4

Clinton Administration, 1992–2000

The presidency of Bill Clinton coincided with the most decisive years for the ICC as the project progressed from a preliminary ILC report in 1992[1] to the foundational treaty signed by 139 countries by the end of 2000.[2] In 1992, the project consisted merely of provisional agreements by the Bush 41 administration about the notion of the court, thereby leaving the new administration the task of negotiating the ICC's function and design. These years were also notable for persistent allegations of contradictory policy: that the United States was a prominent ICC advocate in the early years; conspicuously voted against the final treaty concluded in 1998; then ultimately signed, but while warning against Senate ratification. This is therefore fertile ground for explaining whether and how ideology illuminates 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.[3] 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.[4] Based in New York, the CICC has been particularly significant in 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 international rule of law that included:

[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] See M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text of the Statute, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2005), vol. 1, pp. 74–5.
[4] See Fanny Benedetti, Karine Bonneau & John Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994–1998* (Martinus Nijhoff Publishers, 2013), p. 68.

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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.[5]

These principles represented the core elements of a legalist conception of the ICC as it structured global challenges to the integrity of US policy.

Significant divergence, of course, existed *between* states opposing US ICC policy in this period, with positions during the Rome Conference ranging from a more legalist conception by Germany[6] to a French position reflecting many of the American preferences. Nevertheless, although P5 UNSC members maintained a loose coalition for much of the negotiations, the UK eventually broke away, and France and Russia ultimately approved the statute after obtaining last-minute concessions.[7] France, in particular, thereafter defended its altered position against US demands as 'a matter of principle'.[8] 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), the CICC and the bloc of over 60 countries comprising the so-called 'like-minded states' (LMS). 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.[9] Moreover, the EU has cited the CICC as playing a central role coordinating policy among the three groups.[10]

[5] Cited in Claude E. Welch Jr & Ashley F. Watkins, 'Extending Enforcement: The Coalition for the International Criminal Court' (2011) 33 *Human Rights Quarterly* 927, p. 967.
[6] See Yvonne Dutton, *Rules, Politics, and the International Criminal Court: Committing to the Court* (Routledge, 2013), pp. 70–1.
[7] Specifically a seven-year 'opt-out provision' against prosecution: William K. Lietzau, 'International Criminal Law after Rome: Concerns from a US Military Perspective' (2001) 64 *Law and Contemporary Problems* 119, p. 131.
[8] Caroline Fehl, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford University Press, 2012), pp. 103 & 108.
[9] Theo van Boven, 'The European Union and the International Criminal Court' (1998) 5 *Maastricht Journal of European and Comparative Law* 325, p. 325. See Philippe Krisch QC & Darryl Robinson, 'Reaching Agreement at the Rome Conference', in Antonio Cassese, Paola Gaeta & John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), pp. 70–1. Also termed 'the Like-Minded Group' in some accounts.
[10] General Secretariat of the Council, 'The European Union and the International Criminal Court', May 2010, https://publications.europa.eu/en/publication-detail/-/publication/c3f8f6f3-b507-4adf-8111-b8b6f2cf8bfd, p. 29.

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Despite expectations among some participants that US involvement might lead to its membership, Michael Struett concluded that 'the court that was promoted by the U.S. government is not the one whose charter was adopted in Rome in 1998'.[11] This chapter analyses decision-making processes to demonstrate that US policy never accepted legalist ideals but, rather, was structured by ideologically informed American conceptions of the international rule of law. The administration's approach often aligned with that of global court advocates in the commitment to ending international criminal impunity, but it diverged on the ideal form of global governance for achieving that objective. Positions crucially diverged in US resistance to 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 legal ideals advocated by other major participants.

Inherited ICC Policy: Bush 41 Administration

The Clinton administration did not instigate US engagement with the ICC but, rather, faced the choice of either adopting policies set in place by the Bush 41 administration or 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. Stuart 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'. This was no mere 'careless disregard' for law; rather, it was 'an attempt to pressure the international legal system into changing in a manner beneficial to United States interests'.[12] Struett reviewed interactions with the ICJ across both the Reagan and the Bush 41 administrations to find 'an entirely strategic

[11] Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, 2008), pp. 70–1.

[12] Stuart S. Malawer, 'Reagan's Law and Foreign Policy, 1981–1987: The "Reagan Corollary" of International Law' (1988) 29 *Harvard International Law Journal* 85, p. 85.

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attitude' in which each administration 'sought to use that international court as one instrument to obtain its strategic objectives'.[13]

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 UNGA recommitment to the project until the end of the Bush 41 administration.[14] 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'.[15] 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'.[16]

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 relevant to this IL policy only to the extent to which they had a direct impact on American security, with the administration concerned primarily with the legal regime governing terrorism and international drug trafficking.[17] 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.[18] The administration nevertheless remained resistant to the idea, causing former Nuremburg prosecutor Professor Ferencz to express incomprehension given the atrocities being committed in Iraq.[19] However, the

[13] Struett, *The Politics of Constructing the ICC*, p. 68.
[14] See Benjamin B. Ferencz, 'International Criminal Code and Court: Where They Stand and Where They're Going' (1992) 30 *Columbia Journal of Transnational Law* 375, p. 388.
[15] Michael P. Scharf, 'Getting Serious about an International Criminal Court' (1994) 6 *Pace International Law Review* 103, pp. 103–4.
[16] Ibid., p. 105.
[17] See Michael P. Scharf, 'The Jury Is Still Out on the Need for an International Criminal Court' (1991) 1 *Duke Journal of Comparative and International Law* 135, pp. 149–54.
[18] Stuart H. Deming, 'War Crimes and International Criminal Law' (1994) 28 *Akron Law Review* 421, p. 422.
[19] Ferencz, 'International Criminal Code and Court', pp. 385–6.

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apparently contradictory policy cohered to an illiberal internationalist international rule of law that embraced legal architecture with a limited jurisdiction to facilitate narrowly defined security interests. This is distinct from supporting the court to vindicate breaches of human rights perpetrated by Hussein as its primary objective, as would be the case according to a legalist or liberal internationalist policy. Support for a tribunal advancing limited strategic objectives in the aftermath of a war is easily 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 composed of a loose network of treaties and extradition agreements. Pursuant to the 1989 UNGA resolution, the ILC submitted a report on the scope and feasibility of establishing international criminal jurisdiction.[20] The US representative to the UN Sixth Committee John Knox 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'.[21] In essence the proposed court was seen to derogate from the international rule of law as established by existing legal relations between national courts and treaty regimes, which enabled rather than constrained pragmatic pursuit of national interests.

The intersection of illiberal and internationalist beliefs was most clearly demonstrated in the administration's responses toward policymakers advocating competing IL policies. A key initiative of Bush's opponents, led principally by Senator Arlen Specter, was the passage of legislation through the US House of Representatives in October 1990 calling for the president, among others, to explore the establishment of an international court and report their findings back to Congress.[22] The initial bill was ultimately amended to incorporate the administration's concerns, expressed through Assistant Secretary of State for Legislative Affairs Janet G. Mullins. She wrote 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

[20] 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).

