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Obama Administration, 2008–2016

The transition from the Bush 43 administration to that of Barack Obama brought with it expectations of a new president who possessed 'a genuine concern to bring US policy into line with fundamental principles of international law, and thus represent a significant change from his predecessor'.[1] Public perceptions became tangible in the award of the Nobel Peace Prize to the president in 2009, when the Chairman of the Nobel Committee noted:

> Multilateral diplomacy has regained a central position, with emphasis on the role that the United Nations and other international institutions can play . . . The USA is now paying its bills to the UN. It is joining various committees, and acceding to important conventions. International standards are again respected. Torture is forbidden; the President is doing what he can to close Guantanamo. Human rights and international law are guiding principles.[2]

Such expectation translated into high hopes for a realignment of US–ICC policy with the rest of the world up to, and including, the US 're-signing' the Rome Statute.[3] By this period, the nature of the ICC project itself had changed, from negotiation over the court design during the Clinton era to attempts to quash the project in the first term of the Bush 43 administration to accommodation of the court's first investigations in the second Bush term. By the time of Obama's election, US policymakers were developing policy toward a court actively engaged in prosecutions and further defining its powers in the process. Harold Koh, as Legal

[1] Anthony G. Dworkin, *Beyond the 'War on Terror': Towards a New Transatlantic Framework for Counterterrorism* (European Council on Foreign Relations, 2009), p. 10.

[2] Thorbjørn Jagland, 'Award Ceremony Speech,' Presentation Speech by Thorbjørn Jagland, Chairman of the Norwegian Nobel Committee, Oslo, 10 December 2009, http://nobelprize.org/nobel_prizes/peace/laureates/2009/presentation-speech.html.

[3] See Stephen Eliot Smith, 'Definitely Maybe: The Outlook for US Relations with the International Criminal Court during the Obama Administration' (2010) 22 *Florida Journal of International Law* 155, pp. 186–9.

Adviser to the State Department, described the shift in policy as having 'reset the default on the U.S. relationship with the court from hostility to positive engagement'.[4]

Advocates of a legalist US ICC policy continued to emphasise three core rule of law elements: formally developing global governance; advancing sovereign equality; and separating the court's judicial power from competing international legal powers. These efforts focused particularly on defining the crime of 'aggression', which the Nuremberg trials had declared to be 'the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.[5] After being set aside at the 1998 Rome Conference, the crime finally took shape at the 2010 *Review Conference of the Rome Statute*, held in Kampala, Uganda (Kampala Conference). A definition was confirmed and set to take effect after a further decision in 2017.[6] In so doing, global advocates achieved what many had considered the pinnacle of the international rule of law: subjecting decisions to use international force to judicial determination as a check not only on national governments but also on previously unfettered UNSC power.

For its part, the US began attending the annual meetings of states parties for the first time (as an observer), actively advocating and voting in favour of UNSC referrals to the ICC and contributing substantially to debates over the crime of aggression. The president broke from his predecessor in personally advocating international support for ICC investigations and prosecutions.[7] Explaining the renewed support, US policymakers declared that

> the commitment of the Obama Administration to the rule of law and the principle of accountability is firm, in line with . . . [a] historic tradition of

[4] Harold H. Koh & Stephen J. Rapp, 'U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference', 15 June 2010, https://2009-2017.state.gov/j/gcj/us_releases/remarks/2010/143178.htm.

[5] International Military Tribunal (Nuremberg), 'Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences' (1947) 41 *American Journal of International Law* 172, p. 186, *per curium*.

[6] See *Rome Statute* (1998), Art. 8*bis* ('Crime of Aggression') & Art. 15*bis*–Art. 15*ter* ('Exercise of Jurisdiction over the Crime of Aggression'). The Assembly of States Parties adopted *Resolution ICC-ASP/16/Res.5* ('Activation of the Jurisdiction of the Court over the Crime of Aggression') on 14 December 2017, with the jurisdiction activated as of 17 July 2018.

[7] Barack H. Obama, 'Statement by President Obama on the International Criminal Court Announcement', The White House Office of the Press Secretary, 15 December 2010, www.whitehouse.gov/the-press-office/2010/12/15/statement-president-obama-international-criminal-court-announcement.

> support for international criminal justice that has been a hallmark of United States policy dating back at least to the time of Nuremberg.[8]

Yet, simultaneously, the US strongly resisted the aggression definition agreed at the Kampala Conference, reaffirmed opposition to joining the ICC and, despite previous criticism, declined to recant the 2002 unsigning notification of John Bolton. ICC policy outcomes accordingly continued to diverge from global advocates in ways correlated with the reception of IL through the lens of foreign policy ideology.

Dominant International Law Policy

The defining feature of the Obama IL policy was a rejection of the illiberal nationalist conceptions of the Bush 43 years, which proved a more readily identifiable theme than its positive guiding principles. Ideological beliefs guiding the administration's general foreign policy have proven a major interpretive challenge, with commentators variously describing them as 'liberal internationalist',[9] 'pragmatic internationalist',[10] 'progressive pragmatist',[11] 'Hobbesian optimist',[12] 'accommodationist'[13] and simply guided by '*realpolitik*'.[14] These divergent analyses capture the extent to which decision-making processes traversed the liberal–illiberal and internationalist–nationalist dimensions, albeit in unique configurations within the worldviews of administration policymakers.

Divergent ideologies notwithstanding, the dominant position of the administration remained liberal internationalist: the overarching belief

[8] Stephen J. Rapp, 'Address to Assembly of States Parties', 19 November 2009, https://2009-2017.state.gov/j/gcj/us_releases/remarks/2009/133316.htm.

[9] Walter R. Mead, 'Liberal Internationalism: The Twilight of a Dream', *The American Interest*, 1 April 2010, www.the-american-interest.com/wrm/2010/04/01/liberal-internationalism-the-twilight-of-a-dream/.

[10] Henry R. Nau, in Kim R. Holmes, Helle C. Dale & Henry R. Nau, 'The Obama Doctrine: Hindering American Foreign Policy', The Heritage Foundation, 29 November 2010, www.heritage.org/research/lecture/2010/11/the-obama-doctrine-hindering-american-foreign-policy, p. 5.

[11] Martin S. Indyk, Kenneth G. Lieberthal & Michael E. O'Hanlon, 'Scoring Obama's Foreign Policy: A Progressive Pragmatist Tries to Bend History' (2012) 91 *Foreign Affairs* 44.

[12] Jeffrey Goldberg, 'The Obama Doctrine', *The Atlantic*, April 2016, www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/.

[13] Colin Dueck, 'The Accommodator: Obama's Foreign Policy' (2011) *Policy Review* 13.

[14] Fred Kaplan, 'The Realist: Barack Obama's a Cold Warrior Indeed', *Politico Magazine*, 27 February 2014, www.politico.com/magazine/story/2014/02/barack-obama-realist-foreign-policy-103861.

that IL externalising universal values contained the promise of an international order in equilibrium with US interests. What made the administration's policy distinctive, however, was that the means for achieving those idealised ends revealed commitment to liberal nationalist and illiberal internationalist IL policies, with both ideologies setting limitations on American global liability. Obama described his own admiration for the 'postwar order that married Wilson's idealism to hardheaded realism'.[15] The president directly rejected supposed tensions between American 'realists or idealists – a tension that suggests a stark choice between the narrow pursuit of interests or an endless campaign to impose our values around the world'.[16] Obama's particular formulation nevertheless reveals beliefs that the reality of illiberalism in global politics often necessitates pragmatic and illiberal applications of law to progress a liberal vision and that IL must sometimes be employed protectively to defend liberalism at home. The president himself identified with the Christian realism of Reinhold Niebuhr in accepting inherent tensions between right belief and prudent conduct:[17]

> [T]here's serious evil in the world, and hardship and pain. And we should be humble and modest in our belief we can eliminate those things. But we shouldn't use that as an excuse for cynicism and inaction . . . [W]e have to make these efforts knowing they are hard, and not swinging from naïve idealism to bitter realism.[18]

The challenge 'of being a liberal leader in an often illiberal world'[19] thus manifested itself in fraught ideological configurations that diverged between the aspirational and the operational.

A repeated claim among politically 'conservative' critics is that, in practice, Obama was attracted to transformative liberal internationalist ideals, but lacked commitment to policies necessary to realise them.[20] Mead broadly confirms that, although Obama's general foreign policy

[15] Barack H. Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (Crown, 2006), p. 284.

[16] Barack H. Obama, 'Nobel Lecture: A Just and Lasting Peace', Oslo, 10 December 2009, www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html.

[17] See R. Ward Holder & Peter B. Josephson, 'Obama's Niebuhr Problem' (2013) 82 *Church History* 678.

[18] David Brooks, 'Obama, Gospel and Verse', *The New York Times*, 26 April 2007, www.nytimes.com/2007/04/26/opinion/26brooks.html.

[19] Timothy J. Lynch, 'Obama, Liberalism, and US Foreign Policy', in Inderjeet Parmar, Linda B. Miller & Mark Ledwidge (eds.), *Obama and the World: New Directions in US Foreign Policy* (Routledge, 2014), p. 44.

[20] Holmes, Dale & Nau, 'The Obama Doctrine,' pp. 12–13.

was influenced by aspirations of liberal internationalism,[21] substantive policy decisions remained shaped by liberal nationalism.[22] The resulting tendency to look inward thereby failed to appreciate that a 'world based more on the rule of law and less on the law of the jungle requires an engaged, forward-looking, and, alas, expensive foreign policy'.[23] For Dueck, unsuccessful attempts to reconcile internationalist and nationalist variants of liberalism meant that Obama 'allowed the term "multilateralism" to become an excuse for American inaction'.[24] Such characterisations remain incomplete, however, in that they plausibly identify the aspirations and outcomes of IL policy but not the internal logic of the administration's strategic beliefs. Closer ideological analysis demonstrates a more structured approach of subordinating high moral aspirations to recognised limitations in US power.[25]

'International Law Matters'[26]

It is useful to isolate Obama's own worldview from policy outcomes, particularly in circumstances where the president assumed greater personal control over decision-making than many of his predecessors.[27] In the widest-ranging interview of his foreign policy beliefs, Obama explicitly characterised his worldview in terms of a four-by-four matrix

[21] Mead's 'Wilsonianism': Mead, 'Liberal Internationalism: The Twilight of a Dream'. Note that Mead's approach departs from that adopted in this book by treating 'liberal internationalism' as only a specific strand of his 'Wilsonianism' tradition alongside 'neoconservatism'.

