

# Challenging sovereignty? The USA and the establishment of the International Criminal Court

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## Abstract

Does the establishment of a permanent International War Crimes Tribunal (International Criminal Court—ICC) constitute a challenge to national sovereignty? According to previous US governments and several American observers, the answer is yes. Establishing a world court that acts independently of the states that gave birth to it renders the idea of sovereignty meaningless. This article analyzes the American objections to the ICC and the conception of sovereignty and international law underlying these objections. It first considers the structure and intent behind the criminal court and attempts to unveil the logic hiding behind the idea of ‘America’s historical uniqueness.’ It touches on the diverging US and European conceptions of sovereignty and ends up arguing that governments that stick to traditional conceptions of sovereignty and international law in the employment of their foreign policy may lose the moral legitimacy that has proven increasingly important for winning the sympathy of allies and regaining world leadership.

**Keywords:** *The ICC; US opposition to the court; sovereignty; international law; exceptionalism*

## INTRODUCTION

The ICC statute and the premises underlying it are unacceptable, primarily because of the unprecedented erosion it would work on state sovereignty. (David A. Nill 1999, 16)

On July 17, 1998, 120 states voted in favor of establishing a permanent International Criminal Court (ICC). The decision to establish a permanent court has been considered a great leap forward for international justice and the culmination of a lengthy process that can be traced back to the conventions of the conduct of warfare in the nineteenth century and, more specifically, the Nuremberg and Tokyo trials after World War II.<sup>1</sup> Despite their legacy, however, the Nuremberg and Tokyo

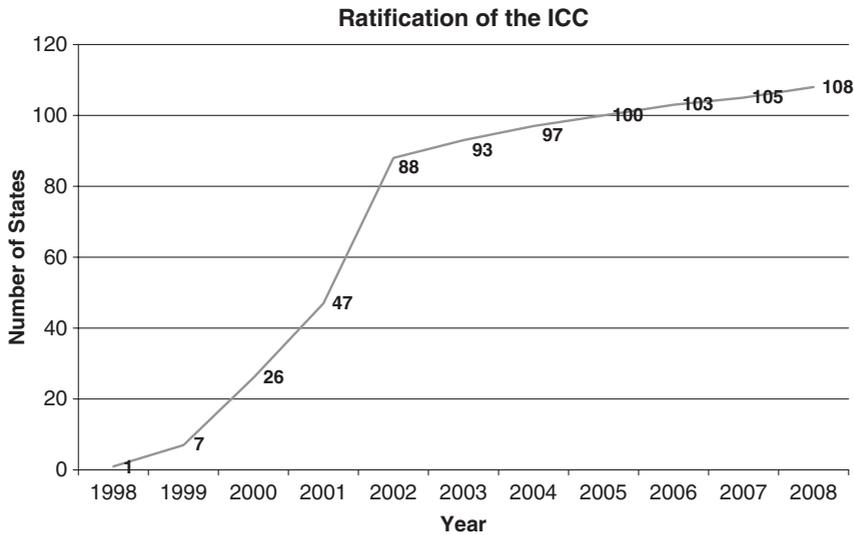
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proceedings<sup>2</sup> have been heavily criticized for only representing victor's justice.<sup>3</sup> It was the victorious party's judges, attorneys, and prosecutors who mounted the benches, and there were few, if any, doubts about the defendants' guilt in advance.<sup>4</sup> By being grounded in—but independent from—the United Nations, the ICC ought to circumvent this problem; however, not everyone has been convinced about the court's unpartisan role.<sup>5</sup>

While former UN Secretary General Kofi Annan saw the establishment of a permanent criminal tribunal as a 'monumental step forward in the march towards universal human rights and the rule of law,'<sup>6</sup> it is well known that the previous American administration in particular has been much more skeptical. Senator John Ashcroft, a US Foreign Relations Committee Member and later the Attorney-General in the George W. Bush administration, has argued that a criminal court will comprise sovereignty in a fundamental manner: 'If there is one critical component of sovereignty, it is the authority to define crimes and punishment. This court strikes at the heart of sovereignty by taking this fundamental power away from individual countries and giving it to international bureaucrats.'<sup>7</sup> Or as Lee A. Casey, an attorney and former advisor to the G.W. Bush administration, has stated: 'Were the United States to become a State party to the Rome Statute, it would, for the first time since July 4, 1776, acknowledge the superior authority of an institution neither elected by the American people, nor accountable to them for its actions.'<sup>8</sup> Though the US government played an important and influential role in the committee work preparing for the establishment of the court, it ultimately refused to ratify. The Bush administration has moreover obstructed the court in the years that followed by launching a campaign to oblige countries to sign bilateral agreements on the non-surrender of American citizens.<sup>9</sup> The so-called 'American Service Members protection Act (ASPA)' is a law specifically designed to ensure that American and allied soldiers and government officials will not be subject to the ICC.<sup>10</sup> As of August 2006, roughly 108 countries had agreed not to hand over American citizens to the court.<sup>11</sup> Figure 1 illustrates the development in the ratification of the Rome Statute.<sup>12</sup>

It is not that American leaders do not believe in the rule of law, but—as this article will argue—when so many influential Americans on both sides of the political divide have reservations of an almost existential nature about empowering a court beyond the reach of the UN Security Council and thereby indirectly US veto power,<sup>13</sup> it calls for further enquiry. At a very fundamental level, many Americans simply do not accept the notion of a permanent tribunal capable of playing an *autonomous role* in international law and which, acting independently of the states that have established it, may question their sovereign right to determine who is a war criminal and who is not.<sup>14</sup> This article argues that parts of this international-court skepticism or self-proclaimed 'American exceptionalism'<sup>15</sup> can be attributed to a classical positivist understanding of international law, where states are states and legal obligations outside the national realm are entirely optional.<sup>16</sup> States sign treaties and produce international law; concurrently, states decide whether it is in their particular interest to follow the dictates of such laws or not. This implies that the authority and legitimacy vested in international bodies is



*Fig. 1.* The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries. As of 1st June 2008, 108 countries are States Parties to the Rome Statute of the International Criminal Court.

of a fundamentally different nature than what is found at the national level.<sup>17</sup> This article will show that what colors the American position to the ICC is the vision of American exceptionalism which elevates the USA above and outside the law combined with a *voluntarist* conception of international law. In a purely voluntarist conception of international law it is considered a contradiction in terms to regard a state as sovereign if it has subjugated itself to an independent international body such as the ICC. While everybody expects the incoming Obama administration to change the US approach to the ICC this article will argue that the special American take on concepts like sovereignty and international law are so deeply ingrained in American legal and political thinking that they will continue to play a strong role no matter which government is in power.

The concept of sovereignty is at the center of the debate here and has traditionally been about whether the authority of supranational organizations poses a threat to national sovereignty or not. This article takes a different vantage point, however, as sovereignty is seen not as a static concept that you either have or do not have, but as a concept with many possible meanings; in other words, sovereignty is a social construct with a range of effects on how states perceive their own interests.<sup>18</sup> Moreover, the different meanings of the concept have consequences for the type of threats a state sees to its sovereignty and thus also for the US perception of the ICC as a constraint on national sovereignty.<sup>19</sup> This article will argue that the American position toward the ICC can be explained by a nineteenth-century conception of sovereignty and international law which perceives these two phenomena as entirely

incommensurable. Leading Americans influencing this debate have continued to regard the USA as elevated above ordinary international legal constraints due to the country's uniqueness, moral virtue, and historical exceptionalism (Mansell & Haslam 2005). Moreover, it is a basic assumption in this study that conceptions and ideas affect policy positions.<sup>20</sup> The way the US administration conceptualizes sovereignty (and thereby frames the world it sees) will have consequences for its foreign policy and position toward the ICC. In other words, the argument pursued here is that the US crusade against the ICC cuts much deeper than merely another attack on international institutions. It feeds into the 'anti-internationalist' movement which to different degrees have been thriving in the USA in the past, not only in governmental quarters but also in scholarly literature.<sup>21</sup> As will be argued here, the 'anti-internationalists' implicitly deny that the body of international law constraining US military force can be considered law at all.<sup>22</sup> The article will proceed by attempting to assess the major US objections to the ICC; however, the initial step will be to briefly account for the basic structure of the ICC and its historical background. Secondly, the main objections voiced by the US delegation when the court was negotiated will be scrutinized. The article will then proceed to examine the proposed link between the positivist conception of international law and the arguments used to defy the legitimacy of the ICC. It will be shown how the dominant US position toward international law links with the vision of American exceptionalism (to be defined below). The article will also draw a brief comparison between the US position and the European conception of sovereignty and international law and courts. Finally, there is a short discussion of the consequences of the position of the US government to the ICC and international law for US foreign policy in general; particularly as regards the ability of the government to win back the moral legitimacy that has proved increasingly important for maintaining world leadership.