[21] Office of the Legal Adviser, Department of State, *Digest of United States Practice in International Law: 1989–1990* (International Law Institute, 2003), p. 134.

[22] Ultimately passed by both houses as *Foreign Operations, Export Financing, and Related Programs Appropriations Act* 1991 Pub L 101–513, s. 599E.

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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'.[23] 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'.[24] 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'.[25]

Scharf well summed up the overall Bush 41 policy when recommending, during the closing months of the administration, that the US continue advancing interests through the court while preserving its 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.[26] Doing so became the illiberal internationalist IL policy inherited by the newly inaugurated Clinton administration.

Dominant Foreign Policy Ideology

The general foreign policy worldview of the Clinton administration is commonly characterised as strongly internationalist and more inclined toward liberal values.[27] Ivo Daalder and James Lindsay describe 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

[23] Janet G. Mullins, *Letter from Assistant Secretary Mullins to Dante B. Fascell, Chairman, Committee of Foreign Affairs, House of Representatives* (11 December 1990), p. 3.
[24] Ibid., p. 2.
[25] Department of State, *Digest of US Practice: 1989–1990*, p. 128.
[26] Scharf, 'The Jury Is Still Out on the Need for an ICC', p. 168.
[27] Walter R. Mead, *Special Providence: American Foreign Policy and How It Changed the World* (Routledge, 2002), pp. 282–96; Colin Dueck, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006), pp. 128–37.

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the rule of law'.[28] Clinton's first Secretary of State, Warren Christopher, noted Clinton's early embrace of democracy promotion as a 'core tenet of his foreign policy'.[29] During the 1992 presidential election, Clinton had 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'.[30] 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'.[31] 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.[32]

This formulation of democracy promotion combines liberalism and internationalism to directly structure the design and development of IL and thereby promote US interests.

Liberal internationalist beliefs were recurrent themes for both of Clinton's Secretaries of State. For Warren Christopher, the United States supported democracy and human rights in Asia because 'states that respect the rule of law at home are more likely to observe the rule of international law abroad'.[33] By recognising America's values as universal, and its exceptional role in spreading them, the United States was 'not imposing an American model; we are supporting a universal impulse for freedom'. Moreover, American 'involvement is essential to regional peace, prosperity, and the promotion of freedom ... [T]he universal

[28] Ivo H. Daalder & James M. Lindsay, *America Unbound: The Bush Revolution in Foreign Policy* (Brookings Institution Press, 2003), p. 12.
[29] Warren Christopher, *In the Stream of History: Shaping Foreign Policy for a New Era* (Stanford University Press, 1998), p. 63, n. 2.
[30] Cited in Dueck, *Reluctant Crusaders*, p. 128.
[31] Mead, *Special Providence*, p. 284.
[32] William J. Clinton, 'Remarks at the University of Connecticut in Storrs', 15 October 1995, www.presidency.ucsb.edu/node/220652.
[33] Christopher, *In the Stream of History*, p. 159.

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values we embody – freedom, democracy, and the rule of law – make us a beacon for all the peoples of the region.'[34]

Clinton's second Secretary of State, Madeleine Albright, turned to an exceptionalist portrayal of the United States as 'the indispensable nation'.[35] Her explanation of the phrase is revealing for both the meaning and the legal impact of her beliefs. Albright acknowledged that the claim could be seen as 'arrogant', but asserted that it referred 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 that Albright meant, it would demonstrate not 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'. Here, Albright appeals to a perceived universality of US values and motivations and, thus, to the claim that US legal obligations and political interests are reconciled. In this frame, Albright declared: '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.'[36] The United States as 'indispensable nation' is not merely a claim to the global significance of US power but, more fundamentally, that the liberal values directing US policy are indispensable to the international rule of law.

The historical record also indicates that the administration was influenced more generally by internationalist principles spanning both ends of the liberal-illiberal dimension. Albright appeared mindful of straddling competing values 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

[34] Ibid., p. 159. Notably Christopher fails to mention the ICC in this or his subsequent memoir: Warren Christopher, *Chances of a Lifetime: A Memoir* (Simon and Schuster, 2001). Scheffer notes the same omission in Albright's memoir: David J. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012), p. 230.

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

[36] Ibid., p. 506.

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> 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.[37]

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 defending human rights but being prepared to balance them against national security issues.

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 Issues.[38] The very creation of this role was significant in signalling US commitment to addressing war crimes as a central component of its IL policy.[39] Scheffer's memoir is a valuable account of his conception of the court and the political machinations that produced final policy outcomes. His support for the ICC aimed to make credible the Clinton administration's principled claim that it 'took the rule of law seriously'.[40] Scheffer's own beliefs are unequivocal in the American obligation to engage internationally through IL to uphold liberal values, yet his public statements make it equally clear that no single set of ideas captured the logic of US IL policy during the period. His account demonstrates especially that competing 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 Defense and Justice, 'the key agencies have to feel comfortable'.[41] For Scheffer, the administration's 'commitment to international justice made a significant difference' and yet, through the influence of competing beliefs, leading figures were 'sometimes weakened in their resolve'.[42] Understanding the specific legal positions taken by the United States therefore requires an account

[37] Ibid., p. 505.
[38] Described by Albright as the 'father of the war crimes tribunals': Scheffer, *All the Missing Souls*, pp. 8–9.
[39] Ibid., p. 3.
[40] Ibid., p. 172.
[41] Ibid., pp. 178–9.
[42] Ibid., p. 7.

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that disaggregates competing policymaking voices to reveal underlying belief structures about the international rule of law.

Developing Non-arbitrary Global Governance

The explicit policy shift from obstruction under the Bush 41 administration to active support under Clinton was interpreted by both America's global counterparts and domestic court advocates as renewed commitment to 'greatly strengthen the rule of law'.[43] 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 non-arbitrary global governance. If so, the eventual refusal to endorse a court design greatly strengthening the formal structure of global governance could be interpreted as erosion of the legal ideal by interests extraneous to law. Alternatively, US policy was structured from the beginning by a particularistic conception of the international rule of law, in which formalised development of international criminal law was only one path toward non-arbitrary governance. The liberal internationalism evident in the administration's legal policy more generally would suggest formalised obligations only as a means for achieving that end, but not a necessary one. The more consequential requirement for realising the international rule of law would remain effective transnational processes to promote the integrity of law. US policy shown to be structured by ideologically informed American conceptions would provide robust evidence that legalist beliefs remained external to 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'.[44] From this perspective, any gap in defining and enforcing international rights and duties was necessarily filled by discretionary

[43] See Johan D. van der Vyver, *The International Criminal Court: American Responses to the Rome Conference and the Role of the European Union* (Inst. für Rechtspolitik, 2003), p. 3.