[22] Mead's 'Jeffersonianism': Walter R. Mead, 'The Carter Syndrome', *Foreign Policy*, 4 January 2010, https://foreignpolicy.com/2010/01/04/the-carter-syndrome/. For a response see Jimmy Carter & Zbigniew Brzezinski, 'Presidential Debate', *Foreign Policy*, 22 February 2010, www.foreignpolicy.com/articles/2010/02/22/presidential_debate.

[23] Walter R. Mead, 'The President's Foreign Policy Paradox', *The Wall Street Journal*, 28 March 2014, http://online.wsj.com/articles/SB10001424052702303725404579457950519734142.

[24] Colin Dueck, *The Obama Doctrine: American Grand Strategy Today* (Oxford University Press, 2015), p. 243.

[25] See Jack Goldsmith, 'The Contributions of the Obama Administration to the Practice and Theory of International Law' (2016) 57 *Harvard International Law Journal* 455, pp. 472–3.

[26] Barack H. Obama, 'Full Transcript: President Obama Gives Speech Addressing Europe, Russia on March 26', *The Washington Post*, 26 March 2014, www.washingtonpost.com/world/transcript-president-obama-gives-speech-addressing-europe-russia-on-march-26/2014/03/26/07ae80ae-b503-11e3-b899-20667de76985_story.html.

[27] See Indyk, Lieberthal & O'Hanlon, 'Scoring Obama's Foreign Policy', p. 31.

of ideal types consistent with the model set forth in this book. Geoffrey Goldberg of *The Atlantic* asked the president how he 'thought his foreign policy might be understood by historians'.[28] According to Deputy National Security Advisor Ben Rhodes, Obama appreciated the insights of academic frameworks for evaluating his broader worldviews and thus responded literate in the relevant scholarship:[29]

> He started by describing for me a four-box grid representing the main schools of American foreign-policy thought. One box he called isolationism, which he dismissed out of hand. 'The world is ever-shrinking,' he said. 'Withdrawal is untenable.' The other boxes he labeled realism, liberal interventionism, and internationalism. 'I suppose you could call me a realist in believing we can't, at any given moment, relieve all the world's misery,' he said. 'We have to choose where we can make a real impact.' He also noted that he was quite obviously an internationalist, devoted as he is to strengthening multilateral organizations and international norms.[30]

Walt observed that Obama 'believes foreign-policy making involves picking and choosing from among the [last] three', consistent with rejecting the isolationist strands of the illiberal nationalist ideology of the Bush 43 years.[31] While Obama's own self-identification with the remaining quadrants is not itself determinative, his articulation of the model is compelling corroboration of this book's analytical approach from the highest levels of US IL policymaking.

Liberalism

The most instructive account of Obama's conception of IL remains his Nobel Lecture, which was largely authored by the president and has been characterised by his closest advisers as a 'template' or 'framework'

[28] Goldberg, 'The Obama Doctrine'.

[29] Ben Rhodes, Personal Communication with Author (14 February 2019).

[30] Goldberg, 'The Obama Doctrine'. Laying Obama's four 'schools' over the ideological structure set out in this book forms the following approximate dimensions and typology:

	Liberal	Illiberal
Internationalist	'Liberal interventionism'	'Internationalism'
	Liberal internationalism	*Illiberal internationalism*
Nationalist	'Realism'	'Isolationism'
	Liberal nationalism	*Illiberal nationalism*

[31] Stephen M. Walt, 'Obama Was Not a Realist President', *Foreign Policy*, 7 April 2016, http://foreignpolicy.com/2016/04/07/obama-was-not-a-realist-president-jeffrey-goldberg-atlantic-obama-doctrine/.

for his foreign policy beliefs.[32] Crucially, the balance of the speech directly addressed the relationship between international power and conflicts internal to American IL policy. Obama's exceptionalist thinking is, paradoxically, revealed in his declaration that the United States cannot 'insist that others follow the rules of the road if we refuse to follow them ourselves', which would appear 'arbitrary'. A belief that the United States elevates liberal values above the ordinary geopolitical incentives to carve out legal exceptions is itself an exceptionalist claim. According to Obama, 'even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight.'[33] The anchoring of IL in liberalism was made explicit in Obama's self-identification as an 'idealist', believing that

> we should be promoting values, like democracy and human rights and norms and values, because not only do they serve our interests the more people adopt values that we share – in the same way that, economically, if people adopt rule of law and property rights and so forth, that is to our advantage – but because it makes the world a better place.[34]

These liberal values found their expression in both internationalist and nationalist approaches to global governance, with a divergence between policy means and ends.

Liberal Internationalism

The president's primary conception of liberalism was of an international rule of law in which the United States played an exceptional role upholding and promoting the system. In Obama's words: 'If you compare us to previous superpowers, we act less on the basis of naked self-interest, and have been interested in establishing norms that benefit everyone.'[35] The halting establishment of the international rule of law was attributed to an exceptional American role after each of the world wars, wherein it 'led the world in constructing an architecture to keep the peace'. This premise

[32] Ben Rhodes, *The World as It Is* (Random House, 2018), p. 80; Kaplan, 'The Realist'; Harold H. Koh in Donald F. Donovan, 'Retrospective on International Law in the First Obama Administration' (2013) 107 *Proceedings of the Annual Meeting (American Society of International Law)* 131, p. 146.
[33] Obama, 'Nobel Lecture'.
[34] Goldberg, 'The Obama Doctrine'.
[35] Ibid.

departs in key ways from legalism by asserting American values and power as constitutive of IL itself:

> [I]t was not simply international institutions – not just treaties and declarations – that brought stability to a post-World War II world. Whatever mistakes we have made, the plain fact is this: The United States of America has helped underwrite global security for more than six decades with the blood of our citizens and the strength of our arms . . . We have borne this burden not because we seek to impose our will. We have done so out of enlightened self-interest.[36]

Read in the context of a warning against 'reflexive suspicion of America, the world's sole military superpower', this was not merely a political observation but an expression of the necessary elements of an effective international legal system.

Obama's understanding of how that system enhances global peace centres on democracy as the link between the municipal and the international rule of law. The evidence was said to be that greater adherence to IL between nations, across the twentieth century, was achieved through US support for 'ideals of liberty and self-determination, equality and the rule of law'. Ultimately, Obama's liberal vision drew on a foundational belief 'that the human condition can be perfected' and in a 'fundamental faith in human progress'.[37] This animating purpose of IL remains distinct from illiberal internationalism, which promotes international engagement without accepting that IL can progressively extend shared values as a strategy for overcoming geopolitical interests.

Dominance of liberal internationalism was reinforced in Obama's preface to the 2010 *National Security Strategy* (NSS 2010),[38] which drew connections between democracy, promoting rights through transnational processes, and American national security:

> The rule of law – and our capacity to enforce it – advances our national security and strengthens our leadership . . . Around the globe, it allows us to hold actors accountable, while supporting both international security and the stability of the global economy. America's commitment to the rule of law is fundamental to our efforts to build an international order that is capable of confronting the emerging challenges of the 21st century.[39]

[36] Obama, 'Nobel Lecture'.
[37] Ibid.
[38] The White House, *The National Security Strategy of the United States of America 2010* (2010).
[39] Ibid., p. 37. See also pp. ii & 2.

The NSS 2010 importantly departed from the strategies of the Bush 43 years in commitment to 'an international order based upon rights and responsibilities' and the 'modernization of institutions, strengthening of international norms, and enforcement of international law'.[40]

Liberal Nationalism

Although Obama self-identified as also a 'realist', Walt and Dueck both rightly point out that the standard IR sense of that term is inconsistent with Obama's overriding liberal objectives.[41] Rather, what he describes is consistent with the narrow realism encompassed by liberal nationalism, that 'we can't, at any given moment, relieve all the world's misery . . . We have to choose where we can make a real impact.' This call remains in the exemplar tradition of American liberalism, being combined with recognition that

> in order to advance both our security interests and those ideals and values that we care about, we've got to be hardheaded at the same time as we're bighearted, and pick and choose our spots, and recognize that there are going to be times where the best that we can do is to shine a spotlight on something that's terrible, but not believe that we can automatically solve it.[42]

The most telling evidence of liberal nationalism was Obama's belief that dividing the burden of global leadership with other nations is desirable to protect liberalism at home, and as a guard against unchecked US global power. Obama warned that global counterparts 'who claim to respect international law cannot avert their eyes when those laws are flouted'. Rather, the responsibility for enforcing IL was a shared one: '[T]he closer we stand together, the less likely we will be faced with the choice between armed intervention and complicity in oppression.'[43] He later added: 'One of the reasons I am so focused on taking action multilaterally where our direct interests are not at stake is that multilateralism regulates hubris.'[44]

Likewise, the NSS 2010 spanned both variants of liberalism, stating that 'national security begins at home' and, accordingly, that 'moral leadership is grounded principally in the power of our example – not through an effort to impose our system on other peoples'.[45] Yet that

[40] Ibid., p. 3.
[41] Walt, 'Obama Was Not a Realist President'; Dueck, *The Obama Doctrine*, pp. 198–9.
[42] Goldberg, 'The Obama Doctrine'.
[43] Obama, 'Nobel Lecture'.
[44] Goldberg, 'The Obama Doctrine'.
[45] The White House, *NSS 2010*, pp. 9–10 & 36.

warning was tempered by beliefs that 'America has never succeeded through isolationism ... [W]e must reengage the world on a comprehensive and sustained basis.'[46] To that end, the United States 'must pursue a rules-based international system that can advance our own interests by serving mutual interests'.[47] This remained consistent with combining a restrained defence of universal American political values with the aspiration of an international environment that would ultimately reinforce them.