## FROM NUREMBERG TO ROME

When agreement concerning the permanent ICC was reached in Rome in 1998, it was simultaneously decided that the treaty would enter into force once 60 states had ratified it. This number was already reached in 2002, and the court was formally launched in March 2003 with a grand ceremony and the introduction of its first 18 judges. The court was established in The Hague, the capital of international law, and has jurisdiction over crimes such as genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>23</sup> One of the more controversial issues from an American perspective is that the court has an independent prosecutor who can take up cases at his or her own initiative. Cases can also be initiated by the UN Security Council and state parties.

After World War II, the Allies met in London<sup>24</sup> and created—after six weeks of negotiations—the first international military tribunal in history.<sup>25</sup> Despite recurrent criticism, most observers agree that the Nuremberg tribunal represents a milestone in international law, precisely because it established the *individual* responsibility of

crimes committed under international law. Traditionally, states have been the sole subjects of international law and the only authority that the individual should answer to if a crime was committed. However, the Nuremberg trials established that individuals have *rights* and *duties* that can be enforced by the international community.<sup>26</sup> By making it possible to hold individuals responsible for their crimes under international law, it was no longer possible to hide behind the shield of the sovereign state.<sup>27</sup> The lessons from Nuremberg were later codified in the Genocide Convention and the Universal Declaration of Human Rights in 1948, and—finally—the four Geneva Conventions adopted in 1949. Despite the broad consensus on the adoption of the Universal Declaration of Human Rights, however, this document and many of the conventions signed subsequently were worth less than the paper they were written on until the end of the Cold War. Global passivity toward atrocities such as the Khmer Rouge, the Pinochet regime, and the military dictatorship in Argentina were obviously rooted in the ideological divide prevailing during the Cold War, which rendered it almost impossible to summon even a marginal common view on the human rights issue. The two combatants, the USA and the Soviet Union, were much more concerned with finding allies than digging up any human rights violations committed by potential allies. After the end of the Cold War, things changed dramatically. The ‘end of history’ scenario, as Francis Fukuyama formulated it, turned liberal values such as rule of law, market economy, democracy, and human rights into indisputable social norms.<sup>28</sup> As the citizens of the former Communist countries took down the Berlin wall, it suddenly became legitimate to scrutinize and criticize the democratic standards and human rights policies of other governments.<sup>29</sup> Regimes which had previously enjoyed the convenient passiveness of the international community during the Cold War suddenly had to defend their past and current policies. This new-found scrutiny extended beyond policies dealing with foreign affairs and the relations to other nations; the domestic relationship between the rulers and the ruled suddenly also became a legitimate concern of the entire world community.<sup>30</sup>

The atrocities that took place during the dissolution of former Yugoslavia together with the Rwandan genocide in the beginning of the 1990s contributed to increasing international debate about how to provide justice to the victims of these violations. This new perspective enabled the Security Council to pass resolution 827 in 1993 creating a special international tribunal to prosecute those responsible for genocide, crimes against humanity, and war crimes in the ongoing war in former Yugoslavia.<sup>31</sup> In 1994, just one year later, when the world again witnessed the horror of human brutality in the Rwandan genocide, the answer was therefore to create yet another temporary tribunal to deal with those responsible.<sup>32</sup>

While the two temporary tribunals were considered a major leap forward in the enforcement of humanitarian and human rights law, they were also heavily criticized for their ad hoc nature. This criticism was a driving force in the decision to establish a permanent court. One of the points of criticism has centered around the fact that all temporary tribunals will depend on the UN Security Council, which gave birth to them. What motivated the most influential member states in the Council when the

temporary tribunals were set up? Did they have ulterior motives? Another widely debated point is that of 'selective justice' and the lack of consistency in the development of humanitarian law in general when new temporary bodies are established and new judges appointed, often under changing political circumstances.<sup>33</sup> To the extent that a criminal court is meant to act as a deterrent, one can also question the relevance of ad hoc tribunals. As Rancilio states: '... ad hoc tribunals ... do not serve as a deterrent, whereas a permanent court would be a constant reminder of the consequences of committing an international crime.'<sup>34</sup> Rancilio even argues that a permanent court might reduce the need for direct US military interventions. This vision is hardly convincing, however, resting as it does on the illusion that law can and should replace politics.<sup>35</sup>

A different question has been whether it is possible to secure justice when an entire legal machinery (as a temporary court) is transposed to a country in ruins, where the legal institutions are not functioning, and where disparity in culture and political makeup may haunt the entire process. The Rwandan tribunal offers a case in point in this regard. I will return below to how the opponents of a permanent tribunal have used these exact arguments (only in reverse) in favor of temporary tribunals. Due to many of the above-mentioned points of criticism, some states have chosen alternative routes for dealing with the human rights violations of former regimes. Truth commissions and amnesty laws are good examples. Such steps are sometimes promoted as more efficient instruments for restoring political and social stability. Some even suggest that transition to democracy in itself may be the right answer.<sup>36</sup> However, such mechanisms for overcoming past atrocities have also been criticized for having severe defaults. As one commentator has stated: '... domestic amnesty laws are inconsistent with international human rights law and are part and parcel of a general policy of human rights violations.'<sup>37</sup>

## FIGHTING GLOBAL JUSTICE?

The opposition of the United States to the International Criminal Court appears as either a puzzle or an embarrassment ... [A] [p]uzzle, because it is not at all obvious why the United States should feel so threatened by this new court ... [A]n embarrassment, because the United States appears to be exempting itself from rules of the game that it believes should apply to others.<sup>38</sup>

The USA voted against the adaptation of the Rome Statute in July 1998, though President Bill Clinton was—at least partly—in favor of an ICC and signed the treaty in December 2000 before leaving office. After failing to secure US citizens immunity and US veto power, however, Clinton also expressed strong reservations toward the treaty establishing the ICC and even recommended the US Senate not to accede the treaty 'until the fundamental U.S. concerns were met.'<sup>39</sup> Jesse Helms, then chairman of the Senate Foreign Relations Committee, declared that the Treaty would 'be dead on arrival' if any American soldiers risked indictments.<sup>40</sup> Today, more than 10 years

after being drafted in Rome, the Statute still lacks backing by the US Senate. Whether the Obama administration intends to change this state of affairs remains to be seen.

The interesting question now becomes why two US administrations—Democratic as well as Republican—have had such strong reservations about signing on to an ICC? Are Republicans as well as Democrats fighting ‘Global Justice’? Or are we—behind the good intentions of spreading democracy and human rights—dealing with a special conception of sovereignty and US ‘exceptionalism’ that is irreconcilable with supranational judicial bodies such as the ICC? Mansell and Haslem define American exceptionalism in relation to international law in the following manner:

The USA must be free to act in way which its citizens democratically determine. Every attempt to constrain through external agreement moves authority away from the Constitution to the international community whose interest may not coincide with those of the USA. Why fetter future governments and, arguably, unconstitutionally hand power to outsiders?<sup>41</sup>

The many debates in the Senate and elsewhere in Washington in the late 1990s and beginning of 2000 reveals that the sovereignty issue plays a central role:

The formation of the ICC opens the door to new and troubling questions concerning the future of international justice and its influence on national sovereignty.<sup>42</sup>

The concern about sovereignty is reemphasized in an analysis from the CATO Institute on the finalization of the Rome Statute in 1998. Here, Gary Dempsey noted that: ‘... the court threatens to diminish America’s sovereignty, produce arbitrary and highly politicized “justice”, and grow into a jurisdictional Leviathan.’<sup>43</sup> In addition to the oft-reappearing sovereignty argument, the US administration has produced a host of additional arguments against the ICC. In a talk at the Center for Strategic and International Studies on May 6, 2002, Under Secretary of State for Political Affairs Marc Grossman makes the position of the American government quite clear. As he states:

‘Here is what America believes in:

- We believe in justice and the promotion of law.
- We believe that those who commit the most serious crimes of concern to the international community should be punished.
- We believe that states, *not international institutions*, are primarily responsible for ensuring justice in the international system.
- We believe that the best way to combat these serious offences is *to build domestic judicial systems*, strengthen political will and promote human freedom.’<sup>44</sup>

Marc Grossman continues by spelling out how the ICC is incapable of fulfilling these objectives:

- ‘We believe the ICC undermines the role of the United Nations Security Council in maintaining international peace and security.
- We believe in checks and balances. The Rome statute creates a prosecutorial system that is an *unchecked power*.
- We believe that in order to be bound by a treaty, a state must be party to that treaty. The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens U.S. sovereignty.
- We believe that the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.’<sup>45</sup>

We will not scrutinize all of these statements and allegations in the following, focusing instead on three core issues of continuing concern to the US administration: the aggression clause in the treaty, the fear of an uncontrolled prosecutor, and the question of sovereignty, which is of main interest in the work at hand.

