive 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.”⁵⁵ This reasoning is a contortion of the rule of IL conception underpinning the UN agreement itself, which depends on measures to progressively formalise the global role of the ICC. Viewed within the structure of ideologically informed conceptions of law, however, the reasoning assumes a coherence it otherwise lacks.

Resistance to the ICC being accepted as a core institution of global governance remained strong right through to the end of this period. US Deputy Representative at the UN, Ambassador Alejandro Wolff, responded forcefully to a 2007 General Assembly 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.”⁵⁶ In response Ambassador Wolff argued that failure to acknowledge the right of the US to remain outside the regime demonstrated that sponsors of the resolution, as well as 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.⁵⁷

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 the pragmatic development being then advocated was the most legitimate strategy for advancing the rule of IL.

⁵² *Ibid*

⁵³ *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* (2004), see *supra*

⁵⁴ Cited in Office of the Legal Adviser, Department of State, in Sally J. Cummins (ed), *Digest of United States Practice in International Law: 2004* (International Law Institute, 2006) at 177

⁵⁵ *Ibid* at 178

⁵⁶ GA Res 62/12, *UN Doc A/RES/62/12*, (26 November, 2007)

⁵⁷ Cited in Office of the Legal Adviser, Department of State, in Sally J. Cummins (ed), *Digest of United States Practice in International Law: 2007* (International Law Institute, 2008) at 181

The Legal Structure of Political Explanations for Shifting US Policy

The main alternative explanation for outcomes in this period is that US legal policymakers engaged in tactical political adjustments in an attempt to mitigate growing global criticism. This is the argument that American IL policy is best explained as an ongoing pragmatic and instrumental compromise between an established rule of law ideal, and US political interests. A specific characterisation made by policymakers in this period is of a progression from *excessive* attention to law in the first term to more politically informed decision-making in the second term.

Philip Zelikow was Counselor of the United States Department of State through the second term⁵⁸ and had previously drafted the NSS 2002 that introduced the legal argument for “pre-emptive” self-defence in the War on Terror.⁵⁹ Zelikow argues that there was 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 legal analysis.”⁶⁰ 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.”⁶¹ Bradley concurs, arguing that the administration demonstrated “an almost obsessive attention to international legal process.”⁶² The lesson learnt was that, although the “rule of law promotes important values, framing questions in legal terms can sometimes produce undesirable outcomes.”⁶³ The shift in the second term was characterised by Zelikow and Bradley as a “pragmatic” return to privileging diplomatic interests over legal doctrine.⁶⁴

This argument turns legalist critiques on their head by claiming that the problem was one of *too* much concern for legality in the first term followed by greater political awareness in the second. Rice corroborated this to some degree 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.⁶⁵ Rice was equally adamant that she was guided by the Justice Department, since she “would never have engaged in—or encouraged the President to undertake—activities that I thought to be illegal.”⁶⁶ In contrast, the conclusion reached by Sands and others is that the first term substituted any concern for legality with political interests, and only subsequently demonstrated an awareness of legal obligations.⁶⁷ This 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. The most coherent explanation is instead that there were competing underlying conceptions of law, which were themselves constituted by politics. First term IL policy did rely on

⁵⁸ See United States Department of State, ‘Counselors,’ *Office of the Historian* <<https://history.state.gov/departments/history/people/principalofficers/counselor>>

⁵⁹ Rice, Condoleezza, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC, 2011) at 153; Mann, James, *Rise of the Vulcans: The History of Bush’s War Cabinet* (Viking, 2004) at 316-317 & 331. Zelikow attributes authorship of the doctrine to Bellinger: Zelikow, Philip D., *In Uncertain Times: American Foreign Policy after the Berlin Wall and 9/11* (13 October, 2011) <<http://www.wilsoncenter.org/event/uncertain-times-american-foreign-policy-after-the-berlin-wall-and-911>>. That claim is expressly refuted by Bellinger: Bellinger III, John B., *Interview with Author* (12 January, 2012)

⁶⁰ Zelikow, Philip, ‘Codes of Conduct for a Twilight War’ (2012) 49 *Houston Law Review* 1 at 5

⁶¹ Zelikow, Philip, ‘Legal Policy for a Twilight War’ (2007) 30 *Houston Journal of International Law* 89 at 94; Zelikow, Philip, ‘Codes of Conduct for a Twilight War’ (2012) 49 *Houston Law Review* 1 at 5

⁶² Bradley, Curtis A., ‘The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy’ (2009) 4 *Duke Journal of Constitutional Law & Public Policy* 57 at 74

⁶³ *Ibid* at 74

⁶⁴ *Ibid* at 58; Zelikow, Philip, ‘Legal Policy for a Twilight War’ (2007) 30 *Houston Journal of International Law* 89 at 94; Zelikow, Philip, ‘Codes of Conduct for a Twilight War’ (2012) 49 *Houston Law Review* 1 at 107-109

⁶⁵ Rice, Condoleezza, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC, 2011) at 117-118

⁶⁶ *Ibid* at 117-120

⁶⁷ See Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at *xix supra*

legalistic justifications, but it would be implausible to characterise these as politically neutral for that reason.⁶⁸ Rather the commitment to a legal framework was consistently guided by a strategy of developing IL as a permissive framework that removed legal constraints to American foreign policy. This reflected the Illiberal Nationalist conception of IL as an existential constraint to be developed into a permissive framework allowing the substance of foreign policy to be determined as far as possible by extralegal criteria. Zelikow's analysis focused largely on the justification of detainee treatment in the War on Terror according to legal criteria, but is equally relevant to legal justifications for ICC policy in this period.⁶⁹ In both cases administration lawyers defined IL so permissively that policy could be defended as consistent with law despite being determined exclusively by reference to unilateral preferences rather than universal standards. This is a conception of IL as malleable almost without limit in order to accommodate the substantive national security and cultural values of Illiberal Nationalism.

Equally the return to "pragmatism" in the second term is more coherently explained as a shift to a competing conception of the rule of IL rather than as tactical rebalancing between law and politics. This is more consistent with a shift between legal conceptions than a shift away from reliance on legal advice. The preferences expressed by Bellinger and other leading legal policymakers recognised the value in pragmatically developing institutions of global governance as a tool for advancing US national security interests. The Illiberal Internationalist conception of the rule of law was to promote US action through international institutions properly developed to advance US interests, while taking account of necessary diplomatic concessions. The renewed relationship between the UNSC and ICC in this period reflected that willingness to strengthen the court according to carefully circumscribed limits to the reach of global governance over US foreign policy. This was consistent with the Illiberal Internationalist recognition that IL afforded an opportunity, where managed effectively, within a selection of diplomatic tools. The most coherent analysis of this period is to say that first term policy was consistent with the permissive legal conception of Illiberal Nationalism, and that the subsequent shift was to the pragmatism of Illiberal Internationalism. In both cases legal policymakers consciously defended US policy in terms of fidelity to law. Bellinger's summary of the UNSC referral of Sudan to the ICC was that, where there were "no other ways to achieve accountability for the genocide in Sudan, then we don't have any problem abstaining."⁷⁰ This policy clearly retained accountability under IL as a priority, and yet rejected the value of formal constraints of global governance to achieve that end. Even as US policy transitioned from active opposition to a form of pragmatic development, it at no point encompassed the legalist rule of IL conception.

Conclusion

During the second term of the Bush administration the ICC sought to consolidate its status as the premier institution of global governance in international criminal law. This was reflected in agreements

⁶⁸ On this see Cole's response to Zelikow: Cole, David, 'The Taint of Torture: The Roles of Law and Policy in Our Descent to the Dark Side' (2012) 49 *Houston Law Review* 53

⁶⁹ See Bradley who treats them together: Bradley, Curtis A., 'The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy' (2009) 4 *Duke Journal of Constitutional Law & Public Policy* 57

⁷⁰ Cited in Bosco, David, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 111-112

with the UN and EU confirming that status in the formalised development of IL. As for the US, there was a meaningful shift in IL policy along the jurisdictional dimension – from the more nationalist conception of the first term that treated municipal law as sufficient to advance American interests, to an internationalist stance that sought to advance those interests through leveraging 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.”⁷¹ Softening of objections to the ICC that this entailed appeared to signal a US position moving closer to the legalist conception of the court. Yet the consistency of the underlying beliefs of policymakers with Illiberal Internationalist legal conceptions provides evidence that US policy continued to be structured by fundamentally different conceptions of the rule of IL itself. On the evidence, at no point in this period did legalist conceptions form a meaningful part of American IL policy.

DEFINING EQUALITY UNDER INTERNATIONAL LAW

From the earliest years of negotiating the Rome Statute, US demands to carve out unequal legal privileges through UNSC resolutions were strongly opposed by other states. During the second term of the Bush administration legalist policymakers strengthened their opposition to US demands for a further renewal of Article 16 UNSC immunity as a precondition to supporting peacekeeping operations.⁷² The continuation of the practice was rejected for institutionalising legal inequality in the ICC. At the same time the UNSC decided in this period to refer the situation in the Darfur region of Sudan to the ICC as a possible genocide case. That became a test for the US 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 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 a potential challenge to the argument that foreign policy ideology creates hard limits to reaching a common conception of the rule of IL. An examination of beliefs structuring decision-making is necessary to determine whether these cases confirm or falsify the central hypothesis about the role of ideology.

Legalist Policy

UNSC exemptions granted to US peacekeepers were always seen as contrary to the rule of IL by policymakers guided by the principle of sovereign equality. In June 2004, when the US insisted on its third annual renewal, the UN Secretary-General Kofi Annan responded that in light of a developing prisoner abuse scandal in Iraq it would be improper both for the US 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.”⁷³ Entailed in this admonition was an insistence that the rules of IL within the court’s jurisdiction be applied equally to all states without allowances for any claimed

⁷¹ Bellinger III, John B., *Interview with Author* (12 January, 2012)

⁷² See *Rome Statute of the International Criminal Court* (1998), Art.16 “Deferral of investigation or prosecution”

⁷³ Lynch, Colum, ‘Annan Opposes Exempting U.S. From Court,’ *Washington Post* (18 June, 2004) A24; See generally CICC, ‘Chronology of the Adoption of Security Council Resolutions 1422/1487 and Withdrawal of the Proposed Renewal in 2004,’ *Factsheet* (2004) <http://www.iccnw.org/documents/FS-1422and1487Chronology_26March2008.pdf>

special character, rights or duties. NGO groups similarly approached the issue by reference to legalist principles defining the proper relationship between sovereign states. The CICC commended eventual US withdrawal of the renewal request arguing that it “reflected the growing international support for the ICC and the diminishing capacity of the US to stand above international law.”⁷⁴ Similarly Amnesty International argued that the immunity resolutions were 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 ultimate failure of the US to gain a renewal as “a victory for international justice and the rule of law.”⁷⁵

At this same time the UNSC moved to use its powers under Article 13(b) of the Rome Statute to refer the situation in Darfur, Sudan to the ICC pursuant to Chapter VII of the UN Charter.⁷⁶ This followed the recommendation of the *International Commission of Inquiry on Darfur* in circumstances where the only way to exercise jurisdiction over Sudan, as a non-State Party to the ICC Statute,⁷⁷ was via a UNSC referral under Article 13(b) of the Rome Statute. That power had been a concession at the Rome negotiations to permit a narrow form of UNSC control, potentially contradicting legalist insistence on sovereign equality. However support for the referral as the only option in Darfur emphasised the way in which the power was to be exercised on behalf of all states equally, rather than by the P-5 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.”⁷⁸ Similarly, in an open letter to Condoleezza Rice, the Executive Director of Human Rights Watch challenged the legitimacy of the US exercising its veto powers as an expression of parochial interests.⁷⁹ The P-5’s powers were interpreted as being subject as far as possible to the interests of all states in the ICC, rather than as being entirely the prerogative of a privileged few members.

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 at the precedent of a resolution specifically granting privileges to the US on the basis of its unique global role. The representative argued that the “maintenance of international peace and the fight against impunity cannot be viewed as conflicting objectives.”⁸⁰ 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 underpinned claims the US ICC stance contradicted its claimed commitment to the rule of IL.

⁷⁴ Cited in CICC, ‘Chronology of the Adoption of Security Council Resolutions 1422/1487 and Withdrawal of the Proposed Renewal in 2004,’ *Factsheet* (2004) <http://www.iccnw.org/documents/FS-1422and1487Chronology_26March2008.pdf>

⁷⁵ 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)

<<http://www.amnesty.org/fr/library/asset/IOR30/016/2004/fr/8f2de323-d5bc-11dd-bb24-1fb85fe8fa05/ior300162004en.html>>

⁷⁶ *Rome Statute of the International Criminal Court* (1998); SC Res 1593, UN Doc S/RES/1593 (31 March, 2005)

⁷⁷ Sudan signed on 8 September 2000, but failed to subsequently ratify treaty

⁷⁸ Cassese, Antonio, 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) at 149

⁷⁹ Roth, Kenneth, ‘U.S.: ICC Best Chance for Justice in Darfur,’ *Letter to Condoleezza Rice* (22 January, 2005)

<<http://www.hrw.org/news/2005/01/21/us-icc-best-chance-justice-darfur>>

⁸⁰ 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) at 11

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 both principles of liberal equality and hegemonic privilege. Clinton reminded European critics that:

the 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.⁸¹

In these sentiments Clinton alluded to elements of American exceptionalism and the implications for an ICC design consistent with her understanding of the rule of IL. “Global responsibilities” referred to were the duties involved in exercising international executive power to uphold IL. Clinton’s concern for “misuse” of the ICC was effectively a charge of “lawfare”: of legalist judicial institutions being used to constrain the US and thereby erode not merely its global power, but the international legal system underpinned by US power.⁸² The possession of exceptionalist beliefs limited recognition of sovereign equality, but did go hand in hand with the granting of hegemonic legal privileges. At the same time, where Clinton sought to speak for “all of those people looking at us and yearning to be part of what we are,”⁸³ her determination of the proper relationship between sovereign states equally revealed an acceptance of the principle of liberal equality.

The significance of such 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 assumptions. Schabas documented that the first sign of a shift in US ICC policy came in 2004 in backing down on requested renewal of UNSC resolutions granting US peacekeepers ICC immunity.⁸⁴ He cited the decisive factor as revelations about the abuses in Abu Ghraib Prison in the aftermath of the 2003 Iraq War: “Shamed and humbled by the tales of abuse” the US withdrew its deferral resolution.⁸⁵ The significance of the 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 cause the US to turn away from legal conceptions relying on associated ideologies. If legal conceptions play a meaningful role in structuring IL policy then the US would be more likely to accede to a policy outcome aligned with legalist demands for sovereign equality – even as political interests were held constant.

⁸¹ Clinton, Hillary Rodham, *German Media Prize Dinner: Remarks of Senator Hillary Rodham Clinton* (13 February, 2005) <http://www.amicc.org/docs/Clinton%202_13_05.pdf>. Taft has responded “I don’t think she really believed that...it’s more of a political judgement” when asked if this statement demonstrated a belief that it was necessary to exempt the US from ICC jurisdiction to uphold the rule of IL: Taft IV, William H., *Interview with Author* (22 November, 2011)

⁸² See Chapter 6 *supra*

⁸³ Clinton, Hillary Rodham, *German Media Prize Dinner: Remarks of Senator Hillary Rodham Clinton* (13 February, 2005) <http://www.amicc.org/docs/Clinton%202_13_05.pdf>

⁸⁴ Schabas, William, *An Introduction to the International Criminal Court* (Cambridge University Press, 4th ed, 2011) at 31. SC Res 1422, UN Doc S/RES/1422 (12 July, 2002); SC Res 1487, UN Doc S/RES/1487 (12 June, 2003)

⁸⁵ Schabas, William, *An Introduction to the International Criminal Court* (Cambridge University Press, 4th ed, 2011) at 32. On the prisoner abuse scandal generally see: Danner, Mark, ‘Abu Ghraib: The Hidden Story’ (2004) 7 *New York Review of Books*; Amann, Diane M., ‘Abu Ghraib’ (2005) 153 *University of Pennsylvania Law Review* 2085

Rice admitted that the images from Abu Ghraib diminished global perceptions of “America as something different.”⁸⁶ She later lamented that lasting damage was caused when “the image of the U.S. soldier around the world became associated with the depravity of Abu Ghraib.”⁸⁷ The translation of this recognition into IL policy was evident in Ambassador Danforth’s classified communications advising the State Department 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.”⁸⁸ Bassiouni explained that the examples “evidenced to the international community the need for accountability,” and most especially for the US, despite holding out 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.”⁸⁹ 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.”⁹⁰

That these circumstances led to the withdrawal of US demands for hegemonic privilege, or even for deference to a form of liberal equality, is compelling evidence of the extent that foreign policy ideology structured conceptions of IL. Once the foundation of exceptionalist beliefs was dissolved, the entire edifice of distinctive interpretations of the rule of law collapsed. The only influential 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 absent an exceptionalist foundation, but for that reason reinforced the power of foreign policy ideology in structuring law.

Reframing UNSC Referral of the Darfur Situation

The shift in US policy culminated in tacit support for a referral of Darfur by the UNSC in March 2005 despite previous declarations never to work with the court.⁹¹ Bosco described the success in gaining US acquiescence to the Darfur referral as a “major breakthrough” in relations.⁹² 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 very 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”⁹³ That was precisely the realisation

⁸⁶ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Dr. Condoleezza Rice to be Secretary of State*, 1st Session 109th Congress (2005) at 147

⁸⁷ Rice, Condoleezza, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC, 2011) at 274

⁸⁸ Danforth, John C., *Peace and Accountability: A Way Forward* (7 January, 2005)

⁸⁹ Bassiouni, M. Cherif, *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) at 143-144

⁹⁰ 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)

⁹¹ <<http://www.amnesty.org/fr/library/asset/IOR30/016/2004/fr/8f2de323-d5bc-11dd-bb24-1fb85fe8fa05/ior300162004en.html>>

⁹² See Schabas, William, *An Introduction to the International Criminal Court* (Cambridge University Press, 4th ed, 2011) at 32

⁹³ Bosco, David, *Rough Justice: The International Criminal Court’s Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 108

⁹⁴ Scharf, Michael P., ‘The United States and the International Criminal Court: A Recommendation for the Bush Administration’ (2000) 7 *ILSA Journal of International & Comparative Law* 385 at 389

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 has 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 would reinforce the wisdom of the original US position of supporting an international court under UNSC control.⁹⁴ In advocating that position 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 he in no way attempted to defend the US position as consistent with the principle of sovereign equality. Rather he 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.⁹⁵

This is an assertion of hegemonic privilege as an element of the rule of IL: that IL must be structured to reflect the realities of political power if it is to be a meaningful force in ameliorating raw political ambition. Bosco argued that Goldsmith had effectively called for the US “to informally merge the court into the system of major-power privilege.”⁹⁶ This was an accurate analysis at the level of the political dynamics underpinning American foreign policy. But, at the level of the interplay between law and politics, it did not explain the logic of legal argumentation adopted in reaching this outcome. Identifying Goldsmith’s argument as structured by Illiberal Internationalism allows for analysis of legal reasoning that reconciles political interests with expressed commitment to IL.

In reviewing these policy outcomes Heyder adopted the standard legalist critique of the US, which was to characterise US acquiescence to the Darfur referral as contradictory in jurisprudential terms, and only coherent when understood as tactical manipulations of the law in order to “maintain hegemonic power over international criminal justice.”⁹⁷ Her conclusion was that the referral “must be interpreted as an attempt to safeguard American exceptionalism and enable the United States to more easily advance its particular interest.”⁹⁸ She was indeed correct to identify the causal role of exceptionalist beliefs in structuring US IL policy, but her conclusion fell short of recognising the way that exceptionalist beliefs were constitutive of American conceptions of the rule of IL itself. The problem was not one of legal policymakers compromising their perception of the rule of IL according to political interests. Rather it was that policymakers were guided by conceptions of IL encompassing exceptionalist beliefs from the beginning.