Illiberal Internationalism

Finally, Obama's recognition of the disjunct between liberal intentions and the reality of an illiberal world also manifested in examples of employing illiberal policies for the limited purpose of returning the global balance of power toward American values:

> I face the world as it is, and cannot stand idle in the face of threats to the American people. For make no mistake: Evil does exist in the world ... To say that force may sometimes be necessary is not a call to cynicism – it is a recognition of history; the imperfections of man and the limits of reason.[48]

Quoting President Kennedy, Obama warned against idealistic adherence to liberal values in IL policy, favouring 'a more practical, more attainable peace, based not on a sudden revolution in human nature but on a gradual evolution in human institutions'. In this vein, he noted that, although 'engagement with repressive regimes lacks the satisfying purity of indignation', it was sometimes necessary to pragmatically advance illiberal interests in the short term, with liberal faith that 'human rights and dignity are advanced over time'.[49]

Senior Legal Policymakers

Along with the new president, a change in senior legal policymakers signalled a more robust role for IL in US foreign relations and enthusiasm for the ICC in particular. These policymakers held an array of beliefs about IL that largely complemented but at times competed with the president's conception of it. The most consequential appointment for

[46] Ibid., pp. 11 & 40.
[47] Ibid., p. 12.
[48] Obama, 'Nobel Lecture'.
[49] Ibid.

IL policy was Hillary Clinton, as Obama's first Secretary of State. Clinton was given a direct opportunity at her confirmation hearing to identify the administration's general foreign policy among variants of the four theorised ideal types, when Senator Robert P. Casey, Jr. adopted Posen and Ross's formulation:[50]

> Historically, the United States has adopted one of four grand strategies, or some combination of the four: Neoisolationism (avoidance of foreign entanglements), selective engagement (traditional balance of power realism that works to ensure peace among the major powers), cooperative security (a liberal world order of interdependence and effective international institutions), and primacy (American unilateralism and continued hegemony). Which grand strategy, or combination of strategies, do you think best describes how you would seek to promote U.S. national security today?[51]

Unsurprisingly, Clinton declined to categorise herself in these terms, arguing that 'the paradigms of the past neither adequately describe our present realities, nor provide a comprehensive guide to what we should do about them'.[52] Asking a policymaker to spontaneously categorise instinctive ideological beliefs within an imposed typology held limited probative value. By the same token, however, Clinton's dismissive response was neither a useful account of the role of foreign policy ideology nor consistent with evidence of continuity in diplomatic thought.

The indication of where to place Clinton's beliefs was in her promise of a 'new direction' that rejected the illiberal nationalism of the first Bush 43 term: 'That America is a nation of laws is one of our great strengths, and the Supreme Court has been clear that the fight against terrorism cannot occur in a "legal black hole."'[53] Clinton's distinctive conception of IL became clear in her meaning of 'a rules-based global order that could manage interactions between states, protect fundamental freedoms, and mobilize common action'.[54] For Clinton, the 'old architecture' of global governance is akin to the 'Parthenon in Greece, with clean lines and clear

[50] See Chapter 2, p. 65, *supra*: Barry R. Posen & Andrew L. Ross, 'Competing Visions for U.S. Grand Strategy' (1996/97) 21 *International Security* 5.

[51] Committee on Foreign Relations, United States Senate, *Senate Committee on Foreign Relations, Nomination of Hillary R. Clinton To Be Secretary of State,* 1st Session 111th Congress (2009), p. 212.

[52] Ibid., p. 212. See also Hillary Rodham Clinton, *Hard Choices: A Memoir* (Simon and Schuster, 2014), pp. 32–3.

[53] Clinton, *Hard Choices*, p. 184.

[54] Ibid., p. 33.

rules'. In contrast, the rules and legal institutions that Clinton sought resembled the deconstructivist architecture of Frank Gehry: 'a dynamic mix of materials, shapes, and structures'.[55] This policy-oriented and deformalised approach to IL revealed Clinton's beliefs in strongly internationalist and primarily liberal terms, without the mediating influence of liberal nationalism found in the president's worldview.

The single most influential figure shaping US ICC policy was Clinton's legal adviser Harold Koh, who was and remains an exemplar of liberal internationalist IL policy. Koh is credited with founding the school of 'transnational legal process' as a successor to the New Haven School of policy-oriented jurisprudence.[56] He forcefully contested the legality of the 2003 Iraq War, during the Bush years and at his Senate confirmation hearing.[57] Koh's conception of the international rule of law was explained to the Senate Judiciary Committee in the months prior to Obama's election in a hearing entitled *Restoring the Rule of Law*:

> [R]espect for the rule of law should not be limited to domestic constitutional law. The next President should recall the words of our founders in the Declaration of Independence to pay 'decent respect to the opinions of mankind' by supporting, not attacking, the institutions and treaties of international human rights law.[58]

Once in office, Koh declared a fundamental shift from the Bush 43 administration in the 'approach and attitude toward international law'.[59] This was captured in what Koh termed an 'emerging "Obama-Clinton Doctrine"' that comprised four elements:

1 *Principled Engagement*;
2 Diplomacy as a Critical Element of *Smart Power*;
3 *Strategic Multilateralism*; and

[55] Ibid., p. 33.
[56] See Harold H. Koh, 'Is There a "New" New Haven School of International Law?' (2007) 32 *Yale Journal of International Law* 559.
[57] Committee on Foreign Relations, United States Senate, *Senate Committee on Foreign Relations, Nomination of Harold H. Koh To Be Legal Adviser to the Department of State*, 1st Session 111th Congress (2009), pp. 25 & 29.
[58] Harold H. Koh, 'Statement of Harold Hongju Koh before the Senate Judiciary Committee, Subcommittee on the Constitution on Restoring the Rule of Law', 16 September 2008, www.fas.org/irp/congress/2008_hr/091608koh.pdf.
[59] Harold H. Koh, 'The Obama Administration and International Law', 25 March 2010, https://2009-2017.state.gov/s/l/releases/remarks/139119.htm.

> 4 the notion that *Living Our Values* Makes Us Stronger and Safer, by Following *Rules of Domestic and International Law; and Following Universal Standards, Not Double Standards.*[60]

The element of 'following universal standards, not double standards' emphasised the degree to which America was 'stronger and safer' by expressing fidelity to the rule of law at home while extending it outward according to common liberal values. Failure of the Bush 43 administration to do likewise had eroded the international rule of law, by converting the United States from 'the major supporter of the post-war global legal exoskeleton into the most visible outlier trying to break free of the very legal framework we created and supported for half a century'.[61] Conversely, Koh also made clear that the interpretation of IL remained subject to the policy-oriented 'smart power' concept, meaning that policy considerations and diplomatic interests shaped the interpretation of law itself. The most fundamental principle remained a 'commitment to living our values by respecting the rule of law'.[62]

Developing Non-arbitrary Global Governance

By the time Obama entered office, the ICC had evolved from an untested forum cautiously seeking state support to a fully operational international legal body engaged in investigations and prosecutions. Legalist advocates sought to harness renewed US support to consolidate the formal status of the court in global governance. For the Obama administration, the most pressing task was demonstrating that the United States had shifted to supporting IL in terms of universal liberal values rather than illiberal national security interests. The clearest demonstration of this change, and one sought by existing states parties, was to reverse the 2002 act of unsigning the Rome Statute and thereby recommit the United States to an ICC policy that, at minimum, complied with the objects and purpose of the treaty, even if not its strict terms. The United States assumed its rights as an observer state at the annual Assembly of States Parties (ASP) governing the ICC, attending and participating in sessions for the first time while actively supporting referral of matters to the court. Yet it fell short of explicitly 're-signing' the statute or of supporting its

[60] Ibid., original emphasis.
[61] Harold H. Koh, 'Jefferson Memorial Lecture: Transnational Legal Process after September 11th' (2004) 22 *Berkeley Journal of International Law* 337, pp. 350–1.
[62] Koh, 'The Obama Administration and International Law'.

eventual ratification, thereby remaining at odds with commitment to the international rule of law as understood by legalist counterparts.

Legalist Policy

The full spectrum of beliefs about the ICC and tensions with US IL policy was contained in the October 2012 UNSC agenda item: *The promotion and strengthening of the rule of law in the maintenance of international peace and security: Peace and justice, with a special focus on the role of the International Criminal Court* (UNSC rule of law meeting).[63] That meeting followed on from a declaration made the previous month committing to 'an international order based on the rule of law', for which the ICC was recognised as integral to 'a multilateral system that aims to end impunity and establish the rule of law'.[64] At the subsequent UNSC rule of law meeting, the Secretary General went further and described the ICC as 'the centre of the new system of international criminal justice'.[65]

A repeated theme at the UNSC rule of law meeting was the need to progressively formalise ICC authority. The Secretary General described a new 'age of accountability' in which the UN would no longer 'promote or condone amnesty for genocide, crimes against humanity, war crimes or gross violations of human rights' when negotiating peace agreements.[66] Similarly, the Togolese representative warned against continued reliance on 'informal mechanisms and arrangements that run the risk of bypassing transparency or control and open the way to arbitrariness'.[67] The Sri Lankan representative was more explicit in declaring that, in this area, 'codification of international law and legal obligations is an important aspect of the rule of law at the international level'.[68]

The specific expression of formalised development was in repeated calls for more states to legally join the Rome Statute. At the Kampala

[63] UN, *6849th Meeting,* United Nations Security Council (17 October 2012) & UN, *6849th Meeting (Resumption 1),* United Nations Security Council (17 October 2012).
[64] The September 2012 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels' was ultimately adopted as a UNGA resolution: *GA Res 67/1, UN Doc A/RES/67/1*, 30 November 2012, www.un.org/ruleoflaw/files/37839_A-RES-67-1.pdf. See Clause 23, p. 4.
[65] UN, *6849th Meeting*, p. 2.
[66] Ibid., p. 2.
[67] Ibid., p. 22.
[68] UN, *6849th Meeting (Resumption 1)*, p. 25.