### WHAT CONSTITUTES AGGRESSION?

For the American administration, the clause in the ICC treaty on ‘the crime of aggression’ has been among the most controversial. According to the Treaty, the concurring states should at some point agree on how to define when an act of war/intervention/attack constitutes an act of ‘aggression’ deserving punishment. Two arguments in particular were put forward when the treaty was negotiated. Firstly, what is ‘aggression’ and how does one define it? The other objection deals with the possible weakening of the UN Security Council. On the one hand, it was decided that the court should be able to punish acts of state aggression. On the other, it was not possible for the signatory states to reach agreement as to when the use of force of one state on another was to be categorized as legitimate self-defense or aggression. At the final drafting of the Rome statute, it was decided that the question should be postponed, and the issue has yet to be resolved.<sup>46</sup>

If we begin by examining the first objection, the signing states have today accepted the treaty without knowing what actually constitutes an act of aggression. Decision was made to postpone the definition and later amend it to the treaty. According to the US administration, including ‘aggression’ might indeed undermine a peoples’ ‘right to self-defense’ as defined in the UN Charter, as it will be impossible to know (or agree on) whether we are dealing with a case of self-defense or aggression. Or to mention a very recent case: it might question the US ‘pre-emptive war’ doctrine and the attack on Iraq, since this could in theory be regarded as an act of aggression by the criminal court. Treaties with unclear scope are likely to be unsatisfactory, not least for a superpower such as the USA, which has worldwide interests. Paradoxically however, the treaty clearly provides that *state parties* can refuse to accept later amendments to the treaty if they do not agree to them. This implies that the USA would in fact be much better protected from any subsequent definition of ‘aggression’ by being signatory to the treaty rather than remaining outside of it.<sup>47</sup>

The purely rational strategy would in other words have been to join the treaty and push for changes or status quo from within the ICC.

Moreover, because the ICC can indict and prosecute persons from states that are not party to the treaty (if these persons have committed crimes on the territory of a state party), the USA has threatened to withdraw its UN peacekeepers around the world if they are not granted immunity.<sup>48</sup> The US administration fears that the ICC may (ab)use its power by attempting to bring leading officials, generals, and soldiers to trail for acts that would not be considered illegal by either the Security Council or national courts. This is why the USA has enacted the ASPA, which, as noted earlier, shall protect American and allied soldiers from ICC indictment.<sup>49</sup>

The second objection related to the ‘aggression issue’ concerns the possible challenge of the court to the UN Security Council. The Bush administration argued that when the parties to the court finally determine the definition of an aggressive act, it will inevitably challenge the authority of the UN Security Council to make decisions regarding the legitimate use of force, i.e. whether we are dealing with a threat to international peace and security or an act of self-defense. To date, the UN Security Council has had the monopoly under international law to define when using arms can be regarded as legitimate. This also implies that a permanent Security Council member is able to veto a proposal to condemn an act of state aggression. Under this model, power thus remains with the permanent Council members. It is rather clear, however, that any say the criminal court has on the issue will weaken the authority of the Security Council and—following the anti-court argument—indirectly transfer power and legitimacy from a state forum (the Security Council) to an ‘uncontrolled and ever-expanding juridical bureaucracy’ as Jasper has put it.<sup>50</sup> According to the court advocates, however, the power of the Security Council in relation to aggression has never been compromised: ‘Acting under Chapter VII, the Council can assert its primary responsibility over international peace and security in specific cases, ensuring that the overall structure of the UN Charter remains unchanged.’<sup>51</sup>

## **A PROSECUTOR RUNNING WILD?**

The ‘uncontrolled bureaucracy-argument’ is however prominent among many commentators who view the power of the ICC as unconstrained. A power should be based on the principle of checks and balances and, as Marc Grossman put it, in Rome: ‘... there was a refusal to constrain the Court’s powers in any meaningful way.’<sup>52</sup> One of the details that the administration was most unhappy with was the role of the independent Prosecutor, who is responsible for investigations and prosecutions before the court. The Prosecutor has several routes for initiating investigations: referrals from state parties, requests from the Security Council, victims or NGOs, or on his or her own initiative. It is the latter possibility that is unacceptable for the Americans. If taking on new cases were left to the state parties or the Security Council, the US reservations would be less adamant. As Eric Posner has argued,

America might even have been a supporter of the ICC ‘...if only the court’s founders had agreed to make prosecutions turn on the Security Council authorization, which would have given the major powers vetoes over prosecutions.’<sup>53</sup> According to the treaty, however, the Prosecutor can take up cases, rendering it impossible for governments and the Security Council to control the process. As the former US Under Secretary of State for Arms Control and International Security and later Ambassador to the United Nations John Bolton stated in 2002, this is a direct and indirect attempt to constrain American power:

Never before has the United States been asked to place any of that power (to decide about prosecutions MW) outside the complete control of our national government without our consent . . . Our principle concern is for our country’s top civilian and military leaders, those responsible for our defense and foreign policy. They are the ones potentially at risk at the hands of the ICC’s politically accountable Prosecutor, as part of an agenda to restrain American discretion, even when our action are legitimated by the operation of our own constitutional system.<sup>54</sup>

As Bolton argues, this is not merely a matter of protecting American interests; at a much deeper level, it concerns the entire idea of checks and balances essential to American democracy: ‘The Prosecutor will answer to no superior executive power, elected or unelected. Nor is there any legislature anywhere in sight, elected or unelected, in the Statute of Rome. The prosecutor is answerable only to the Court,<sup>55</sup> and then only partially, although the Prosecutor may be removed by the Assembly of State Parties.’<sup>56</sup> Following Bolton, the separation of powers is an American specialty, unknown to most Europeans:

Continental European constitutional structures do not, by and large, reflect a similar set of beliefs. They do not thoroughly separate judicial from executive powers just as their parliamentary systems do not so thoroughly separate executive from legislative powers. That of course, is entirely Europe’s prerogative, and may explain why Europeans appear to be more comfortable with the ICC’s structure, which closely melds prosecutorial and juridical functions in the European fashion.<sup>57</sup>

The Americans suggest instead that the UN Security Council ought to be able to intervene in the case of possible excesses by the ICC prosecutor.<sup>58</sup> By allowing the Security Council to veto the court, the Prosecutor could be kept on a short leash and power would remain firmly in the hands of the UN’s most powerful body. No such guarantees were given, however, even though it is possible for the Security Council to request the postponement of an investigation for 12 months. Not giving the Security Council any powerful role in the ICC process was deliberate. Placing the Security Council on top of the ICC would, according to most ICC proponents, have failed to secure a new universal justice system but merely confirmed the already-existing hierarchy in the international system.<sup>59</sup> Moreover, a case will only be taken up at the ICC if the country in question refuses or is unable to prosecute a particular war crime itself. This is called the principle of *complimentarity* and should perhaps have

been sufficient to persuade the USA that the ICC's own safeguards will prevent politically motivated indictments.

However, the argument concerning the role of the Prosecutor is ultimately also about sovereignty and the ability of the USA to control the development of international law and institutions. As many neoconservative Americans have stated, international (legal) bodies that are given excessive autonomous power may develop into world Leviathans, thus rendering it difficult for governments to continue seeing themselves as the makers and unmakers of their own international obligations.<sup>60</sup> As will be demonstrated below, the US opposition to the ICC is thus closely linked to a very classical conception of sovereignty according to which a state cannot be bound beyond its own wishes.

## CONSENTING TO JUSTICE

States are understandably jealous of their right to investigate and try international criminals in their own courts. National pride leads states to have faith in the competency and fairness of their domestic judicial systems. They do not want to surrender control over criminal cases to another tribunal.<sup>61</sup>

When browsing through material on the US position on the ICC, the word 'sovereignty' repeatedly appears in most official government papers. This in itself is rather remarkable. In Europe, sovereignty would seldom, if ever, be used as an argument for staying out of, for instance, an EU policy initiative or international institutions in general—it would simply not be regarded as legitimate. Things are different on the other side of the Atlantic, where 'the sovereignty argument' seems both legitimate and obvious when discussing the virtues and pitfalls of international institutions and international law.<sup>62</sup> For instance, when Under Secretary of State Marc Grossman states that the ICC treaty threatens US sovereignty because it '... claims authority to detain and try American citizens, even though our democratically elected representatives have not agreed to be bound by the treaty.'<sup>63</sup> According to Grossman:

While sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory, the United States has never recognized the right of an international organization to do so absent consent or a UN Security mandate.<sup>64</sup>