[44] Cited in James Podgers, 'Praised and Prodded: U.N. Conferees Urge Lawyers to Build on Past Efforts to Bolster Human Rights' (1998) 84 *American Bar Association Journal* 92, p. 92.

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decisions of states and was thereby *ipso facto* inconsistent with the rule of law. The task of developing non-arbitrary forms of global governance translated into broad ICC jurisdiction, to eliminate as far as possible the extra-legal discretion of states when responding to international criminal matters. That principle was demonstrated most clearly in opposition to granting amnesties from international prosecutions as part of negotiated peace settlements. Gerhard Hafner et al. argued that it was imperative for the ICC to exclude recognition of amnesties 'irrespective of the political implications of the situation'. To do otherwise ran 'counter to the basic objectives of the United Nations'.[45] Here, legalist advocates applied a doctrinal analysis to the formal 'legal effect' of the Rome Statute crimes, which were held to establish an *erga omnes* duty to prosecute. The case for removing prosecutorial discretion from states turned on a view that '[u]nlike the horizontal relations in extradition and judicial assistance, the relation between the ICC and states parties is a vertical one'.[46] Realising the international rule of law thus required both universal accession to the court's founding statute and substitution of the court's formal authority for political discretion in global governance.

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.[47] State Department Legal Adviser Conrad Harper announced that the new administration had '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'.[48] According to Scheffer, on as many as six occasions prior 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

[45] Gerhard Hafner, 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, pp. 109 & 111.
[46] Ibid., p. 112.
[47] Scharf, 'Getting Serious about an ICC', p. 103.
[48] Cited in ibid., p. 109.

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prosecute crimes against humanity'.[49] 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'.[50] Yet careful examination reveals that, despite a common desire to end impunity under the law, the administration's renewed 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.' The Chairman concluded his remarks by reminding the nominee that 'you will take office at a time when you can truly reshape the world'.[51] 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'.[52] Dodd's own father had been Deputy Prosecutor at the Nuremberg trials,[53] with the vision of both father and son cited by Clinton as contributing to his ultimate support for the permanent court.[54] 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'. In this context, Dodd continued:

> [D]espite 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 . . .

[49] David J. Scheffer, 'The United States and the International Criminal Court' (1999) 93 *American Journal of International Law* 12, p. 13. See William J. Clinton, 'Remarks in New York City Commemorating the 50th Anniversary of the Universal Declaration of Human Rights', 9 December 1997, www.presidency.ucsb.edu/node/223909.

[50] *Foreign Relations Authorization Act, Fiscal Year 1994 and 1995,* 1994 Pub L 103–236.

[51] Committee on Foreign Relations, United States Senate, *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), pp. 1–2.

[52] Ibid., p. 13.

[53] See Christopher Dodd, *Letters from Nuremberg: My Father's Narrative of a Quest for Justice* (Random House Digital, Inc., 2008).

[54] William J. Clinton, *My Life* (Hutchinson, 2004), p. 674.

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> Recent events suggest that a crimes tribunal is a critical element to restoring and maintaining the international rule of law.[55]

Even from this point, the project was signalling a special US role and, moreover, one likely to challenge a formalised design excluding policy discretion. Dodd emphasised that the ICC would 'never happen, in my view, unless the United States takes the leadership role in this issue'.[56] 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.[57]

The distinction from legalism matters, since this exchange presupposes an exceptional US role making IL work, and one advocated throughout the Clinton administration as more decisive to the international rule of law than the substance of any ICC agreement.

The significance of this more policy-oriented understanding of the ICC is evident in the words of Christopher's successor Madeleine Albright, who contextualised the court within broader liberal internationalist commitment to 'building a more integrated, stable, and democratic world, with increased security for all who respect the interests and rights of others'.[58] That understanding again emphasised transnational connections between international criminal law and democracy as central to promoting non-arbitrary governance. US commitment to underwriting any process that strengthened these liberal values mattered, and more so than any specific court design formalised in a binding treaty, or of securing its universal membership.

Pragmatic Development of the ICC

Although liberal internationalist beliefs dominated in this period, they competed throughout with alternative ideologically informed conceptions of IL.

[55] United States Senate, *Nomination of Warren M. Christopher*, p. 13.
[56] Ibid., p. 72.
[57] Ibid., pp. 72–3.
[58] Albright, *Madam Secretary*, pp. 504–5.

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In particular, legal policymakers from the Department of Defense strongly emphasised a more pragmatic approach, and one moreover that Scheffer believed 'undercut my negotiating posture with other governments'.[59] Immediately before the Rome Conference, the Pentagon issued a cable to military representatives from over 100 states expressing concerns that advocates were expanding crimes within the court's statute beyond their customary limits. The cable warned that the ICC 'must not be used to push the envelope of international law'.[60] The most detailed account of these military views is 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. Following the Conference, he went on to prepare the draft elements of crimes relied on at the Preparatory Commission for the Establishment of an ICC between 1999 and 2002.[61] Scheffer described Lietzau as 'instrumental' in persuading participants at Rome and the Preparatory Commission to explicitly define elements of crimes falling under the court's jurisdiction rather than leaving them to judicial discretion.[62]

Lietzau's jurisprudence was firmly internationalist in advocating global institution building and in opposing the Rome Statute for threatening American international engagement.[63] Along the values dimension, his position primarily emphasised illiberal concerns to maximise American strategic autonomy for national security purposes. He did acknowledge the broader liberal context of the court as a means for addressing atrocities, but this concern was addressed by advocating greater 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.[64]

[59] Ibid., p. 190. See Karl K. Schonberg, 'The General's Diplomacy: US Military Influence in the Treaty Process, 1992–2000' (2002) 3 *Seton Hall Journal of Diplomacy and International Relations* 68, pp. 78–9.

[60] Dated 31 March 1998 and reproduced as 'Appendix C' in Ellen Grigorian, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns* (Congressional Research Service, 6 January 1999), p. 32.

[61] 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.

[62] Scheffer, *All the Missing Souls*, pp. 231–2.

[63] See Lietzau, 'International Criminal Law after Rome', p. 126.

[64] Ibid., p. 139.

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What is notable about Lietzau's recollections of and proposals for the court is his framing that 'the rule of law must itself be preeminent'.[65] 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.'[66] 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 the projection of a domestic analogy to the international level, however, as not only misguided but also a threat to the realisation of the international rule of law itself. Rather than seeing law controlling politics in the court, he identified the court itself as threatening to constrain American foreign policy through 'politically-motivated charges'.[67] This view was no less focused on the idea of the international rule of law than the dominant approach within the administration, but it eschewed the central focus on liberal values, which were promoted only indirectly through pragmatic considerations of national security.