Conference, the EU representative set out its primary objective as '[p]romoting the universality and preserving the integrity of the Rome Statute'.[69] At the UNSC rule of law meeting, the UK concurred: 'Achieving the universality of the Rome Statute is the key to deepening and broadening the reach of the rule of law.'[70] Absent formal obligations, the ICC remained a mere diplomatic forum. Germany, which already believed that the ICC had 'strengthened the rule of law in international relations',[71] alluded to this distinction in accepting that although UNSC referrals to the ICC were a welcome addition, they remained merely a 'tool of last resort, as an act of political responsibility'. In contrast, the creation of legal obligation required 'ratification of the Rome Statute by the greatest possible number of States so that referrals become more and more obsolete'.[72] Similarly, Liechtenstein described UNSC referrals as a 'mixed blessing' for their advancing of criminal justice while being 'driven by [the] political convenience' of powerful ICC non-member countries.[73] Discretionary US engagement did not amount to commitment to the rule of law, even when done to alter international behaviour toward increasing legal compliance.

Beliefs of American Legal Policymakers

Maintaining Ambiguous Obligations under the Rome Statute

The Obama administration's official ICC position was set out in the NSS 2010, in terms that became something of a mantra among legal policymakers:

> Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.[74]

[69] María J. F. López-Palop, 'Declaración realizada en nombre de la Unión Europea', 31 May 2010, https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-GenDeba-European%20Union-SPA-ENG-FRA.pdf.
[70] UN, *6849th Meeting*, p. 24.
[71] Markus Löning, 'Statement on Behalf of Germany, International Criminal Court Review Conference', 1 June 2010, https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Germany-ENG.pdf.
[72] UN, *6849th Meeting*, p. 18.
[73] UN, *6849th Meeting (Resumption 1)*, p. 2.
[74] The White House, *NSS 2010*, p. 8.

The terms of renewed support were equally a confirmation of the court's subordinate status to US legal autonomy and the perceived need to shield military personnel.

The divergent path of US policy is clearest in the administration's ambiguous retraction of the 2002 unsigning statement of John Bolton, combined with emphatic assurances that a clear policy shift had occurred.[75] The act of unsigning during the first term of the Bush 43 administration was widely accepted as effective in removing minimal US obligations to not frustrate the objects of the treaty.[76] As the Bush 43 era came to a close, this remained the most conspicuous signal of the hostility flowing from illiberal nationalist conceptions of the ICC. Immediately prior to assuming the role of State Department Legal Adviser, Koh declared that,

> at the earliest opportunity, the new Secretary of State should withdraw the Bush Administration's May 2002 letter to the United Nations 'unsigning' the U.S. signature to the Rome Treaty creating the ICC, restoring the *status quo ante* that existed at the end of the Clinton Administration.[77]

Doing so was framed as a necessary step toward an IL policy 'that lives up to America's historically high standards of international responsibility and respect for the rule of international law'.[78] In Scheffer's opinion, 'a new letter could nullify the effect of Bolton's missive and resurrect the legal authority of the signature on the treaty'.[79] The call by Koh and Scheffer was therefore for the formal reacceptance of the legal obligations created by Clinton's 2000 signature, which would equally send the strongest political signal of US commitment to the international rule of law. In the years following these statements, US policy is best described as political recommitment to the substance of Rome Statute signatory obligations, but ambiguous commitment to legally binding obligations. Koh had previously characterised the Bush administration's increased ICC cooperation during its second term as '*de facto* repudiation of the political act of unsigning' that largely brought the United States back in line with its former international obligations.[80] The subsequent Obama

[75] See Chapter 5, *supra*.
[76] Under *Rome Statute*, Art. 18. See Edward T. Swaine, 'Unsigning' (2003) 55 *Stanford Law Review* 2061.
[77] Koh, 'Statement before the Senate Judiciary Committee', p. 11.
[78] Ibid., p. 12.
[79] David J. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012), p. 243.
[80] Koh, 'Jefferson Memorial Lecture', p. 351.

policy, led by Koh, suggests that this '*de facto*' shift was adopted as sufficient for the policy 'reset', without further formalised obligations.

The United States signalled its policy shift by attending the Annual Session of the ASP for the first time in November 2009. Questions soon followed about what that signified about US legal obligations in circumstances where the Bolton letter was never formally annulled. The issue was deftly avoided by US Ambassador-at-Large for War Crimes Issues Stephen Rapp, who told reporters that the United States was entitled to participate in the ASP and related conferences irrespective of the treaty signature – by virtue of signing the *Final Act* at the 1998 Rome Conference.[81] When pushed on the unsigning, he stated only that the effect of the Bolton letter was the limited one of making it 'clear that we did not, that the Bush administration did not, believe that we were bound to act as others expected a signatory to act'.[82] He pointedly did not repudiate the release from legal obligations, emphasising that US participation 'did not require an acknowledgement of our December 2000 signature to the treaty'.[83] When later asked about the same issue at the Kampala Conference, Koh agreed that the United States was legally entitled to engage as an observer nation, but was more explicit that US cooperation arose from discretionary decisions alone:

> We should make clear that there is no legal decision involved in our being here. It's not a decision about whether to change any law, to ratify any treaty, or to change any statute or change any other agreement. But it is part of a broader policy, as I said, for closer engagement with this important international institution.[84]

This is consistent with the administration's overall policy of 'principled engagement' in multilateral forums to advance American interests. Yet, in legalist terms, this remains a diplomatic stance and not a commitment to be bound by IL *stricto sensu*. That point was picked up by a questioner at the post-Kampala press conference who noted that the 'reset' in ICC

[81] The official agreement on the record of proceedings: UN, *The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Final Act,* UN Doc A/CONF.183/1, (17 July 1998).

[82] Stephen J. Rapp, 'Press Briefing with Stephen J. Rapp Ambassador-at-Large for War Crimes Issues', Mission of the United States Geneva, 22 January 2010, http://geneva.usmission.gov/2010/01/22/stephen-rapp/.

[83] Stephen J. Rapp, Interview with Author (15 February 2012).

[84] Harold H. Koh & Stephen J. Rapp, 'Briefing on the International Criminal Court Conference in Kampala, Uganda', 2 June 2010, https://2009-2017.state.gov/j/gcj/us_releases/remarks/2010/142585.htm.

policy had 'more of a political tinge' than a legal character. Koh's and Rapp's responses confirmed that the US reset entailed accepting the ICC as 'a tool in the international toolbox', but not as a binding regime.

Later, in 2010, some commentators perceived Koh moving closer to a de jure shift in obligations, by picking up the words of Article 18 of the VCLT to distinguish the Obama policy from that of his predecessors:

> You do not see what international lawyers might call a concerted effort to frustrate the *object and purpose* of the Rome Statute. That is explicitly not the policy of this administration. Because although the United States is not a party to the Rome Statute, we share with the States parties a deep and abiding interest in seeing the Court successfully complete the important prosecutions it has already begun.[85]

This carefully worded phrase was quoted by Koh in subsequent speeches, but without further clarification.[86] There is some uncertainty when interpreting the legal significance of these words. It is worth noting that the statement was made in the context of a quote from the NSS 2010: a document that studiously avoided any suggestion that the United States was legally bound by the ICC. At the time of Koh's statement, Beth van Schaack raised but did not answer the question of 'whether Koh has said the magic words' necessary to annul the 2002 Bolton letter. She agreed that the *policy* of obstructing the court was at an end but that no conclusive inferences could be drawn about altered legal obligations.[87] Jennifer Trahan described Koh's words as having 'orally negated' the unsigning, but conceded that the statements lacked 'the weight of a counter-note'. Rather, she reiterated her previous call, as chair of the American Branch of the International Law Association's ICC Committee, to send a legally binding note.[88] Finally, Amann drew the conclusion that 'top Obama Administration officials have made clear that the United States now acts toward the ICC treaty as any good signatory

[85] Harold H. Koh, 'The Challenges and Future of International Justice', 27 October 2010, https://2009-2017.state.gov/s/l/releases/remarks/150497.htm, emphasis added.

[86] See Harold H. Koh, 'International Criminal Justice 5.0' (2013) 38 *Yale Journal of International Law* 525, p. 537.

[87] Beth van Schaack, 'The U.S. Says It Is Not Its Goal to Undermine the ICC', *IntLawGrrls,* 12 November 2010, www.intlawgrrls.com/2010/11/us-says-it-is-not-its-goal-to-undermine.html.

[88] Jennifer Trahan, 'U.S. Affirms that It Adheres to Rome Statute Signatory Obligations: It Should Put This in Writing', *Opinio Juris,* 27 February 2013, http://opiniojuris.org/2013/02/27/u-s-affirms-that-it-adheres-to-rome-statute-signatory-obligations-it-should-put-this-in-writing/.

should'.[89] So much had already been made clear, but this goes no further than the non-binding undertakings of policymakers.

The combined force of these statements and legal opinions is that: (a) the Obama administration firmly committed to an IL policy consistent with the objects and purposes of the Rome Statute; and (b) the Obama administration conspicuously avoided accepting any formal legal obligations commensurate to its stated policy. Moreover, beyond such ambiguity, policymakers were much clearer that there was no intention to ratify the statute at any time in the foreseeable future which, by virtue of gridlocked domestic politics and the intractability of US Senate opposition, remained 'not a question of when . . . [but of] if'.[90] Those impediments are undeniable, yet there is scant evidence that the Obama administration would have moved to ratify the treaty as it then stood, even absent Congressional opposition. Attention must turn to foreign policy ideology to understand how American legal policymakers squared outcomes with simultaneous statements that the Obama ICC policy *did* represent recommitment to the international rule of law.