Granting 'consent' is the key expression here. According to the Vienna Convention on the Law of the Treaties, states are only bound if they themselves have consented to it.<sup>65</sup> A more explicit view on this issue can be found in the neoconservative magazine *The New American*, where William Jasper notes<sup>66</sup> that: 'Never before has the claim been made that states, which are not party to a treaty, are nonetheless bound by the same instrument. It is a violation of the most fundamental principle of

treaty law. A treaty does not create either obligations or rights for a third State without its consent.<sup>67</sup>

The fact that the ICC can try citizens of non-state parties is clearly an innovation in international law and questions a traditional concept of sovereignty. On the other hand, the USA has never hesitated when it comes to letting its courts try foreign citizens, whether their governments are state parties or non-state parties to a particular convention; particularly when drug trafficking or terrorism has been involved.<sup>68</sup> As Weller points out: ‘... the US has been in the forefront in insisting that other states must comply with the international excise of criminal jurisdiction without having given their consent. ...’<sup>69</sup>

However, the risk of having its citizens prosecuted by an international court to which it is not party has provoked the US government so much that it initiated its infamous ‘article 98 campaign’ in 2002, which, as noted above, was aimed at persuading as many governments as possible to sign bilateral anti-extradition agreements with the USA.<sup>70</sup> The campaign has been quite successful. More than 100 countries have been persuaded to ratify the agreement thus far,<sup>71</sup> where the US promises economic, military, or political assistance to a country if it refuses to hand over American suspects to the ICC. At a summit on September 30, 2002, even the European Council of Ministers reluctantly accepted that its members could sign Art. 98 agreements with the US government, although only under very strict conditions. Moreover, the European Council emphasized that ‘Entering into U.S. agreements—as presently drafted—would be inconsistent with ICC States Parties’ obligations with regard to the ICC Statute.’<sup>72</sup> There is little doubt that the Art. 98-campaign gave the previous American administration a bad reputation among its European partners. In comments and analyses of current US foreign policy, the campaign and the US position vis-à-vis the ICC has been a recurring theme together with the (lack of) diplomatic efforts of the previous US administration in relation to the Iraqi war.<sup>73</sup> That the Bush administration viewed its own legal system as the only legitimate authority when it comes to prosecuting alleged war criminals of American origin has been emphasized on several occasions and serves to underscore the vision of some kind of American exceptionalism vis-à-vis international law. Below George W. Bush puts it in the following way:

The United States cooperates with many other nations to keep the peace, but will not submit American troops to prosecutors and judges whose jurisdiction we do not accept ... Every person who serves under the American flag will answer to his or her superiors and to military law, not to the rulings of an unaccountable International Criminal Court.<sup>74</sup>

As noted above the US opposition toward the ICC is about more than narrow self-interest (i.e. the ability to maneuver politically in the world while avoiding prosecution at the hands of hostile foreign judges). This becomes clear when scrutinizing how the Administration argues about the country’s special or exceptional status in the international system. In other words, American exceptionalism implies that American foreign policy may (and shall) promote human rights and democracy

abroad. However, enmeshing the USA itself in an international legal hierarchy would be tantamount to compromise its own existence as a unique democracy answering to no foreign powers (or as in this case: courts). According to Jason Ralph, even from a liberal Wilsonian perspective, ‘US foreign policy should not put at risk American democracy and only promote the kind of democracy that is based on the nation-state.’<sup>75</sup>

The US sovereignty dispute is clearly also about the power and authority of national courts vis-à-vis international courts. Following the ICC statute however, domestic courts are in fact meant to continue playing a prominent role in prosecuting war criminals. The ICC only comes into play if and when a national legal system has not dealt with a particular case in a satisfactory manner or has not been willing to prosecute war crimes at all. Whether or not this has been the case is for the ICC to decide, which is exactly what makes the ICC unacceptable to the Americans. It grants the ICC juridical review over cases determined by national courts, thereby reducing national courts to lower courts in the international hierarchy. In *Policy Analysis*, Gary Dempsey argues the following:

... if the ICC gets to invalidate national trials by deciding what constitutes an ‘effective’ or ‘ineffective’ trial, the international court will exercise a kind of judicial review power over national criminal justice systems. In other words, the ICC will have de facto supreme judicial oversight.<sup>76</sup>

And he continues:

The ICC will also become an unavoidable participant in the national legal process. Indeed, because it will set precedents regarding what it considers ‘effective’ and ‘ineffective’ domestic criminal trials, the ICC will indirectly force states to adopt those precedents or risk having cases called up before the international court. That constitutes an unprecedented change in the sources of national lawmaking one that diminishes the traditional notion of sovereignty.<sup>77</sup>

Following David Nill, domestic courts could (and should) indeed play an even greater role in prosecuting war crimes: ‘Perhaps the best alternative to the ICC that would help preserve national sovereignty while addressing the pertinent crimes, would be to allow states to handle such prosecutions domestically.’<sup>78</sup> As indicated above, however, national judicial systems in many of the countries in question will often be either non-existent or in an untenable condition. According to Nill, this problem could be overcome if the UN system would help by ‘establishing international judicial standards palatable to both civil and common law traditions offering aid in the form of funds and expert consultants to assist countries in the development of their judicial systems. With a solid judiciary in place, nations could deal with the human rights crimes that might occur.’<sup>79</sup> Nevertheless, ‘a solid judiciary’ cannot be built overnight, and it is difficult to imagine how nations that have undergone a devastating war should have the capacity (and perhaps even willingness) to establish a fair trial for potential war criminals. The arguments above reemphasize the emphasis placed on *domestic* as opposed to *international* or—even

worse—supranational judicial bodies. This leads us directly to the core of the argument in focus here—the issue of sovereignty and the self-proclaimed American exceptionalism which draws strongly on nineteenth-century rhetoric on international law and obligations.

### **SOVEREIGNTY AND INTERNATIONAL LAW: AN IRRECONCILABLE DILEMMA?**

Anthony d'Amato once wrote an article entitled 'Is international law really "law"?'<sup>80</sup> The essay provoked great debate, because international law has existed and been referred to *as law* since at least the seventeenth century and the writings of Hugo Grotius. Nonetheless, international law has always had something unresolved about it, particularly in modern times. Following H.J. Morgenthau, for instance, international law is, as he puts it: '... a primitive type of law resembling the kind of law that prevails in certain preliterate societies, such as Australian aborigines and the Yurok of northern California. It is a primitive type of law because it is almost completely decentralized.'<sup>81</sup> The 'primitive' character of international law was also what one could extract from legal philosopher H.L.A. Hart's 'The Concept of Law' from 1961: 'It (international law) is in fact no more than a set of separate rules related to each other only because all are more or less regularly observed by states. There are no generally accepted tests of legal validity in international law, and it is therefore merely a matter of fact that states regard certain practices as obligatory.'<sup>82</sup> That is to say, when there is no generally accepted test for the validity of a law, rules only exist as rules as long as those actors agreeing to them adhere to them and find them useful for regulating social affairs.

Because positivist legal thinking became so dominant in international legal scholarship in the nineteenth and twentieth centuries, international law gained a somewhat dubious status in legal theory.<sup>83</sup> As William Pfaff has pointed out, however, the somewhat fuzzy character of international law is prominent in most contemporary international conventions, including those dealing with war crimes: 'Most international "law" that exists today is a compilation of international conventions and treaty agreements mutually convenient to the signatory nations or imposed upon them by more powerful nations ... (T)he "laws" of war, identifying war "crimes", are agreements among governments, and possess no authority as law.'<sup>84</sup> The former US Ambassador to the UN John Bolton has for long argued exactly this: international law is not 'law' in the classical meaning of the term and there is thus no real difference between international law and international relations.<sup>85</sup>

Though this crude understanding may have become less dominant after World War II and even less so after the more recent revolutions in Eastern Europe, it was certainly prominent in the nineteenth century and closely linked to a Hobbesian concept of sovereignty. At that time, it was commonplace to argue exactly like Bolton

that international 'law' is not really law but pure moral opinion. As John Austin put it in 1832:

... international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another. And hence it inevitably follows, that the law obtaining between nations is *not* positive law: for every *positive law* is set by a given sovereign to a person or persons in a state of subjection to its author. . . . the law obtaining between nations is (improperly so called) set by general opinion. The duties which it imposes are enforced by *moral* sanctions. . . .<sup>86</sup>

The close link between sovereignty and this primitive conception of international law emerged simultaneously with the European state system in the fifteenth and sixteenth centuries and gradually set aside the natural law doctrines dominating the field in the fourteenth and fifteenth centuries.<sup>87</sup> As time passed, however, sovereignty and international law became increasingly irreconcilable. As natural law gradually waned and the authority of the Church lost its grip, it became more and more difficult to come to terms with the idea that a ruler could be both the ultimate master within his own territory with no superior above him *and* subordinate to a body of international norms which he himself had created jointly with other sovereigns.<sup>88</sup> Rather, for the sovereign to be considered a true sovereign, the law would only be binding as law as long as he so commanded, which is exactly what has given international law its rather uncertain standing. The Danish legal philosopher Alf Ross formulated the dilemma between sovereignty and international law in the following manner in his international law textbook from 1942:

One must either take seriously that the state is only limited by its own will; but in that case, there will be no real limits, no real international law. Or one will have to completely embrace the restrictions of international law. In that case, however, the state will be bound by things beyond its own free will, in which case it will not be absolutely sovereign.<sup>89</sup>

As positive law gradually replaced natural law doctrines, what we now refer to as international law, including treaties and international customary law, came to be regarded as 'law' not because of some higher moral code or by sovereign command, but precisely because states *freely consented* to abide by it. And when agreements and norms are based on consent rather than an ultimate authority, it is also obvious that consent can be withdrawn should the agreed-upon norm no longer fit the national interest.<sup>90</sup> The contractual conception of international law rendered it possible to accept international obligations as binding *while* insisting that this normative obligation was a product of *state consent*, generated either through explicit acceptance or through custom and established practice. The 'free-will' character of international obligations has thus been an indispensable feature of modern international law for many years and is clearly one of the main reasons why nations always dispute and debate (sometimes without agreement) how a certain convention or treaty should be interpreted.<sup>91</sup>

The interesting thing now is that despite the victory of positivist international law over natural law doctrines in the eighteenth and nineteenth century, natural law gradually clawed its way back into public discourse during the twentieth century.<sup>92</sup> The argument has been that there are a number of moral principles that are elevated above the will of the state and which embrace some minimal human rights standards that belong to all of mankind. The Nuremberg trials, the UN Charter of Human Rights in 1948 and other human rights conventions in the preceding decades offer good examples. Natural law doctrines were thus also referred to in 1948 when the UN adopted its genocide convention. Here, it was argued that genocide was ‘naturally’ a crime against humanity that neither could nor should be accepted by anyone. Ironically, the USA could not ratify the genocide convention before 1986 because it challenged ‘...national sovereignty by subjecting individuals to an international rather than national tribunal.’<sup>93</sup> This certainly echoes the current debate over the ICC.

The ‘move to human rights’ has, as noted earlier in this article, been particularly prominent after the end of the Cold War, when some scholars even started to speak of ‘A Real New World Order’ and the strengthening of human rights law as a consequence of a reemergence of natural law principles in world politics.<sup>94</sup> In the view of Pfaff, this tendency even holds for the temporary international war crimes tribunals in The Hague and Arusha, even though he does not view the natural law influence as very successful: ‘The international war crimes tribunals ... rest on an intellectual tradition and a philosophy of law which are under serious attack within Western culture.’<sup>95</sup> Going beyond the much disputed natural law argument,<sup>96</sup> however, what we find appears to have much more to do with a rather fundamental reformulation of sovereignty—at least in parts of the world—where respect for human rights has become part and parcel of what it means to be a legitimate democratic state today. As Weiss has written:

The definitions of sovereignty and of national interests have been dramatically expanded to include humanitarian values. As social constructs, either definition is cast in concrete but rather changes over time in response to new circumstances and human society. It is striking ... That contemporary interests in military intervention (much to the dismay of realists) is driven by normative concerns.<sup>97</sup>

What Weiss refers to here is the increase in the number of humanitarian interventions in the 1990s. The initiative ‘Responsibility to Protect’ populations from genocide, ethnic cleansing, war crimes, and crimes against humanity points in the same direction.<sup>98</sup> In 2005, world leaders agreed that states have a primary responsibility to protect their own populations and that the international community has a responsibility to act when governments fail to protect the most vulnerable among us.

Respect for human rights has today become a prerequisite for *avoiding* external challenges to sovereignty: ‘Respect for human rights is required if the state is to be accepted as a legitimate sovereign entity.’<sup>99</sup> Interestingly, human rights violations were also (at some point, at least) a strong argument for invading Iraq as long as the

state-building efforts did not involve universal jurisdiction for crimes committed by American soldiers.

Despite the changing conceptions of sovereignty, however, the Bush administration maintained a classical positivist approach to international law and international relations. In Ralph words: ‘America’s commitment to global democracy is quite clearly limited to its commitment to statehood.’<sup>100</sup> Two arguments have been put forward by (neo)conservative ideologists regarding the unique US relationship to international law. Firstly, it has been argued that the crimes that the ICC will deal with may not be universal after all. Here, ‘universal’ implies that the crimes are illegal no matter whether a state has signed a treaty outlawing them or not. This position has not convinced many, however, primarily due to the fact that most of the crimes listed in the ICC statute—genocide, crimes against humanity etc.—already enjoy universality in international law: ‘It is the very essence of the doctrine of universality that it can be applied by any state over the national of any other state without the need to obtain consent from the latter state . . . It is entirely uncontested that the territorial state of an offence has the legal right to exercise jurisdiction over foreigners.’<sup>101</sup> Secondly, neoconservative ideologists have left the attempt to argue against the new humanitarian influence in international law—again—by placing the USA in its own unique legal category. Kristol and Kagan have spoken about the USA as ‘a benevolent hegemon’ emphasizing an ‘American Exceptionalism’ where the USA—due to its higher morality—is elevated above (and largely unbound by) traditional international law.<sup>102</sup>

It is exactly on the conception of international law, sovereignty, and international institutions that the European and American perspectives seem to differ. That most Europeans favor (and depend on) multilateralism and cooperation through international institutions is almost conventional knowledge. The European–USA divide over the Iraqi war offers a case in point. What annoyed the Europeans in this case was not only the rather miserable diplomatic efforts of the Bush administration leading up to the invasion, but also the arrogance and belief in US moral virtue; the conviction that western-style democracy is universally applicable and that everyone in the Muslim world would welcome western military liberation—no matter the costs. Where the Europeans stood side-by-side with their US partners after 9/11, sharing in their grief, shock, and frustration, the subsequent preemptive war strategy, unilateralism, and approach to the ICC has sparked almost anti-American sentiment in many European countries.<sup>103</sup> To this comes of course the circumstance that the development of the EU over the past 50 years has meant that Europeans have learned to conceive of sovereignty and international law in a fundamentally different way than the classical positivist conception, which still colors the perception of the neoconservatives in the US. Europeans have not only learned that states as well as nationals can be subjects of supranational law, but also that the classical positivist conception of sovereignty has little to offer. In a classical conception of international law, it has been commonplace to distinguish between international law as horizontal and *voluntary* and domestic law as hierarchical and *compulsory*.<sup>104</sup> However, in Europe things are no longer so clear-cut. Europe represents a new legal regime situated *in between* these

two extremes<sup>105</sup>—neither national nor international but constituting an entirely *new legal order* according to the European Court of Justice.<sup>106</sup> In the EU, sovereign states have surrendered aspects of their sovereignty to an international body, and a supranational (European) Court has the authority to make rulings that set aside the conflicting national constitutional law of the member states.<sup>107</sup> This is quite exceptional, particularly because it has never been explicitly consented to by the member states, though nevertheless accepted and internalized as the norm.<sup>108</sup> This also means that contemporary European governments live with a very actual and real chance of being subject to indictments in a supranational legal system; not only by other member states and EU institutions, but also from their own citizens who can launch cases against their own government and (through the national courts) ask the European Court for a preliminary ruling on the matter through Art. 234 EC.<sup>109</sup> This is more than a mere theoretical risk, as the 200 preliminary annual rulings make it more of a daily event. Several things suggest in other words that Europeans have learned to view sovereignty as a changing social construction rather than an objective fact that must be defended everyday on nineteenth century positivist premises.