The power of exceptionalist beliefs as the lynchpin for American legal conceptions was laid bare in Rice’s explanation for why citizens of Sudan, as a non-party to the Rome Statute, should be

⁹⁴ Goldsmith, Jack L., ‘Support War Crimes Trials for Darfur,’ *Washington Post* (24 January, 2005) <<http://www.washingtonpost.com/wp-dyn/articles/A31594-2005Jan23.html>>

⁹⁵ *Ibid*

⁹⁶ Bosco, David, *Rough Justice: The International Criminal Court’s Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 111

⁹⁷ Heyder, Corrina, ‘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 at 666

⁹⁸ *Ibid* at 667

subject to ICC jurisdiction whilst the US adamantly denied that jurisdiction over American citizens. 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.”⁹⁹ Reference was made to the protections of non-parties to the treaty in the referring UNSC resolution, but this was hardly an answer given that those protections were directed at the US itself. The further explanation was that, as a practical matter, Sudan represented “a humanitarian crisis, it is a moral crisis, and it is 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.”¹⁰⁰ Sands described this response as “flummoxed.”¹⁰¹ A consistent principle can be identified in the unequal treatment, however, which was that, because the US was believed to occupy an unequal position, the meaning of equality under IL entailed a commensurate adjustment of legal rights and duties. Certainly Rice appeared satisfied that US policy was guided by principles consistent with the rule of IL when she addressed the Annual Meeting of the American Society of International Law later that same day:

America is a country of laws...when 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.¹⁰²

Beyond objections to the principle of UNSC control, Bosco noted that Resolution 1593 created an important precedent whereby the US was effectively able to circumscribe the rights and privileges to be enjoyed by specific states before the ICC. This appeared to go beyond the UNSC’s proper power to simply refer situations under Article 13(b) of the Rome Statute, which falls short of a power to set the terms for an ICC prosecution.¹⁰³ Robert Cryer specifically cited this as a key reason for raising “serious questions” about the resolution’s “compliance with basic principles of the rule of law.”¹⁰⁴ He reviewed previous statements by Scheffer which seem to suggest an interpretation of Article 13(b) permitting the US to specifically “define the parameters” of ICC jurisdiction over states who play a special enforcement role in the international legal system.¹⁰⁵ In weighing up the value of fidelity to the rule of IL against UNSC action Cryer, rejected the legitimacy of the US interpretation for elevating “exceptionalist claims” over respect for sovereign equality.¹⁰⁶

Reviewing Cryer’s argument demonstrates very clearly the limitations of divorcing law and politics when explaining US ICC policy. He noted that 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 this was immediately followed with the counterpoint that “prosecutions for extremely serious crimes are likely now to occur, when they were unlikely to have

⁹⁹ Rice, Condoleezza, *Remarks With Hungarian Foreign Minister Ferenc Somogyi After Meeting, Treaty Room, Washington, DC* (1 April, 2005) <<http://2001-2009.state.gov/secretary/rm/2005/44104.htm>>

¹⁰⁰ *Ibid*

¹⁰¹ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at 248

¹⁰² Rice, Condoleezza, *Remarks at Annual Meeting of the American Society of International Law, Lowes L’Enfant Plaza Hotel, Washington, DC* (1 April, 2005) <<http://2001-2009.state.gov/secretary/rm/2005/44159.htm>>

¹⁰³ Bosco, David, *Rough Justice: The International Criminal Court’s Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 112

¹⁰⁴ Cryer, Robert, ‘Sudan, Resolution 1593, and International Criminal Justice’ (2006) 19 *Leiden Journal of International Law* 195 at 205

¹⁰⁵ *Ibid* at 212, citing Scheffer, David J., ‘Staying the Course with the International Criminal Court’ (2001) 35 *Cornell International Law Journal* 47 at 90

¹⁰⁶ Cryer, Robert, ‘Sudan, Resolution 1593, and International Criminal Justice’ (2006) 19 *Leiden Journal of International Law* 195 at 215

done so if the Security Council had no role in referring cases to the ICC.”¹⁰⁷ Cryer was eager to avoid “being too precious about principle” where practical justice was being advanced,¹⁰⁸ yet he ultimately retained the binary distinction between the concept of the rule of IL and American political power. The quandary he posed is that exceptionalist claims are incompatible with sovereign equality as an element of the rule of IL, and yet the veracity of those claims is reinforced wherever the UNSC is called upon to make the legal system effective.

For US legal policymakers that nexus between exceptionalism and the operation of IL is not unique to the Darfur referral but is constitutive of the international legal system. In this view there is no conceivable scenario where the legalist rule of law conception *would* usefully provide principles for US policy to establish the rule of IL. In short, a system defined by reference to sovereign equality is not merely a poor description of law: it is an account incompatible with the realisation of the ideal. Cryer’s refusal to adjust the purity of legal principles, even while admitting their failure to capture the way law operates, is precisely the limitation that sustains US claims that a meaningful account of the rule of IL must incorporate policy considerations within the central concept. In this case it was precisely by preserving hegemonic privilege that global politics was seen to be most effectively ordered according to predetermined legal rights and duties.

Prior to the referral Heyder opined that it was “difficult to understand” why the US 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.”¹⁰⁹ The apparent contradiction stemmed from the commentator’s assumption that the operation and strengthening of the ICC, as it was structured in 2005, was consistent with US policymakers’ commitments to international criminal law. However, so long as the court remained structured according to the principle of sovereign equality, any vote for the court referral at that point was tantamount to an endorsement of that definition of equality. It was ultimately this divergence in legal principles that lay behind the appearance of contradictions in American condemnation for the situation in Darfur and wariness toward an ICC resolution. The consolidation of US hegemonic privilege as a principle for upholding the rule of law was complete by 2008 when the US supported the ICC in blocking African Union attempts to provide immunity from prosecution for Sudanese President Omar al-Bashir flowing from the Darfur referral. Scheffer observed that by this period “the Bush administration had finally rid itself of Bolton” and thereby was able to exercise its international legal privileges to facilitate the functioning of the court.¹¹⁰

Conclusion

The shift in US policy regarding the proper relationship between sovereign states demonstrated the significant influence of exceptionalist beliefs underpinning competing conceptions of IL. During the first term of the Bush 43 administration the US had assertively sought and obtained unequal immunities from ICC jurisdiction through the UNSC. From a political perspective this could be

¹⁰⁷ *Ibid* at 216-217

¹⁰⁸ *Ibid* at 217

¹⁰⁹ Heyder, Corrina, ‘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 at 661

¹¹⁰ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 416

explained broadly as the predictable behaviour of a powerful state manipulating international legal rules. However, in legal terms, the foundation of 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. The 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. As the exceptionalist veil was pierced US IL policy fell in line with the legalist rejection of UNSC immunity for being contrary to sovereign equality.

In permitting the referral of the Darfur situation, the shift in US policy reasserted underlying exceptionalist beliefs and thereby remained distinct from legalist preferences even as policy became more accommodating. Where US policymakers were guided by one or more of the ideal type American legal conceptions the act of allowing the referral, without positively endorsing it, was capable of sustaining each of those alternative conceptions. The US did ultimately allow the referral, choosing to abstain from any vote against the action. Yet despite this advancing the ICC cause, critics argued that the “selective enforcement of international criminal law” in the referral demonstrated that the international legal system “has a long way to go before it represents a system that truly reflects rule of law principles.”¹¹¹ The enhanced enforcement of criminal liability was not recognised by legalist advocates as advancing the rule of law so long as US policy ignored the principle of sovereign equality. The beliefs structuring the US position revealed most strongly the influence of Illiberal Internationalism, which saw the circumstances as an opportunity to reassert the role of the ICC as a diplomatic tool advancing US national security interests.

ORDERING INTERNATIONAL LEGAL POWER

Disagreement over ordering of the court’s international legal powers during the second term centred on overcoming harsher measures in the ASPA designed to curtail ICC powers altogether. That legislation sought to alter the hierarchy of powers between the court and sovereign states by restricting forms of political cooperation that strengthened the court’s judicial and prosecutorial functions. For legalist advocates this was a clear contradiction of the separation of judicial powers in the ICC necessary to sustain the rule of IL. By the second term the consequence of US insistence on the supremacy of its own legal powers was eroded cooperation with key partners who had 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 referred to disruptions to vital military relationships due to US “fixation with the international criminal court, as codified by the American Servicemen’s Protection Act.”¹¹² The US relented and modified application of the ASPA to allow for greater cooperation with allies and a more conciliatory policy permitting exceptions for US assistance to the ICC. Rice announced the changes noting the negative impact upon counterterrorism and drug

¹¹¹ Cryer, Robert, ‘Sudan, Resolution 1593, and International Criminal Justice’ (2006) 19 *Leiden Journal of International Law* 195 at 222

¹¹² United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Dr. Condoleezza Rice to be Secretary of State*, 1st Session 109th Congress (2005) at 43

operations, and on military cooperation in Iraq and Afghanistan.¹¹³ The ASPA had to yield to the preservation of “relationships that are really important to us from the point of view of...improving the security environment.”¹¹⁴ However, even as US policy sanctioned the legitimacy of ICC judicial power, it continued to deny the plausibility of impartial international judicial power and to reserve judicial authority over its nationals to US courts. Policy outcomes showed some evidence of increased deference to the ICC’s judicial power, but this remained distinct from relinquishing parallel judicial powers exercised at the US municipal level. This again created a potential contradiction and a case for examining the role of ideological conceptions of law in structuring decision-making processes.

Legalist Policy

Legalist advocates in this period continued to adhere to the idea that the ICC was capable of exercising independent judicial power as a counterbalance to political interests. The developing UNSC-ICC relationship contained in the *International Commission of Inquiry on Darfur*¹¹⁵ was defended as being consistent with 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.”¹¹⁶ That view was equally reflected in the position of NGOs, who continued to advocate separation of the court’s judicial power, and thereby the need to place it above the exercise of parallel powers by states. The head of Amnesty International 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.”¹¹⁷ In these statements advocates revealed the extent to which their conception of the rule of IL turned on separating powers into defined global bodies.

The inadequacy of any legal policy that fell short of a separation of powers was also evident in the reactions of states engaging with the US at this time. France’s permanent representative to the UN, Jean-Marc de La Sablière, noted that immunity requested by the US in resolution 1593 was acceded to only on pragmatic grounds, with an expectation that such clauses would not be included in future referrals.¹¹⁸ Brazil was less compromising in its abstention to protest the precedent of specifically reserving judicial power to the US while excluding ICC authority. This was despite acknowledging the desirability of the resolution and the practical effect it would have in the particular circumstances. Brazil nevertheless affirmed the need to preserve the character of the ICC as “an independent judicial body,” which already “provides all the necessary checks and balances to prevent possible abuses and politically motivated misuse of its jurisdiction.” On this basis the Brazilian representative rejected a reference to Article 98 agreements in the preamble as contradicting the fight

¹¹³ Office of the Legal Adviser, Department of State, in Sally J. Cummins (ed), *Digest of United States Practice in International Law: 2006* (International Law Institute, 2007) at 278

¹¹⁴ Rice, Condoleezza, ‘En Route to San Juan, Puerto Rico, March 10, 2006,’ *Trip Briefing* (2006) <<http://2001-2009.state.gov/secretary/rm/2006/63001.htm>>

¹¹⁵ Cassese, Antonio, 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)

¹¹⁶ *Ibid* at 149

¹¹⁷ 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)

<<http://www.amnesty.org/fr/library/asset/IOR30/016/2004/fr/8f2de323-d5bc-11dd-bb24-1fb85fe8fa05/ior300162004en.html>>

¹¹⁸ UN, ‘Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court,’ *Press Release SC/8351* (31 March, 2005) <<http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>>

against impunity by limiting the jurisdictional reach of the court. Neither could Brazil support operative clause 6 “through which the Council recognizes the existence of exclusive jurisdiction, a legal exception that is inconsistent in international law.”¹¹⁹ Together these measures were likely to “have the effect of dismantling the achievements reached in the field of international criminal justice.”¹²⁰ 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.”¹²¹ States were not merely looking for practical US support for the ICC in the immediate case. Rather there was a clear conception of the contribution of the ICC to the rule of IL and what was required of the US to meet that principle.

Beliefs of American Legal Policymakers

Sanctioning of ICC Judicial Power as Limited by US Consent to Jurisdiction

US approaches to the Darfur referral uniformly insisted on terms contrary to a court design based on an effective separation of international legal powers. Any legal disputes amongst American policymakers were thus not about how to accommodate the supremacy of the ICC’s judicial power, but rather between entirely separate ordering principles drawn from ideological interpretations of American strategic interests. The chief policy shift in this period was from a belief that municipal legal powers must remain supreme without exception, to an acceptance that US interests were advanced by consenting to defined ICC legal functions. Bellinger emphasised that, in the second term, the administration only resisted the ICC’s “method for *achieving* accountability” rather than its aspiration to do so.¹²² This was an argument about the proper ordering of international legal power according to a “deeply held American belief that power needs to be checked and public actors need to be held accountable.”¹²³ In the first term of the Bush administration there was insistence that judicial determination of the subject matter of international criminal law must 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. Subsequent US action was thereby structured by the legal obligations to resist any ICC role. 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 terms of any such prosecution continued to clearly exclude matters falling under US judicial power. There was a shift along the jurisdictional dimension from an Illiberal Nationalist to Illiberal Internationalist conception of American interests, which thereby bolstered the operation of the court while still denying the supremacy of ICC judicial power.

Initially, the US continued to resist the UNSC referral according to its long held insistence that only municipal law could be relied on in matters of criminal justice. The US had been among the first and most prominent states to declare that the situation in Darfur amounted to genocide. Rice endorsed this action by emphasising that the facts fulfilled the twin elements of the formal legal

¹¹⁹ See *infra*

¹²⁰ 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) at 11

¹²¹ Representative Abdallah Baali for Algeria: *ibid* at 4-5

¹²² Bellinger III, John B., ‘Reflections on Transatlantic Approaches to International Law’ (2007) 17 *Duke Journal of Comparative and International Law* 513 at 520. Original emphasis

¹²³ *Ibid* at 520

definition of genocide.¹²⁴ Accordingly, policymakers were at great pains to deny a lack of US commitment to international criminal justice. Rather Rice's recollection is that Bush's rejection of the Rome Statute was in large measure due to the unaccountability of the prosecutor to an identifiable government. Opposition to the ICC "was an issue of sovereignty and a step that looked a bit too much like 'world government.'"¹²⁵ Acting UN Ambassador Anne Patterson similarly reiterated a US preference for domestic based resolutions, such as a hybrid tribunal in Africa.¹²⁶ The evidence is that the US was presented from the beginning with a choice between blocking the referral in preference for a hybrid court using the infrastructure of the ICTR, or to "carve out US exemption" within a referral it could support.¹²⁷ 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 conception of the ICC role initially recommended by Ambassador Danforth.¹²⁸ Notably Rice ultimately decided to support 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 construction of the court or the Rome Statute."¹²⁹ This is revealing for the extent to which both ideology and a commitment to the idea of greater legal accountability were taken into account in the shift from one policy stance to another.

On US insistence the terms of UNSC Resolution 1593 explicitly took note of "agreements referred to in Article 98-2 of the Rome Statute." This was inserted as a measure to preserve US judicial authority over potential cases of US nationals committing crimes within the territory of state parties to the ICC.¹³⁰ More directly, the resolution reiterated the limits of US consent to ICC judicial authority in the sixth of its operative clauses which stated that the Security Council:

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 State¹³¹

On the one hand the resolution as a whole was designed to legitimise the ICC's exercise of international judicial power, but on the other hand, this clause denied an effective separation of that power from the states exercising international executive and legislative functions. The effect of clause six was to ensure that judicial power over international criminal matters was retained by the US in relation to its own nationals. This was potentially consistent with the influence of a number of the American legal conceptions, but was most strongly influenced by the return to an Illiberal Internationalist stance.

¹²⁴ Rice, Condoleezza, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC, 2011) at 387

¹²⁵ *Ibid* at 388

¹²⁶ Patterson, Anne W., 'Ambassador Anne Patterson Explains U.S. Position,' *United States Abstains on U.N. Darfur War Crimes Resolution* (1 April, 2005)

<<http://iipdigital.usembassy.gov/st/english/texttrans/2005/04/20050401163352ihecuor0.4920465.html#axzz3CukwFoft>>. See also Bellingier III, John B., 'Trials of Moammar Gaddafi's favored few belong in Libya's courts,' *Washington Post* (22 November, 2011) <http://www.washingtonpost.com/opinions/trials-of-moammar-gaddafis-favored-few-belong-in-libyas-courts/2011/11/22/gIQANU4WmN_story.html>

¹²⁷ Goldberg, Mark, 'From Mark Goldberg on Sudan and the International Criminal Court,' *Citizens for Global Solutions* (2 August, 2007) <<http://globalsolutions.org/blog/2007/08/Mark-Goldberg-Sudan-and-International-Criminal-Court#.VCIPkFflaaQ>>

¹²⁸ *Ibid*; Danforth, John C., *Peace and Accountability: A Way Forward* (7 January, 2005)

¹²⁹ Rice, Condoleezza, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC, 2011) at 388

¹³⁰ SC Res 1593, UN Doc S/RES/1593 (31 March, 2005)

¹³¹ *Ibid*. See also operative clause 2 of the resolution

Acting Ambassador Patterson emphasised that consent to jurisdiction set the limits of US support for the Darfur referral, noting that any alternative arrangement struck “at the essence of the nature of sovereignty.” On those terms the US would still not 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.¹³²

Notably, the explanation provided by Patterson was structured around the theme of US commitment to end impunity for violations of IL, with the principle of a consent based allocation of powers being central to that end. In general the US remained committed to the principle that: “Violators of international humanitarian law and human rights law must be held accountable.” In this context Patterson reminded her audience that the US 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.” Immediately thereafter however she reiterated that, where the US was concerned, continued objections to the ICC were due to the weakness of “sufficient protections from the possibility of politicized prosecutions.” In this sense her beliefs identified politics as both the guarantor of the rule of IL in the UNSC, but its enemy in the ICC. This apparent incoherence is resolved by viewing the underlying conception of IL in terms of the role of foreign policy ideology and exceptionalist beliefs in structuring conceptions of law. The US rejected the suggestion that this position equated to sanctioning impunity, since the US itself would “continue to discipline our own people where appropriate.”¹³³ As a whole the arrangement achieved in the Darfur referral normalised and institutionalised a situation of parallel exercises of international judicial power by both the court and US municipal processes.

Conclusion

This period saw the realisation of the Illiberal Internationalist preference for the ordering of international legal powers in the ICC, with the court confirmed as a legitimate source of international judicial authority, yet with clear limitations on the exercise of that power. This did not correspond with the principled objections of US global counterparts, which continued to insist that the ICC had an oversight role in exercising independent international judicial powers. Despite optimism about the apparent US shift toward a legalist ICC policy, some advocates recognised that these circumstances revealed the hard limits to further cooperation. Heyder began her analysis from the legalist position of arguing 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.”¹³⁴ She nevertheless accepted the implications of her logic in admitting that persisting with this design made it “very unlikely” that US opposition would subside. Even in the best-case scenario, a properly functioning court could lead only to the US providing “possible ad hoc cooperation in the

¹³² Patterson, Anne W., ‘Ambassador Anne Patterson Explains U.S. Position,’ *United States Abstains on U.N. Darfur War Crimes Resolution* (1 April, 2005)

<<http://iipdigital.usembassy.gov/st/english/texttrans/2005/04/20050401163352ihecuor0.4920465.html#axzz3CukwFoft>>

¹³³ *Ibid*

¹³⁴ Heyder, Corrina, ‘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 at 671

long run.”¹³⁵ Optimism that the US would review its position was misplaced insofar as it failed to take account of structural constraints – in the form of ideologically informed conceptions of the proper ordering of international legal power.

CHAPTER CONCLUSION

The shift in policy outcomes during the second term of the Bush 43 administration followed an assessment by administration policymakers that previous Illiberal Nationalist responses to the ICC had not optimised American national security interests. There was a concerted effort to reengage with the court and accept its legitimacy as an element of global governance.¹³⁶ However, the decision-making process underpinning this shift closely followed the principles comprising competing ideologically informed conceptions of IL, and in no way was an attempt to approximate legalist principles in the ICC design. At the level of analysing legal principles, it is not useful simply to describe the period as the weakening of political objections to global legalism in favour of greater adherence to the rule of IL. Such would assume the universality of a particular rule of law ideal as a guiding principle for IL policy. Instead, the dynamic was of a shift between discrete sets of beliefs about the nature of the rule of IL and a corresponding change in ICC policy.

There were undoubtedly many American voices representing NGOs and academic perspectives calling for the US to accede to the ICC according to a view structured by legalism. There is no evidence however that US policymakers accepted this set of beliefs, even in narrow cases where policy acceded to legalist preferences. Bosco’s review of this period affirms this conclusion in recognising that, although US ICC policy became “more pragmatic,” it remained the case that “no influential voices on the American political spectrum advocated membership.”¹³⁷ The veracity of these conclusions, and the role of legalist ideals, were to come under even greater scrutiny as the presidency transitioned back to the control of a candidate who had staked himself out as an advocate of an enlarged role for IL and who even appeared to mirror legalist ideals.

¹³⁵ *Ibid* at 671

¹³⁶ Cerone suggests that continued anti-ICC rhetoric may have been a mere “smokescreen” to mask the first term miscalculations: Cerone, John P., ‘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) at 305, n.168

¹³⁷ Bosco, David, *Rough Justice: The International Criminal Court’s Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 132

OBAMA ADMINISTRATION 2008-2012

Even prior to becoming a Presidential candidate in 2008, Barack Obama, and the figures who ultimately became his key legal policymakers, had expressed strong commitment to the rule of IL and a specific enthusiasm for the ICC. The change in administration accordingly raised expectations that Obama possessed “a genuine concern to bring US policy into line with fundamental principles of international law, and thus represent a significant change from his predecessor.”¹ The perception became tangible in the award of the Nobel Peace Prize to the President in 2009. In making the presentation the Chairman of the Norwegian Nobel Committee noted that:

Multilateral diplomacy has regained a central position, with emphasis on the role that the United Nations and other international institutions can play... The USA is now paying its bills to the UN. It is joining various committees, and acceding to important conventions. International standards are again respected. Torture is forbidden; the President is doing what he can to close Guantanamo. Human rights and international law are guiding principles.²

Specifically this translated into high hopes for a realignment of US-ICC policy with the rest of the world, up to and including possible US ratification of the Rome Statute.³ By this period the nature of the ICC project itself had changed, from negotiation over the court design during the Clinton era, to the attempts to quash the project in the first term of the Bush 43 administration, to the accommodation of the court's first investigations in the second Bush term. By the time of Obama's election, US policymakers were developing policy toward a court actively engaged in prosecutions and further defining its powers in the process. Harold Koh, as Legal Adviser to the State Department, described the shift in policy as having “reset the default on the U.S. relationship with the court from hostility to positive engagement.”⁴

The focus of legalist ICC policy during this period continued to emphasise the core rule of law elements of: formally developing global governance; advancing sovereign equality; and, separating the court's powers from competing sources of international legal power. These principles were focussed particularly on defining the crime of “aggression,” which had been set aside for later consideration at the 1998 Rome Conference. This was achieved at the 2010 *Review Conference of the Rome Statute*, held in Kampala, Uganda (“Kampala Conference”),⁵ where a definition was

¹ Dworkin, Anthony Gary, *Beyond the “War on Terror”: Towards a New Transatlantic Framework for Counterterrorism* (European Council on Foreign Relations, 2009) at 10; Gosalbo-Bono, Ricardo ‘The Significance of the Rule of Law and Its Implications for the European Union and the United States’ (2010) 72 *University of Pittsburgh Law Review* 229 at 354

² Jagland, Thorbjørn, *Award Ceremony Speech: Presentation Speech by Thorbjørn Jagland, Chairman of the Norwegian Nobel Committee, Oslo* (10 December, 2009) <http://nobelprize.org/nobel_prizes/peace/laureates/2009/presentation-speech.html>

³ See Smith, Stephen Eliot, ‘Definitely Maybe: The Outlook for US Relations with the International Criminal Court During the Obama Administration’ (2010) 22 *Florida Journal of International Law* 155 at 186-189; Fairlie, Megan, ‘The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage’ (2011) 29 *Berkeley Journal of International Law* 529 at 528; Kelly, Michael J., ‘Charting America's Return to Public International Law Under the Obama Administration’ (2009) 3 *Journal of National Security Law & Policy* 239 at 250-253

⁴ Koh, Harold H. & Stephen J. Rapp, *U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference* (15 June, 2010) <http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm>

⁵ See generally ICC, *ICC - Review Conference* (15 February, 2011) <http://www.icc-cpi.int/en_menus/asp/reviewconference/Pages/review%20conference.aspx>

confirmed and set to take effect after a further final decision in 2017.⁶ In so doing, global advocates achieved what many had considered the pinnacle of the rule of IL in subjecting decisions to use international force to judicial determination as a check not only on national governments, but also on previously unfettered UNSC power.