Transnational Development of Global Governance

The consistent position emphasised by the United States through this period was closer engagement with the court's activities and the processes through which US actions were brought in line with the entire project of international criminal justice. This exemplifies the 'transnational legal process' explanation for how IL shapes the behaviour of states. Increased US interactions with states parties and the ICC itself caused increased compliance with legal norms and, through this engagement, the United States became a part of mechanisms making the court effective. Koh had contested perceived US legal failings throughout the first term of the Bush 43 administration, arguing that 'the United States and those within it who are committed to the rule of law should now invoke transnational legal process as a way to address the continuing problems'. Indeed, Koh believed that US constitutional values were already imbued in the ICC through transnational legal processes such that 'as much as the Bush administration may wish to be free of the legal exoskeleton that the United States has helped create, already that legal framework is visibly pushing back'.[91] This

[89] Diane M. Amann, 'Officials Treat United States as Once & Present Signatory of ICC's Rome Statute', 27 February 2013, http://dianemarieamann.com/2013/02/27/officials-treat-united-states-as-once-present-signatory-of-iccs-rome-statute/.
[90] Rapp, 'Press Briefing with Stephen J. Rapp'.
[91] Koh, 'Jefferson Memorial Lecture', p. 351.

highlights a conceptual distinction between Koh's jurisprudence and that of his predecessor John Bellinger, in circumstances where their ICC policies of re-engaging with the ICC appeared functionally alike. Bellinger expressed illiberal internationalist commitment to pragmatically develop the court by reference to clearly identified strategic interests, while limiting its reach to that extent. Koh, on the other hand, saw the shift under Bellinger less as a calculated decision and more as a consequence of the milieu of transnational forces drawing the United States back toward universal liberal values.

This is not to suggest that formally signing the Rome Statute and even creating conditions for ratification were not genuine aspirations for liberal internationalists. The Clinton administration always aimed its efforts at the ideal of a treaty drafted in such terms that the United States could formally accept its obligations. However, for these policy-makers such steps were meaningful primarily for advancing an effective regime shaping international legal behaviour. On that basis, the Obama administration placed its strongest emphasis on the degree to which it was influenced by and continued to influence the development of legal norms through the court. Secretary Clinton confirmed early in the administration that the United States intended to 'end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways that promoted US interests by bringing war criminals to justice'.[92] In the UNSC rule of law meeting, Ambassador Susan Rice characterised the ICC as 'an important tool for accountability', even as the United States repudiated formal membership. Instead:

> We will continue working with the ICC to identify practical ways to cooperate, particularly in areas such as information-sharing and witness protection on a case-by-case basis, as consistent with United States policy and law.[93]

That stance was reinforced in a major policy speech by Sarah Sewell, Under Secretary for Civilian Security, Democracy, and Human Rights, who argued that although the United States agreed that 'aggression is inimical to a rules-based international order', the real question for upholding such an order was not formalised endorsement of the crime but, rather, 'whether the Rome Statute amendments can be an effective and appropriate addition to the international community's tool-box'.[94]

[92] United States Senate, *Nomination of Hillary R. Clinton*, p. 131.
[93] UN, *6849th Meeting*, p. 8.
[94] Sarah Sewell, 'The ICC Crime of Aggression and the Changing International Security Landscape', Annual Meeting of the American Society of International Law, Washington,

Running through these arguments are strands of exceptionalist belief that reconcile a special US role with legal principle. Koh described US policy as shifting to an 'integrated approach to criminal justice', by which was meant reconciling 'incongruous' historical support for the Nuremberg, Tokyo and ad hoc tribunals with equivocation about the ICC. The objective was to 'align, integrate, and make congruent our approach towards these institutions'.[95] Koh's statements downplaying formal obligations were accompanied by reference to beliefs in a unique global mission: 'Our historic commitment to the cause of international justice remains strong.'[96] Likewise, Rapp noted that the United States had been 'a leader in international justice' in establishing the ad hoc tribunals and making them operational. In the case of the ICC, 'the opportunity to do some of those same things presents itself' with the United States again leading the initiative.[97] These are telling comparisons given that the United States was generally excluded from the jurisdiction of the ad hoc tribunals by their very subject matter,[98] whereas no such limitation would exist for a criminal court with general jurisdiction. Yet the United States sought exclusion from ICC constraints, through claims to an exceptional role fostering the institutions that made international criminal justice effective.

A reporter at the Kampala Conference observed that it was 'curious that an administration would become so engaged in shaping the kind of format of a court that it's not a signatory to'. Koh invoked exceptionalist beliefs in his response that 'international institutions and courts with which the United States is not involved tend not to be as effective', whereas the ad hoc tribunals 'have been more successful by virtue of deep U.S. engagement'. For Koh, the proper understanding of US policy was that it represented a 'process' rather than an 'end game' toward

DC, 9 April 2015, extracted in Beth van Schaack, 'U.S. Policy on the ICC Crime of Aggression Announced', *Just Security*, 21 April 2015, www.justsecurity.org/22248/u-s-policy-icc-crime-aggression/.

[95] Koh, 'The Challenges and Future of International Justice'.

[96] Harold H. Koh, 'Statement by Harold Hongju Koh, Legal Adviser, United States Department of State, Regarding Crime of Aggression at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court', 23 March 2010, http://usun.state.gov/briefing/statements/2010/139000.htm.

[97] Koh & Rapp, 'U.S. Engagement with the ICC'.

[98] The ICTY did claim jurisdiction over US personnel involved in relevant NATO military actions, but circumstances of the tribunal's founding effectively foreclosed its exercise: See Melissa J. Epstein, 'The Customary Origins and Elements of Select Conduct of Hostilities Charges before the ICTY' (2004) 179 *Military Law Review* 68, p. 90, n. 97.

membership.[99] By necessary inference, the explanation for involvement in criminal justice without formal obligations is that the United States saw itself as enmeshed in transnational legal processes shifting behaviour in line with the international rule of law.

Conclusion

A recurring argument made by commentators is that the real break in policy was between the two terms of the Bush 43 administration, with no meaningful change leading into the Obama administration.[100] Even key figures in the Obama administration have acknowledged the possibility that 'the bigger break is between the Bush first term and the Bush second term', while accentuating a meaningful shift between administrations.[101] Here, the magnitude of any policy shift is not conclusive on the question of continuity in legal beliefs. Across both periods, the United States largely continued to work from without the system, essentially unconstrained by the regime, while supporting elements of ICC development. However, in the latter period, the beliefs structuring US policy distinctively revolved around processes creating greater compliance with universal norms of international criminal law – from the municipal through to the global level. Irrespective, US policy remained inconsistent with conceptions of the international rule of law fixed on formal and universal ICC obligations. Looking to 'U.S. legal traditions', Ferencz perceives a failure 'to advance respect for the predictable and uniform rule of law'.[102] In legalist terms: 'The words "Equal justice under law" are etched in the portico of the United States Supreme Court. If they stand for anything, they certainly stand for predictable enforcement of law', rather than the discretionary regime promoted by the United States.[103] Yet, the relationship described by US policymakers at the UNSC rule of law meeting and elsewhere followed liberal internationalist conceptions of a rule of law advanced through transnational development of global

[99] Koh & Rapp, 'U.S. Engagement with the ICC'.

[100] See especially John Bellinger who has repeatedly made this case: John B. Bellinger III, 'The United States and the International Criminal Court: Where We've Been and Where We're Going; Remarks to the DePaul University College of Law', 25 April 2008, https://2001-2009.state.gov/s/l/rls/104053.htm.

[101] Rapp, Interview with Author.

[102] Donald M. Ferencz, 'Current US Policy on the Crime of Aggression: History in the Unmaking' (2016) 48 *Case Western Reserve Journal of International Law* 189, p. 201.

[103] Ibid., p. 201, n. 42.

governance. In so doing, the United States remained fundamentally outside of the legalist vision of its global counterparts.

Defining Equality under International Law

From the earliest days of the ICC project, participating states and NGOs were motivated by a desire to 'democratise' the oligarchic configuration of the UNSC.[104] This opportunity arose in the initiative set aside at the Rome Conference to include the crime of aggression within the court's jurisdiction. The goal was ambitious and would significantly expand the subject matter of international criminal law. More fundamentally, the initiative was in large part directed at divesting the UNSC of sole legal control over this most consequential crime and subjecting it to the equal control of all ICC members. The P5 remained united in their insistence on an exclusive 'Security Council trigger' for aggression cases[105] – consistent with rational incentives for powerful states to entrench their position in law. However, that general dynamic does not explain the specific question of whether and how American legal policymakers reconciled political motives with an explicit commitment to the international rule of law. US policy adamantly held out the UNSC as the cornerstone of the international legal system, with exclusive power to delegate such matters to an international court. Moreover, the definition of the crime of aggression itself was contested on the basis that it may constrain existing US autonomy to employ force upholding IL. US policy, nominally aimed at advancing the objectives of the ICC and international criminal law, remained steadfastly opposed to sovereign equality.

Legalist Policy

Critics of the UNSC have long fixed on sovereign equality as a guiding principle for the legitimate exercise of international legal power. At the UNSC rule of law meeting, Lesotho argued that, when making referrals, 'the aspirations of the general membership of the United Nations should override the individual national interests of Council members'.[106] For Sri Lanka, the 'principle of sovereign equality . . . which is intrinsic to international rule

[104] See David Bosco, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014), p. 166.
[105] Matthew C. Weed, *International Criminal Court and the Rome Statute: 2010 Review Conference* (Congressional Research Service, 10 March 2011), p. 10.
[106] UN, *6849th Meeting (Resumption 1)*, p. 17.

of law, must be maintained, as international rules are made and implemented. It is a principle that protects all States, especially the small and the weak.'[107] These amounted to demands for constructive sovereign equality in the UNSC – requiring the P5, with formally unequal privileges, to exercise them by reference to the inferred will of the equally weighted voices of all states. The opportunity to restructure international criminal law along these lines arose at the Kampala Conference, with the agreement to establish the crime of aggression. Conference delegates saw in this agreement 'completion of the codification of the existing body of crimes under customary international law and for the closure of the last remaining important lacuna contained in the substantive part of the ICC Statute'.[108]

In terms of commitment to equality under law, advocates were specifically motivated by beliefs that the UNSC's sole authority over this subject matter remained a stumbling block to the international rule of law. Brazil refuted characterisations of aggression as an inherently political crime by arguing that 'world peace and security are by definition political in nature, but are best addressed through a legal framework that enjoys broad support and legitimacy'. By this was meant that the 'universality of the Court lies in the widely held values that it espouses. Its reach will grow as a result of fulfilling its promise and not by submitting to false pragmatism and the so-called realities of power.'[109] Likewise, Liechtenstein, then president of the ASP, conceded that, despite the UNSC's long-established authority in this area, the proposal would ensure that 'jurisdiction is not ultimately contingent upon the Council's decisions'.[110] In these statements, states reaffirmed the legalist principle of sovereign equality to circumvent the UNSC, and thereby protect the court's integrity.