One of the other successes of the European legal regime has been its continuous merging of different legal traditions; ‘judicial cross fertilization’ as Joseph Weiler has called it.<sup>110</sup> Here we also see a difference to the US position, where there continues to be a strong emphasis on national legal sources and a strong opposition among courts and judges to borrow from foreign legal traditions.<sup>111</sup> As Supreme Justice Scalia has tellingly put it in a dissent in the Lawrence case where reasoning from foreign courts are taken into account: ‘The Court’s discussion of ... foreign views ... is ... meaningless dicta. Dangerous dicta, however, since this Court ... should not impose foreign moods, fads or fashions on Americans.’<sup>112</sup>

Moreover, whereas European and modern international law places great emphasis on individual rights and responsibilities, the US experience differs markedly. When considering the US position vis-à-vis the ICC, it becomes clear that holding individuals instead of states accountable before an international court was one of the core issues dividing the court protagonists and its opponents. The idea of making individuals subjects of international law fits badly with a classical conception of sovereignty and international law, where individuals are only accountable to their own national superior. International bodies have traditionally had no competence to either prosecute or pass judgment on individuals.<sup>113</sup> On the other hand, this cannot be something that the US government objects to out of principle, since making individuals accountable before an international court was also the prime objective of the temporary tribunals of the former Yugoslavia and Rwanda to which the USA gave its blessing and even financed to a large extent. It seems likely that the American 9/11 experience, the war on terrorism and Bush’s pre-emptive war doctrine has drawn attention away from attempts to create international consensus on the ICC and multilateralism in general. However, despite the sympathy that one may or may not have for American foreign policy under George W. Bush, several things suggest that international discourse on sovereignty and international law is currently undergoing radical changes; changes that make it increasingly problematic to put sovereignty

before human rights, also in situations where national security appears to be at stake.<sup>114</sup>

From a theoretical perspective, what we see with the US position is an immensely close link between the concept of sovereignty and the classical positivist conception of international law. As a government's general view on sovereignty and international law may have an intense impact on its perception of possible 'threats' and its policies toward international institutions, the supporters of the ICC are up against much more than classical interest-based power politics. They are fighting sedimented ideas and centuries-old conceptions of what constitutes a sovereign America. However, while the objections toward the ICC result from a persistent idea of American exceptionalism, it nevertheless increasingly contradicts the evolution of international law and society in other parts of the contemporary world. Will the incoming President Obama change this policy on the ICC as many expects? Obama has made no statements on the ICC after entering office but is unsurprisingly less categorical on the issue of US cooperation with the court. However, there still seems to be a long road to travel before the USA may join and thus ratify the Rome Statute, as Obama put it during his campaign in 2007:

Now that it [the ICC] is operational, we are learning more and more about how the ICC functions. The Court has pursued charges only in cases of the most serious and systematic crimes and it is in America's interests that these most heinous of criminals ... are held accountable.[...]. Yet the Court is still young, many questions remain unanswered about the ultimate scope of its activities, and it is premature to commit the U.S. to any course of action at this time.<sup>115</sup>

However, the US skepticism against the ICC is stronger and more ingrained in American political thinking than what a simple change of government may promise. As Kevin Jon Heller puts it:

The U.S. has been the ICC's most bitter critic, refusing to ratify a Statute it played a critical role in drafting, launching a multi-year blackmail campaign to force States to sign Article 98 agreements, and even authorizing the use of military force against the Hague should an American ever end up in the dock there. Joining the ICC would thus not only demonstrate to the world that the U.S. no longer thinks it is above the (international) law, it would *legitimize* the Court in the eyes of its member States and—perhaps even more important—indicate to other ICC critics, such as Israel and Russia, that their opposition is unwarranted. Indeed, one could easily argue without too much hyperbole that U.S. membership in the ICC would be the single most momentous event in the brief history of the Court, literally heralding the dawn of a new era for international criminal justice.<sup>116</sup>

## CONCLUSION

From the analysis above, it is not possible to draw any firm conclusion regarding the central question of this article: does the ICC challenge national sovereignty? One of the reasons for this is that sovereignty is and will remain a social construction rather than an objective standard that can be settled once and for all. As Thomas Weiss has

pointed out, concepts such as ‘sovereignty’ are not cast in concrete but ‘change[s] over time in response to new circumstances and human society.’<sup>117</sup> Thus, when the American administration and the American right-wing movement argue that the ICC poses a threat to national sovereignty, they may be right; particularly, if their point of departure is a very strict and traditional positivist perception of international law. In this reading, *states*—not international institutions—should be responsible for justice in the institutional system. The war on international crime should thus build on domestic rather than international courts.

Realists will probably argue that by leaving the ICC unsigned and initiating a campaign against the extradition of American citizens to the permanent court in The Hague, the USA is simply cultivating its national interest, as could be expected from the world’s greatest nation.<sup>118</sup> The question is, however, whether such a policy will in fact serve American interests in the long run. In April 2003, the Bush administration attempted to force two countries (Latvia and Bulgaria) to sign bilateral agreements (ASPA) that would prevent US citizens from being handed over to the ICC. The USA made clear that since the NATO membership of the two countries was still pending, any unfriendly acts toward the USA would not improve their respective cases.<sup>119</sup> To many observers, it indeed came as a shock that the USA saw a need to resort to such primitive tactics in order to achieve its foreign policy goals—particularly in a world in which it has full hegemony. Indeed, what one might rightfully have expected from the world’s leading superpower was not only economic and military superiority, but also moral leadership. No matter what the incoming US government chooses to do in its relations with the ICC in the years to come, there is little doubt that it cannot prevent new ideas of multilateralism and international human rights law to continue challenging conventional visions of national sovereignty; nor can it prevent the world from expecting the USA to come to terms with this reality.

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## NOTES

1. Gulio Gallarotti and Arik Y. Preis, ‘Toward Universal Human Rights and the Rule of Law: The Permanent International Criminal Court’, *Australian Journal of International Affairs* 53, no. 1 (1999): 95–117; Andrea Bianchi, ‘Individual Accountability for Crimes against Humanity: Reckoning with the Past, Thinking of the Future’, *SAIS Review* 19, no. 2 (1999): 97–131; Marc Weller, ‘Undoing the Global Constitution: UN Security Council Action on the International Criminal Court’, *International Affairs* 78, no. 4 (2002): 693–712.

2. Jeremy Rabkin, 'Nuremberg Misremembered', *SAIS Review* 19, no. 2 (1999): 81–96.
3. For a radical critique of the Nuremberg trials, see Jeremy Rabkin, 'Nuremberg Misremembered', *SAIS Review* 19, no. 2 (1999): 81–96. As he writes, the Nuremberg Trials were: '... more concerned with vindicating Allied war aims than with establishing a new standard for all nations.' (Jeremy Rabkin, 'Nuremberg Misremembered', *SAIS Review* 19, no. 2 (1999): 86); See also David A. Nill, 'National Sovereignty: Must it be Sacrificed to the International Criminal Court?', *Brigham Young Journal of Public Law* 14, no. 119, (1999): 2.
4. Jeremy Rabkin, 'Nuremberg Misremembered', *SAIS Review* 19, no. 2 (1999): 86–87.
5. Hazel Fox, 'An International Tribunal for War Crimes: Will the UN Succeed Where Nuremberg Failed?' *The World Today* 49, no. 10 (1993): 194–7.
6. Gulio Gallarotti and Arik Y. Preis, 'Toward Universal Human Rights and the Rule of Law: The Permanent International Criminal Court', *Australian Journal of International Affairs* 53, no. 1 (1999): 1.
7. John Ashcroft cited in: David A. Nill, 'National Sovereignty: Must it be Sacrificed to the International Criminal Court?', *Brigham Young Journal of Public Law* 14, no. 119 (1999): 8.
8. Lee A. Casey, 'The Case against the International Criminal Court', *Fordham International Law Journal* 25 (2002): 841.
9. The campaign included several elements, as Marc Weller has pointed out '... from the deployment of national legislation against the court, to the obstruction of crucial decisions of the UN Security Council and to pressure directed against individual states to contract out of the ICC regime they had just joined.' (Marc Weller, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court', *International Affairs* 78, no. 4 (2002): 694; See *The Economist*, March 15–21, 2003, 30, for a discussion of which countries have signed these agreements.
10. John R. Worth, 'Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-signing" of the Rome Statute and the Legacy of Senator Bricker', *Indiana Law Journal* 79, no. 8 (2004): 245–65; Attila Bogdan, 'The United States and the International Criminal Court: Avoiding Jurisdiction through Bilateral Agreements in Reliance on Article 98', *International Criminal Law Review* 8 (2008): 1–54.
11. CRS Report to Congress, Update from August 2006.
12. See the ICC Website: <http://www.icc-cpi.int/statesparties.html> (accessed August 22, 2006).
13. Article 16 of the Rome Statute (Deferral of investigation or prosecution) reads the following: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the court to that effect; that request may be renewed by the Council under the same conditions.
14. In a survey from 2002 conducted by the Chicago Council Poll, 29% of the adult population thought that '... the US should not support the proposed Court because trumped up charges may be brought against Americans, for example, US soldiers who use force in the course of a peacekeeping operation.' At the same time, however, 66% agreed that 'the US should support such a court because the world needs a better way to prosecute war criminals, many of whom go unpunished today.' See [www.americans-world.org/digest/global\\_issues/un/un1.cfm](http://www.americans-world.org/digest/global_issues/un/un1.cfm) (accessed May 17, 2007).
15. I here use the term American 'exceptionalism' or 'historical uniqueness' as first used by James Reed, 'Why is the USA Not a like-Minded Country?', in *Enhancing Global Governance*, ed. Andrew Cooper (United Nations University Press, 2002), 55–69; See also Francis Fukuyama, *After the Neocons: America at the Crossroads* (London: Profile Books, 2006). I also rely on the debate of American exceptionalism and international law in Wade Mansell and Emily Haslam, 'John Bolton and the United States' Retreat from International Law', *Social Legal Studies* 14 (2005): 467–70.
16. Wade Mansell and Emily Haslam, 'John Bolton and the United States' Retreat from International Law', *Social Legal Studies* 14 (2005): 467–70.