For its part the Obama administration began for the first time attending annual states parties meetings as an observer, actively advocating and voting in favour of UNSC referrals to the ICC, and contributing substantially to debates over the crime of aggression at the Kampala Conference. The President broke sharply from his predecessor in releasing statements personally calling for international support for ICC investigations and prosecutions.⁷ Explaining the renewed support, US policymakers declared that:

the commitment of the Obama Administration to the rule of law and the principle of accountability is firm, in line with... [a] historic tradition of support for international criminal justice that has been a hallmark of United States policy dating back at least to the time of Nuremberg.⁸

Yet, parallel to these changes, the US strongly resisted the definition of aggression agreed at the Review Conference, reaffirmed opposition to joining the ICC and, despite forcefully criticising the previous administration, declined to recant the 2002 “unsigned” notification of John Bolton. ICC policy outcomes accordingly continued to diverge from global advocates in ways that potentially confirmed the influence of foreign policy ideology on underlying conceptions of the rule of IL.

DOMINANT INTERNATIONAL LAW POLICY

The defining feature of the Obama IL policy was a rejection of Illiberal Nationalist conceptions of the Bush 43 years,⁹ which proved a more consistent theme than any positive set of guiding principles. The ideological beliefs guiding the administration’s general foreign policy have proven to be a major interpretive challenge, with commentators describing policy variously as “Liberal Internationalist,”¹⁰ “pragmatic internationalist,”¹¹ “progressive pragmatist,”¹² “Jeffersonian,”¹³ “accommodationist,”¹⁴ and guided by “*realpolitik*.”¹⁵ These divergent analyses capture the extent to which outcomes traversed

⁶ See *Rome Statute of the International Criminal Court* (1998), Art.8bis (“Crime of aggression”) & Art.15bis-Art.15ter (“Exercise of jurisdiction over the crime of aggression”)

⁷ Obama, Barack H., ‘Statement by President Obama on the International Criminal Court announcement,’ *White House Office of the Press Secretary* (15 December, 2010) <<http://www.whitehouse.gov/the-press-office/2010/12/15/statement-president-obama-international-criminal-court-announcement>>

⁸ Rapp, Stephen J., *Address to Assembly of States Parties* (19 November, 2009) <http://www.state.gov/j/gcj/us_releases/remarks/2009/133316.htm>

⁹ See Beinart, Peter, ‘Pursuing ISIS to the Gates of Hell,’ *The Atlantic* (4 September, 2014)

<<http://www.theatlantic.com/international/archive/2014/09/why-americas-pursuing-isis-to-the-gates-of-hell/379622/>>

¹⁰ Mead, Walter R., ‘Liberal Internationalism: The Twilight of a Dream,’ *The American Interest* (1 April, 2010) <<http://www.the-american-interest.com/wrm/2010/04/01/liberal-internationalism-the-twilight-of-a-dream/>>

¹¹ Nau in Holmes, Kim R., Henry R. Nau & Helle C. Dale, ‘The Obama Doctrine: Hindering American Foreign Policy,’ *The Heritage Foundation* (29 November, 2010) <<http://www.heritage.org/research/lecture/2010/11/the-obama-doctrine-hindering-american-foreign-policy>> at 5

¹² Indyk, Martin S., Kenneth G. Lieberthal & Michael E. O’Hanlon, ‘Scoring Obama’s Foreign Policy: A Progressive Pragmatist Tries to Bend History’ (2012) 91 *Foreign Affairs* 44

¹³ Mead, Walter R., ‘The Carter Syndrome,’ *Foreign Policy* (4 January, 2010) <http://www.foreignpolicy.com/articles/2010/01/04/the_carter_syndrome>

¹⁴ Dueck, Colin, ‘The Accommodator: Obama’s Foreign Policy’ (2011) *Policy Review* 13

¹⁵ Kaplan, Fred, ‘The Realist: Barack Obama’s a Cold Warrior Indeed,’ *Politico Magazine* (27 February, 2014)

<<http://www.politico.com/magazine/story/2014/02/barack-obama-realist-foreign-policy-103861.html#ixzz3HXRG5oxz>>; Drezner,

the liberal-illiberal and internationalist-nationalist dimensions across a range of foreign policy challenges. This may in part reflect bureaucratic politics, with political circumstances resulting in former Bush 43 appointees continuing in some key policymaking positions so that policy was “far more diffuse and diverse than ideologically doctrinaire.”¹⁶ However the outcome is also consistent with the theorised role of foreign policy ideologies, which are categorised as discrete ideal types, but may be received in unique configurations within the worldview of a particular policymaker or administration.

The dominant ideological position of the administration has been Liberal Internationalist: identifying the purpose of IL policy in externalising universal values. Yet the means for achieving this objective have often followed competing logics of Illiberal Internationalism and Liberal Nationalism: both ideologies setting limitations to American global responsibilities. Obama’s own beliefs suggest that the reality of illiberalism in global politics often necessitates more pragmatic and illiberal applications of law to progress a liberal vision, or alternatively, that IL should be employed defensively to protect liberalism at home: the challenge “of being a liberal leader in an often illiberal world.”¹⁷ In consequence ideology has sometimes manifested itself in uncomfortable configurations of strategic ideas.¹⁸

In the context of IL policy specifically, it is useful to isolate Obama’s own worldview from policy outcomes, particularly in circumstances where the President has assumed greater personal control over decision-making than many of his predecessors.¹⁹ A reliable account of Obama’s conception of IL is in his Nobel Peace Prize oration, which according to a variety of sources, was almost entirely authored by the President and has been characterised by his closest advisers as a “template” or “framework” for his foreign policy beliefs.²⁰ This is particularly useful where the balance of the speech directly addressed the relationship between international power and the “just war” tradition, and conflicts internal to American IL policy. In his address Obama challenged the supposed tension in American thinking between “realists or idealists – a tension that suggests a stark choice between the narrow pursuit of interests or an endless campaign to impose our values around the world.” This binary is a well-worn strawman adopted by US leaders to demonstrate the nuance of their own middle ground position,²¹ but Obama’s formulation nevertheless revealed his dominant position as a Liberal Internationalist.

Daniel W., ‘Why Obama is Arming Syria’s Rebels: It’s the Realism, Stupid.’ *Foreign Policy* (14 June, 2013)

<http://www.foreignpolicy.com/posts/2013/06/14/why_obama_is_arming_syrias_rebels_its_the_realism_stupid>

¹⁶ Lynch, Timothy J., ‘Obama, Liberalism, and US Foreign Policy’ in Inderjeet Parmar, Linda B. Miller & Mark Ledwidge (ed), *Obama and the World: New Directions in US Foreign Policy* (Routledge, 2014) at 48

¹⁷ *Ibid* at 44

¹⁸ See Dueck, Colin, ‘Regaining a Realistic Foreign Policy,’ *Hoover Institution* (1 August, 2010)

<<http://www.hoover.org/research/regaining-realistic-foreign-policy>>

¹⁹ See Indyk, Martin S., Kenneth G. Lieberthal & Michael E. O’Hanlon, ‘Scoring Obama’s Foreign Policy: A Progressive Pragmatist Tries to Bend History’ (2012) 91 *Foreign Affairs* 44 at 31; Milne, David, ‘Pragmatism or What? The Future of US Foreign Policy’ (2012) 88 *International Affairs* 935 at 936

²⁰ Obama, Barack H., ‘Nobel Lecture: A Just and Lasting Peace,’ *Nobelprize.org* (10 December, 2009)

<http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html>. See Kaplan, Fred, ‘The Realist: Barack Obama’s a Cold Warrior Indeed,’ *Politico Magazine* (27 February, 2014)

<<http://www.politico.com/magazine/story/2014/02/barack-obama-realist-foreign-policy-103861.html#ixzz3HXRG5oxz>>; Koh, Harold H. in Donovan, Donald F., ‘Retrospective on International Law in the First Obama Administration’ (2013) 107

Proceedings of the Annual Meeting (American Society of International Law) 131 at 146

²¹ See the precise same formulation by Madeleine Albright at Chapter 5 *supra*

At first glance the speech appeared to reject forms of exceptionalist thinking. Obama identified an effective international legal system as the fulcrum of global peace and security, believing that “all nations – strong and weak alike – must adhere to standards that govern the use of force.” America cannot “insist that others follow the rules of the road if we refuse to follow them ourselves” which would appear “arbitrary.”²² He specifically rejected Illiberal Nationalist policies that set aside torture prohibitions for enemies that failed to reciprocate respect for IL.²³ Rather, for Obama, “even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight.”²⁴

Obama’s conception was however of a rule of IL in which the US played an exceptional role upholding the system and developing it according to universal liberal values. The halting establishment of the rule of IL was attributed to the exceptional American role after each of the world wars, wherein it “led the world in constructing an architecture to keep the peace.” In this premise Obama departed in key ways from legalism in asserting American values and power as constitutive of the rule of IL itself:

it was not simply international institutions – not just treaties and declarations – that brought stability to a post-World War II world. Whatever mistakes we have made, the plain fact is this: The United States of America has helped underwrite global security for more than six decades with the blood of our citizens and the strength of our arms... We have borne this burden not because we seek to impose our will. We have done so out of enlightened self-interest – because we seek a better future for our children and grandchildren, and we believe that their lives will be better if others’ children and grandchildren can live in freedom and prosperity.²⁵

Read in the context of a warning against “reflexive suspicion of America, the world’s sole military superpower,” this was not merely a political observation, but an expression of the elements of an effective international legal system.

The understanding of how that system has brought greater global peace drew upon the Liberal Internationalist belief in democracy as the link between the municipal and international rule of law. The evidence was said to be that greater adherence to IL between nations across the twentieth century was achieved through US support for “ideals of liberty and self-determination, equality and the rule of law.” Ultimately Obama’s liberal vision drew on a foundational belief “that the human condition can be perfected” and in a “fundamental faith in human progress.”²⁶ This animating purpose of IL remained distinct from Illiberal Internationalism, which does not accept that IL can progressively extend shared values as a strategy for overcoming geopolitical interests. In this utopian vision Obama is foremost a Liberal Internationalist.

The evidence that Obama nevertheless departed from the pure logic of Liberal Internationalism is an equal emphasis within the speech on the disjunct between liberal purpose and the reality of an illiberal world. For Obama, promoting liberal values must sometimes be set aside on

²² For an example of this interpretation see Kitfield, James, ‘Nobel Speech Articulates Obama Doctrine,’ *National Journal* (11 December, 2009) <http://www.nationaljournal.com/njonline/no_20091210_2200.php>

²³ See Chapter 7 *supra*

²⁴ Obama, Barack H., ‘Nobel Lecture: A Just and Lasting Peace,’ *Nobelprize.org* (10 December, 2009) <http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html>

²⁵ *Ibid*

²⁶ *Ibid*

national security grounds, in particular where it is necessary to alter the global balance of power in America's favour:

I face the world as it is, and cannot stand idle in the face of threats to the American people. For make no mistake: Evil does exist in the world... To say that force may sometimes be necessary is not a call to cynicism – it is a recognition of history; the imperfections of man and the limits of reason.²⁷

Quoting President Kennedy, Obama warned against idealistic adherence to liberal values in IL policy, favouring “a more practical, more attainable peace, based not on a sudden revolution in human nature but on a gradual evolution in human institutions.” In this vein he noted that, although “engagement with repressive regimes lacks the satisfying purity of indignation,” it was sometimes necessary to pragmatically advance illiberal interests in the short term, with faith that this would better ensure that “human rights and dignity are advanced over time.”²⁸ In this way he sought to reconcile illiberal means with the liberal ends of the administration's IL policy. Liberal Nationalist beliefs were also evident in Obama's call to rethink the enforcement mechanisms of IL, in order to reduce the burden on US global engagement. He warned that states “who claim to respect international law cannot avert their eyes when those laws are flouted.” Rather than relying solely on the US military, responsibilities should be shared: “the closer we stand together, the less likely we will be faced with the choice between armed intervention and complicity in oppression.”²⁹

That Obama's IL conception is primarily Liberal Internationalist, but influenced by countervailing strategies, is corroborated by his preface to the 2010 *National Security Strategy* (NSS 2010),³⁰ which drew connections between democracy, promoting these rights through transnational processes, and American national security:

The rule of law—and our capacity to enforce it—advances our national security and strengthens our leadership... Around the globe, it allows us to hold actors accountable, while supporting both international security and the stability of the global economy. America's commitment to the rule of law is fundamental to our efforts to build an international order that is capable of confronting the emerging challenges of the 21st century.³¹

In this way the NSS 2010 departed from the strategies of the Bush 43 years in setting out a commitment to “an international order based upon rights and responsibilities” and the “modernization of institutions, strengthening of international norms, and enforcement of international law.”³² Nevertheless, as Gray notes, these references were not to IL as a constraint, but were rather all made in the context of enforcing IL.³³

The strategy also spanned both variants of liberalism in drawing upon the appeal of Liberal Nationalist foreign policy ideals. Principally in an attempt to draw a distinction with the previous administration the NSS 2010 stated that “national security begins at home” and that accordingly “moral leadership is grounded principally in the power of our example—not through an effort to

²⁷ *Ibid*

²⁸ *Ibid*

²⁹ *Ibid*

³⁰ The White House, *The National Security Strategy of the United States of America 2010*, The White House (2010)

³¹ *Ibid* at 37. See also at ii & 2

³² *Ibid* at 3. See Colucci, Lamont, *The National Security Doctrines of the American Presidency: How They Shape Our Present and Future* (Praeger Security International, 2012) at 488

³³ Gray, Christine, ‘President Obama's 2010 United States National Security Strategy and International Law on the Use of Force’ (2011) 10 *Chinese Journal of International Law* 35 at 37

impose our system on other peoples.”³⁴ On the other hand the strategy emphasised that “America has never succeeded through isolationism...we must reengage the world on a comprehensive and sustained basis.”³⁵ To that end the US “must pursue a rules-based international system that can advance our own interests by serving mutual interests.”³⁶ This was consistent with the Nobel oration in reflecting both a liberal recognition of the universality of American political values, and cautious endorsement of fostering an international environment consistent with them.

Reviewing this evidence, Mead confirmed the strong influence of Liberal Internationalist beliefs among key Administration legal policymakers, up to and including the President.³⁷ He concluded however that, in practice, although Obama’s general foreign policy has been influenced by the aspirations of Liberal Internationalism (“Wilsonianism”), it has also been heavily influenced by Liberal Nationalism (or “Jeffersonianism”).³⁸ Obama has been attracted to transformative Liberal Internationalist ideals, but combined them with incomplete commitment to policies necessary to realise them.³⁹ The tendency to look inward fails to appreciate that a “world based more on the rule of law and less on the law of the jungle requires an engaged, forward-looking, and, alas, expensive foreign policy.”⁴⁰ Dueck has similarly characterised the Obama foreign policy strategy as “overarching American retrenchment and accommodation internationally, to allow for progressive policies at home.”⁴¹ For Dueck the implication for IL is that Obama has unsuccessfully attempted to reconcile the internationalist and nationalist variants of liberalism by using “multilateralism as an excuse for inaction.”⁴² Nau concludes that, despite his liberal values, Obama is not a “traditional liberal internationalist” in the sense of placing primary emphasis on promoting “freedom and democracy and human rights.” Rather he is a “functional internationalist” in the sense of engaging to solve material problems rather than “moral challenges.”⁴³ Nau himself expressed his nostalgia for Reagan’s moralistic foreign policy, corroborating evidence that the Obama IL policy has clearly rejected such Illiberal Nationalist promotion of culturally specific values.⁴⁴

³⁴ The White House, *The National Security Strategy of the United States of America 2010*, The White House (2010) at 9-10 &

³⁶

³⁵ *Ibid* at 11 & 40

³⁶ *Ibid* at 12

³⁷ Mead, Walter R., ‘Liberal Internationalism: The Twilight of a Dream,’ *The American Interest* (1 April, 2010) <<http://www.the-american-interest.com/wrm/2010/04/01/liberal-internationalism-the-twilight-of-a-dream/>>. Note that Mead’s approach departs from that adopted in this thesis by treating “liberal internationalism” as a distinct strand of his “Wilsonianism” along with “neoconservatism.”

³⁸ Mead, Walter R., ‘The Carter Syndrome,’ *Foreign Policy* (4 January, 2010)

<http://www.foreignpolicy.com/articles/2010/01/04/the_carter_syndrome>. For a response from President Carter and his then National Security Adviser see Carter, Jimmy & Zbigniew Brzezinski, ‘Presidential Debate,’ *Foreign Policy* (22 February, 2010) <http://www.foreignpolicy.com/articles/2010/02/22/presidential_debate>

³⁹ Mead, Walter R., ‘The Carter Syndrome,’ *Foreign Policy* (4 January, 2010)

<http://www.foreignpolicy.com/articles/2010/01/04/the_carter_syndrome>

⁴⁰ Mead, Walter R., ‘The President’s Foreign Policy Paradox,’ *Wall Street Journal* (28 March, 2014)

<<http://online.wsj.com/articles/SB10001424052702303725404579457950519734142>>

⁴¹ See Fischer-Zernin, Maxime, ‘The Obama Doctrine: Retrenchment and Accommodation,’ *Duke Political Review* (2 October, 2014) <<http://dukepoliticalreview.org/the-obama-doctrine-retrenchment-and-accommodation/>>, citing Dueck, Colin, *The Obama Doctrine: American Grand Strategy Today* (Oxford University Press, 2015, forthcoming)

⁴² Cited in Fischer-Zernin, Maxime, ‘The Obama Doctrine: Retrenchment and Accommodation,’ *Duke Political Review* (2 October, 2014) <<http://dukepoliticalreview.org/the-obama-doctrine-retrenchment-and-accommodation/>>

⁴³ Holmes, Kim R., Henry R. Nau & Helle C. Dale, ‘The Obama Doctrine: Hindering American Foreign Policy,’ *The Heritage Foundation* (29 November, 2010) <<http://www.heritage.org/research/lecture/2010/11/the-obama-doctrine-hindering-american-foreign-policy>>

⁴⁴ *Ibid* at 12-13

Along with the President the change in senior legal policymakers in this period signalled a more robust role for IL in US foreign relations and enthusiasm for the ICC in particular.⁴⁵ These policymakers held an array of beliefs about IL that largely complemented but at times competed with the President's conception of IL. The most consequential appointment for IL policy was Hillary Clinton as Secretary of State. Clinton was given a direct opportunity at her confirmation hearing to identify the administration's general foreign policy among variants of the four theorised ideal types when Senator Robert P. Casey, Jr. adopted Posen and Ross' formulation:⁴⁶

Historically, the United States has adopted one of four grand strategies, or some combination of the four: Neoisolationism (avoidance of foreign entanglements), selective engagement (traditional balance of power realism that works to ensure peace among the major powers), cooperative security (a liberal world order of interdependence and effective international institutions), and primacy (American unilateralism and continued hegemony). Which grand strategy, or combination of strategies, do you think best describes how you would seek to promote U.S. national security today?⁴⁷

Unsurprisingly, Clinton declined to categorise herself in these terms, arguing that "the paradigms of the past neither adequately describe our present realities, nor provide a comprehensive guide to what we should do about them."⁴⁸ In naively asking a policymaker to isolate instinctive ideological beliefs and consciously identify themselves as a discrete "type," Casey's question held little probative value. By the same token Clinton's dismissive response was neither a useful account of the role of foreign policy ideology, nor consistent with evidence of continuity in diplomatic thought.