Beliefs of American Legal Policymakers

The American Interpretive Gloss on the Crime of Aggression

US policymakers had long pushed for an exclusive UNSC filter over aggression – beginning as early as the 1994 draft statute. The Obama

[107] Ibid., p. 26.

[108] Niels Blokker & Claus Kreß, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala' (2010) 23 *Leiden Journal of International Law* 889, pp. 894–5.

[109] Marcel Biato, 'Statement by Ambassador Marcel Biato on Behalf of the Brazilian Delegation to the Review Conference', 31 May 2010, https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Brazil-ENG.pdf.

[110] UN, *6849th Meeting (Resumption 1)*, p. 3.

administration reiterated the position from its very first re-engagement with the ASP in late 2009, arguing that 'jurisdiction should follow a Security Council determination that aggression has occurred'.[111] The outcome of the Kampala negotiations was ultimately a compromise creating two routes for an aggression prosecution. The first was through an exclusive UNSC trigger in the same terms as those governing the existing Rome Statute crimes.[112] The second route was through the ICC prosecutor's own motion, where the UNSC failed to take action within a six-month period, but still subject to the existing UNSC power to halt any ICC investigation under Article 16 of the Rome Statute.[113] The primary UNSC role over cases of aggression was almost entirely maintained, with only a marginal step taken in the direction of sovereign equality.

The compromise resolution does not support any further inference that participants reached an agreed position on legal principles for guiding the court's enlarged subject matter jurisdiction. Much of the distance between the United States and other states parties and observers is reflected in what became *Annex III* to the 2010 amendments, entitled *Understandings regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression* (the Understandings). During the Kampala Conference, Koh fixed upon a suggestion from the conference chair to address concerns about the proposed amendments through written 'understandings' that placed a gloss on the meaning of draft articles, without disturbing their language. Koh stated: '[W]e believe that without agreed-upon understandings, the current draft definition remains flawed' and that 'apparent consensus on the wording of Article 8*bis* masks sharp disagreement on particular points regarding the meaning of that language'.[114] US absence from a decade of prior negotiations effectively precluded any alteration of an aggression definition 'locked in stone',[115] with the understandings becoming a backdoor means for registering concerns. As a matter of strict legal interpretation, Heller rightly points out that the understandings comprise 'nothing more than supplementary means of interpretation that the Court would have the right to ignore

[111] Rapp, 'Address to Assembly of States Parties'.
[112] *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression* 2010, Art. 15*ter*.
[113] Ibid., Art. 15*bis*(8).
[114] Harold H. Koh, 'Statement at the Review Conference of the International Criminal Court', 4 June 2010, https://2009-2017.state.gov/s/l/releases/remarks/142665.htm.
[115] Rapp, Interview with Author.

once the aggression amendments entered into force'.[116] However, they are valuable as formulations of the divergence in legal views held by American policymakers about the ideal design of the ICC.

Exceptional Humanitarian Responsibilities

Substantive US demands in the Understandings focused on bolstering exclusive UNSC control and on limiting ICC jurisdiction where authority was to be shared. Understanding 2 stated that the ICC could exercise jurisdiction pursuant to a UNSC referral 'irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard'. Heller notes that this understanding is unlikely to have 'any substantive effect', as it merely mirrors the 'default position under the Rome Statute'.[117] However, it does reveal the degree of concern that American policymakers had about any erosion of existing legal privilege.

The more significant assertion of legal principles was in understandings that sought to limit ICC jurisdiction by reference to exceptionalist beliefs, and thereby to reinforce UNSC privileges. A consistent theme when defending the status quo was the exceptional role of the United States in making the system of international criminal law effective. On several occasions, Koh and Rapp framed US opposition to the aggression definition by reference to a line in Obama's Nobel Lecture: there are 'times when nations – acting individually or in concert – will find the use of force not only necessary but morally justified'.[118] The United States argued that the definition, as it then stood, could be used to entrench the principle of non-intervention as an absolute prohibition. That would be the strongest expression of sovereign equality, but, in contrast, it would conflict with any legal conception privileging the liberal equality of natural persons. Koh proposed that the Article 8*bis* definition of aggression be accompanied by written understandings explicitly protecting 'those who undertake efforts to prevent war crimes, crimes against humanity or genocide – the very crimes that the Rome Statute is designed to deter'.[119]

[116] Kevin Jon Heller, 'The Uncertain Legal Status of the Aggression Understandings' (2012) 10 *Journal of International Criminal Justice* 229, p. 231. For a response see Harold H. Koh & Todd F. Buchwald, 'The Crime of Aggression: The United States Perspective' (2015) 109 *American Journal of International Law* 257, p. 273.

[117] Heller, 'The Uncertain Legal Status of the Aggression Understandings', pp. 231–2.

[118] Koh & Rapp, 'Briefing on the ICC Conference in Kampala'.

[119] Koh, 'Statement at the Review Conference of the ICC'.

The initial draft understanding was phrased to exempt any actions 'undertaken in connection with an effort to prevent the commission of any of the crimes contained in Articles 6, 7 or 8 of the Statute'.[120] That formulation was rejected by other states, who recognised that, in practice, this amounted to creating special legal rights exercisable primarily by the United States.[121] Understanding 6 ultimately read:

> It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

The intent behind 'consequences' remained exemption of claimed 'unilateral humanitarian intervention' from ICC aggression jurisdiction, as exemplified by the United States–backed 1999 NATO intervention in Kosovo. Koh pointed out: 'Regardless of how states may view the legality of such efforts, those who plan them are not committing the "crime of aggression" and should not run the risk of prosecution.'[122] Responding to a question about the meaning of the 'international rule of law', Rapp responded in part that 'where atrocities are being committed and UNSC approval is not possible, it is possible to proceed with a legitimate action to protect civilians ... The Kosovo precedent may be said to have established a new custom, applicable in truly exceptional cases.'[123] Legalistic negotiations over the scope of the aggression definition never disconnected from consciousness of the history of American global engagement and a specific understanding of how IL facilitated that role.[124]

By the end of the Kampala Conference, Koh considered that the 'final resolution took insufficient account of the Security Council's assigned role to define aggression', but that the definition had been narrowed through US efforts. He defended the privileged UNSC role sustained by

[120] Articles setting out substantive crimes in the *Rome Statute*.
[121] Claus Kreß, Stefan Barriga, Leena Grover & Leonie von Holtzendorff, 'Negotiating the Understandings on the Crime of Aggression', in Stefan Barriga & Claus Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), p. 95.
[122] Koh, 'Statement at the Review Conference of the ICC'.
[123] Rapp, Interview with Author.
[124] Michael J. Glennon, 'The Blank-Prose Crime of Aggression' (2010) 35 *Yale Journal of International Law* 71, p. 111.

the resolution by articulating the exceptionalist premise underpinning US policy:

> The big picture going forward ... is that as the country of Nuremberg prosecutor Justice Jackson, we are the only country that has successfully prosecuted the crime of aggression at Nuremberg and Tokyo. *Of course, we do not commit aggression* and the chances are extremely remote that a prosecution on this crime will, at some point in the distant future, affect us negatively.[125]

It is here that Koh most explicitly emphasised the substantive beliefs reconciling US legal privilege with a stated commitment to the international rule of law. UNSC privileges presupposed beliefs in both the United States' capacity to uphold liberal norms without the oversight of sovereign equals and its unique global role in advancing compliance with international criminal law.

Conclusion

Negotiations over the crime of aggression were in many ways the climax of tensions about UNSC privileges that had been simmering since the earliest days of the ICC project. Attempts to grant the court power over the crime of aggression became a tangible method for transferring the system of international criminal law onto a foundation aligned with the principle of sovereign equality. That initiative was strongly opposed by all P5 members consistent with rational state incentives to maintain legal privileges. Ferencz suggests that US resistance in Kampala, 'like its non-membership in the Court itself, may perhaps be based on perceived geo-political, rather than merely humanitarian, interest and objectives'.[126] This fairly describes political outcomes, but at the level of legal decision-making, the beliefs guiding US legal policymakers remained those drawn from the dominant legal ideologies influencing the Obama administration.

US arguments for protecting the status quo drew strongly upon the principle of liberal equality and the exceptional role of the United States as facilitated by its UNSC privileges. Scheffer sought to frame the outcome in a conciliatory light, arguing that, although the 'result is a slap at the equality of states, or at least the theory of equality', it remained the case that 'most major shifts in the international system begin that

[125] Koh & Rapp, 'U.S. Engagement with the ICC', emphasis added.
[126] Ferencz, 'Current US Policy on the Crime of Aggression', p. 211.

way'.[127] However, there is no evidence that the outcome at Kampala signalled even the embryo of converging beliefs about the proper legal relationship between sovereign states. In deGuzman's terms, the United States continued to perceive of itself as 'a supranational justice "donor" rather than as a leading member of the global justice community'.[128] Professor Jane Stromseth, deputy to the Ambassador-at-Large in the Office of Global Criminal Justice during this period and later acting head of the office, defended the US policy approach for supporting the ICC's 'work in catalyzing meaningful accountability at the national level – the primary and most important foundation for justice and the rule of law'.[129] In what might otherwise appear as a contradiction, American policymakers consistently rejected the principle of sovereign equality not as mere political expediency but as fidelity to primarily liberal internationalist legal conceptions.