17. Robert B.J. Walker, 'State Sovereignty and the Articulation of Political Space/Time', *Millennium: Journal of International Studies* 20, no. 3 (1991): 445–61.
18. Robert B.J. Walker, *Inside/Outside: International Relations as Political Theory* (Cambridge: Cambridge University Press, 1993); Samuel J. Barkin, 'The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms', *Millennium—Journal of International Studies* 27, no. 2 (1998): 229–52; Rebecca Adler-Nissen and Thomas Gammeltoft-Hansen, eds., *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond* (London: Palgrave, 2008).
19. Samuel J. Barkin, 'The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms', *Millennium—Journal of International Studies* 27, no. 2 (1998): 229–52; Amitay Acharya, 'State Sovereignty After 9/11: Disorganised Hypocrisy', *Political Studies* 55, no. 2 (2007): 277–96; Adriana Sinclair and Michael Byers, 'When US Scholars Speak of "Sovereignty". What do They Mean?', *Political Studies* 55, no. 2 (2007): 318–40.
20. Ronald L. Jepperson, Alexander Wendt, and Peter J. Katzenstein, 'Norms, Identity, and Culture', in *The Culture of National Security: Norms and Identity in World Politics*, ed. P.J. Katzenstein (New York: Columbia University Press, 1996), 33–75.
21. Following Mansell and Haslam this can be characterized as a 'Redneck School of American Jurisprudence' (See Wade Mansell and Emily Haslam, 'John Bolton and the United States' Retreat from International Law', *Social Legal Studies*, 14 (2005): 459).
22. Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005); Adriana Sinclair and Michael Byers, 'When US Scholars Speak of "Sovereignty". What do They Mean?', *Political Studies* 55, no. 2 (2007): 332; Wade Mansell and Emily Haslam, 'John Bolton and the United States' Retreat from International Law', *Social Legal Studies*, 14 (2005).
23. Is yet to be defined.
24. Peggy E. Rancilio, 'From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation', *University of Detroit Mercy Law Review* 78 (1999): 2.
25. Officially called 'The London agreement of August 8, 1945.' To this comes the 'Tokyo Proclamation' by the Supreme Commander of the Allied Powers of January 19, 1946.
26. Andrea Bianchi, 'Individual Accountability for Crimes against Humanity: Reckoning with the Past, Thinking of the Future', *SAIS Review* 19, no. 2 (1999): 4; Peggy E. Rancilio, 'From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation', *University of Detroit Mercy Law Review* 78, (1999): 3.
27. William Pfaff, 'Judging War Crimes', *Survival* 42, no. 1 (2000): 46–58.
28. Francis Fukuyama, *The End of History and the Last Man* (London: Hamish Hamilton, 1992); David Held, 'Democracy and Globalization', in *Re-imagining Political Community: Studies in Cosmopolitan Democracy*, eds. D. Archibugi, D. Held, and M. Kohler (Oxford: Polity Press, 1998), 11–27.
29. Thomas Weiss, 'The Politics of Humanitarian Ideas', *Security Dialogue* 31, no. 1 (2000): 11–23; See also Samuel J. Barkin, 'The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms', *Millennium—Journal of International Studies* 27, no. 2 (1998), 229–52.
30. Marlene Wind, 'Legal Globalization and the New Human Rights Regime: Human Rights in a Post-Sovereign World', in *The New Millennium: Challenges and Strategies for a Globalizing World*, ed. Sai Felicia Krishna-Hensel (London: Ashgate, 2000), 265–83.
31. Andrea Bianchi, 'Individual Accountability for Crimes against Humanity: Reckoning with the Past, Thinking of the Future', *SAIS Review* 19, no. 2 (1999), 97–131.
32. The Rwanda tribunal was the first international court in history to deal with crimes against humanity in a purely national conflict.
33. Andrea Bianchi, 'Individual Accountability for Crimes against Humanity: Reckoning with the Past, Thinking of the Future', *SAIS Review* 19, no. 2 (1999), 97–131.

34. Peggy E. Rancilio, 'From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation', *University of Detroit Mercy Law Review* 78, (1999): 15.
35. Paul W. Kahn, 'Why the United States is so Opposed: The International Criminal Court: An End to Impunity?', *Magazine*, 2003, [www.crimesofwar.org/print/icc/icc-kahn-print.html](http://www.crimesofwar.org/print/icc/icc-kahn-print.html) (accessed March 11, 2009).
36. John Bolton, 'The United States and the International Criminal Court', Speech to the Federalist Society, November 14, 2002, [www.state.gov/t/us/rm/15158.htm](http://www.state.gov/t/us/rm/15158.htm) (assessed January 15, 2008); David A. Nill, 'National Sovereignty: Must it be Sacrificed to the International Criminal Court?', *Brigham Young Journal of Public Law* 14, no. 119 (1999): 15; Jeremy Rabkin, 'Nuremberg Misremembered', *SAIS Review* 19, no. 2 (1999): 89.
37. Andrea Bianchi, 'Individual Accountability for Crimes against Humanity: Reckoning with the Past, Thinking of the Future', *SAIS Review* 19, no. 2 (1999): 16–7.
38. Paul W. Kahn, 'Why the United States is so Opposed: The International Criminal Court: An End to Impunity?', *Magazine*, 2003, [www.crimesofwar.org/print/icc/icc-kahn-print.html](http://www.crimesofwar.org/print/icc/icc-kahn-print.html) (accessed March 11, 2009).
39. For more on this visit: [www.amicc.org/usinfo/papers.html](http://www.amicc.org/usinfo/papers.html) (accessed March 23, 2009).
40. Geoffrey Robertson, *Crimes Against Humanity*, 3rd ed. (London: Penguin Group, 2006), 422–3.
41. Wade Mansell and Emily Haslam, 'John Bolton and the United States' Retreat from International Law', *Social Legal Studies*, 14 (2005): 465.
42. David A. Nill, 'National Sovereignty: Must it be Sacrificed to the International Criminal Court?', *Brigham Young Journal of Public Law* 14, no. 119 (1999): 2.
43. Gary Dempsey, 'Reasonable Doubt: The Case Against the Proposed International Criminal Court' (1998), Cato Policy Analysis No. 311, [http://www.cato.org/pub\\_display.php?pub\\_id=1170](http://www.cato.org/pub_display.php?pub_id=1170) (accessed March 11, 2009) (Washington, DC: Cato Institute).
44. Emphasis by the authors.
45. Emphasis by the authors.
46. United Nations Department of Public Information, 'Background Information; Crimes within the Court's Jurisdiction; May 1998', United Nations <http://www.un.org/icc/crimes.htm> (accessed August 2002).
47. This also means that individuals from non-signatory states can be convicted for crimes that were unclear and undefined when they were committed. According to the American government, this deprives American citizens of the fundamental rights that they have under the American Constitution.
48. In July 2002, a compromise was drawn up in the Security Council giving Americans involved in UN peacekeeping immunity from the jurisdiction of the court. However, this exception was renewed in July 2003.
49. Attila Bogdan, 'The United States and the International Criminal Court: Avoiding Jurisdiction Through Bilateral Agreements in Reliance on Article 98', *International Criminal Law Review*, 8 (2008): 1–54.
50. This argument has been promoted by the far right. See, for instance, William Jasper, *The New American* 14, no. 18 (1998).
51. Marc Weller, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court', *International Affairs* 78, no. 4 (2002): 704.
52. Marc Grossman, 'American Foreign Policy and the International Criminal Court', (2002) [www.state.gov/p/9949.htm](http://www.state.gov/p/9949.htm) (accessed May 2004).
53. Eric Posner, 'All Justice, Too, Is Local', *The New York Times*, December 30, 2004.
54. John Bolton, 'The United States and the International Criminal Court', Speech to the Federalist Society, November 14, 2002. [www.state.gov/t/us/rm/15158.htm](http://www.state.gov/t/us/rm/15158.htm), 2.