Pragmatism was also evident in the preferences among some US legal policymakers to exclude the role of IL altogether, where strictures of international criminal law were seen to impede peace agreements. This initiative was led in part by then national security adviser Sandy Berger, with specific reference to the 1994 amnesty given to coup leaders in Haiti to facilitate the return of ousted president Jean-Bertrand Aristide.[68] Here, Scheffer acknowledged that the very idea of limiting jurisdiction by political amnesties 'seemingly flew in the face of the entire purpose' of the ICC.[69] John Czarnetzky and Ronald 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'.[70] However, in illiberal internationalist

[65] Ibid., p. 139.
[66] William K. Lietzau, 'Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court' (1999) 32 *Cornell International Law Journal* 477, p. 487.
[67] William K. Lietzau, '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, p. 516.
[68] Michael P. Scharf, 'Justice versus Peace', in Sarah B. Sewell & Carl Kaysen (eds.), *The United States and the International Criminal Court: National Security and International Law* (Rowman & Littlefield Publishers, 2000), p. 180.
[69] Scheffer, *All the Missing Souls*, p. 183.
[70] John M. Czarnetzky & Ronald J. Rychlak, 'An Empire of Law: Legalism and the International Criminal Court' (2003) 79 *Notre Dame Law Review* 55, p. 94, original emphasis.

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terms, pragmatically defining exceptions to law's proper reach remained entirely consistent with eliminating arbitrariness within a stable global legal system.

Nationalist Objections

From the very first discussions in 1994, competing internationalist conceptions were met with forceful nationalist opposition to the very concept of the court and any enlargement of the international legal system. At a 1998 US Senate hearing on the Rome Conference, the chairman, Senator Rod Grams, expressed liberal nationalist concerns that the court's jurisdiction came at the expense of US constitutional protections and that judges might be selected from undemocratic countries lacking the rule of law at home. He concluded with the plea that the court 'shares the same fate as the League of Nations and collapses without U.S. support . . . [T]his court truly I believe is the monster and it is the monster that we need to slay.'[71] The voice of illiberal nationalist opposition was led by Senator Jesse Helms, who served as Chairman of the Senate Committee on Foreign Relations from 1995 to 2001. In an open letter to Secretary Albright he declared himself 'unalterably opposed to the creation of a permanent U.N. criminal court' that would be 'dead-on-arrival' in the Senate unless 'a clear U.S. veto' was provided for.[72] 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 never constraining US power. In the absence of this unlikely design, Scheffer concluded that Helms' singular intention became 'to kill the court and any American role in it'.[73] For these reasons, Scheffer described feeling only 'soiled' when Helms later congratulated him for ultimately rejecting the Rome Statute.[74] In these examples, nationalist US legal policymakers contested not only legalism but also internationalist American policymakers, with agreement only on the outcome of all opposing the final agreement at Rome.

[71] Committee on Foreign Relations, United States Senate, *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations United States Senate,* 2nd Session 105th Congress (1998), pp. 2–4.

[72] Jesse Helms, 'Helms Vows to Make War on U.N. Court', *The New York Times*, 27 March 1998, www.nytimes.com/1998/03/27/world/helms-vows-to-make-war-on-un-court.html.

[73] Scheffer, *All the Missing Souls*, p. 188.

[74] Ibid., p. 231.

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Conclusion

US policy toward developing global governance has been perceived as the high-water mark of contradictions in its ICC policy. The United States 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, 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.[75]

Clinton later recalled of this statement: '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.'[76] 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.

Yet the policy of securing an exceptional US role while standing outside formal treaty obligations hews closely to the legal ideals evident within the administration. Clinton's Acting State Department Legal Adviser Michael Matheson later argued that the 'critical question' was not whether the United States ratified the Rome Statute but, rather, whether the United States sought to 'be helpful, to facilitate, to cooperate, to pursue common aims ... [T]hat's much more important than the technical question of whether the US is a party.'[77] Scheffer was well aware that the distance between American policy and the legalist position created an impression of the United States being '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'.[78] This claim is consistent with the evidence of a genuine commitment by key US legal policymakers to design and develop the ICC but subject to pre-existing ideological commitments. The 'alternative foundation' identified

[75] BBC, 'Clinton's Statement on War Crimes Court', *BBC News*, 31 December 2000, http://news.bbc.co.uk/2/hi/1095580.stm.
[76] Clinton, *My Life*, pp. 942–3.
[77] Michael J. Matheson, Interview with Author (19 October 2011).
[78] Scheffer, *All the Missing Souls*, p. 217.

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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.

Defining Equality under International Law

During the period of designing and establishing the ICC, the principle articulated as indispensable by global advocates 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 international rule of law. The policy outcome for the Clinton administration was, in contrast, insistence on a design that acknowledged and facilitated the unequal role of the United States 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 the P5. Scheffer, who advocated this policy, conceded that the proposal amounted to a 'means of carving out an exceptionalist enclave for the United States'.[79] The beliefs of US legal policymakers about the connection between sovereign equality and the international rule of law are, therefore, central to the question of whether, and how, distinct legal conceptions informed the divergent US position.

Legalist Policy

Michael Scharf noted that a key factor in moving from UNSC created ad hoc criminal tribunals to a permanent court was the desire by a majority of UN members to eliminate unjustified P5 privileges.[80] Whereas a shared feature of both the Yugoslav and the Rwanda tribunals was being creatures of the UNSC, replicating this design would yield an ICC that had 'lost its political independence and compromised its impartiality and equal application of the law to all concerned'.[81] 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

[79] Ibid., p. 233.
[80] Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg* (Carolina Academic Press, 1997), p. 228.
[81] Bassiouni, *The Legislative History of the ICC*, vol. 1, p. 156.

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and equal justice for all'.[82] This is replicated in Caroline Fehl's observation that delegates at Rome saw US demands as 'conflicting with the principles of state equality and judicial fairness, and thus detrimental to the court's legitimacy'.[83] 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-Cold War distribution of international power.[84] For these states, establishing sovereign equality was always a key element of an ICC design consistent with the international rule of law. The case for a design based on state party rather than on UNSC referral gained traction in the years leading up to the Conference and, through a 'palace revolution',[85] largely prevailed in the Rome Statute.

Beliefs of American Legal Policymakers

Achieving Liberal Equality

At the level of general legal principles, Scheffer affirmed 'two basic building blocks' necessary for the rule of law, being 'reciprocity' in the rights and duties exercised between states and 'equality of nations' under international treaties. 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 the ICC crimes, however, this meant that 'no perpetrator of atrocity crimes should be able to avoid justice'.[86] Contradictory commitments to the rule of law are concealed by the simplicity of Scheffer's formulation but become visible in the many scenarios in which upholding sovereign equality is a practical barrier to prosecuting perpetrators of international crimes.

Scheffer's own conception expresses the internationalist belief that has been the main source of hypocrisy accusations: that the United States faced 'the paradox of being a leader for international justice but at the

[82] Johan D. van der Vyver, 'American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness' (2001) 50 *Emory Law Journal* 775, p. 777.
[83] Fehl, *Living with a Reluctant Hegemon*, p. 102.
[84] M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* (Transnational Publishers, 2005), vol. 3, p. 179.
[85] Ruth Wedgwood, 'The International Criminal Court: An American View' (1999) 10 *European Journal of International Law* 93, p. 97.
[86] Scheffer, *All the Missing Souls*, pp. 165–6.