Determining International Judicial Power

The final area of legal policy disagreement concerned the determination of international judicial powers in the fully operational court. The dominant approach of international advocates was to cast the ICC as ultimate guarantor of international judicial power, through independence from competing legal powers exercised by states. Many argued against the legitimacy of states parties and non-parties alike exempting themselves from ICC aggression jurisdiction. Just as sovereign equality provided a basis for opposing the creation of differential rights under UNSC referrals, so too did charges that special immunities breached the separation of international legal powers. Any design granting the United States sole authority to adjudicate ICC crimes committed by its own nationals improperly intermingled international judicial power with parallel domestic executive and legislative powers. For their part, US policymakers defended mechanisms for constraining the independence of the court, including preserving US courts' exclusive jurisdiction over US nationals, particularly in relation to the crime of aggression. The

[127] David J. Scheffer, 'The Complex Crime of Aggression under the Rome Statute' (2010) 23 *Leiden Journal of International Law* 897, p. 904.

[128] Margaret M. deGuzman, 'Inter-National Justice for Them or Global Justice for Us?: The US As a Supranational Justice Donor' (2016) 48 *Case Western Reserve Journal of International Law* 177, pp. 179 & 182.

[129] Jane Stromseth, 'Why Bolton's Assault on the ICC Is Not in U.S. Interests', *Just Security*, 14 September 2018, www.justsecurity.org/60743/boltons-assault-icc-u-s-interests/.

United States also remained largely isolated in continuing to advocate hybrid and locally constituted courts exercising international judicial power separately from the ICC. Yet, even as the legalist demand for independent judicial power was denied, US policymakers defended each of these measures as consistent with, and indeed necessary to, upholding the international rule of law.

Legalist Policy

The particular contention motivating states to resist a growing UNSC role in ICC operations was the 'double standards' in referrals granting immunities to non-states parties. These were a feature of the original Darfur referral in 2005, in order to secure US abstention, but were repeated in almost identical terms in the 2011 Libyan referral voted for by the United States.[130] This fuelled a 'growing disquiet about how power politics and international justice were mixing'.[131] In relation to both referrals, Brazil challenged distinctive US rights in order to 'promote respect for international law'. Voting for the Libyan referral, the Brazilian representative reiterated 'strong reservation' towards exempting jurisdiction over non-party states,[132] which remained inconsistent with visions of the impartial judicial power unique to an international court.[133] In the Kampala Conference general debate, Brazil further reminded delegates of the need to make legal obligations universal and that, like 'a la carte multilateralism, cherry-picking when it comes to rules is ultimately self-defeating'.[134] These principles were reiterated at the UNSC rule of law meeting, where Liechtenstein urged the UNSC to cease the practice of creating differentiated rights of immunity since they 'corroborate[d] the suspicion of selectivity in creating accountability' and were thereby 'contrary to international law'.[135] Bangladesh concluded that these exemptions were 'undermining the rule of law by infringing on the work of the ICC and . . . undermining the perception of the Court as an independent legal body free of political considerations'.[136] The exclusion of entire national populations from ICC jurisdiction necessarily

[130] SC Res 1970, UN Doc S/RES/1970 (26 February 2011).
[131] Bosco, *Rough Justice*, p. 171.
[132] SC Res 1970, operative clause 6.
[133] UN, *Official Records of the Security Council,* UN Doc S/PV.6491 (26 February 2011), p. 7.
[134] Biato, 'Statement by Ambassador Marcel Biato'.
[135] UN, *6849th Meeting (Resumption 1)*, p. 3.
[136] Ibid., p. 9.

condoned the associated non-states parties to the Rome Statute exercising international judicial power parallel to, and free from, ICC oversight.

Representatives at the UNSC rule of law meeting identified a key distinction between the independent 'judicial' powers of the ICC, on the one hand, and the 'political' powers of the UNSC, on the other. The principle of separating international powers was breached wherever the UNSC exercised its powers in a way that altered the ICC's prosecutorial and judicial independence.[137] The Secretary General emphasised that the ICC was 'a judicial body, independent and impartial. Once set in motion, justice takes its own inexorable course, unswayed by politics. That is its strength, its distinctive virtue.'[138] Then ICC President Judge Sang-Hyun Song concurred on the need to separate legal powers in the ICC:

> There is an independent Prosecutor, an independent defence and an independent judiciary. The Prosecutor decides which cases to pursue, but it is the judges who have the final say on whether to issue an arrest warrant or summons to appear, or whether there is sufficient evidence for charges to proceed to a trial.[139]

Japan cautioned that the integrity of judicial power must be determined through its separation from UNSC referral powers, which were 'not for purely legal reasons'.[140] Similarly, India emphasised the 'need to strengthen the rule of law at the international level by avoiding selectivity, partiality and double standards' and freeing the ICC from 'the clutches of political considerations'.[141] At the most basic level, these states argued for 'the complete separation of the ICC's judicial process from the functions and decisions of the Security Council'.[142]

Delegations were equally opposed to setting a higher threshold for ICC jurisdiction than that required for a UNSC finding – such as requiring a 'flagrant' or 'manifest' violation.[143] The effect would be to prioritise the UNSC exercise of judicial and non-judicial powers over the ICC. The importance of the legalist ordering principle was significant enough for

[137] See, for example, UN, *6849th Meeting*, p. 6 per Phakiso Mochochoko, Head of the Jurisdiction, Complementarity and Cooperation Division of the ICC (Office of the Prosecutor).
[138] Ibid., p. 2.
[139] Ibid., p. 4.
[140] UN, *6849th Meeting (Resumption 1)*, p. 7.
[141] UN, *6849th Meeting*, p. 11.
[142] Weed, *ICC and the Rome Statute*, p. 11.
[143] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Stefan Barriga & Claus Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), p. 29.

the Togolese representative to state that 'in the name of the principle of the separation of powers, the International Criminal Court should, in principle, not have relations with the Security Council'. Granting any UNSC control over the ICC, through Articles 13(b) and 16 of the Rome Statute, was 'comparable to a regime's executive and political bodies applying laws to citizens while exempting themselves from those same laws'.[144]

Beliefs of American Legal Policymakers

Continued Role of Ad Hoc and Hybrid Tribunals

From the very first attendance at the ASP in 2009, the United States opposed any determination of international judicial powers through supranational ICC authority.[145] The 'greatest importance' was attached not to a globalised court upholding criminal justice but to 'assisting countries where the rule of law has been shattered to stand up for their own system of protection and accountability'.[146] The NSS 2010 reaffirmed that the Obama administration was foremost 'working to strengthen national justice systems and is maintaining our support for ad hoc international tribunals and hybrid courts'.[147] Only secondarily would the administration turn to 'supporting the ICC's prosecution' in a backstopping capacity.

That stance was maintained through the UNSC rule of law meeting, where US policy was distinguished by its primary emphasis on addressing international criminal justice through national justice systems and 'hybrid structures where appropriate'.[148] Even in relation to prosecuting ongoing atrocities in Syria, the United States carefully made clear that it was not 'prejudging the ultimate venue for it'.[149] Rather than seeing an independent ICC as an ideal for international criminal justice, US policymakers instead saw it embedding forms of politics into the law, and ones likely to be foreign to victims of atrocities. The operative principle for

[144] UN, *6849th Meeting*, p. 21.
[145] See Megan Fairlie, 'The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage' (2011) 29 *Berkeley Journal of International Law* 529, pp. 529–30.
[146] Rapp, 'Address to Assembly of States Parties'.
[147] The White House, *NSS 2010*, p. 48.
[148] UN, *6849th Meeting*, p. 8.
[149] Ibid., p. 9.

determining the integrity of international judicial power remained their grounding in effective democratic checks and balances.

Dividing *In Personam* ICC Jurisdiction

US support for the court reached new levels of engagement in relation to the 2011 Libyan Civil War when, for the first time, it voted through the UNSC to refer a situation for ICC investigation.[150] Yet the resolution equally sought to divide the judicial power presumptively reserved to the court. Consistent with a rejection of formal legal obligations, the resolution was written 'recognizing that States not party to the Rome Statute have no obligation under the Statute' while still urging 'all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor'.[151] More particularly, the United States denied the institutional separation of international judicial power by preserving the capacity of the US legal system to exercise these powers parallel to the ICC. Substantive clause 6 of the UNSC resolution decided

> that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.[152]

This replicated limitations in the Darfur referral, which upheld institutional principles other than a separation of international judicial powers. There was no suggestion that the United States was carving out the right for its military personnel to act with impunity, contrary to accusations by some states parties. Rather, the objective was always defended in terms of preserving the jurisdiction of domestic courts and military tribunals to try defendants in such matters.

In response to a question on whether there was any conceivable situation where international judges would be better placed to deal with American nationals, Ambassador Rapp reiterated that it was the United States' 'constitutional system that establishes who can be judges and generally these positions are restricted to American citizens'. The clear implication was that there was a hard limit to accepting international judicial

[150] SC Res 1970.
[151] Ibid., operative clause 5.
[152] Ibid., operative clause 6.

power as a continuation of municipal powers. The essence of a liberal nationalist vertical separation of powers is that these remain distinct and not interchangeable in relation to the same subject matter. At the same time, Rapp gave an assurance that the administration would 'conduct ourselves in terms of our adherence to international law in such a way that we will never give cause to any legitimately motivated prosecutor to bring a case or to seek admission of a case against an American citizen in an international court'.[153] This argument from liberal internationalism is distinct from the first, in seeking to check international judicial powers through the integrity of the American system, as compared to the absolute separation of that system from international powers. By tracing ideological influences, it is clear that the administration thus charted a course rejecting the illiberal principles that shaped the Bush 43 ICC policy, of supremacy of municipal legal power and a bare right to withhold consent, yet also legalism's supremacy of international judicial power in the ICC.