The indication of where to place Clinton's beliefs was in her promise of a "new direction" which rejected the Illiberal Nationalism of the first Bush 43 term: "That America is a nation of laws is one of our great strengths, and the Supreme Court has been clear that the fight against terrorism cannot occur in a 'legal black hole.'"⁴⁹ Rather Clinton echoed Obama in introducing her signature concept of "smart power," centred on diplomacy, and on "marrying principles and pragmatism to advance our security and interests in an increasingly complex and interdependent world."⁵⁰ The distinctive form of Clinton's conception of IL became clear in her analogy for explaining what she meant by her commitment to "a rules-based global order that could manage interactions between states, protect fundamental freedoms, and mobilize common action."⁵¹ For Clinton the "old architecture" of global governance is akin to the "Parthenon in Greece, with clean lines and clear rules." In contrast the rules and legal institutions that Clinton sought should resemble the deconstructivist architecture of a "Frank Gehry"⁵²: "a dynamic mix of materials, shapes, and

⁴⁵ Schabas, William, *An Introduction to the International Criminal Court* (Cambridge University Press, 4th ed, 2011) at 34; Bosco, David, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 153-154

⁴⁶ See at Chapter 3 *supra*: Posen, Barry R. & Andrew L. Ross, 'Competing Visions for U.S. Grand Strategy' (1996/97) 21 *International Security* 5

⁴⁷ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Hillary R. Clinton to be Secretary of State*, 1st Session 111th Congress (2009) at 212

⁴⁸ *Ibid* at 212. See also Clinton, Hillary Rodham, *Hard Choices: A Memoir* (Simon and Schuster, 2014) at 32-33

⁴⁹ Clinton, Hillary Rodham, *Hard Choices: A Memoir* (Simon and Schuster, 2014) at 184

⁵⁰ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Hillary R. Clinton to be Secretary of State*, 1st Session 111th Congress (2009) at 212; Clinton, Hillary Rodham, *Hard Choices: A Memoir* (Simon and Schuster, 2014) at x-xi & 33-34

⁵¹ Clinton, Hillary Rodham, *Hard Choices: A Memoir* (Simon and Schuster, 2014) at 33

⁵² See Gehry, Frank, *Gehry Partners, LLP* (2008) <<https://www.foga.com/>>

structures.”⁵³ This pragmatic and functional approach to IL thus provided the context for Clinton’s beliefs about the rule of IL as largely consistent with Illiberal Internationalism, while encompassing elements of Obama’s liberal vision.

The single most influential figure shaping US ICC policy was Clinton’s legal adviser Harold Koh. Koh is credited with founding the school of “transnational legal process” as a successor to the New Haven School of policy-oriented jurisprudence.⁵⁴ He forcefully contested the legality of the 2003 Iraq War during the Bush years,⁵⁵ a position he maintained at his Senate confirmation hearing.⁵⁶ Koh’s conception of the rule of IL was explained to the Senate Judiciary Committee in the months prior to Obama’s election in a hearing entitled *Restoring the Rule of Law*:

respect for the rule of law should not be limited to domestic constitutional law. The next President should recall the words of our founders in the Declaration of Independence to pay “decent respect to the opinions of mankind” by supporting, not attacking, the institutions and treaties of international human rights law.⁵⁷

Koh’s understanding of what that meant in practice was set out in a speech entitled: *The Obama Administration and International Law*.⁵⁸ There Koh elaborated on Clinton’s concept of “smart power” and argued that the administration marked a fundamental departure from the Bush 43 administration in its “approach and attitude toward international law.” This was captured in what Koh termed an “emerging ‘Obama-Clinton Doctrine’” comprised of four elements:

1. *Principled Engagement*; 2. *Diplomacy as a Critical Element of Smart Power*; 3. *Strategic Multilateralism*; and 4. the notion that *Living Our Values Makes us Stronger and Safer, by Following Rules of Domestic and International Law; and Following Universal Standards, Not Double Standards*.⁵⁹

The element of “following universal standards, not double standards” emphasised the degree to which America was “stronger and safer” by expressing fidelity to the rule of law at home while extending it outward according to common liberal values. The failure of the Bush administration to do likewise was criticised as contrary to the rule of IL for converting the US from “the major supporter of the post-war global legal exoskeleton into the most visible outlier trying to break free of the very legal framework we created and supported for half a century.”⁶⁰ Conversely, Koh also made clear that the interpretation of IL remained subject to the “smart power” concept such that policy considerations and diplomatic interests shaped the interpretation of law itself.⁶¹ The most fundamental principle remained a “commitment to living our values by respecting the rule of law.”⁶²

⁵³ Clinton, Hillary Rodham, *Hard Choices: A Memoir* (Simon and Schuster, 2014) at 33

⁵⁴ See Chapter 4 *supra*; Koh, Harold H., ‘Trasnational Legal Process’ (1996) 75 *Nebraska Law Review* 181; Koh, Harold H., ‘Is there a “New” New Haven School of International Law?’ (2007) 32 *Yale Journal of International Law* 559

⁵⁵ Koh, Harold H., *A Better Way To Deal With Iraq* (21 October, 2002) <<http://www.law.yale.edu/news/4407.htm>>

⁵⁶ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Harold H. Koh to be Legal Adviser to the Department of State*, 1st Session 111th Congress (2009)

⁵⁷ Koh, Harold H., *Statement of Harold Hongju Koh before the Senate Judiciary Committee, Subcommittee on the Constitution on Restoring the Rule of Law* (16 September, 2008) <http://www.fas.org/irp/congress/2008_hr/091608koh.pdf>

⁵⁸ Koh, Harold H., *The Obama Administration and International Law* (25 March, 2010)

<<http://www.state.gov/s/l/releases/remarks/139119.htm>>

⁵⁹ *Ibid.* Original emphasis. See also Koh, Harold H. in Donovan, Donald F., ‘Retrospective on International Law in the First Obama Administration’ (2013) 107 *Proceedings of the Annual Meeting (American Society of International Law)* 131 at 139-140

⁶⁰ Koh, Harold H., ‘Jefferson Memorial Lecture: Transnational Legal Process after September 11th’ (2004) 22 *Berkeley Journal of International Law* 337 at 350-351

⁶¹ Koh, Harold H., *The Obama Administration and International Law* (25 March, 2010)

<<http://www.state.gov/s/l/releases/remarks/139119.htm>>

⁶² *Ibid.* Koh, Harold H., *The Challenges and Future of International Justice* (27 October, 2010)

<<http://www.state.gov/s/l/releases/remarks/150497.htm>>

DEVELOPING NON-ARBITRARY GLOBAL GOVERNANCE

By the time Obama entered office the ICC had evolved, from an untested forum cautiously seeking state support for its legal authority, to a fully operational international body engaged in multiple investigations and prosecutions. Legalist advocates sought to harness renewed US support to consolidate the formal status of the court as a universally authoritative institution of global governance. For the Obama administration the most pressing task was demonstrating that the US had shifted to supporting IL in terms of universal liberal values rather than parochial national security interests. The clearest demonstration of this change, and one sought by existing states parties, was to reverse the 2002 act of “unsigning” the Rome Statute and thereby recommit the US to an ICC policy that, at minimum, complied with the objects and purpose of the treaty, even if not its strict terms. The US assumed its rights as an observer state at the annual Assembly of States Parties (“ASP”) governing the ICC, attending and participating in sessions for the first time, while actively supporting the referral of matters to the court. Yet it fell short of explicitly “re-signing” the statute or of supporting its eventual ratification, thereby remaining at odds with a commitment to the rule of IL as understood by legalist counterparts. Key US legal policymakers nevertheless continued to frame the shift in US policy as a recommitment to the rule of IL.

Legalist Policy

The full spectrum of beliefs about the role of the ICC in developing the rule of IL were set out before the UNSC in the October 2012 agenda item: *The promotion and strengthening of the rule of law in the maintenance of international peace and security: Peace and justice, with a special focus on the role of the International Criminal Court* (“UNSC rule of law meeting”).⁶³ The statements of the UN Secretary General, ICC President and prosecutor, and 50 state representatives (including the EU) provided a wide-ranging account of the state of ICC development and of ongoing tensions with US IL policy. The meeting followed on from the *High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, which had convened one month earlier.⁶⁴ That meeting’s final resolution committed to “an international order based on the rule of law,” for which the ICC was specifically recognised as integral to “a multilateral system that aims to end impunity and establish the rule of law.”⁶⁵ At the subsequent UNSC meeting the Secretary General went further and described the ICC as “the centre of the new system of international criminal justice.”⁶⁶

A theme repeated by the Secretary General, ICC officials, and most of the 50 countries represented at the UNSC rule of law meeting was the need to progressively formalise ICC authority to realise the rule of IL. The Secretary General described a new “age of accountability” in which the UN itself would no longer “promote or condone amnesty for genocide, crimes against humanity, war crimes or gross violations of human rights” when negotiating peace agreements.⁶⁷ Similarly, the Togolese representative warned against the continued reliance on “informal mechanisms and

⁶³ UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) & UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012)

⁶⁴ See UN, ‘High-level Meeting on the Rule of Law, 24 September 2012,’ *United Nations Rule of Law* (24 September, 2012) <http://www.unrol.org/article.aspx?article_id=168>

⁶⁵ Clause 23 at 4

⁶⁶ UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) at 2

⁶⁷ *Ibid* at 2

arrangements that run the risk of bypassing transparency or control and open the way to arbitrariness.”⁶⁸ The Sri Lankan representative was more explicit in declaring that in this area “codification of international law and legal obligations is an important aspect of the rule of law at the international level.”⁶⁹

The specific expression of this rule of IL principle was in repeated calls from representatives for more states to formally join the Rome Statute.⁷⁰ At the Kampala Conference the EU representative set out its primary objective as: “Promoting the universality and preserving the integrity of the Rome Statute.”⁷¹ At the UNSC rule of law meeting the UK argued that: “Achieving the universality of the Rome Statute is the key to deepening and broadening the reach of the rule of law.”⁷² From a legalist perspective, it was not mere engagement with the court, but the universality of formal obligations under the Rome Statute that was necessary to transform the ICC from a mere diplomatic forum into a global governance institution. Germany, which already believed the ICC had “strengthened the rule of law in international relations,”⁷³ alluded to this distinction in accepting that, although UNSC referrals to the ICC were a welcome addition, they remained merely a “tool of last resort, as an act of political responsibility.” In contrast the creation of legal obligation required “ratification of the Rome Statute by the greatest possible number of States so that referrals become more and more obsolete.”⁷⁴ Similarly, Liechtenstein described UNSC referrals as a “mixed blessing” for advancing criminal justice while being “driven by political convenience” of powerful ICC non-member countries.⁷⁵ In these positions it was not sufficient that the ICC was already being used by states such as the US to alter international behaviour and increase compliance with existing legal norms. Rather the rule of IL would remain unrealised so long as the court’s authority was not formally and universally established.

Beliefs of American Legal Policymakers

Maintaining Ambiguous Obligations under the Rome Statute

The official Obama administration position on the ICC was set out in the NSS 2010 in terms that became something of a mantra among legal policymakers:

Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC’s prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.⁷⁶

The terms of renewed ICC support fell well short of recognising the court as an authoritative institution of global governance. The assertion of US ICC support was couched within a reminder that the US

⁶⁸ *Ibid* at 22

⁶⁹ UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012) at 25

⁷⁰ See for example UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) at 13 per the Portuguese representative; at 25 per the Guatemalan representative; at 28 per the Estonian representative

⁷¹ López-Palop, María J.F., *Declaración realizada en nombre de la Unión Europea* (31 May, 2010) <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-GenDeba-European%20Union-SPA-ENG-FRA.pdf>

⁷² UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) at 24. See also the statement of Ecuador: UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012) at 29

⁷³ Löning, Markus, *Statement on behalf of Germany, International Criminal Court Review Conference* (1 June, 2010) <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Germany-ENG.pdf>

⁷⁴ UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) at 18

⁷⁵ UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012) at 2 per the Liechtenstein representative

⁷⁶ The White House, *The National Security Strategy of the United States of America 2010*, The White House (2010) at 48

remained unconstrained by the strict legal terms of the Rome Statute and the need to shield military personnel.

The divergent path of US policy can be most clearly isolated in the ambiguity of the Obama administration's retraction of the 2002 "unsigned" statement of John Bolton combined with emphatic assurances that a clear policy shift had occurred.⁷⁷ The act of "unsigned" during the first term of the Bush 43 administration was widely accepted as effective in removing minimal US obligations to not frustrate the objects of the treaty.⁷⁸ As the Bush 43 era came to a close this remained the most conspicuous signal of the hostility flowing from illiberal Nationalist conceptions of the ICC. Immediately prior to assuming the role of State Department Legal Adviser, Koh had emphasised that:

at the earliest opportunity, the new Secretary of State should withdraw the Bush Administration's May 2002 letter to the United Nations "unsigned" the U.S. signature to the Rome Treaty creating the ICC, restoring the *status quo ante* that existed at the end of the Clinton Administration.⁷⁹

Doing so was framed as a necessary step for shifting to an IL policy "that lives up to America's historically high standards of international responsibility and respect for the rule of international law."⁸⁰ In Scheffer's opinion "a new letter could nullify the effect of Bolton's missive and resurrect the legal authority of the signature on the treaty."⁸¹ The call by Koh and Scheffer was therefore for the formal re-acceptance of legal obligations created by Clinton's 2000 signature, which would equally send the strongest political signal of US commitment to the rule of IL. In the years following these statements, US policy can best be described as political recommitment to the substance of Rome Statute signatory obligations, but ambiguous commitment to legally binding obligations. Koh had previously characterised the Bush administration's increased ICC cooperation during its second term as "*de facto* repudiation of the political act of unsigned" that brought the US largely back in line with its international obligations before the change in administration.⁸² The subsequent Obama policy, led by Koh, suggests that this "*de facto*" shift was adopted as a sufficient basis for the policy "reset" without further formalised obligations.

Actions taken early in the Obama administration to signal a policy shift included attending the 8th Session of the ASP in November 2009, New York.⁸³ This was the first such attendance by the US, with the stated goal of "listening to gain a better understanding of the issues being considered by the ASP and of the workings of the International Criminal Court."⁸⁴ Inevitable questions soon followed about what this signified about US legal obligations in circumstances when the administration had never formally annulled the Bolton letter. The issue was deftly avoided in 2009 by US Ambassador-at-

⁷⁷ See Chapter 6 *supra*

⁷⁸ Under Art.18 *Rome Statute of the International Criminal Court* (1998). See Crawford, James, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) at 372, n.39; Harris, David John, *Cases and Materials on International Law* (Sweet & Maxwell, 2010) at 651; Swaine, Edward T., 'Unsigned' (2003) 55 *Stanford Law Review* 2061

⁷⁹ Koh, Harold H., *Statement of Harold Hongju Koh before the Senate Judiciary Committee, Subcommittee on the Constitution on Restoring the Rule of Law* (16 September, 2008) <http://www.fas.org/irp/congress/2008_hr/091608koh.pdf> at 11

⁸⁰ *Ibid* at 12

⁸¹ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 243

⁸² Koh, Harold H., 'Jefferson Memorial Lecture: Transnational Legal Process after September 11th' (2004) 22 *Berkeley Journal of International Law* 337 at 351

⁸³ Fairlie, Megan, 'The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage' (2011) 29 *Berkeley Journal of International Law* 529 at 542

⁸⁴ Koh, Harold H., *The Obama Administration and International Law* (25 March, 2010) <<http://www.state.gov/s/l/releases/remarks/139119.htm>>

Large for War Crimes Issues Stephen Rapp when he emphasised to reporters that the US was entitled to participate in the ASP and related conferences irrespective of the status of its original signature – by virtue of signing the *Final Act* at the 1998 Rome Conference.⁸⁵ When pushed on the unsigning he stated only that the effect of the Bolton letter was the limited one of making it “clear that we did not, that the Bush administration did not, believe that we were bound to act as others expected a signatory to act.”⁸⁶ He pointedly did not repudiate the release from legal obligations. When later asked about the same issue Koh agreed that the US was legally entitled to engage as an observer nation, but was more explicit that US cooperation arose from discretionary decisions alone:

We should make clear that there is no legal decision involved in our being here [at the Kampala Conference]. It's not a decision about whether to change any law, to ratify any treaty, or to change any statute or change any other agreement. But it is part of a broader policy, as I said, for closer engagement with this important international institution.⁸⁷

This is consistent with the administration's overall policy of “principled engagement” in multilateral forums to advance American interests. Yet in legalist terms this remains a diplomatic stance, and not a commitment to be bound by IL *stricto sensu*. This point was picked up by a questioner at the post-Kampala press conference who noted that the “reset” in ICC policy had “more of a political tinge” than constituting a legal position.⁸⁸ Koh's and Rapp's response appeared to confirm that the US reset entailed accepting the ICC as “a tool in the international toolbox” but not as a regime binding on the US.⁸⁹

Later that year some commentators saw Koh as moving closer to a *de jure* shift in obligations by picking up the words of Article 18 of the *Vienna Convention* to distinguish the Obama policy from his predecessors:

You do not see what international lawyers might call a concerted effort to frustrate the *object and purpose* of the Rome Statute. That is explicitly not the policy of this administration. Because although the United States is not a party to the Rome Statute, we share with the States parties a deep and abiding interest in seeing the Court successfully complete the important prosecutions it has already begun.⁹⁰

This carefully-worded phrase was quoted by Koh in subsequent speeches, but without further clarification.⁹¹ In the limited considerations of these words there is some divergence in interpretation of the legal significance. It is worth noting, however, that the statement was made in the context of a quote from the NSS 2010: a document that studiously avoided any suggestion that the US was legally

⁸⁵ The official agreement on the record of proceedings: UN, *The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Final Act*, UN Doc A/CONF.183/10 (17 July, 1998)

⁸⁶ Rapp, Stephen J., ‘Press Briefing with Stephen J. Rapp Ambassador-at-Large for War Crimes Issues,’ *Mission of the United States Geneva* (22 January, 2010) <<http://geneva.usmission.gov/2010/01/22/stephen-rapp/>>

⁸⁷ Koh, Harold H. & Stephen J. Rapp, *Briefing on the International Criminal Court Conference in Kampala, Uganda* (2 June, 2010) <http://www.state.gov/j/gcj/us_releases/remarks/2010/142585.htm>

⁸⁸ *Ibid*

⁸⁹ *Ibid*

⁹⁰ Koh, Harold H., *The Challenges and Future of International Justice* (27 October, 2010) <<http://www.state.gov/s/l/releases/remarks/150497.htm>>. Emphasis added. See *Vienna Convention on the Law of Treaties* (1969), Art. 18: “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty”

⁹¹ See Koh, Harold H., *International Criminal Justice 5.0* (8 November, 2012) <<http://www.state.gov/s/l/releases/remarks/200957.htm>>

bound by the ICC.⁹² At the time of Koh's statement Van Schaack raised but did not answer the question of "whether Koh has said the magic words" necessary to annul the 2002 Bolton letter. She found that the *policy* of obstructing the court was at an end, but that no further legal inferences could be conclusively drawn about legal obligations accepted by the US.⁹³ Trahan described Koh's words as having "orally negated" the unsigned, but conceded that the statements lacked "the weight of a counter-note." Rather she reiterated her previous call as chair of the American Branch of the International Law Association's International Criminal Court Committee to make a legally binding commitment to formally send such a note.⁹⁴ Finally, Amann drew the conclusion that "top Obama Administration officials have made clear that the United States now acts toward the ICC treaty as any good signatory should."⁹⁵ So much had already been made clear, but this goes no further than the non-binding undertakings of policymakers.

The combined force of these statements and legal opinions is that: (a) the Obama administration firmly committed to an IL policy consistent with the objects and purposes of the Rome Statute; and, (b) the Obama administration conspicuously avoided accepting any formal legal obligations commensurate to its stated policy. This contravened legalist commitment to formalised development of global governance as an element of the rule of IL, since it preserved the autonomy to act outside of the constraints of the ICC. Moreover, beyond this ambiguity, policymakers were much clearer that there was no intention to ratify the statute at any time in the foreseeable future which remained "not a question of when" but of "if."⁹⁶ This position has been variously attributed to the gridlock of domestic politics and the intractability of US Senate opposition to ratification.⁹⁷ Those impediments are undeniable, but neither is there any evidence that the Obama administration would move to ratify the treaty in its current form absent congressional opposition. It is an open question therefore how American legal policymakers have squared outcomes with simultaneous statements that the Obama ICC policy *does* represent a recommitment to the rule of IL.

Transnational Development of Global Governance

The consistent American position emphasised through this period was the deep engagement of the US in supporting the court's activities, and the process through which this had brought US actions in compliance with the entire project of international criminal justice. This exemplifies the "transnational legal process" explanation for how IL shapes the behaviour of states. Increased US interactions with states-parties and the ICC itself reflected the process by which the US was brought in compliance with legal norms and, through its engagement, became a part of mechanisms making the court

⁹² Koh, Harold H., *The Challenges and Future of International Justice* (27 October, 2010) <<http://www.state.gov/s/l/releases/remarks/150497.htm>>. See discussion of The White House, *The National Security Strategy of the United States of America 2010*, The White House (2010) *supra*

⁹³ van Schaack, Beth, 'The U.S. Says It Is Not Its Goal to Undermine the ICC,' *IntLawGrrls* (12 November, 2010) <<http://www.intlawgrrls.com/2010/11/us-says-it-is-not-its-goal-to-undermine.html>>

⁹⁴ Trahan, Jennifer, 'U.S. Affirms that It Adheres to Rome Statute Signatory Obligations: It Should Put This In Writing,' *Opinio Juris* (27 February, 2013) <<http://opiniojuris.org/2013/02/27/u-s-affirms-that-it-adheres-to-rome-statute-signatory-obligations-it-should-put-this-in-writing/>>

⁹⁵ Amann, Diane M., *Officials Treat United States as Once & Present Signatory of ICC's Rome Statute* (27 February, 2013) <<http://dianemarieamann.com/2013/02/27/officials-treat-united-states-as-once-present-signatory-of-iccs-rome-statute/>>

⁹⁶ Rapp, Stephen J., 'Press Briefing with Stephen J. Rapp Ambassador-at-Large for War Crimes Issues,' *Mission of the United States Geneva* (22 January, 2010) <<http://geneva.usmission.gov/2010/01/22/stephen-rapp/>>

⁹⁷ *Ibid*

effective.⁹⁸ This was consistent with Liberal Internationalist beliefs that the process of US policy aligning with the global governance role of the ICC was ultimately a more significant factor in advancing the rule of IL than formally acceding to legal obligations under the Rome Statute.