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same time a leader for international peace and security'.[87] Justice under the ICC depended on the equal application of the law, but, as with any effective system of justice, the court also presumed a framework of effective enforcement mechanisms. For liberal internationalists, 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.[88] Scheffer's paradox was that, to achieve equal justice, it may sometimes be necessary to recognise inequality in American responsibilities before the law.

Murphy's explanation for contradictory policies toward the ICC was a belief that 'global responsibilities for maintaining the peace' should exempt US military personnel and civilians from appearing before the court.[89] A design that reduced the status of the United States to a single voice among many thereby risks undermining real commitment to the international rule of law. It is notable that Scheffer's reflections on the Rome Conference attributed significant blame not to the United States' insistence that its disproportionate military role be recognised through unequal legal protections but to its failure to properly explain its unique legal responsibilities. This represented a 'disconnect between our military commanders and those of other nations because they were not confronting atrocity crimes with the same understandings'.[90] The 'disconnect' is evident in Richard Goldstone's retort: '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.'[91] The suggestion of hypocrisy recedes only when the US position is seen as drawn from beliefs in America's messianic 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

[87] Thomas W. Lippman, 'War Crimes Court Approval Gives U.S. a Dilemma', *The Washington Post*, 23 July 1998, www.washingtonpost.com/archive/politics/1998/07/23/war-crimes-court-approval-gives-us-a-dilemma/a9fb27cf-8640-4a29-a253-14eb26c1c146/.

[88] See Scheffer's 1997 statement: Office of the Legal Adviser, Department of State, *Digest of United States Practice in International Law: 1991–1999* (International Law Institute, 2005), p. 626.

[89] John F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004), p. 7.

[90] Scheffer, *All the Missing Souls*, p. 228.

[91] Farhan Haq, 'Goldstone: US Stance Contradictory', 3 *Terra Viva*, 17 June 1998, www.legal-tools.org/doc/f83fcc/pdf/, p. 7.

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structure of the UNSC and the oversight of US veto power. 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.'.[92] Read in the context of the United States' beliefs about its role promoting liberal equality, insistence on UNSC privileges remained consistent with a liberal internationalist conception of IL.

Institutionalising Hegemonic Privilege

Liberal internationalist policy converged neatly with illiberal internationalist preferences for an institutional design preserving hegemonic privilege. The Pentagon made it clear from the beginning that the UNSC must retain sole power of referral over ICC crimes, reflecting beliefs in effective international legal power, as already institutionalised in P5 membership. Scheffer was informed by a Pentagon representative that the sheer global responsibilities of the United States, including 200,000 troops deployed in 40 countries, 'had to mean something in the negotiations'.[93] Lietzau was sceptical about the fixation on sovereign equality and any suggestion to treat the court as an apolitical judicial body. His conception took account of the 'unique and vital national security responsibilities' of the United States in maintaining international peace and security.[94] 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'.[95] The evidence from decision-making processes does not therefore point toward Defense Department lawyers disregarding legal principles for political expediency. Rather, policy was structured by beliefs that principles of sovereign equality actually sat in opposition to the international rule of law, as established by existing legal processes spanning municipal and international jurisdiction.

It is important not to conflate the two variants of internationalist thinking, which conflicted significantly at Rome. Despite Scheffer's insistence on a central UNSC role, he believed that the Defense approach 'made little sense', since it insisted on immunity for US forces while denying it to others.[96] That contradiction can again be understood in the

[92] United States Senate, *Nomination of Warren M. Christopher*, pp. 71–2.
[93] Scheffer, *All the Missing Souls*, p. 184.
[94] Lietzau, 'International Criminal Law after Rome', pp. 126 & 138–9.
[95] Ibid., p. 135.
[96] Scheffer, *All the Missing Souls*, p. 184.

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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. Pentagon demands for a right to withhold consent to prosecutions were integral to an institutional design recognising power realities, albeit structured by predetermined legal principles. The internal US compromise was ultimately to propose a design requiring consent only for *non*-parties to the Statute as 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 rejected outright by other negotiating parties for enshrining sovereign inequality in the law.[97]

Conclusion

Scheffer's characterisation of a 'paradox' in the US position cannot be understood apart from the context of exceptionalist beliefs about a US mission to vindicate 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 international rule of law, either because of the exceptional US role in promoting human rights globally, or because the rule of law could not 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 these conceptions with the rule of law: 'The Defense Department insisted on a 100 percent foolproof mechanism [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.'[98]

To the extent that there was legal incoherence in US policy toward the principle of equality, this reflected the compromise between competing

[97] See the position of UK legal adviser Frank Berman: ibid., pp. 211–12.
[98] Lippman, 'U.S. Caught in Bind on War Crimes'.

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American conceptions, rather than a tactical 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'. He concluded, however, that, owing to competing internal positions on the ICC, American policy was 'not a matter of principle or of self-interest but [one of] internal political expedience'.[99] This distinction, and his critique of the campaign led by Senator Helms, merely beg the question, however, since they do 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 in ideological terms.

Determining International Judicial Power

Throughout the Rome negotiations, legalist advocates insisted on a design achieving effective separation between the ICC's judicial and prosecutorial powers on the one hand, and parallel legal powers exercised by states parties and established international institutions on the other. This reflected a view that formally separating powers determined their integrity in the ICC as much as in municipal legal systems. These proposals entailed a deeper claim that it was both desirable and possible to institutionalise judicial power in an independent global court. 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. These principles were incorporated in a 1994 draft statute supported by the United States, which introduced the novel principle of 'complementarity', privileging national over international enforcement of Rome Statute crimes, and which required state consent or a UNSC referral for the ICC to exercise jurisdiction. That modest design avoided any claims to true universal jurisdiction, or the necessity of separating and institutionalising independent judicial power. Thus the question arises of whether US preferences to dilute judicial independence represented a tactical compromise on the international rule of law, or whether ideals of law itself were being contested.

[99] van der Vyver, 'American Exceptionalism', pp. 796–804.

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Legalist Policy

Max du Plessis identified among ICC proponents 'a growing conceptual awareness that because individuals live under the international legal system, they must necessarily have rights and obligations flowing from it'.[100] The institutional ideal entailed in such claims is for global judicial power that operates separately from national governments and courts implementing criminal law. Du Plessis cited the precedent of the post-WWII war crimes tribunals as a model with 'defining characteristics that draw their inspiration from the rule of law' including 'independent prosecutors and judges'.[101] 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'.[102]

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 United States had rejected the integrity of judicial powers in the Rome Statute, Roth demanded that the United States sign 'to reaffirm America's commitment to justice and the rule of law'.[103] Responding to US scepticism about the plausibility of a depoliticised international court, Roth argued that 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'.[104] In other words, the international rule of law was determined by a clear separation of ICC judicial power from other powers of international governance. This was reinforced by a design that ensured that the court's primary and secondary rules were separately determined by a '"legislature" – the governments that join the court'.[105]

Faith in the capacity of the court to transcend political interests was anchored in a variety of sources. Bassiouni argued that it was 'international

[100] Max du Plessis, '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, p. 304.
[101] Ibid., p. 303.
[102] van der Vyver, 'American Exceptionalism', p. 825.
[103] Kenneth Roth, '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), p. 19.
[104] Ibid., p. 28.
[105] Ibid., p. 29.