The Indivisibility of Legalism and the Crime of Aggression

Although the United States maintained a constructive dialogue defining and implementing the crime of aggression, it became clear that its very inclusion in the Rome Statute ran counter to any conception of legal power held by American policymakers. Across a series of statements, Koh and Rapp emphasised that, even apart from actual politicisation of aggression prosecutions, it would be impossible to avoid the apprehension of such bias. Koh warned that any such ICC prosecution 'by its very nature, even if perfectly defined, would inevitably be seen as political'.[154] Moreover, however judicial power was determined, inevitably, '*someone* must make these political judgements'.[155] Rapp explained that aggression would take the ICC 'into the political area' dealing with 'crimes not against individual civilians, as in war crimes or crimes against humanity or genocide, but crimes against states'.[156] These were not merely criticisms about the design of the ICC but a challenge to the very principle of instituting judicial powers at the global level lacking democratic foundations. US scepticism translated into a policy of maintaining direct and indirect barriers to realising the crime in any meaningful form.[157]

[153] Rapp, 'Press Briefing with Stephen J. Rapp'.
[154] Koh, 'Statement Regarding Crime of Aggression'.
[155] Koh & Buchwald, 'The Crime of Aggression', p. 266, original emphasis.
[156] Koh & Rapp, 'U.S. Engagement with the ICC'.
[157] US opposition was further expressed in Understanding 4, which sought to decouple the treaty crime from customary international law developments: see Kreß, Barriga, Grover

US policymakers raised an especial concern that inadequate consideration had been given to how complementarity could work in the case of aggression. The nature of the crime was such that political leaders would rarely be prosecuted by their own states, and thus it may fall to other states to do so.[158] US policymakers warned that this scenario would contravene basic principles of sovereign immunity by allowing 'the domestic courts of one country to sit in judgment upon the state acts of other countries in a manner highly unlikely to promote peace and security'.[159] Scenarios were envisioned of states circumventing sovereign immunity by claiming that complementarity empowered them to act as agents exercising the independent judicial powers of the ICC.[160] Since official state involvement is an element of the crime itself, there was a real risk of adversaries exploiting the crime to engage in 'lawfare'.[161] Understanding 5 was thus instituted to directly combat expansive applications of complementarity:

> It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

The Understanding contravened legalist principles by effectively denying any exercise of universal jurisdiction by states parties.[162] Koh responded, however, that any power to prosecute aggression at the municipal level 'derives from national jurisdiction' and not from notionally impartial ICC power. The general rule that a state must consent to another state exercising jurisdiction over its leaders must hold for domestic aggression prosecutions.[163]

The eventual outcome of the Kampala negotiations was a compromise between states who opposed a UNSC monopoly on aggression cases and US insistence that it check ICC jurisdiction. The UNSC's monopoly was loosened by allowing the prosecutor to proceed where the UNSC had declined or failed to act. This minor concession came, however, at the

& Von Holtzendorff, 'Negotiating the Understandings on the Crime of Aggression', p. 93.

158 Fairlie, 'The US and the ICC Post-Bush', pp. 553–4.

159 Koh, 'Statement at the Review Conference of the ICC'.

160 Kreß, Barriga, Grover & von Holtzendorff, 'Negotiating the Understandings on the Crime of Aggression', pp. 93–4.

161 Beth van Schaack, 'Par in Parem Imperium Non Habet Complementarity and the Crime of Aggression' (2012) 10 *Journal of International Criminal Justice* 133, p. 150.

162 Weed, *ICC and the Rome Statute*, p. 13.

163 Koh, 'Statement Regarding Crime of Aggression'.

cost of granting the US immunity from all aggression prosecutions for so long as it remained a non-state party, and even as a state party through an opt out provision.[164] The agreement transformed ad hoc immunities of non-state parties set out in prior UNSC referrals and enshrined them in the Rome Statute itself. US policymakers had ensured 'total protection for our Armed Forces and other U.S. nationals going forward'.[165] The arrangement was adopted by consensus in the final resolution of the Kampala Conference.

Far from being evidence of a common understanding on the proper legal principles for determining ICC judicial powers, the outcome represented a highly contentious political trade-off. Paulus foresaw the risk of 'politicization' if the United States and other UNSC members were granted the power to control ICC judicial independence, but ultimately accepted that legal principle must give way to political expediency. The ideal of 'complete freedom' needed to be weighed against the risk that it would endanger the 'vital support of the P5 for ICC investigations in the first place, and further alienate the United States, in particular'.[166] States that had opposed US negotiators throughout the Kampala Conference viewed the agreement as an instrumental concession to political power. Minutes before the final resolution was adopted, Japan intervened to declare as its 'sad duty' that compromises within represented 'the undermining of the credibility of the Rome Statute and the whole system it represents'.[167] Throughout the conference, Japan had highlighted its 'strong belief that the activities of the ICC [contribute] . . . to the establishment of the rule of law in the international community'.[168] Faced with the final resolution, Japan condemned the exclusion of non-states parties and territories from ICC aggression jurisdiction under Article 15*bis*(5). Such a concession 'unjustifiably solidifies blanket and automatic impunity of nationals of non-States Parties: a clear departure from the basic tenet of article 12 of the Statute'. The method by which this was incorporated amounted to 'suicide of legal integrity'. With 'a heavy heart', Japan

[164] See *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, Art. 15*bis*(5).

[165] Koh & Rapp, 'U.S. Engagement with the ICC'.

[166] Andreas L. Paulus, 'Second Thoughts on the Crime of Aggression' (2009) 20 *European Journal of International Law* 1117, pp. 1125–6.

[167] Cited in Stefan Barriga & Claus Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), p. 810.

[168] Ichiro Komatsu, 'Statement of the Government of Japan at the Review Conference of the Rome Statute of the International Criminal Court', 31 May 2010, https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Japan-ENG.pdf.

allowed the adoption by consensus, but warned that its future cooperation depended on these concerns being addressed.[169]

Conclusion

Whereas states parties argued for separation of international judicial power into a court with supreme authority, policymakers in the Obama administration continued to argue for the merits of ad hoc and hybrid tribunals exercising those same international powers. The legalist view was necessarily anchored in the 'cosmopolitan claim of the global justice community'[170] – a set of values often convergent, yet distinct from the claims of US democratic values. Whereas states parties argued that the ICC should sit above all countries as a check over international criminal acts, US policymakers carved out exclusive rights to adjudicate those matters in relation to their own nationals. The success of the US claim for effective immunity from the crime of aggression came only at the expense of key states accepting a court design they considered to be contrary to the international rule of law.

Ultimately, the parties at the Kampala Conference could reach agreement only by deferring implementation of the crime of aggression until a further 'decision to be taken after 1 January 2017'.[171] This was a success for the US tactic of obstructing recognition of the crime in the ICC's ordinary jurisdiction. Under Obama, the United States continued to increase non-binding support for the ICC, even as it challenged the desirability or feasibility of establishing independent judicial power at the apex of the system of international criminal justice. Where 'concerns regarding the potential for politicized prosecutions are at the core of U.S. opposition', that opposition became crystallised in liberal legal principles constituting the very meaning of the rule of law for those who held them.[172]

[169] Cited in Barriga & Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression*, pp. 810–12. Curiously, Koh cites these statements in support of his arguments *for* US political discretion as a check on ICC jurisdiction: Koh & Buchwald, 'The Crime of Aggression', p. 290.

[170] deGuzman, 'Inter-National Justice for Them or Global Justice for Us?', p. 184.

[171] *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, Arts. 15*bis*(3) & 15*ter*(3).

[172] Fairlie, 'The US and the ICC Post-Bush', pp. 559–60.

Chapter Conclusion

Bosco notes, perhaps cynically, that, during the Obama administration, 'US officials were becoming adept at framing efforts to guide the court as expressions of concern for its well-being'.[173] That appraisal echoes the hypothesis of US legal policymakers consciously disregarding commitment to law in favour of political interests. The evidence from this period points to a more nuanced interpretation, in which political interests were channelled through ideologically entrenched conceptions of law itself. In what reads as a veiled criticism of the legalist position, Koh intervened in the Kampala Conference to remind delegates that the ultimate objective remained 'making international criminal law for the real world'. That goal was threatened by any 'unworkable and divisive compromise that weakens the Court, diverts it from its core human rights mission, or undermines our multilateral system of peace and security'.[174] These were all charges laid by American policymakers against states and organisations insisting that the necessary elements of an ICC compliant with the international rule of law remained formalised development of global governance, sovereign equality between states and the separation of international judicial powers. Instead, across this period, US policymakers emphasised the processes of transnational development as more significant than the formal obligations of a signed treaty. The perception of an exceptional US role in upholding liberal values was maintained as a reason for opposing the equal application of legal rights. Finally, scepticism about the integrity of independent judicial power was held out as a reason for maintaining immunities from ICC jurisdiction.

Toward the end of the Obama administration, the 2015 *National Security Strategy* (NSS 2015) was released, which mentioned the ICC only once, and in terms that consolidated the preference for transnational and pragmatic development of the court. The strategy committed support to the ICC – subject to a proviso that it was 'consistent with U.S. law and our commitment to protecting our personnel'.[175] That commitment to flexible obligations under the ICC was couched within, and given meaning by, broader exceptionalist beliefs:

[173] Bosco, *Rough Justice*, p. 165.
[174] Koh, 'Statement at the Review Conference of the ICC'.
[175] The White House, *The National Security Strategy of the United States of America 2015* (2015), p. 22.

> Strong and sustained American leadership is essential to a rules-based international order that promotes global security and prosperity as well as the dignity and human rights of all peoples. The question is never whether America should lead, but how we lead.[176]

In all these ways, the Obama administration continued to receive the hegemonic impulses of US power through the lens of distinctively American conceptions of the international rule of law.

[176] Ibid., p. i.