During the first term of the Bush 43 administration, Koh explicitly argued for acceptance of, and support for, the transnational development of IL, whereby the US municipal rule of law was formally and practically connected to institutions of global governance. At that time Koh argued that, in order to remedy the Bush 43 administration's legal failings, "the United States and those within it who are committed to the rule of law should now invoke transnational legal process as a way to address the continuing problems."⁹⁹ Applying that principle to the ICC, Koh believed that US constitutional values had already been imbued in the ICC through transnational legal processes so that, "as much as the Bush administration may wish to be free of the legal exoskeleton that the United States has helped create, already that legal framework is visibly pushing back."¹⁰⁰ This highlighted a conceptual distinction between the IL conception of Koh and his predecessor John Bellinger in circumstances where their ICC policies of re-engaging with the ICC appear functionally identical. Bellinger's approach reflected Illiberal Internationalist commitment to pragmatically develop the court, by reference to clearly identified strategic interests, and limiting its reach to that extent. Koh on the other hand saw the shift in the second term of the Bush 43 administration less as a calculated decision and more as a consequence of the milieu of transnational forces drawing the US back toward universal liberal values.

This is not to suggest that formally signing the Rome Statute, and even moving to ratification, were not genuine goals for Liberal Internationalists. The Clinton administration always aimed its efforts at the ideal of a treaty drafted in such terms that the US could formally accept its obligations. However, for these policymakers such steps were meaningful only insofar as they advanced an effective regime shaping international legal behaviour through transnational processes. On that basis the Obama administration placed its strongest emphasis on the degree to which it was influenced by and continued to influence the development of legal norms through the court. Secretary Clinton confirmed early in the administration that the US intended to "end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways that promoted US interests by bringing war criminals to justice."¹⁰¹ In the UNSC rule of law meeting Ambassador Susan Rice characterised the ICC as "an important tool for accountability," even as the US repudiated formal membership. Rather the US had:

actively engaged with the ICC Prosecutor and Registrar to consider how we can support specific prosecutions already under way, and we responded positively to informal requests for assistance. We will continue working with the ICC to identify practical ways to cooperate, particularly in areas such as information-sharing and witness protection on a case-by-case basis, as consistent with United States policy and law.¹⁰²

⁹⁸ Koh undertakes a similar analysis in relation to shifting compliance with the Anti-Ballistic Missile Treaty 1972 from the Reagan through to Clinton administrations, along with some additional examples from the Clinton administration: Koh, Harold H., 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181 at 194-195

⁹⁹ Koh, Harold H., 'Jefferson Memorial Lecture: Transnational Legal Process after September 11th' (2004) 22 *Berkeley Journal of International Law* 337 at 351

¹⁰⁰ *Ibid* at 351

¹⁰¹ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Hillary R. Clinton to be Secretary of State*, 1st Session 111th Congress (2009) at 131

¹⁰² UN, 6849th Meeting, United Nations Security Council (17 October, 2012) at 8

Through these statements US policymakers reiterated the ways in which the policy of remaining outside of formalised legal arrangements was nevertheless consistent with a commitment to advancing the rule of IL.

Running through this policy are strands of exceptionalist belief that reconcile a special US role with legal principle. Koh described US policy as shifting to an “integrated approach to criminal justice,” by which was meant reconciling “incongruous” historical support for the Nuremberg, Tokyo and ad hoc tribunals with equivocation about the ICC. The objective was to “align, integrate, and make congruent our approach towards these institutions.”¹⁰³ Each of Koh’s statements downplaying the importance of formal obligations was accompanied by reference to a unique global mission:

Our historic commitment to the cause of international justice remains strong. ... Although the United States is not a party to the *Rome Statute*, the Obama Administration has been actively looking at ways that we can assist the ICC in fulfilling its historic charge of providing justice to those who have endured crimes of epic savagery and scope.¹⁰⁴

Likewise Rapp noted that the US had been “a leader in international justice” in establishing tribunals from Nuremberg to Rwanda and Sierra Leone and in undertaking the leadership and logistical tasks to make them operational. In the case of the ICC “the opportunity to do some of those same things presents itself” with the US again leading the initiative.¹⁰⁵ These are telling comparisons given that the US was generally excluded from the jurisdiction of the ad hoc tribunals by their very subject matter, whereas no such limitation would exist for a criminal court with general jurisdiction. Yet the US sought to position itself as equally excluded from ICC constraints in part due to belief in its exceptional role fostering the institutions that made international criminal justice effective.

Koh corroborated the transnational development interpretation of US policy in responding to a reporter’s statement that it was “curious that an administration would become so engaged in shaping the kind of format of a court that it’s not a signatory to.” Koh again asserted the exceptional role of the US in global justice where other states recognised that “international institutions and courts with which the United States is not involved tend not to be as effective” whereas the ad hoc tribunals “have been more successful by virtue of deep U.S. engagement.” For Koh the proper understanding of US policy was that it represented a “process” rather than an “end game” intended to result in membership.¹⁰⁶ By necessary inference the answer to the involvement in criminal justice in the absence of a formal capacity is that the US saw itself as becoming enmeshed in the transnational legal processes shifting behaviour in line with legal norms, with this ultimately being a decisive indicator of support for the rule of IL. In each subsequent address to the Assembly of States Parties the US continued to outline measures undertaken to advance global justice, but to date none has amounted to the recognition of formal legal constraints on US political autonomy.¹⁰⁷

¹⁰³ Koh, Harold H., *The Challenges and Future of International Justice* (27 October, 2010)

<<http://www.state.gov/s/l/releases/remarks/150497.htm>>

¹⁰⁴ Koh, Harold H., *Statement by Harold Hongju Koh, Legal Advisor, United States Department of State, Regarding Crime of Aggression at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court* (23 March, 2010) <<http://usun.state.gov/briefing/statements/2010/139000.htm>>

¹⁰⁵ Koh, Harold H. & Stephen J. Rapp, *U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference* (15 June, 2010) <http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm>

¹⁰⁶ *Ibid*

¹⁰⁷ See for example Rapp, Stephen J., *U.S. Statement to the Assembly of States Parties of the International Criminal Court* (14 December, 2011) <http://www.state.gov/j/gcj/us_releases/remarks/2011/179208.htm>

Conclusion

A reoccurring argument made by commentators on the Obama administration has been that the real break in policy was between the two terms of the Bush 43 administration, with no meaningful change thereafter.¹⁰⁸ There is some merit to the observation that the shift in ICC policy outcomes between the two terms of the Bush administration was more pronounced than the shift seen in the Obama administration. However, this is not conclusive on the question of continuity of legal beliefs between administrations. Across both periods the US largely continued to work from without the system, essentially unconstrained by the regime, while maintaining forms of support for developing the ICC.¹⁰⁹ However in the latter period the beliefs structuring US policy distinctively revolved around transnational legal processes creating greater compliance with universal norms of international criminal law – from the municipal through to the global level. In legalist terms, US policy remained inconsistent with the rule of IL as long as the constraints of formal ICC membership were rejected and support for the court was on a discretionary basis only. In contrast, the relationship described by US officials at the UNSC rule of law meeting and elsewhere remained entirely consistent with the Liberal Internationalist belief that it was transnational development of global governance which foremost advanced the rule of IL. In so doing the US remained fundamentally outside of the vision of its global counterparts.

DEFINING EQUALITY UNDER INTERNATIONAL LAW

From the earliest days of the ICC project participating states and NGOs were motivated by a desire to “democratise” the oligarchic configuration of the UNSC.¹¹⁰ This opportunity arose in the initiative set aside at the Rome Conference to extend the court’s jurisdictional reach to include the crime of aggression.¹¹¹ The goal was ambitious, and would have significantly expanded the scope of matters properly treated as subjects of international criminal law. More fundamentally, the initiative was in large part directed at divesting the UNSC of sole legal control over this most consequential crime, and subjecting it to the equal control of all ICC members.¹¹² As numerous accounts have recalled, the P-5 were united in their insistence on an exclusive “Security Council trigger” for cases of aggression.¹¹³ This is consistent with the rational actions of states seeking to entrench political power through law. However, that fact does not explain the central question of whether and how American legal policymakers reconciled this political motive with an explicit commitment to the rule of IL. US policy

¹⁰⁸ See especially John Bellinger who has repeatedly made this case: Bellinger III, John B., ‘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) <<http://2001-2009.state.gov/s/l/rls/104053.htm>>; Neack, Laura, ‘The Future of Human Security: Taking Advantage of a States-First World’ in Courtney Hillebrecht, Tyler R. White & Patrice C. McMahon (ed), *State Responses to Human Security: At Home and Abroad* (Routledge, 2013) at 179

¹⁰⁹ Koh, Harold H., ‘Jefferson Memorial Lecture: Transnational Legal Process after September 11th’ (2004) 22 *Berkeley Journal of International Law* 337 at 351

¹¹⁰ See Bosco, David, *Rough Justice: The International Criminal Court’s Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 166

¹¹¹ See *Rome Statute of the International Criminal Court* (1998), Art.5(2)

¹¹² Under *Charter of the United Nations* (1945), Art.39

¹¹³ Weed, Matthew C., *International Criminal Court and the Rome Statute: 2010 Review Conference* (Congressional Research Service, 10 March, 2011) at 10; See Bosco, David, *Rough Justice: The International Criminal Court’s Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 164

adamantly held out the UNSC as the cornerstone of the international legal system.¹¹⁴ Policymakers defended the privileged role this secured for the US in determining acts of aggression, including the exclusive power to delegate such matters to an international court. Moreover the definition of the crime of aggression itself was contested on the basis that it could constrain existing US autonomy to employ force to uphold IL. US policy, nominally aimed at advancing the principles of the ICC and international criminal law, remained steadfastly opposed to sovereign equality.

Legalist Policy

Challenges to the UNSC had long fixed on sovereign equality as a guiding principle for the legitimate exercise of international legal power. At the UNSC rule of law meeting Lesotho challenged the UNSC's inconsistency with sovereign equality by arguing that, when making referrals, "the aspirations of the general membership of the United Nations should override the individual national interests of Council members."¹¹⁵ This amounted to a demand for constructive sovereign equality – requiring the P-5 with formally unequal privileges to exercise them by reference to the inferred will of the equally weighted voices of all states. In setting out principles for guiding ICC development, Sri Lanka stated that the "principle of sovereign equality..., which is intrinsic to international rule of law, must be maintained, as international rules are made and implemented. It is a principle that protects all States, especially the small and the weak."¹¹⁶ These views were united by the legalist belief that, for the ICC to develop consistently with the rule of IL, it was necessary that all states remained subject to equal rights and duties under the law, irrespective of supposedly disproportionate global responsibilities.

The opportunity to restructure international criminal law in line with these desires arose in proceedings to agree on and finalise the crime of aggression at the Kampala Conference. At Nuremberg it was declared that to "initiate a war of aggression...is not only an international crime, it is the supreme crime."¹¹⁷ Azerbaijan echoed these sentiments in supporting the prohibition as necessary to address the "most serious and dangerous form of the illegal use of force between States."¹¹⁸ Doing so promised to transform determinations about aggression from the political decision-making processes of the UNSC to a formalised legal process through the ICC. Former delegates to the Kampala conference reflected that the agreement on aggression allowed for "the completion of the codification of the existing body of crimes under customary international law and for the closure of the last remaining important lacuna contained in the substantive part of the ICC Statute."¹¹⁹ For the Portuguese representative, the achievement of the Kampala Conference was to "successfully fill the gap left open in Rome on the set of crimes covered by the Statute."¹²⁰ In this view a failure to formally extend governance over this area of global politics would represent a gap in the

¹¹⁴ Koh, Harold H., *Closing Intervention at the Review Conference of the International Criminal Court* (11 June, 2010) <<http://www.state.gov/s/l/releases/remarks/143218.htm>>

¹¹⁵ UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012) at 17

¹¹⁶ *Ibid* at 26

¹¹⁷ International Military Tribunal (Nuremberg), 'Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences' (1947) 41 *American Journal of International Law* 172 at 186, *per curiam*

¹¹⁸ UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) at 15

¹¹⁹ Blokker, Niels & Claus Kress, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala' (2010) 23 *Leiden Journal of International Law* 889 at 894-895

¹²⁰ UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) at 13

rule of IL by allowing the subject matter to be resolved through diplomatic and other discretionary responses.

A leading factor motivating delegates at the Kampala Conference was more particularly a view that the UNSC's sole authority over this subject matter remained a stumbling block to realising the rule of IL. Brazil directly addressed the charge that aggression was an inherently political crime by arguing that "world peace and security are by definition political in nature, but are best addressed through a legal framework that enjoys broad support and legitimacy." By this was meant that the "universality of the Court lies in the widely held values that it espouses. Its reach will grow as a result of fulfilling its promise and not by submitting to false pragmatism and the so-called realities of power."¹²¹ Likewise Liechtenstein, then President of the ASP, conceded that, despite the UNSC's long established authority in this area, the proposal would ensure that "jurisdiction is not ultimately contingent upon the Council's decisions."¹²² In these statements states drew upon the legalist principle of sovereign equality to defend circumventing the UNSC as necessary to protect the court's integrity

Beliefs of American Legal Policymakers

The American Interpretive Gloss on the Crime of Aggression

US policymakers argued for an exclusive UNSC filter over aggression from as early as the 1994 draft statute, which first proposed that design.¹²³ The position was maintained from the Obama administration's very first reengagement with the ASP in late 2009 where the US delegation set out the legal case for maintaining the status quo.¹²⁴ Rapp's argument to the ASP was prefaced with the statement that "the commitment of the Obama Administration to the rule of law and the principle of accountability is firm, in line with my country's historic tradition of support for international criminal justice that has been a hallmark of United States policy dating back at least to the time of Nuremberg."¹²⁵ On that basis he reasserted that "jurisdiction should follow a Security Council determination that aggression has occurred."¹²⁶ The outcome of the Kampala negotiations was ultimately a compromise between this preference for a controlling UNSC role, and the legalist demands to reform global legal architecture. The final resolution created two routes for an ICC prosecution of aggression. The first was through an exclusive UNSC trigger in the same terms as that governing the existing Rome Statute crimes.¹²⁷ The second route was through the ICC prosecutor's own motion where the UNSC failed to take action within a six month period, but subject still to the existing power to halt any ICC investigation under Article 16 of the Rome Statute.¹²⁸ The primary

¹²¹ Biato, Marcel, *Statement by Ambassador Marcel Biato on behalf of The Brazilian Delegation to the Review Conference* (31 May, 2010) <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Brazil-ENG.pdf>

¹²² UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012) at 3

¹²³ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 173

¹²⁴ Barriga, Stefan, 'Negotiating the Amendments on the Crime of Aggression' in Stefan Barriga & Claus Kreß (ed), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012) at 44

¹²⁵ Rapp, Stephen J., *Address to Assembly of States Parties* (19 November, 2009)

<http://www.state.gov/j/gcj/us_releases/remarks/2009/133316.htm>

¹²⁶ *Ibid*

¹²⁷ *Amendments to the Rome Statute of the International Criminal Court on the crime of aggression* (2010), Art.15ter

¹²⁸ *Ibid*, Art.15bis(8)

UNSC role over cases of aggression was almost entirely maintained, with only a marginal step taken in the direction of sovereign equality.

The compromise outcome does not however support the further inference that participants reached an agreed position on the legal principles for guiding the court's enlarged subject matter jurisdiction. The US response, and strategies employed at the negotiations, reveals the extent to which US decision-making was structured by the distinct legal conceptions influencing Obama's IL policy more broadly. Much of the distance between the US and other States Parties and observers to ICC processes can be seen in what became *Annex III* to the 2010 amendments entitled: *Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression* ("the Understandings"). During the Kampala conference Koh fixed upon a suggestion from the conference Chair to address concerns about the proposed amendments through written "understandings" that placed a gloss on the meaning of draft articles without disturbing their language. On that basis Koh stated: "we believe that without agreed-upon understandings, the current draft definition remains flawed" and that "apparent consensus on the wording of Article 8bis masks sharp disagreement on particular points regarding the meaning of that language."¹²⁹ US absence from a decade of prior negotiations probably precluded any alteration of the aggression definition, with the understandings becoming a backdoor means for registering concerns.¹³⁰ Moreover, as a matter of strict legal interpretation, Heller has rightly pointed out that the status of the understandings remains uncertain. At present they are "nothing more than supplementary means of interpretation that the Court would have the right to ignore once the aggression amendments entered into force."¹³¹ However they are valuable as formulations of the divergence in legal views held by American policymakers about the ideal design of the ICC.

Exceptional Humanitarian Responsibilities

Substantive US demands in the Understandings focussed on confirming circumstances of exclusive UNSC control, and on limiting ICC jurisdiction where authority was to be shared. Understanding 2 stated that the ICC could exercise jurisdiction pursuant to a UNSC referral "irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard." As Heller noted, it is unlikely this understanding has "any substantive effect" as it merely mirrors the "default position under the Rome Statute."¹³² However it does reveal the degree of concern American policymakers had about any erosion of existing legal privilege.

The more significant assertion of legal principles was in understandings that sought to limit ICC jurisdiction by reference to exceptionalist beliefs, and thereby indirectly bolster UNSC privileges. A consistent theme in the defence of the status quo was the exceptional role of the US in making the system of international criminal law effective. On a number of occasions Koh and Rapp framed US opposition to the aggression definition by reference to Obama's Nobel oration and the argument that

¹²⁹ Koh, Harold H., *Statement at the Review Conference of the International Criminal Court* (4 June, 2010) <<http://www.state.gov/s/l/releases/remarks/142665.htm>>

¹³⁰ Trahan, Jennifer, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference' (2011) 11 *International Criminal Law Review* 49 at 73

¹³¹ Heller, Kevin Jon, 'The Uncertain Legal Status of the Aggression Understandings' (2012) 10 *Journal of International Criminal Justice* 229 at 231

¹³² *Ibid* at 231-232

there are “times when nations – acting individually or in concert – will find the use of force not only necessary but morally justified.”¹³³ The US argument was that the definition, as it then stood, could be used to reinforce the principle of non-intervention in a wide variety of circumstances. That would be the strongest form of protection of a rule of IL based on sovereign equality. In contrast the US position was structured by beliefs that IL should properly facilitate an exceptional American role in upholding liberal equality of natural persons as a trump over sovereign equality.¹³⁴ Koh proposed that the definition of aggression contained in Article 8*bis* should be accompanied by written and agreed understandings making clear that “those who undertake efforts to prevent war crimes, crimes against humanity or genocide—the very crimes that the Rome Statute is designed to deter” had not breached any crime within ICC jurisdiction.¹³⁵

The initial draft understanding was phrased to exempt any actions “undertaken in connection with an effort to prevent the commission of any of the crimes contained in Articles 6, 7 or 8 of the Statute.”¹³⁶ That explicit exemption was forcefully rejected by other states, which recognised that in practice this amounted to creating special legal rights exercisable by few states other than the US.¹³⁷ Understanding 6, as it ultimately became, instead read:

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

The emphasis on “consequences” was directly aimed at the exemption of unilateral humanitarian intervention from ICC aggression jurisdiction including, potentially, illegal uses of force not condoned by the UN Charter.¹³⁸ Koh himself pointed out that: “Regardless of how states may view the legality of such efforts, those who plan them are not committing the “crime of aggression” and should not run the risk of prosecution.”¹³⁹ The type of case American policymakers appeared to have in mind was the US-backed 1999 NATO intervention in Kosovo.¹⁴⁰ The legalistic negotiations over the scope of the aggression definition never disconnected from a consciousness of the history of American global engagement and a specific understanding of how IL could facilitate that role.¹⁴¹

At the end of the Kampala Conference Koh maintained that the “final resolution took insufficient account of the Security Council’s assigned role to define aggression” but had been

¹³³ Obama, Barack H., ‘Nobel Lecture: A Just and Lasting Peace,’ *Nobelprize.org* (10 December, 2009) <http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html>. See Koh, Harold H. & Stephen J. Rapp, *Briefing on the International Criminal Court Conference in Kampala, Uganda* (2 June, 2010) <http://www.state.gov/j/gcj/us_releases/remarks/2010/142585.htm>

¹³⁴ See Weed, Matthew C., *International Criminal Court and the Rome Statute: 2010 Review Conference* (Congressional Research Service, 10 March, 2011) at 7

¹³⁵ Koh, Harold H., *Statement at the Review Conference of the International Criminal Court* (4 June, 2010) <<http://www.state.gov/s/l/releases/remarks/142665.htm>>

¹³⁶ Being the sections setting out substantive crimes in the *Rome Statute of the International Criminal Court* (1998)

¹³⁷ Kreß, Claus, Stefan Barriga, Leena Grover & Leonie Von Holtendorff, ‘Negotiating the Understandings on the Crime of Aggression’ in Stefan Barriga & Claus Kreß (ed), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012) at 95

¹³⁸ Heller, Kevin Jon, ‘The Uncertain Legal Status of the Aggression Understandings’ (2012) 10 *Journal of International Criminal Justice* 229

¹³⁹ Koh, Harold H., *Statement at the Review Conference of the International Criminal Court* (4 June, 2010) <<http://www.state.gov/s/l/releases/remarks/142665.htm>>

¹⁴⁰ Barriga, Stefan, ‘Negotiating the Amendments on the Crime of Aggression’ in Stefan Barriga & Claus Kreß (ed), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012) at 29, n.149

¹⁴¹ Glennon, Michael J., ‘The Blank-Page Crime of Aggression’ (2010) 35 *Yale Journal of International Law* 71 at 111

narrowed through US efforts. He more particularly defended the privileged UNSC role sustained by the resolution by stating the exceptionalist premise underpinning US policy:

The big picture going forward, I think we should keep in mind, is that as the country of Nuremberg prosecutor Justice Jackson, we are the only country that has successfully prosecuted the crime of aggression at Nuremberg and Tokyo. *Of course, we do not commit aggression* and the chances are extremely remote that a prosecution on this crime will, at some point in the distant future, affect us negatively.¹⁴²

It is here that Koh most explicitly emphasised the substantive beliefs that reconcile US arguments for legal privilege with a stated commitment to the rule of IL. The assertion of the legitimacy of UNSC privileges turned on a belief in both the capacity of the US to uphold liberal norms without the oversight of sovereign equals, and its unique global role in advancing compliance with international criminal law. This reflects the strong influence of a Liberal Internationalist interpretation of the proper relationship between states under IL, and the privileging of liberal over sovereign equality. It was also consistent with the evidence of more illiberal ideological influences within the administration and the principle of upholding hegemonic privilege commensurate to global responsibilities.