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civil society' that had 'finally reached the limits of its tolerance for impunity and now demands some modicum of justice'.[106] 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.[107]

French jurist Robert Badinter eloquently 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?[108]

Badinter's answer, which was the final statement in a lengthy and influential ICC commentary, is that depoliticisation will be upheld by 'NGOs dedicated to humanitarian action' and 'public opinion'.[109] Through these related formulations, legalist advocates resisted any design sharing the ICC's judicial powers with states and international bodies as contrary to the international rule of law.

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

[106] Bassiouni, *The Legislative History of the ICC*, vol. 1, p. 44.
[107] David Bosco, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014), p. 39.
[108] Robert Badinter, 'International Criminal Justice: From Darkness to Light', in Antonio Cassese, Paola Gaeta & John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), p. 1934.
[109] Ibid., p. 1934.

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United States. He referred to the supposed 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.'[110] 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'.[111] What this claim overlooked, however, is the central role of democratic legitimacy in 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 independent judicial power in the ICC but founded instead on cosmopolitan values.

Lietzau's jurisprudence expressed liberal commitment to the rule of law founded on 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. 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'.[112] 'American legal culture' was accordingly defined by a belief that judicial power must ultimately be tied to citizens' democratic control.[113] 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'.[114] Likewise, Scheffer argued that the United States 'could not negotiate as if certain risks could be easily dismissed or certain procedures of the permanent court would be infallible'.[115] These legal ideals remained central to US challenges to ICC judicial and prosecutorial independence.

[110] Responding to the decision in *Worcester* v. *Georgia* (1832) 31 *U.S. (6 Pet.)* 515.
[111] Bassiouni, *The Legislative History of the ICC*, vol. 1, p. xx.
[112] Lietzau, 'International Criminal Law after Rome', p. 136.
[113] Lietzau, 'Comments to the Panel on the ICC', pp. 548–9.
[114] Lietzau, 'International Criminal Law after Rome', p. 136.
[115] See Scheffer's 1999 statement: Department of State, *Digest of US Practice: 1991–1999*, p. 637.

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Complementarity as a Check on ICC Independence

The legalist principle for determining international judicial power was to establish ICC 'primacy' over domestic law, following the precedent of the ICTY and the ICTR.[116] The United States challenged that design from an early stage, proposing a court based on the novel principle of 'complementarity'. Primary prosecutorial obligations would be reserved to states, with ICC jurisdiction enlivened only when the state was deemed 'unwilling or unable genuinely to carry out the investigation or prosecution'.[117] The principle pressured states to 'prosecute nationally, or risk international prosecution', forming the quintessential example of IL playing a backstopping role in establishing a true transnational legal order.[118] Complementarity appeared to offer a genuine reconciliation between liberal internationalist and legalist preferences by preserving both municipal legal processes and the overarching authority of IL, with separate jurisdictions assumed to be 'guided by the same objectives'.[119] However, the record demonstrates that parties remained divided on whether the principle strengthened or derogated from the rule of law. Although states largely accepted complementarity, many held concerns that fracturing international judicial power would allow states to shield perpetrators through sham investigations. Indeed, the principle was accepted by many as a compromise to accommodate political interests and therefore it was considered to be incapable of ensuring ICC integrity in its own right.[120] For these policymakers, complementarity necessitated a counterbalance, by giving the court 'its own discretionary power to determine its jurisdiction'.[121] Advocates accordingly insisted on granting the ICC prosecutor *proprio motu* powers: the independent power to initiate an investigation and

[116] Bartram S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 *Yale Journal of International Law* 383, p. 385.

[117] *Rome Statute*, Art. 17(1)(a).

[118] David J. Scheffer, 'Challenges Confronting International Justice' (1998) 9 *Department of State Dispatch* 19, p. 22.

[119] Adriaan Bos, 'From the International Law Commission to the Rome Conference (1994–1998)', in Antonio Cassese, Paola Gaeta & John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), p. 44.

[120] James Crawford, 'The Work of the International Law Commission', in Antonio Cassese, Paola Gaeta & John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), p. 25.

[121] Bos, 'From the International Law Commission to the Rome Conference', pp. 44–5.

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bring a case before the court.[122] Germany reasoned that such power had the attraction of 'depoliticizing the process of initiating investigations'.[123] The Office of the Prosecutor (OTP) was thus created as an independent organ of the court, intended to promote the international rule of law by checking complementarity.[124]

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 judgement that 'a functioning national system is not bona fide'.[125] 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 ... [A]s 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.[126]

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 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.[127]

In this context, the United States rejected an independent prosecutor as 'utopian', thereby risking 'rejection of the Draft by States'.[128] For the United States, the nature of prosecutorial power has been somewhat contentious even at the level of municipal law, and was acutely so around the 1998 impeachment of President Clinton. It is nominally an extension of executive functions, yet the task of prosecution requires a degree of independence from executive direction. Executive control nevertheless

[122] See *Rome Statute*, Arts. 13(c), 15 & 53(1).
[123] Bassiouni, *The Legislative History of the ICC*, vol. 3, pp. 175–6.
[124] See *Rome Statute*, Arts. 34 & 42.
[125] Jamison S. Borek, 'Agenda Item 142: Establishment of an International Criminal Court', 1 November 1995, https://2009-2017.state.gov/documents/organization/65827.pdf, p. 3.
[126] UN, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc A/51/22 (1996), par. [154], emphasis added.
[127] See *Rome Statute*, Art. 18.
[128] Crawford, 'The Work of the ILC', pp. 33–4.

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remains crucial to ensure democratic accountability against 'frivolous or vindictive prosecutions'.[129] 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 beliefs of American policymakers, who saw the prosecutor 'making difficult public policy decisions' and therefore eroding both the appearance and the reality of prosecutorial impartiality.[130]

Former chief prosecutor of the Yugoslav and Rwandan Tribunals Justice Louise Arbour responded to US opposition by arguing:

> [T]here is more to fear from an impotent than from an overreaching Prosecutor . . . [A]n institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith for improper purposes . . . [T]he powers of the Prosecutor, and of the court itself, should be designed in a manner consistent with the effective enforcement of the statute.[131]

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 that itself required checking by an independent prosecutor.