Conclusion

The 2010 negotiations over the crime of aggression were in many ways the climax of tensions about UNSC privileges that had simmered since the earliest days of the ICC project. Attempts to grant the court power over the crime of aggression became a tangible method for transferring the system of international criminal law onto a foundation aligned with the principle of sovereign equality. That initiative was strongly opposed by all P-5 members consistent with the expectations of rational state incentives to maintain legal privileges. However, the particular beliefs structuring US policy reflected the ideal type conceptions of IL influencing policymakers in the Obama administration more broadly. The argument for retaining the status quo drew strongly upon the principle of liberal equality, and the exceptional role of the US as facilitated by its UNSC privileges. Scheffer sought to frame the outcome in a conciliatory light, arguing that, although the “result is a slap at the equality of states, or at least the theory of equality,” it remained the case that “most major shifts in the international system begin that way.”¹⁴³ However, at the level of legal beliefs, there is no evidence that the outcome at Kampala signalled even the embryo of converging beliefs about the proper relationship between sovereign states under the ICC regime. Forceful rejection of the principle of sovereign equality by American policymakers was consistently approached not as mere political expediency, but as a core legal principle for advancing the rule of IL.

ORDERING INTERNATIONAL LEGAL POWER

The final area of disagreement over ICC policy concerned ordering international legal powers in the fully operational court. The predominant policy approach of international advocates was to emphasise

¹⁴² Koh, Harold H. & Stephen J. Rapp, *U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference* (15 June, 2010) <http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm>. Emphasis added

¹⁴³ Scheffer, David J., ‘The Complex Crime of Aggression under the Rome Statute’ (2010) 23 *Leiden Journal of International Law* 897 at 904

the role of the ICC as ultimate guarantor of international judicial power through its independence from competing powers exercised by states. In this context many states argued against the legitimacy of states exempting themselves from ICC jurisdiction over aggression, both as parties and as non-parties. Insistence on sovereign equality had provided a basis for opposing the creation of differential rights under UNSC referrals. Equally however, the debate in this period can also be understood in terms of a charge that special immunities breached the separation of international legal powers. By reserving sole authority to the US to adjudicate ICC crimes committed by its own nationals, international judicial power became intermingled with parallel executive and legislative functions exercised by American policymakers. For their part US policymakers did not join their global counterparts in endorsing the independent judicial character of the ICC. Rather they defended mechanisms for constraining the independence of the court, including preserving US courts' exclusive jurisdiction over US nationals, particularly in relation to the crime of aggression. The US also remained almost alone in continuing to advocate hybrid and locally constituted courts exercising international judicial power separately from the ICC. Yet even as the legalist demand for independent judicial power was denied, US policymakers defended each of these measures as consistent with and indeed necessary to uphold the rule of IL.

Legalist Policy

The particular contention motivating states to resist a growing UNSC role in ICC operations was the emerging practice of "double standards" in referrals that granted immunities to non-states parties.¹⁴⁴ These had been a feature of the original Darfur referral in 2005 in order to secure US acquiescence, but had been repeated in almost identical terms in a 2011 Libyan referral voted for by the US.¹⁴⁵ This fuelled a "growing disquiet about how power politics and international justice were mixing."¹⁴⁶ In relation to both referrals, Brazil expressed the desire to "promote respect for international law," and on that basis challenged US attempts to carve out distinct rights. In voting for the Libyan referral the Brazilian representative reiterated "strong reservation" to the exclusion of jurisdiction over non-party states,¹⁴⁷ and the perceived inconsistency of US policy with the rule of IL:

We oppose the exemption from jurisdiction of nationals of those countries not parties to the Rome Statute... We reiterate our conviction that initiatives aimed at establishing exemptions of certain categories of individuals from the jurisdiction of the International Criminal Court are not helpful to advancing the cause of justice and accountability and will not contribute to strengthening the role of the Court.¹⁴⁸

From a legalist perspective, the effect of such reservations was to defeat the vision of impartial and universal application of criminal justice through an international court.¹⁴⁹ In the Kampala Conference general debate Brazil reminded delegates of the need to make legal obligations universal

¹⁴⁴ See for example UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012) at 30 per the Ecuadorian representative

¹⁴⁵ SC Res 1970, UN Doc S/RES/1970 (26 February, 2011)

¹⁴⁶ Bosco, David, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 171

¹⁴⁷ SC Res 1970, UN Doc S/RES/1970 (26 February, 2011), operative clause 6 (see *infra*)

¹⁴⁸ UN, *Official Records of the Security Council*, UN Doc S/PV.6491 (26 February, 2011) at 7

¹⁴⁹ See for example UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) at 16 per the South African representative; UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012) at 5 per the New Zealand representative and at 20 per the Swiss representative

and that, like “a la carte multilateralism, cherry-picking when it comes to rules is ultimately self-defeating.”¹⁵⁰ This was reiterated at the UNSC rule of law meeting in Brazil’s “commitment to the integrity of the Rome Statute and our firm opposition to any form of exemption from the jurisdiction of the ICC.”¹⁵¹ Liechtenstein urged that that the UNSC stop the practice of creating differentiated rights of immunity since they “corroborate the suspicion of selectivity in creating accountability” and were thereby “contrary to international law.”¹⁵² Bangladesh concluded that these exemptions were “undermining the rule of law by infringing on the work of the ICC and are undermining the perception of the Court as an independent legal body free of political considerations.”¹⁵³ The foundation of the legalist approach was the belief that isolating international judicial power in the ICC was both possible, and necessary, to realise the rule of IL. The exclusion of certain criminal acts from ICC jurisdiction necessarily condoned non-states parties to the Rome Statute exercising international judicial power parallel to and free from ICC oversight.

Representatives at the UNSC rule of law meeting identified a key distinction between the independent “judicial” powers of the ICC on the one hand, and the “political” powers of the UNSC to maintain “international peace and security” on the other.¹⁵⁴ The principle of separating international judicial power in the court was breached wherever the UNSC exercised its powers in a way that altered the ICC’s prosecutorial and judicial independence.¹⁵⁵ The Secretary General emphasised that the ICC was “a judicial body, independent and impartial. Once set in motion, justice takes its own inexorable course, unswayed by politics. That is its strength, its distinctive virtue.”¹⁵⁶ ICC President Judge Sang-Hyun Song concurred on the need to separate international powers in the ICC:

There is an independent Prosecutor, an independent defence and an independent judiciary. The Prosecutor decides which cases to pursue, but it is the judges who have the final say on whether to issue an arrest warrant or summons to appear, or whether there is sufficient evidence for charges to proceed to a trial.¹⁵⁷

This particular view relied on a belief not only in the principle of separating judicial power, but the feasibility of an international court doing so while excluding “political or other factors extraneous to the proceedings.”¹⁵⁸ Japan cautioned that UNSC referrals to the ICC were “not for purely legal reasons.”¹⁵⁹ Similarly, India emphasised the “need to strengthen the rule of law at the international level by avoiding selectivity, partiality and double standards” and freeing the ICC from “the clutches of

¹⁵⁰ Biato, Marcel, *Statement by Ambassador Marcel Biato on behalf of The Brazilian Delegation to the Review Conference* (31 May, 2010) <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendebe-Brazil-ENG.pdf>

¹⁵¹ UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012) at 4

¹⁵² *Ibid* at 3 per the Liechtenstein representative

¹⁵³ *Ibid* at 9. See also at 12 per the Argentinean representative

¹⁵⁴ See for example UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) at 6 per Phakiso Mochochoko as Head of the Jurisdiction, Complementarity and Cooperation Division of the ICC (Office of the Prosecutor); at 13 per the Pakistani representative; UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012) at 16 per the Costa Rican representative and at 30 per the Ecuadorian representative

¹⁵⁵ UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) at 6 per Phakiso Mochochoko as Head of the Jurisdiction, Complementarity and Cooperation Division of the ICC (Office of the Prosecutor)

¹⁵⁶ *Ibid* at 2

¹⁵⁷ *Ibid* at 4

¹⁵⁸ *Ibid* at 4 per Judge Song

¹⁵⁹ UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012) at 7

political considerations.”¹⁶⁰ At the most basic level these states argued for “the complete separation of the ICC’s judicial process from the functions and decisions of the Security Council.”¹⁶¹

Delegations were equally opposed to setting a higher threshold for ICC jurisdiction than that required for a UNSC finding – such as requiring a “flagrant” or manifest” violation.¹⁶² The effect would be to condone the UNSC exercising judicial and non-judicial powers parallel to the ICC. The importance of the legalist ordering principle was significant enough for the Togolese representative to state that “in the name of the principle of the separation of powers, the International Criminal Court should, in principle, not have relations with the Security Council.” To the extent that the UNSC was granted control over the ICC through Articles 13(b) and 16 of the Rome Statute this was a power “not always in accord with international law.” In this view the breach of the separation of powers doctrine rendered the exercise of power inconsistent with basic principles of IL. Indeed Togo argued that the inability of the UNSC to reflect ICC membership “should cause the Council to declare itself not competent” to exercise its powers under the Rome Statute. To do otherwise “is comparable to a regime’s executive and political bodies applying laws to citizens while exempting themselves from those same laws.”¹⁶³

Beliefs of American Legal Policymakers

Continued Role of Ad Hoc and Hybrid Tribunals

From the very first attendance at the ASP in 2009 the US reiterated the preference to order international legal powers in a configuration that denied the ICC supranational judicial authority.¹⁶⁴ The “greatest importance” was placed not on an international court in upholding criminal justice, but on “assisting countries where the rule of law has been shattered to stand up for their own system of protection and accountability.”¹⁶⁵ It was only where this option proved impossible that the ICC was to approximate domestic courts as a necessary compromise. In the NSS 2010 the Obama administration stated foremost that, in light of America’s historical support for international justice, it was:

working to strengthen national justice systems and is maintaining our support for ad hoc international tribunals and hybrid courts. Those who intentionally target innocent civilians must be held accountable, and we will continue to support institutions and prosecutions that advance this important interest.¹⁶⁶

Only secondarily to this principle was the administration prepared to favour “supporting the ICC’s prosecution” of appropriate cases.

That stance was followed through in the UNSC rule of law meeting, where the US position was distinguished from every other participant by its primary emphasis on addressing international

¹⁶⁰ UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) at 11

¹⁶¹ Weed, Matthew C., *International Criminal Court and the Rome Statute: 2010 Review Conference* (Congressional Research Service, 10 March, 2011) at 11

¹⁶² Barriga, Stefan, ‘Negotiating the Amendments on the Crime of Aggression’ in Stefan Barriga & Claus Kreß (ed), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012) at 29

¹⁶³ UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) at 21. For a similar position see also UN, *6849th Meeting (Resumption 1)*, United Nations Security Council (17 October, 2012) at 15 per Botswana’s representative

¹⁶⁴ See Fairlie, Megan, ‘The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage’ (2011) 29 *Berkeley Journal of International Law* 529 at 529-530

¹⁶⁵ Rapp, Stephen J., *Address to Assembly of States Parties* (19 November, 2009)

<http://www.state.gov/j/gcj/us_releases/remarks/2009/133316.htm>

¹⁶⁶ The White House, *The National Security Strategy of the United States of America 2010*, The White House (2010) at 48

criminal justice through national justice systems and “hybrid structures where appropriate.”¹⁶⁷ Even in relation to prosecuting ongoing atrocities in Syria the US was careful to make clear it was not “prejudging the ultimate venue for it.”¹⁶⁸ This indicates the extent to which US policy continued to challenge the concentration of judicial power over international crimes in an international court acting independent of municipal legal control. The resistance was borne of a particular scepticism toward the idea that judicial power could exist as a self-contained source of legitimacy when divorced from any political context. Rather than seeing an independent ICC as the purest form of international criminal justice, US policymakers instead saw it embedding particular forms of politics into the law, and ones likely to be foreign to victims of atrocities. The ordering principle to achieve the rule of IL remained international judicial power that was not independent of state control but, to the contrary, was subject to democratic checks and balances.

Dividing In Personam ICC Jurisdiction

US support for the court reached new levels of engagement in relation to the 2011 Libyan Civil War when, for the first time, it voted through the UNSC to refer a situation for ICC investigation.¹⁶⁹ Yet the resolution equally sought to divide the judicial power presumptively reserved to the court. Consistent with a rejection of formal legal obligations the resolution was written “recognizing that States not party to the Rome Statute have no obligation under the Statute” while still urging “all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor.”¹⁷⁰ More particularly the US denied the institutional separation of international judicial power by preserving the capacity of the US legal system to exercise these powers parallel to the ICC. In substantive clause six the UNSC:

Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.¹⁷¹

This replicated limitations in the Darfur referral¹⁷² that upheld ordering principles other than a separation of international legal powers. There was no suggestion that the US was carving out the right for its military personal to act with impunity, contrary to accusations by some states-parties. Rather the objective was always defended in terms of preserving the jurisdiction of domestic courts and military tribunals to try such matters. This design was capable of supporting all four ideal American conceptions of IL such that: international criminal justice could be subjected to democratic checks and balances; the jurisdiction of the ICC was limited by US consent; there was a clear

¹⁶⁷ UN, *6849th Meeting*, United Nations Security Council (17 October, 2012) at 8

¹⁶⁸ *Ibid* at 9

¹⁶⁹ SC Res 1970, UN Doc S/RES/1970 (26 February, 2011); Corey-Boulet, Robbie, ‘The United States’ Evolving Stance on the ICC,’ *World Politics Review* (23 March, 2011) <<http://www.worldpoliticsreview.com/articles/8278/the-united-states-evolving-stance-on-the-icc>>

¹⁷⁰ SC Res 1970, UN Doc S/RES/1970 (26 February, 2011), operative clause 5

¹⁷¹ *Ibid*, operative clause 6

¹⁷² See Chapter 7 *supra*

separation between international and domestic judicial authority; and the supremacy of municipal over international law was maintained.

Ambassador Rapp expressed the ordering of international legal power in liberal terms that expressed a commitment both to a vertical separation of powers and to democratic checks and balances. In response to a question on whether there was any conceivable situation where international judges would be better placed to deal with American nationals, Rapp reiterated that it was the US “constitutional system that establishes who can be judges and generally these positions are restricted to American citizens.”¹⁷³ The clear implication was that there was a hard limit to treating international judicial power as a continuation of municipal powers. The essence of a vertical separation of powers is that these remain distinct and not interchangeable in relation to the same subject matter. At the same time Rapp gave an assurance that the administration would “conduct ourselves in terms of our adherence to international law in such a way that we will never give cause to any legitimately motivated prosecutor to bring a case or to seek admission of a case against an American citizen in an international court.”¹⁷⁴ This point is distinct from the first in seeking to check international legal powers through the integrity of the American system, as compared to the absolute separation of that system from international powers. In neither case however did the administration turn to the illiberal principles shaping the Bush 43 ICC policy of in principle supremacy of municipal legal power or a bare right to withhold consent, while equally it rejected legalism’s complete separation of international judicial power in the ICC.

The Indivisibility of Legalism and the Crime of Aggression

Although the US maintained a constructive dialogue defining and implementing the crime of aggression, it became clear that its very inclusion in the Rome Statute ran counter to any conception of legal power held by American policymakers. In a series of statements concerning the crime of aggression, Koh and Rapp emphasised that, even apart from actual politicisation of aggression prosecutions, it would be impossible to avoid the apprehension of such bias. In his 2010 statement to the Assembly of States Parties Koh warned of the risk that any ICC prosecution for the crime of aggression “by its very nature, even if perfectly defined, would inevitably be seen as political.”¹⁷⁵ Rapp explained that aggression would take the ICC “into the political area” dealing with “crimes not against individual civilians, as in war crimes or crimes against humanity or genocide, but crimes against states.”¹⁷⁶ This reflected the continued scepticism that an international court could truly maintain the integrity of judicial powers without a solid democratic political foundation. This was not merely a criticism about the particular design of the ICC, but a challenge to the very principle of a complete separation of powers at the global level. Legalist beliefs that the independence of the court’s judicial power would ensure legal integrity were inseparable from any endeavour to grant an international

¹⁷³ Rapp, Stephen J., ‘Press Briefing with Stephen J. Rapp Ambassador-at-Large for War Crimes Issues,’ *Mission of the United States Geneva* (22 January, 2010) <<http://geneva.usmission.gov/2010/01/22/stephen-rapp/>>

¹⁷⁴ *Ibid*

¹⁷⁵ Koh, Harold H., *Statement by Harold Hongju Koh, Legal Advisor, United States Department of State, Regarding Crime of Aggression at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court* (23 March, 2010) <<http://usun.state.gov/briefing/statements/2010/139000.htm>>

¹⁷⁶ Koh, Harold H. & Stephen J. Rapp, *U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference* (15 June, 2010) <http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm>

court such powers. US scepticism translated into a policy of maintaining direct and indirect barriers to realising the crime in any meaningful form.¹⁷⁷

American opposition to ICC prosecutions was no less pronounced in relation to equivalent actions taken at the municipal level. Complementarity had provided a common ground for agreeing that states had primary responsibility to prosecute genocide, crimes against humanity and war crimes, with the ICC stepping in only where this arrangement proved inadequate.¹⁷⁸ US policymakers long argued however that inadequate consideration had been given to how complementarity could actually work in the case of aggression. The nature of the crime was such that political leaders would rarely be prosecuted by their own states, and thus it would fall to other states to do so.¹⁷⁹ US policymakers warned that this scenario would contravene basic principles of sovereign immunity by allowing “the domestic courts of one country to sit in judgment upon the state acts of other countries in a manner highly unlikely to promote peace and security.”¹⁸⁰ Understanding 5 was thus instituted to deal directly with “domestic jurisdiction over the crime of aggression” and the risks of an expansive application of complementarity:

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

The Understanding contravened legalist principles by effectively denying any exercise of universal jurisdiction by states parties.¹⁸¹ The US fear however was that states would seek an exemption to sovereign immunity in the case of aggression by claiming that, by acting under the complementarity principle, jurisdiction was empowered by the impartial judicial powers of the ICC. The US faced the possibility of states exercising universal jurisdiction so that “under expansive principles of jurisdiction, government officials will be prosecuted for alleged aggression in the courts of another state.”¹⁸² US policymakers feared there would be little to prevent domestic courts being used to engage in “unjustified domestic prosecutions” under the guise of being agents for the independent judicial power

¹⁷⁷ Schabas, William, ‘Kampala Diary 4/6/10,’ *The ICC Review Conference: Kampala 2010* (5 June, 2010) <<http://iccreviewconference.blogspot.com.au/search?updated-max=2010-06-06T08:01:00%2B03:00>>. Opposition even extended to denying the development of the crime in customary international law. Understanding 4 read:

“4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

The initial draft of this Understanding was followed with the words: “and shall not be interpreted as constituting a statement of the definition ‘crime of aggression’ or ‘act of aggression’ under customary international law.” The explicit decoupling of the treaty from customary international law was roundly rejected by other states with “not even a distant hope” that the US position would be adopted: See Kreß, Claus, Stefan Barriga, Leena Grover & Leonie Von Holtzendorff, ‘Negotiating the Understandings on the Crime of Aggression’ in Stefan Barriga & Claus Kreß (ed), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012) at 93

¹⁷⁸ Koh, Harold H. & Stephen J. Rapp, *U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference* (15 June, 2010) <http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm>

¹⁷⁹ Fairlie, Megan, ‘The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage’ (2011) 29 *Berkeley Journal of International Law* 529 at 553-554

¹⁸⁰ Koh, Harold H., *Statement at the Review Conference of the International Criminal Court* (4 June, 2010) <<http://www.state.gov/s/l/releases/remarks/142665.htm>>. See generally Crawford, James, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th ed, 2012) at 487-506

¹⁸¹ Weed, Matthew C., *International Criminal Court and the Rome Statute: 2010 Review Conference* (Congressional Research Service, 10 March, 2011) at 13

¹⁸² Koh, Harold H., *Statement at the Review Conference of the International Criminal Court* (4 June, 2010) <<http://www.state.gov/s/l/releases/remarks/142665.htm>>; Weed, Matthew C., *International Criminal Court and the Rome Statute: 2010 Review Conference* (Congressional Research Service, 10 March, 2011) at 9-10

of the ICC.¹⁸³ Because official state involvement is an element of the crime itself, there is a real risk of adversaries seizing the crime as an opportunity to engage in “lawfare.”¹⁸⁴ Koh was at pains to emphasise that any power to prosecute aggression at the municipal level “derives from national jurisdiction” and not from notionally impartial ICC power. The general rule that a state must consent to another state exercising jurisdiction over its leaders should hold for domestic prosecutions.¹⁸⁵

The eventual outcome of the Kampala negotiations was a compromise between the states who opposed a UNSC monopoly on aggression cases and US insistence that it be able to check ICC jurisdiction. The UNSC’s monopoly over cases of aggression was loosened by allowing the prosecutor to proceed where the UNSC had declined or failed to act.¹⁸⁶ This minor concession came however at the cost of granting the US immunity from all aggression prosecutions for so long as it remained a non-state party, and even as a state party through an opt out provision.¹⁸⁷ The agreement transformed ad-hoc immunities of non-state parties set out in UNSC referrals and crystallised them in the Rome Statute itself. US policymakers had ensured “total protection for our Armed Forces and other U.S. nationals going forward.”¹⁸⁸ The arrangement was adopted by “consensus” in the final resolution at the Kampala Conference.