Contesting 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.[132] Earlier stages of negotiation had seen calls from key states and voices within the LMS and CICC for a form

[129] Katy J. Harriger, 'The Law: Executive Power and Prosecution: Lessons from the Libby Trial and the US Attorney Firings' (2008) 38 *Presidential Studies Quarterly* 491, p. 493.

[130] Bassiouni, *The Legislative History of the ICC*, vol. 3, pp. 172–3.

[131] Louise Arbour, 'The Prosecutor of the International Tribunals for the Former Yugoslavia and for Rwanda [Urges] that the International Permanent Court "Be Strong and Well Equipped to Operate As an Authoritative Mechanism"', 8 December 1997, www.icty.org/sid/7434.

[132] Alternatively 'ceded jurisdiction': Gennady M. Danilenko, 'ICC Statute and Third States', in Antonio Cassese, Paola Gaeta & John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), p. 1881.

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of universal jurisdiction.[133] Those expansive claims were rejected by the United States for being 'in conflict with certain fundamental principles of international law'.[134] The final outcome under Article 12 of the Rome Statute was instead a regime based nominally on consent to jurisdiction by states parties, but with the extension of jurisdiction to all crimes committed in the territory of member states – irrespective of whether an accused was a national of a member state.[135] In consequence, territorial jurisdiction came to divide US policymakers from their global counterparts as the 'single most problematic part of the Rome Treaty'.[136]

What was not disputed was that states had a 'fundamental' right to exercise jurisdiction over crimes committed in their own territory, as confirmed in the landmark *Lotus Case*.[137] Furthermore, that right may extend to transferring jurisdiction to a third state that met relevant criteria for extradition. However, prominent voices went on to assert a right 'to transfer jurisdiction to another state that has jurisdiction over an accused, *or to an international adjudicating body*'.[138] The ICC regime was argued to constitute an analogous 'delegation' to an international court, which did not turn on state consent any more than did the direct exercise of territorial jurisdiction.[139] In so arguing, states invoked the *Lotus* principle: 'Restrictions upon the independence of States cannot therefore be presumed.'[140] Absent a specific contrary rule, delegated jurisdiction remained presumptively legal.

The United States contested the legality of delegated jurisdiction from the beginning, and did so from a position defended as 'grounded in law'.[141] For David Scheffer, the legalist position depended on a customary IL

[133] See, for example, the German and Korean proposals: M. Cherif Bassiouni, *The Legislative History of the ICC*, vol. 3, pp. 144–6.

[134] Borek, 'Agenda Item 142', p. 4. The US did, however, support a form of universal jurisdiction over the crime of genocide.

[135] *Rome Statute*, Art. 12(2)(a).

[136] David J. Scheffer, 'The International Criminal Court: The Challenge of Jurisdiction' (1999) 93 *Proceedings of the Annual Meeting (American Society of International Law)* 68, p. 69.

[137] See *S.S. Lotus, The (France* v. *Turkey)* (1927) No. 10 *PCIJ Ser A*, p. 20.

[138] Bassiouni, *The Legislative History of the ICC*, vol. 1, p. 136, emphasis added.

[139] Antonio Cassese, Paola Gaeta & John R. W. D. Jones, 'The Rome Statute: A Tentative Assessment', in Antonio Cassese, Paola Gaeta & John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), p. 1911.

[140] See *Lotus*, p. 18; Hafner et al., 'A Response to the American View', p. 117.

[141] See Scheffer's 1999 statement: Department of State, *Digest of US Practice: 1991–1999*, pp. 635 & 638.

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assumption 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 territorial jurisdiction, customary IL did not yet recognise the equal status of an international court.[142] Moreover, 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'.[143] The difference thus came down to a question of whether and how the ICC was distinguished from national courts for delegation purposes.

The jurisprudence of the US legal position was developed from the academic work of Professor Madeline Morris, whose critique of the delegation analogy was picked up and endorsed by Scheffer.[144] Up to that point, the US government had relied chiefly on arguments under the VCLT that, as a 'third State', the United States could not be bound by treaty obligations it had not consented to.[145] In Scheffer's words, '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'.[146] The legal objections were more fundamental for Morris, however, and went to the limits of institutionalised global judicial power. Whereas the 'jurisdictional structure of the ICC is based on a view of the ICC as a criminal court, *tout court*', which adjudicates over individuals, the nature of ICC cases would necessarily also adjudicate official acts of states. In these cases, 'the ICC's role as an adjudicator of interstate disputes is not adequately accounted for in the Court's jurisdictional design'.[147] Existing customary law rights could not therefore be delegated to an international court, which would carry 'an authoritative weight and resulting political impact of a categorically different nature' to those of municipal courts. Moreover, the ICC held 'the power to create

[142] Ibid., pp. 635 & 638.
[143] Scheffer, *All the Missing Souls*, p. 234.
[144] Madeline Morris, Personal Communication with Author (16 March 2018); Scheffer, *All the Missing Souls*, p. 478, n. 13.
[145] *Vienna Convention on the Law of Treaties* (1969), Art. 34.
[146] Scheffer's 1999 statement, pp. 635 & 638.
[147] Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States' (2001) 64 *Law and Contemporary Problems* 13, pp. 14–16.

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international law in a manner disproportionate to that of any state', which was not easily amended through domestic legislative processes.[148]

These are intriguing arguments, since the precise factors cited by Morris are those that legalist advocates cite as evidence of the ICC *upholding* the rule of law. From an alternative perspective, the listed concerns have been interpreted as evidence of superior political and legal authority derived from an effective separation of international and domestic judicial powers, and the integrity of third-party adjudication untainted by parochial politics.[149] The US position has been criticised as politically compromised, with Georg Nolte arguing that 'it can be comparatively easily refuted'[150] and Cassese claiming that, as 'a legal objection, this is easily dismissed'.[151] Sands more forcefully rejected 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'.[152] The dispute persists nearly twenty years later, with American legal policymakers acknowledging the obstacles that disagreement has created, but with no clear resolution.[153] Such divergence, on what should be a matter of jurisprudential interpretation, presents a striking case for identifying the reception and contestation of IL through competing ideologies.

It matters that US interpretations originated in the intervention of Professor Morris speaking as an independent scholar bound by legal convention, and not as a government advocate.[154] Crucially, Morris argued that US concerns could not be dismissed as irrelevant to law, since the legality of customary obligations is itself constituted by

[148] Equally applicable in cases of delegated universal and delegated territorial jurisdiction: ibid., pp. 30–33 & 45.

[149] See Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 618, pp. 625–34.

[150] Georg Nolte, 'The United States and the International Criminal Court', in David Malone & Yuen Foong Khong (eds.), *Unilateralism and US Foreign Policy: International Perspectives* (Lynne Rienner Publishers, 2003), p. 76.

[151] Cassese, 'The Rome Statute', p. 1911.

[152] Philippe Sands, *Lawless World: Making and Breaking Global Rules* (Viking, 2006), p. 244.

[153] See Stephen Pomper, 'The US and Int'l Criminal Court May Still Steer Past Each Other–Why and How', *Just Security,* 5 April 2018, www.justsecurity.org/54543/intl-criminal-court-steer-other-why/. For a careful reconsideration of the issue see Michael A. Newton, 'How the International Criminal Court Threatens Treaty Norms' (2016) 49 *Vanderbilt Journal of Transnational Law* 371.

[154] Morris, Personal Communication. Morris has served as a legal adviser and counsel to the US government, but not at the time of her intervention, or on this particular issue.

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consistent state practice. Thus, these are 'not "mere policy concerns" but are, in fact, of fundamental *legal* significance'.[155] The division opened by US policy represented 'a genuine dilemma – not excuses or pretexts, but legitimate concerns on each side'.[156] Foreign policy ideology provides a compelling explanation for such divergent yet firmly held legal interpretations: that legalist and US policy determined the integrity of international judicial power through competing conceptions of IL and that they have remained coherent in these terms. David Wippman recognises that, as between the United States 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'.[157] That Morris's interpretation resonated so readily with US legal policymakers, including in the National Security Council, speaks to the power of shared ideological IL attitudes, which now manifested in sophisticated jurisprudential terms.

Consent-Based Division of Powers

Legalist advocates opposed US demands for a UNSC-centred court not only for contravening sovereign equality, but also for eroding the separation of powers at the global level. Bassiouni warned that such a design 'cannot be reconciled with the principles of judicial independence and judicial impartiality'.[158] Fears of the UNSC 'unduly tainting the independence of a judicial body' were duly noted by Borek for the State Department. She responded 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'.[159] Rather, 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'.[160] Proposed measures included limiting the UNSC to only referring 'over-all situations' to the prosecutor,

[155] Madeline Morris, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Party States' (2000) 6 *ILSA Journal of International & Comparative Law* 363, p. 366, original emphasis.
[156] Ibid., p. 369.
[157] David Wippman, 'The International Criminal Court', in Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge University Press, 2004), p. 173.
[158] Bassiouni, *The Legislative History of the ICC*, vol. 1, p. 156.
[159] Borek, 'Agenda Item 142', p. 3.
[160] Ibid., p. 5.

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with the prosecutor then retaining sole power to determine which individuals to indict.[161] This was a rejection not merely of the specific draft design, therefore, but also of the very compatibility of legalist principles with preserving the integrity of international judicial power. Implicit was that UNSC members, and the United States in particular, would in contrast remain faithful to rule of law principles in exercising global powers.

Liberal internationalist policymakers were prepared to endorse the formal capacity of the ICC to prosecute US nationals via complementarity, should the United States ever become a state party and fail to prosecute. In this, Scheffer expressed faith that the operation of exceptionalist constitutional values would ensure that accountability remained in US municipal courts: 'Either we are the United States of America committed to the rule of law, or we have transformed into another kind of nation.'[162] That faith was not shared by the Departments of Justice and Defense, however, who, although diverging on preferred institutional design, each turned to illiberal internationalist insistence on strict US consent. Justice insisted on UNSC control as the sole method for referring cases – despite that design being considered 'toxic' in the eyes of 'almost the entire world'.[163]

Even so, UNSC control alone remained inadequate protection for Pentagon officials, who argued, consistently with maintaining hegemonic privileges, that additional immunity for US military personnel was essential to upholding international policing duties. To that end, Defense insisted that consent of the state of nationality also be required – a position endorsed by Clinton.[164] *The Washington Post* reported on the extent to which Pentagon pressure, in conjunction with congressional support, had significantly shaped the US position going into Rome. Defense officials were said to

> 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.[165]

Scheffer admonished the Pentagon for failing to recognise 'how impractical their insistence on the alleged war criminal's government consenting

[161] See Scheffer's 1997 statement: Department of State, *Digest of US Practice: 1991–1999*, p. 616.
[162] Scheffer, *All the Missing Souls*, p. 201.
[163] Ibid., p. 181.
[164] Ibid., pp. 197 & 201–2.
[165] John M. Goshko, 'U.S. Proposes Limit on Global Court: Critics Fear Curb Would Paralyze Prosecution of War Crimes', *The Washington Post* (26 March 1998), p. A29.

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to his prosecution sounded to the rest of the world'.[166] In any case, broader international support for a UNSC-centred court had already waned in the years leading up to the Rome Conference, with all such US proposals ultimately rejected by other delegations as incompatible with rule of law beliefs.[167]

Conclusion

By the end of this period, US ICC policy had 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 to control the referral process.[168] The United States 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.[169] 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'.[170] Such was improbable when US policy revealed the controlling influence of an internationalist ideological stance, expressed across both ends of the liberal–illiberal dimension. At no point did American policymakers recognise the legalist principle of separating international judicial powers, with legal conceptions remaining unmoved.

Chapter Conclusion

Throughout the Clinton administration there were characterisations, even among US officials, of a contest 'between the ideal of an

[166] Scheffer, *All the Missing Souls*, p. 181.
[167] Bassiouni, *The Legislative History of the ICC*, vol. 1, pp. 89 & 90, n. 199.
[168] Pursuant to a final negotiating position approved by Clinton: Scheffer, *All the Missing Souls*, p. 209.
[169] Bos, 'From the ILC to the Rome Conference', pp. 42–3.
[170] Krisch & Robinson, 'Reaching Agreement at the Rome Conference', p. 89.

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international criminal court and the reality of the world today'.[171] Such statements are consistent with interpretations that contradiction flowed from a contest between a universal concept of the rule of law and US political interests. Reviewing the extensive evidence from this period leads to a more compelling account, however, in which the very definition of national interests was embedded in ideological conceptions of IL. 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'.[172] The implication is that legalist insistence on formalised development, sovereign equality and independent judicial power was inherently limited as a basis for reaching common agreement on ideals for ICC design and development. The dominance of liberal internationalism, combined with competing illiberal internationalist pressures, led to US insistence on a flexible role to develop international criminal law, including the preservation of amnesties as a limitation on 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 responsibilities. Finally, US policymakers rejected the compatibility of ICC independence with the rule of law, disagreeing in particular about the legitimacy of delegating core state functions to an international court.

Bassiouni noted the frustration of the LMS who felt that they 'had bent over backwards to accommodate the US'. The perception was that the United States was being held back by 'completely unrelated domestic political reasons'.[173] Yet this characterisation begs the question as to how the persons and agencies applying domestic interests conceived 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 international rule of law was indeed destined to rouse claims of hypocrisy and contradiction. Yet, at every major decision point between 1992 and 2000, US policy hewed closely to competing and internally coherent sets of ideological beliefs about the meaning of the international rule of law.

[171] Jim Lobel, 'Go for Real, Not Ideal, Court', 3 *Terra Viva*, 17 June 1998, www.legal-tools.org/doc/f83fcc/pdf/, p. 3.
[172] Borek, 'Agenda Item 142', p. 5.
[173] Bassiouni, *The Legislative History of the ICC*, vol. 1, p. 88.

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