The outcome should not be seen as evidence of a common understanding on the proper legal principles for ordering ICC legal powers however, but rather as a highly contentious political trade-off. Paulus warned of the risk of “politicization” if the US and other UNSC members were granted the power to control the judicial independence of the ICC, but ultimately accepted that the legal principle must give way to political expediency. The ideal of “complete freedom” needed to be weighed against the risk that it would endanger “vital support of the P5 for ICC investigations in the first place, and further alienate the United States, in particular.”¹⁸⁹ At the Kampala Conference states that had opposed US negotiators throughout viewed their agreement as representing an instrumental concession to political power. Minutes before the final resolution was adopted Japan intervened to declare as its “sad duty” that compromises within represented “the undermining of the credibility of the Rome Statute and the whole system it represents.”¹⁹⁰ Throughout the conference Japan had highlighted its “strong belief that the activities of the ICC contributes to the establishment of the rule of law in the international community.”¹⁹¹ Faced with the final resolution Japan condemned the exclusion of non-States Parties and territories from ICC jurisdiction over acts of aggression in Article 15*bis*(5).

¹⁸³ Koh, Harold H., *Statement at the Review Conference of the International Criminal Court* (4 June, 2010)

<<http://www.state.gov/s/l/releases/remarks/142665.htm>>; Kreß, Claus, Stefan Barriga, Leena Grover & Leonie Von Holtzendorff, ‘Negotiating the Understandings on the Crime of Aggression’ in Stefan Barriga & Claus Kreß (ed), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012) at 93-94

¹⁸⁴ van Schaack, Beth, ‘Par in Parem Imperium Non Habet Complementarity and the Crime of Aggression’ (2012) 10 *Journal of International Criminal Justice* 133 at 150

¹⁸⁵ Koh, Harold H., *Statement by Harold Hongju Koh, Legal Advisor, United States Department of State, Regarding Crime of Aggression at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court* (23 March, 2010) <<http://usun.state.gov/briefing/statements/2010/139000.htm>>

¹⁸⁶ See *Amendments to the Rome Statute of the International Criminal Court on the crime of aggression* (2010), Art. 15*bis*(8)

¹⁸⁷ See *ibid.*, Art. 15*bis*(5)

¹⁸⁸ Koh, Harold H. & Stephen J. Rapp, *U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference* (15 June, 2010) <http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm>

¹⁸⁹ Paulus, Andreas L., ‘Second Thoughts on the Crime of Aggression’ (2009) 20 *European Journal of International Law* 1117 at 1125-1126

¹⁹⁰ Cited in Barriga, Stefan & Claus Kreß, *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012) at 810

¹⁹¹ Komatsu, Ichiro, *Statement of the Government of Japan at the Review Conference of the Rome Statute of the International Criminal Court* (31 May, 2010) <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Japan-ENG.pdf>

Such a concession “unjustifiably solidifies blanket and automatic impunity of nationals of non States Parties: a clear departure from the basic tenet of article 12 of the Statute.” The method by which this was incorporated amounted to “suicide of legal integrity.”¹⁹² It was only with “a heavy heart” therefore that Japan allowed the adoption by consensus, but warned that Japan’s future cooperation would “hinge” on addressing these concerns.¹⁹³

Conclusion

Whereas states parties argued for separation of international judicial power into a court with supreme authority, policymakers in the Obama administration continued to argue for the merits of ad hoc and hybrid tribunals exercising those same international powers. As states parties argued that the ICC should sit above all countries as a check over international criminal acts, US policymakers carved out exclusive rights to adjudicate those matters in relation to its own nationals. Finally, the US argued for the right to effective immunity from ICC jurisdiction for the crime of aggression, but did so only at the expense of a court design rejected by key states as contrary to the rule of IL. Ultimately, the parties at the Kampala conference could only reach agreement by deferring implementation of the crime of aggression until a further “decision to be taken after 1 January 2017.”¹⁹⁴ This was consistent with the US approach of tactically obstructing recognition of the crime in the ICC’s ordinary jurisdiction. Under Obama, the US continued to increase non-binding support for the ICC, even as it challenged the desirability or feasibility of establishing independent judicial power at the apex of the system of international criminal justice. Fairlie notes that the court subsequently focussed exclusively on crimes where the perpetrator and victim were of the same nationality; therefore making it highly unlikely American peacekeepers would ever be prosecuted. Yet, where US resistance was based in liberal legal principles, and where “concerns regarding the potential for politicized prosecutions are at the core of U.S. opposition,” altering practices within the court remains unlikely to alter US policy.¹⁹⁵

CHAPTER CONCLUSION

Bosco notes, perhaps cynically, that during the Obama administration “US officials were becoming adept at framing efforts to guide the court as expressions of concern for its well-being.”¹⁹⁶ This is suggestive of the hypothesis that legal policymakers consciously disregarded their commitment to the law in order to advance political power. However, the most plausible interpretation of evidence remains that of political interests being channelled through ideologically entrenched conceptions of the law itself. Analysing the dynamics of foreign policy ideology in this period is especially difficult for two key reasons. Interpretations of the Obama administration’s ideological beliefs remain unsettled,

¹⁹² Cited in Barriga, Stefan & Claus Kreß, *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012) at 812

¹⁹³ Cited in *ibid* at 810-812

¹⁹⁴ *Amendments to the Rome Statute of the International Criminal Court on the crime of aggression* (2010), Arts.15bis(3) & 15ter(3); Weed, Matthew C., *International Criminal Court and the Rome Statute: 2010 Review Conference* (Congressional Research Service, 10 March, 2011) at 12-13

¹⁹⁵ Fairlie, Megan, ‘The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage’ (2011) 29 *Berkeley Journal of International Law* 529 at 559-560

¹⁹⁶ Bosco, David, *Rough Justice: The International Criminal Court’s Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 165

with evidence of a mainly reactive distancing from Illiberal Nationalism replaced by an eclectic blending of beliefs. The second reason is that global positions toward the ICC were equally eclectic in the mix of positions adopted by states. Van Schaack notes that, compared to Rome, the “negotiating dynamics in Kampala were considerably more complex.” The previously united opposition to the US by LMS and NGOs “splintered” into more diverse positions.¹⁹⁷ The largely united P-5 stance was drawn to “two irreconcilable positions.” The first “idealistic, if not hopelessly naïve” position envisioned an independent ICC exercising universal jurisdiction. The other position accepted that some degree of state consent was required.¹⁹⁸ The fact that it was no longer the “US versus the rest” did not however mean that US policy was any less structured by the established dynamic of competition between legalism and ideal American conceptions of law.

In what reads as a veiled criticism of the legalist position, Koh intervened in the Kampala Conference to remind delegates that the ultimate objective remained “making international criminal law for the real world.” That goal was threatened by any “unworkable and divisive compromise that weakens the Court, diverts it from its core human rights mission, or undermines our multilateral system of peace and security.”¹⁹⁹ These were all charges laid by American policymakers against states and organisations that insisted on formalised development of global governance, sovereign equality between states and the separation of international legal powers, as necessary elements of an ICC compliant with the rule of IL. Rather, across this period US policymakers emphasised the process of transnational development as more significant than the formal obligations of a signed treaty. The perception of an exceptional US role in upholding liberal values was maintained as a reason for opposing the equal application of legal rights. Finally, scepticism about the merit of independent judicial power was held out as a reason for maintaining immunities from ICC jurisdiction. In all these ways the hegemonic impulses of US power continued to be interpreted through the lens of distinctively American versions of the rule of IL.

¹⁹⁷ van Schaack, Beth, ‘Negotiating at the Interface of Power and Law: The Crime of Aggression’ (2010) 49 *Columbia Journal of Transnational Law* 505 at 513-514

¹⁹⁸ *Ibid* at 515

¹⁹⁹ Koh, Harold H., *Statement at the Review Conference of the International Criminal Court* (4 June, 2010) <<http://www.state.gov/s/l/releases/remarks/142665.htm>>

Conclusion

CONCLUSION

BETWEEN POWER & TRANSCENDENT VALUES

IDEOLOGICAL LIMITS OF THE INTERNATIONAL CRIMINAL COURT

The very existence of the ICC could cast doubt on the argument that competing foreign policy ideologies set hard limits to its development. In 1964 Shklar identified a motive behind the Nuremberg trials as “a desire to do something for the future of the rule of law in international relations.”¹ Yet the extraordinary circumstances in the aftermath of WWII suggested to Shklar that the Nuremberg achievements were unlikely to be replicated in a standing international criminal court: “nothing effective along these lines is even imaginable at present.” To expect otherwise “was unreasonable, an extravagance of the legalistic imagination.”² The establishment of the court in 2002, tracing its lineage to Nuremberg, seems to vindicate the possibility of real progress toward a global consensus on the meaning of the rule of IL.

The evidence from a quarter-century of American ICC policy does suggest progress is possible in terms of strengthening the institutional architecture of international criminal justice. Moreover the US has demonstrated a practical capacity to work with other states to fight impunity and advance accountability for perpetrators of “atrocious crimes.”³ However this thesis has found no evidence of progress toward a universal conception of the “rule of IL” as an ideal guiding the design and development of international criminal justice. Rather the court, as realised, uncomfortably straddles the interstices and political compromises between competing and often incompatible ideologies. Legalism and the four American ideological types each crystallise interests in legal principles that divide adherents according to internally coherent but mutually conflicting legal ideals. Fletcher and Ohlin reviewed the tentative progress in US ICC policy to conclude that:

The more the ICC becomes like a real criminal court, operating under the rule of law, the more American politicians are likely to shelve their fears of politicized prosecution and support the ICC as an important instrument of international peace and harmony.⁴

Such optimism conflates difficult political compromises on both sides with a progress toward legal consensus on the meaning of a court “operating under the rule of law.”

The contribution of interpreting American ICC policy through foreign policy ideology becomes clear by comparing Jürgen Habermas’ related analysis of policy contradictions.⁵ Habermas agreed,

¹ Shklar, Judith N., *Legalism* (Harvard University Press, 1964) at 176

² *Ibid* at 177

³ The term is Scheffer’s in reference to the slate of ICC crimes: Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 2

⁴ Fletcher, George P. & Ohlin, Jens David, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ (2005) 3 *Journal of International Criminal Justice* 539 at 561. See also Fairlie, Megan, ‘The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage’ (2011) 29 *Berkeley Journal of International Law* 529 at 576

⁵ Habermas, Jürgen, *America and the World: A Conversation with Jürgen Habermas* (2004)

<http://www.logosjournal.com/habermas_america.htm>. For Habermas’ views on IL more generally see: Habermas, Jürgen, ‘The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society’ (2008) 15 *Constellations* 444; Habermas, Jürgen, ‘The Crisis of the European Union in the Light of a Constitutionalization of International Law’ (2012) 23 *European Journal of International Law* 335

consistent with this thesis, that Kagan's characterisation of a transatlantic divide was too crude for legal analysis.⁶ For Habermas the greatest conflicts over the conception of IL "occurred, not between the continents, but, rather, within American policy itself"⁷:

Kagan is suggesting a false continuity. The newly-elected Bush administration's definitive repudiation of internationalism has remained its keynote: The rejection of the (since established) International Criminal Court was no trivial delict. One must not imagine that the offensive marginalizing of the United Nations and the cavalier contempt for international law which this administration has allowed itself to be guilty of, represent the expression of some necessary constant of American foreign policy.⁸

However, Habermas departed from the insights of this thesis in citing policymakers such as Woodrow Wilson and Franklin D. Roosevelt as examples of a countervailing commitment to legalism in American diplomatic history. For him the question at the end of the Cold War was whether "the one remaining superpower would turn away from its leading role in the march toward a cosmopolitan legal order, and fall back into the imperial role of a good hegemon above international law."⁹ The ICC case has not supported that characterisation, finding no evidence that American policymakers were ever committed to a rule of IL founded on cosmopolitan values. Habermas was right to remind us that the Bush administration could "be replaced in the coming year by an administration that gives the lie to Kagan," but wrong to suggest that shift could be to legalism. As in Max Weber's analogy, policy has switched between the finite number of tracks provided by American ideologies, none of which leads to a global consensus.¹⁰

The Status of Contradictions in US Policy

Analysing American ICC policy through foreign policy ideology does not dispel the criticism that it is often contradictory, but it redefines the nature of inconsistencies. The evidence suggests far greater coherence in legal principles, but greater political incoherence than is generally posited. Legal scholarship claims jurisprudential incoherence in American policy: that policymakers have pledged fidelity to the principle of the rule of IL, but that legal principle has been subverted to tactical political compromises in designing and developing the ICC. The conclusion from the ICC case is that charges of hypocrisy do not stand up, with strong evidence that legal policymakers were committed to the processes of the international legal system according to distinct and internally coherent conceptions of the rule of law. Policy outcomes often revealed contradictory legal principles due to domestic ideological competition, but decision-making processes were structured by multiple coherent legal commitments, rather than by an absence of them.

The process of these ideological types competing within and between administrations however demonstrated that the *political* coherence of American IL policy cannot be assumed. The standard explanation for contradictory outcomes in legal scholarship has been the role of political power: that the consistent logic of national interests is privileged over law. Van der Vyver identifies the logic in US

⁶ Referring to Kagan, Robert, *Of Paradise and Power* (Vintage Books, 2004). See Chapter 2 *supra*

⁷ Habermas, Jürgen, *America and the World: A Conversation with Jürgen Habermas* (2004)
<http://www.logosjournal.com/habermas_america.htm>

⁸ *Ibid*

⁹ *Ibid*

¹⁰ Weber, Max, 'The Social Psychology of the World Religions' in H.H. Gerth and C. Wright Mills (ed), *From Max Weber: Essays in Sociology* (Oxford University Press, 1946) at 280

policy as electing to “place considerations of self-interest above everything else.”¹¹ However, each ideology entails its own definition of the national interest and strategies for achieving it through IL. Due to the same dynamic that establishes forms of legal coherence, it cannot be assumed that the interests guiding US IL policy are fixed. Rather American IL policy has exhibited contradictory outcomes over time by shifting between alternative definitions of interests.¹² Incorporating the explanatory role of American foreign policy ideology precisely reverses the conclusions of legal analysis. Where legal scholars have seen contradictions in American fidelity to the rule of IL they have tended to overlook underlying legal rationality. But, when they explain this as the rational process of national interests trumping law, they overlook fundamental contradictions in what policymakers believe interests are.

Scheffer’s recollection of the Rome Conference demonstrated the way that competing legal conceptions among American legal policymakers contributed to the appearance that American IL policy was bereft of any principled commitment to law. Scheffer was accompanied in the Rome negotiations by Senator Helms’ staffers, whom he was expected to accommodate as a courtesy to the US legislature.¹³ Unsurprisingly Scheffer found himself correcting misperceptions among foreign diplomats that Helms’ confrontational Illiberal Nationalist language represented the true US position, rather than the accommodating language in official communications.¹⁴ Likewise, in Scheffer’s view, the 1998 Pentagon letter demanding total immunity for US military personnel in Illiberal Internationalist terms “undercut my negotiating posture with other governments.”¹⁵ These cases signalled to other states that official US statements masked a degree of hypocrisy and increased wariness toward making further concessions.¹⁶ Clearer understanding by global counterparts of the competing legal commitments of US policymakers may have facilitated more constructive engagement with the dominant Liberal Internationalist ideology of the administration.¹⁷

Conversely, the shift from internationalist to nationalist legal conceptions between the Clinton and Bush 43 administrations revealed contradictions between understandings of the national interest. Scheffer’s successful effort lobbying the US government to sign the Rome Statute was done with the clear strategic objective of bolstering US credibility and support for transnational legal development.¹⁸ The Bush 43 reversal toward Illiberal Nationalism rendered US policy incoherent and self defeating and severely strained relations with American allies. The conspicuous act of signing the statute was

¹¹ van der Vyver, Johan D, *The International Criminal Court: American Responses to the Rome Conference and the Role of the European Union* (Inst. für Rechtspolitik, 2003) at 4

¹² Simpson, Gerry J., ‘Throwing a Little Remembering on the Past: The International Criminal Court and the Politics of Sovereignty’ (1999) 5 *UC Davis Journal of International Law and Policy* 133 at 142-143; Luck, Edward C., ‘American Exceptionalism and International Organization: Lessons from the 1990s’ in Rosemary S. Foot, Neil MacFarlane & Michael Mastanduno (ed), *US Hegemony and International Organizations: The United States and Multilateral Institutions* (Oxford University Press, 2003) at 48; Wippman, David, ‘The International Criminal Court’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) at 181-182

¹³ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 229

¹⁴ *Ibid* at 188

¹⁵ *Ibid* at 190. See Schonberg, Karl K., ‘The General’s Diplomacy: US Military Influence in the Treaty Process, 1992-2000’ (2002) 3 *Seton Hall Journal of Diplomacy and International Relations* 68 at 78-79 and Chapter 5 *supra*

¹⁶ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 167

¹⁷ For a complementary study seeking to reduce US misunderstanding of European motivations see: Fehl, Caroline, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford University Press, 2012) at 7-8

¹⁸ Scheffer, David J., *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) at 236

worse than no action at all where it could be used by opponents to challenge US motives once the statute was conspicuously “unsigned.” Interpreting the shift in policy as being drawn from competing ideologies allows legal scholars to move beyond presumptions that law is trumped by consistent US interests. The evidence emphasises the limitation of drawing conclusions about legal principles or political interests from “American ICC policy” as a single object of analysis.¹⁹ The dynamic of competing ideological approaches necessitates taking account of the logic and objectives of multiple ICC policies.

Implications for ICC Scholarship and Legal Policymakers

The significance of this study for legal scholarship is that it reveals the valuable insights from conceiving US disputes with the ICC as a battle *internal to* law rather than as an *external* battle against politics. The difference was exemplified in the long standing debate over the proper ICC relationship with the UNSC, which clearly demonstrated the role of foreign policy ideology in translating international power through the beliefs of American political culture. At the level of policy outcomes, relative power was shown to matter, with the US consistently joining with the P-5 to justify various levels of legal privilege. Likewise, the US supported UNSC privileges across the four periods of the case study, irrespective of changes in dominant foreign policy ideologies. The implication is that US policy could be explained as the expected behaviour of a powerful state institutionalising its position through law.²⁰ However, legal scholarship is not directly interested in outcomes, but rather in explicating the legal doctrines and principles that guided state conduct. At that level, competing ideological conceptions of law did establish distinct legal principles separating the US from its P-5 counterparts, and US administrations from each other.

The significance of disaggregating and setting out distinct legal principles defining equality and the ordering of legal powers in the UNSC is that criticisms and challenges to US policy framed in rule of law terms were shown not to resonate with American policymakers so long as they drew solely from legalism. Exhortations to honour sovereign equality and the separation of international legal powers were not rejected by American policymakers merely as politically undesirable, but as contrary to received understandings of an ICC designed in conformity with the rule of IL. In particular, moralistic appeals to set aside political expediency and recommit to the law assumed a distinction that in many cases simply did not exist. The charge of hypocrisy in American insistence on UNSC privileges projected an understanding of the rule of IL onto American policymakers, and then levelled the charge of incoherence when US policymakers failed to meet that imputed ideal.

What the UNSC example reveals is that the key to challenging American IL policy is to understand the structure of American foreign policy ideology in order to challenge policymakers for contradicting their own terms. The concern of legalist advocates was not that the US was breaching

¹⁹ For examples of this approach see Dutton, Yvonne, *Rules, Politics, and the International Criminal Court: Committing to the Court* (Routledge, 2013) at 47-60; Orentlicher, Diane F., ‘Unilateral Multilateralism: United States Policy Toward the International Criminal Court’ (2003) 36 *Cornell International Law Journal* 415

²⁰ Likewise Bosco persuasively demonstrates the strong negative correlation between population size and military spending, and likelihood of membership of the ICC: See Bosco, David, *Rough Justice: The International Criminal Court’s Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014), Figures 5.2 & 5.3 at 133-134. On the other hand, although the US was joined by India, Russia and China in rejecting court membership, each did so according to a distinct legal rationale

international criminal law with impunity through these years,²¹ but that its proposals for the rule of IL rejected institutional constraints in favour of America's own good faith adherence to exceptionalist values. Bosco notes that US legal principles were "competing with the narrative of accountability" throughout and thus remained unconvincing. Outside of American policymaking these principles appeared as "little more than an exercise in exceptionalism: the United States wanted international justice, but only if it could control how it would be applied."²² The veracity of exceptionalism thus lay at the heart of divergence between legalist demands for more formalised legal relations, and the American defence of more flexible and contextual arrangements. Challenging US legal policy required not pointing out contradictions with legalist principles, but demonstrating incoherence in exceptionalist assumptions.

The power of that strategy was demonstrated in the 2004 example of the US withdrawing demands for ICC immunity following the Abu Ghraib prisoner abuse scandal.²³ The passing of previous UNSC resolutions granting ICC immunity to US peacekeepers had been defended in terms of internationalist principles about the unequal US role in upholding liberal values and the value of hegemonic privilege. The integrity of IL in both cases was guaranteed by exceptionalist beliefs in "America as something different"²⁴ and therefore its own check against abuse. When the UNSC granted immunity in the 2002-2003 resolutions, opposition had been expressed in terms of contravening the principle of sovereign equality and failed to resonate on each occasion.²⁵ In 2004, however, opponents pointed to the growing scandal as evidence that US privileges were no longer proportionate to any role in advancing international criminal justice. In American policymakers' own terms, the only means of avoiding hypocrisy became the equal application of internationally determined rights and duties to American military personnel.

The power of holding a mirror up to American legal policymakers' own legal ideals is not a means for establishing the legalist rule of IL. This is a reactive strategy that ameliorates only unambiguous cases of hypocrisy. The historical record, however, is that in the vast majority of cases, discomfort with US policy has been a principled objection to the absence of independent institutions rather than recognition of actual lawlessness. Conversely, the greatest threat to the rule of IL, as conceived by any involved party, is precisely those rare cases where US actions truly contradict not only legalism, but American ideological commitments.²⁶ Engaging through foreign policy ideology will not align parties' conceptions of the rule of IL, but can influence policies that achieve more acceptable compromises. In particular, this may entail pragmatically appealing to the ideas of Liberal Internationalism and internationalism more generally as the legal approaches having most common ground with legalism. Conversely, legal policymakers can work to delegitimise nationalist and specifically Illiberal Nationalist beliefs as the conceptions most incompatible with the legalist rule of

²¹ See Fehl, Caroline, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford University Press, 2012) at 92

²² Bosco, David, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014) at 179

²³ See Chapter 7 *supra*

²⁴ United States Senate, Committee on Foreign Relations, *Senate Committee on Foreign Relations, Nomination of Dr. Condoleezza Rice to be Secretary of State*, 1st Session 109th Congress (2005) at 147

²⁵ See SC Res 1422, UN Doc S/RES/1422 (12 July, 2002); SC Res 1487, UN Doc S/RES/1487 (12 June, 2003)

²⁶ The Congressional Research Service cites the example of the 1968 My Lai massacre in this context: See Grigorian, Ellen, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns* (Congressional Research Service, 6 January, 1999) at 11-12, n.46

IL.²⁷ Through this dynamic it does ultimately matter that American legal policymakers from all persuasions are committed to dialogue over the meaning of the rule of IL, and that none identifies US interests in explicit lawlessness.

The Future of American ICC Policy

The future of the ICC relationship is likely to remain one of political compromises straddling competing legal ideals.²⁸ In 2005, during the height of transatlantic tensions over American legal policy, the Atlantic Council sought to fulfil its mission of “renewing the Atlantic community” through its report: *Law and the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law*.²⁹ In noting many of the same power based and cultural explanations set out in this thesis, the report articulated the heart of the challenge:

Since at least the end of World War II, the United States and Europe have been strong partners and advocates — in word and usually in deed — in support of international institutions and the rule of law in relations between states. Yet, in recent years, the United States and European governments have found themselves at odds over a range of international legal issues. While the European Union has taken the role of enthusiastic promoter of the ICC, for instance, the United States has refused to join and sought immunity for its citizens from potential Court action.³⁰

Reviewing key recommendations for “building a consensus” on the ICC, it is clear that no consensus on the rule of IL was evident according to any ordinary meaning of that term.³¹ The report did point the way forward, with key recommendations including that the US: “Review its own legal code for compatibility with the standards set by the Rome Statute...; Seek promises of U.S. jurisdiction rather than immunity when negotiating Article 98 agreements; and Provide technical and evidentiary assistance to ICC procedures.”³² These are principles for a pragmatic agreement to split the difference in a court capable of advancing international criminal justice. They are in no way a formula for “a new transatlantic consensus on the role and scope of the international legal system.”³³ Limitations are not a product of the special history of the ICC, or the idiosyncrasies of legal policymakers,³⁴ but fundamental to the nature of the rule of IL.

The Obama administration’s *National Security Strategy* released in February 2015 mentions the ICC only once, and in terms that consolidate the preference for transnational and pragmatic development of the court. In the context of American promotion of liberal values the strategy commits to “work with the international community to prevent and call to account those responsible for the worst human rights abuses, including through support to the International Criminal Court, consistent

²⁷ Schabas describes the shift away from the Bush 43 administration’s Illiberal Nationalism as a “great diplomatic defeat for the United States”: Schabas, William, *An Introduction to the International Criminal Court* (Cambridge University Press, 4th ed, 2011) at 34

²⁸ See Kaye, David, ‘America’s Honeymoon with the ICC,’ *Foreign Affairs* (16 April, 2013) <<http://www.foreignaffairs.com/articles/139170/david-kaye/americas-honeymoon-with-the-icc>>

²⁹ Taft IV, William H. & Frances G. Burwell, *Law and the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law* (Policy Paper, The Atlantic Council of the United States, April, 2007) at 15. See Atlantic Council, *About the Council* <<http://www.atlanticcouncil.org/>>

³⁰ Taft IV, William H. & Frances G. Burwell, *Law and the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law* (Policy Paper, The Atlantic Council of the United States, April, 2007) at 3

³¹ *Ibid* at 10

³² *Ibid* at 3

³³ *Ibid* at 15

³⁴ As has been suggested in some accounts: See Benedetti, Fanny, Karine Bonneau, et al., *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Martinus Nijhoff Publishers, 2013) at 140

with U.S. law and our commitment to protecting our personnel.”³⁵ This commitment to flexible obligations under the ICC is couched within, and is given meaning by, a broader exceptionalist role in upholding the rule of IL. Noting “undeniable strains” in international legal architecture, the strategy stakes out beliefs that: “Strong and sustained American leadership is essential to a rules-based international order that promotes global security and prosperity as well as the dignity and human rights of all peoples. The question is never whether America should lead, but how we lead.”³⁶

CONTESTING THE RULE OF INTERNATIONAL LAW

Areas for Future Research

The greatest contribution from identifying the role of foreign policy ideology in the ICC is providing a framework capable of explaining American IL policy more generally. It is possible that the findings are limited to circumstances specific to the ICC, or are more relevant to explaining US policy toward international courts than broader legal issues. In relation to the first suggestion, the beliefs shaping ICC policy were hardly unprecedented. Congressional refusal to ratify the Genocide Convention for over 40 years was in large part due to fears it would expose American citizens to international prosecutions. The objection was only overcome through reservations denying that eventuality.³⁷ Likewise, from 1946 to 1986, the US accepted the compulsory jurisdiction of the ICJ subject to the “Connally reservation,” which allowed the US to determine on a case-by-case basis whether any legal dispute was the sole province of domestic courts.³⁸ Where the US was unable to rely on even this reservation to reorder international legal power it withdrew consent to compulsory jurisdiction entirely in 1986, while defending its decision as “commitment to the rule of law.”³⁹ Accordingly, the case is highly convincing for applying foreign policy ideology to explain future policy toward international courts generally.

As to the question of broader relevance, a range of puzzles in post-Cold War IL policy provide fertile ground for further research. The leading case which could corroborate the ICC findings is IL policy in the “long war with Iraq,” lasting from 1990 to 2011 (and perhaps to the present day).⁴⁰ The legal policy of each President from Bush 41 onward has provoked voluminous analysis about implications for the rule of IL. An example of the type of puzzle that foreign policy ideology could address is convergent legal justifications for the use of force against Iraq during the Clinton and Bush 43 administrations. The legality of airstrikes carried out throughout the 1990s under Clinton was

³⁵ The White House, *The National Security Strategy of the United States of America 2015*, The White House (2015) at 22

³⁶ *Ibid* at i

³⁷ Struett, Michael J., *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, 2008) at 69

³⁸ See Murphy, Sean D., ‘The United States and the International Court of Justice: Coping with Antinomies’ in Cesare P.R. Romano (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge University Press, 2009) at 65-66

³⁹ US Department of State, cited in Leich, Marian N., ‘U.S. Withdrawal of Proceedings Initiated by Nicaragua’ (1985) 79 *American Journal of International Law* 431 at 441. See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* [1984] ICJ Rep 392. Although the declaration under *Charter of the United Nations* (1945), Article 36(2) was withdrawn, the US did continue to accept ICJ jurisdiction under several treaties, including the *Vienna Convention on Consular Relations* (1963) at issue in subsequent cases: *Lagrand (Germany v. United States of America)* [2001] ICJ Rep 466; *Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Rep 12

⁴⁰ Lynch, Timothy J., ‘Obama, Liberalism, and US Foreign Policy’ in Inderjeet Parmar, Linda B. Miller & Mark Ledwidge (ed), *Obama and the World: New Directions in US Foreign Policy* (Routledge, 2014) at 47

based in part on implied and revived authorisation of UNSC resolutions from the Persian Gulf War⁴¹ which became the explicit foundation for the 2003 invasion.⁴² Yet, despite commonalities, there was a conspicuous contrast between intense criticism of the 2003 War, both domestically and externally, and minimal criticism of the Clinton airstrikes. Bellinger has argued that “there was either legal authority to use force, or there was not...[and] if there was not legal authority to use force, then the legal problem did not begin in 2003 – it went all the way back through the 1990s.”⁴³ Identifying ideological shifts can move beyond doctrinal analysis to distinguish these periods according to competing conceptions of the rule of IL.

A further question raised in this study is whether the theorised ideological structure extends beyond the executive and legislative branches to the judiciary as “legal policymakers”: Do judges’ conceptions of IL exhibit the same ideological dimensionality and structure as general foreign policy? Within the US Supreme Court in particular, views on IL and its reception into the common law have animated intense disagreements that parallel beliefs within each administration. There is some truth to Sands’ description of certain members of the US Supreme Court refusing to follow IL pursuant to an “exceptionalist and isolationist perspective that sees America as an island of law hermetically sealed off from the rest of the world.”⁴⁴ Conversely, other judges have argued forcefully for the integration of American law into transnational processes.⁴⁵

As a *prima facie* case, the divergence between majority and minority judgements in *Hamdan*⁴⁶ correlates with the ideological structure of foreign policy.⁴⁷ The majority judgement found that Common Article 3 of the 1949 Geneva Conventions constrained the US government, and moreover, that the standard for a “regularly constituted court” trying detainees was found in the additional protocols to the Geneva Conventions that the US had accepted in policy statements, but had declined to ratify.⁴⁸ In contrast, the dissent of Justice Thomas interpreted Common Article 3 permissively as being inapplicable pursuant to a “duty to defer to the President’s understanding of the provision at issue.”⁴⁹ Certainly the Bush 43 administration recognised in its second term that its shift in support for the rule of IL mirrored the majority judgement. When the Justice Department first conducted a review of detainee practices, Rice rejected the resulting executive order for failing to accord with the principles set out in the Supreme Court ruling.⁵⁰ Compliance with Common Article 3 was considered necessary to reassure European allies of US fidelity to the rule of law and thus for

⁴¹ Symes, Gavin A., ‘Force Without Law: Seeking a Legal Justification for the September 1996 US Military Intervention in Iraq’ (1997) 19 *Michigan Journal of International Law* 581 at 602-608

⁴² Through the combined operation of UN Security Council Resolutions 678 (1990), 687 (1991), and 1441 (2002): Taft IV, William H. & Todd F. Buchwald, ‘Preemption, Iraq and International Law’ (2003) 97 *American Journal of International Law* 557 at 559-560. Notably Taft has conceded that this interpretation “certainly did have a weakening effect” on the institution of the UNSC by likely increasing reluctance to pass future resolutions: See Taft IV, William H., *Interview with Author* (22 November, 2011)

⁴³ Bellinger III, John B., ‘Interview with John Bellinger,’ *International Bar Association* (2011) <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=37f4f087-bc3a-4c21-a108-92f15391785c>>

⁴⁴ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at 252

⁴⁵ For a useful profile see: Toobin, Jeffrey, ‘Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court’ (2005) September 12 *New Yorker* 42

⁴⁶ *Hamdan v. Rumsfeld* (2006) 548 U.S. 557

⁴⁷ Abebe and Posner appear to interpret *Hamdan* in these terms: See Abebe, Daniel & Eric A. Posner, ‘The Flaws of Foreign Affairs Legalism’ (2010) 51 *Virginia Journal of International Law* 507 at 532-533

⁴⁸ *Hamdan v. Rumsfeld* (2006) 548 U.S. 557 at 633 per Stevens J. Referring to Article 75 of Protocol I to *Geneva Conventions* (1949)

⁴⁹ *Hamdan v. Rumsfeld* (2006) 548 U.S. 557 at 718-719. See also Ku, Julian & John Yoo, *Taming Globalization: International Law, the US Constitution, and the New World Order* (Oxford University Press, 2012) at 221

⁵⁰ Rice, Condoleezza, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC, 2011) at 503

advancing US legal interests.⁵¹ Beliefs evident in the judicial ruling were at least correlated with the executive's worldview.

Moving beyond American IL policy, this research has the potential to bring greater understanding to the international legal system more generally. The focus of the work has been inward, looking at the ideological structure of American international legal practice. But the correlative is the impact of American policy on the design and development of IL. One possible application of these findings is to refine accounts of the American IL "epoch." This extends Grewe's foundational work in identifying the particularistic features of the current period in what is otherwise the consistent story of great powers shaping law.⁵² The American footprint can be seen in the P-5 privileges of the UNSC, in increasingly permissive rules on the use of international force,⁵³ and in the design of the ICC itself. The structure of legal beliefs set out herein provides a tool for understanding the principles that moulded each of these areas of law into its particular form.

The Rule of International Law as Process

In 2005, US legal policymakers faced the task of redressing perceptions among allies that Illiberal Nationalist attitudes in the early years of the Bush 43 administration signalled a retreat from the rule of IL. Secretary Rice used her address to the Annual Meeting of the American Society of International Law to emphasise what she described as America's:

strong belief that international law is vital and a powerful force in the search for freedom. The United States has been and will continue to be the world's strongest voice for the development and defense of international legal norms. We know from history that nations governed by the rule of law are nations that are just.⁵⁴

The gesture, in the context of a turn to Illiberal Internationalism, received a tepid response. In his concluding chapter entitled "Window Dressing," Sands noted that these were "important words, but they remain just that."⁵⁵ This thesis has made the case that the very meaning of the rule of IL is contested such that statements of legal obligation, including that by Rice, are not mere words to mask a conscious repudiation of legal ideals, but a manifestation of divergent political interests within the very meaning of the rule of IL. American legal policymakers' expressed commitments are to distinctive legal principles informed by the structure of four competing foreign policy ideologies: Liberal Internationalism, Illiberal Internationalism, Liberal Nationalism and Illiberal Nationalism. These conceptions set the parameters of possible commitments to legal ideals in American IL policymaking,

⁵¹ *Ibid* at 501; Scharf, Michael P. & 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) at 194-195

⁵² Grewe, Wilhelm G., *The Epochs Of International Law; Translated and Revised by Michael Byers* (Walter de Gruyter, 2000) at 701-703. For the current leading example of this endeavour see: Byers, Michael, 'Introduction: The Complexities of Foundational Change' in Michael Byers & Georg Nolte (ed), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003)

⁵³ See recent developments relating to military action in Iraq and Syria from 2014: Lederman, Marty, 'The War Powers Resolution and Article 51 Letters Concerning Use of Force in Syria Against ISIL and the Khorasan Group,' *Just Security* (23 September, 2014) <<http://justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group/>>; Ohlin, Jens David, 'The Unwilling or Unable Doctrine Comes to Life,' *Opinio Juris* (24 September, 2014) <<http://opiniojuris.org/2014/09/23/unwilling-unable-doctrine-comes-life/>>; Jorgensen, Malcolm A., 'Ungoverned Space: US Request to Join Fight in Syria Carries Legal Risk,' *Canberra Times* (26 August, 2015) <<http://www.canberratimes.com.au/comment/ungoverned-space-us-request-to-join-fight-in-syria-carries-legal-risk-20150826-gj7wxm.html>>

⁵⁴ Rice, Condoleezza, *Remarks at Annual Meeting of the American Society of International Law, Lowes L'Enfant Plaza Hotel, Washington, DC* (1 April, 2005) <<http://2001-2009.state.gov/secretary/rm/2005/44159.htm>>

⁵⁵ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at 253

and are united in accepting that the rule of IL “cannot rest upon an unbridled faith in legalism.”⁵⁶ The political foundation of IL is confirmed by Sands’ own position that he in contrast “unashamedly makes the case for international rules” in the belief that they “reflect common values, to the extent that these can be ascertained.”⁵⁷ Each side of this divide has the capacity to express good-faith commitment to legal principle, but the substance of those commitments remains indivisible from ideological context.

This thesis has equally emphasised that the task of defining legal principles to guide the design and development of international institutions should not be abandoned as futile. As Koskeniemi has argued, something must be built up beyond the recognition that law is politicised: “From the fact that law has no shape of its own, but always comes to us in the shape of particular traditions or preferences, it does not follow that we cannot choose between better or worse preferences, traditions we have more or less reason to hope to universalize.”⁵⁸ Intervening to argue that foreign policy ideology is ingrained in IL has been done to sharpen analytical understanding, not to defeat the political project of lawyers such as Sands looking to a rule of IL based on “common values.” That vision ultimately emerges as the core of contestation over the rule of IL: as a paradoxical quest to reconcile global power and transcendent values. Law is inevitably “always part of a political project that connects the present via the past to a future ‘utopia.’”⁵⁹ The claim made by each of the ideological types, and by legalist advocates, is to have melded power and principles within law. Yet each formulation necessarily represents partial values and particularistic interests. The rule of IL is thus better reconceived as a commitment to the process of debating the meaning of non-arbitrary global governance, equality under IL, and the proper ordering of international legal power. No participant has a monopoly on legitimate conceptions of the rule of IL, but value can be found in both the legalist commitment to formalised rights and duties, and in harnessing unrivalled American power to advance an effective international legal system.

The value of legalism is as a vehicle for contesting concentrated global power and its ossification in IL. What is required is a consciousness that formalised legal rules, sovereign equality, and the separation of international legal powers, are harnessed to a common political purpose. Moyn cautions that:

no one approaches international criminal law as a political enterprise. Its supporters, almost to a man and woman, appear to believe that the best way to advance it is to deny its political essence, as if talking about international criminal law exclusively as extant law would by itself convert passionately held ideals into generally observed realities. So long as no one interested in the topic openly discusses international criminal law as a political matter...the project will lack plausibility.⁶⁰

⁵⁶ Czarnetzky, John M. & Ronald J. Rychlak, ‘An Empire of Law: Legalism and the International Criminal Court’ (2003) 79 *Notre Dame Law Review* 55 at 126

⁵⁷ Sands, Philippe, *Lawless World: Making and Breaking Global Rules* (Viking, 2006) at xviii

⁵⁸ Koskeniemi, Martti, ‘International Law in Europe: Between Tradition and Renewal’ (2005) 16 *European Journal of International Law* 113 at 119

⁵⁹ Kratochwil, Friedrich, ‘Legal Theory and International Law’ in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge, 2009) at 56

⁶⁰ Moyn, Samuel, ‘Judith Shklar versus the International Criminal Court’ (2013) 4 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 473 at 494-495. See also Moyn, Samuel, ‘The International Law That Is America: Reflections on the Last Chapter of the Gentle Civilizer of Nations’ (2013) 27 *Temple International and Comparative Law Journal* 399

Shklar recognised the power of legalism to translate political values into a more desirable international order if adherents freed themselves “from the illusions of the ‘rule of law’ ideologists”⁶¹ in order to “promote legalistic values in such a way as to contribute to constitutional politics and to a decent political system.”⁶² In these terms Koskenniemi reasserts the value of legalism because of, rather than despite, its political foundation: “You need to choose the law that will be yours; you need to vindicate a particular understanding, a particular bias or preference over contrasting biases and preferences. The choice is not between law and politics, but between one politics of law, and another.”⁶³ By uncovering the role of foreign policy ideology a return to the formalised conception of the rule of law is no longer possible.⁶⁴ Yet there can be a second life for formalism, not as a “jurisprudential doctrine of the black and white of legal validity” but “as a culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it. As such, it makes a claim for universality that may be able to resist the pull towards imperialism.”⁶⁵

On the other hand, American conceptions of the rule of IL remain central and indispensable to the dialogue. The evidence is incontrovertible that American power put in the service of commonly agreed legal objectives has unmatched potential for realising an operational system of law. But it is also true that particular forms of American legal belief stray so far from the political views of global counterparts that they will be seen as inherently threatening, and as a barrier to even pragmatic compromises on global institutions. Nevertheless, in cases where US IL policy becomes conspicuously arbitrary, unequal or imperial, the promised release valve for other states remains genuine belief in American exceptionalism. For Kagan, the belief that national values are universal values means that “Americans have been forced to care what the liberal world thinks by their unique national ideology.”⁶⁶ Through that mechanism, policy toward the international legal system can be directed back toward politically acceptable bounds by “the steady denial of international legitimacy by fellow democracies.”⁶⁷

The advancement of the rule of IL remains an iterative process between irreconcilable positions that will challenge each other, occasionally align, but never converge on the precise conception of legal ideals. Yet consensus cannot be the ideal for law. The end state of each concept of IL is a utopian vision that could only be realised by levelling the rich diversity of ideological commitments and values of real people making up the international legal system: legal utopia presupposes a form of totalitarianism. The opposition of ideologies preserves the vision of reconciling power and transcendent values precisely because it is a contest that cannot be resolved.

⁶¹ Shklar, Judith N., *Legalism* (Harvard University Press, 1964) at 142

⁶² *Ibid* at 145

⁶³ Koskenniemi, Martti, ‘International Law in Europe: Between Tradition and Renewal’ (2005) 16 *European Journal of International Law* 113 at 123

⁶⁴ See Koskenniemi, Martti, *The Gentle Civilizer of Nations 1870-1960* (Cambridge University Press, 2001) at 495

⁶⁵ *Ibid* at 500

⁶⁶ Kagan, Robert, *Of Paradise and Power* (Vintage Books, 2004) at 151

⁶⁷ *Ibid* at 152

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