55. *Ibid.*, 3 (See also David A. Nill, 'National Sovereignty: Must it be Sacrificed to the International Criminal Court?', *Brigham Young Journal of Public Law* 14, no. 119, (1999): 14 and E. Posner, 'All Justice, Too, Is Local', *The New York Times*, December 30, 2004).
56. As Nill writes: 'The value of having a government refer it (the case MW) or the Security Council refer it is that they are accountable to somebody. They are accountable either to their people, their populace, for doing so, or the Security Council is accountable to the United Nations System. We believe that fundamental principle of accountability should be at the core of referrals to this court.' David A. Nill, 'National Sovereignty: Must it be Sacrificed to the International Criminal Court?', *Brigham Young Journal of Public Law* 14, no. 119 (1999): 14.
57. John Bolton, 'The United States and the International Criminal Court', Speech to the Federalist Society, November 14, 2002. [www.state.gov/t/us/rm/15158.htm](http://www.state.gov/t/us/rm/15158.htm) Bolton, 'The United States and the International Criminal Court', 2 (accessed April 2007).
58. Marc Grossman: 'American Foreign Policy and the International Criminal Court', (2002) [www.state.gov/p/9949.htm](http://www.state.gov/p/9949.htm), 2.
59. Jason Ralph, 'Between Cosmopolitan and American Democracy: Understanding US Opposition to the International Criminal Court', *International Relations* 17, no. 2 (2003): 195–211.
60. Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005). See also William Jasper, *The New American* 14, no. 18 (1998).
61. David A. Nill, 'National Sovereignty: Must it be Sacrificed to the International Criminal Court?', *Brigham Young Journal of Public Law* 14, no. 119 (1999): 7.
62. Adriana Sinclair and Michael Byers, 'When US Scholars Speak of "Sovereignty". What do They Mean?', *Political Studies* 55, no. 2 (2007): 318–40.
63. *Ibid.*
64. Marc Grossman, 'American Foreign Policy and the International Criminal Court', 2002, [www.state.gov/p/9949.htm](http://www.state.gov/p/9949.htm), 2–3.
65. This does not mean that states are not bound by customary law however. See the analysis below of sovereignty and international law.
66. William Jasper, 'Courting Global Tyranny', *The New American* 14, no. 18 (1998): 1–14.
67. Emphasis by the authors.
68. Marc Weller, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court', *International Affairs* 78, no. 4 (2002): 710.
69. *Ibid.*
70. Attila Bogdan, 'The United States and the International Criminal Court: Avoiding Jurisdiction Through Bilateral Agreements in Reliance on Article 98', *International Criminal Law Review* (2008): 1–54.
71. Coalition for the International Criminal Court, December 11, 2006, [http://www.iccnw.org/documents/CICCFS\\_BIA\\_status\\_current.pdf](http://www.iccnw.org/documents/CICCFS_BIA_status_current.pdf) (accessed May 11, 2009).
72. Washington Working Group on the International Criminal Court, January 2008, 8, no. 1/2, 1–54. See: [www.wfa.org/issues/wicc/wicc.html](http://www.wfa.org/issues/wicc/wicc.html) (accessed May 11, 2009).
73. See for instance the article by Fareed Zakaria, 'The arrogant Empire', *Newsweek*, March 24, 2003.
74. George W. Bush cited in John Bolton, 'The United States and the International Criminal Court', Speech to the Federalist Society, November 14, 2002. [www.state.gov/t/us/rm/15158.htm](http://www.state.gov/t/us/rm/15158.htm) (UK: SAGE Publications, University of Leeds), 1.
75. Jason Ralph, 'Between Cosmopolitan and American Democracy: Understanding US Opposition to the International Criminal Court', *International Relations* 17, no. 2 (2003), 195–211; Wade Mansell and Emily Haslam, 'John Bolton and the United States' Retreat from International Law', *Social Legal Studies*, 14 (2005): 465ff.

76. Gary Dempsey, 'Reasonable Doubt: The Case against the Proposed International Criminal Court' (1998), Cato Policy Analysis No. 311, [http://www.cato.org/pub\\_display.php?pub\\_id=1170](http://www.cato.org/pub_display.php?pub_id=1170), 2 (accessed March 11, 2009).
77. Ibid.
78. David A. Nill, 'National Sovereignty: Must it be Sacrificed to the International Criminal Court?', *Brigham Young Journal of Public Law* 14, no. 119 (1999): 15.
79. Ibid.
80. Antonio Amato, 'Is International Law Really "Law"?' *Northwestern University: LawReview* 79 (1985): 1293–314.
81. Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: KNOFF, 1948/1985), 295–688.
82. Terry Nardin, *Law, Morality, and the Relations of States* (Princeton, NJ: Princeton University Press, 1983), 157–350; Herbert L.A. Hart, *The Concept of Law* (Cambridge: Cambridge University Press, 1961), 231–309.
83. Marlene Wind, *Sovereignty and European Integration: Towards a Post-Hobbesian Order*, (Palgrave, 2001), 1–259.
84. William Pfaff, 'Judging War Crimes', *Survival* 42, no. 1 (2000): 46–58.
85. Wade Mansell and Emily Haslam, 'John Bolton and the United States' Retreat from International Law', *Social Legal Studies*, 14 (2005): 459–85.
86. John A. Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicholson, 1832/1954), 201, 11–12, 142. (Emphasis by the author).
87. Terry Nardin, *Law, Morality, and the Relations of States* (Princeton, NJ: Princeton University Press, 1983).
88. David Kennedy, 'Theses about International Law Discourse', *German Yearbook of International Law* 23 (1980), 354–91.
89. Alf Ross, *Introduction to International Law* (Copenhagen: Nyt Nordisk Forlag. Arnold Busk, 1984), 44ff. (Own translation).
90. Fridrich Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989).
91. Robert Vander Lugt, 'International Legal Rules: Contending Approaches', Paper presented at the 36th Annual Meeting of ISA, Chicago, IL, February 1995.
92. Terry Nardin, *Law, Morality, and the Relations of States* (Princeton, NJ: Princeton University Press, 1983).
93. William Pfaff, 'Judging War Crimes', *Survival* 42, no. 1 (2000): 50.
94. Anne-Marie Slaughter, 'The Real New World Order', *Foreign Affairs* 76 (1997): 183; William Pfaff, 'Judging War Crimes', *Survival* 42, no. 1 (2000): 46–58; Andrea Bianchi, 'Individual Accountability for Crimes against Humanity: Reckoning with the Past, Thinking of the Future', *SAIS Review* 19, no. 2 (1999): 97–131.
95. William Pfaff, 'Judging War Crimes', *Survival* 42, no. 1 (2000): 50.
96. For instance, one could argue that humanitarian values have little to do with natural law but rather refer to the fact that an increasing number of states have agreed to sign international human rights conventions and the UN Charter, all of which have to do with the respect for human rights.
97. Thomas Weiss, 'The Politics of Humanitarian Ideas', *Security Dialogue* 31, no. 1 (2000): 15–6.
98. The Responsibility to Protect-Engaging Civil Society (R2PCS) project seeks to advance R2P and to promote concrete policies to better enable governments, regional organizations, and the UN to protect vulnerable populations. See more on [www.responsibilitytoprotect.org](http://www.responsibilitytoprotect.org)
99. Samuel J. Barkin, 'The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms', *Millennium—Journal of International Studies* 27, no. 2 (1998): 249.

100. Jason Ralph, 'Between Cosmopolitan and American Democracy: Understanding US Opposition to the International Criminal Court', *International Relations* 17, no. 2 (2003): 209.
101. Marc Weller, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court', *International Affairs* 78, no. 4 (2002), 693–712.
102. Francis Fukuyama, *After the Neocons: America at the Crossroads* (London: Profile Books, 2006), 102; William Kristol and Robert Kagan, 'Towards a Neo-Reaganite Foreign Policy', *Foreign Affairs* 75 (1996) 18–32.
103. Francis Fukuyama, *After the Neocons: America at the Crossroads* (London: Profile Books, 2006).
104. Emmeric de Vattel, vol. III of 'International Law' *The Classics of International Law*. (Washington, DC: Carnegie Institution, 1758/1916); Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie U. Praxis* (Berlin: Dunker und Humbolt, 1984).
105. See also Joseph H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), 29.
106. See the Van Gend en Loos case 26/62 [1963] ECR 13.
107. Joseph H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999).
108. Ibid.
109. Joseph H.H. Weiler and Marlene Wind, *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003).
110. Ibid.
111. Michel Rosenfeld, 'Principle or Ideology? A Comparativist Perspective on the U.S. Controversy over Supreme Court Citations to Foreign Authorities' Working Paper no. 213, Benjamin N. Cardozo School of Law, 2008, 20.
112. Scalia cited in Rosenfeld, 'Principle or Ideology? A Comparativist Perspective on the U.S. Controversy over Supreme Court Citations to Foreign Authorities', 20.
113. William Pfaff, 'Judging War Crimes', *Survival* 42, no. 1 (2000): 47.
114. See also Samuel J. Barkin, 'The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms', *Millennium—Journal of International Studies* 27, no. 2 (1998), 229–52.
115. Statements of U.S. Presidential Candidates on the International Criminal Court, AIMCC, <http://www.amicc.org/docs/2008%20Candidates%20on%20ICC.pdf> (accessed March 16, 2009).
116. Kevin Jon Heller, 'Does Obama support the ICC? Opinio Juris', 2008, <http://opiniojuris.org/2008/07/26/does-obama-support-the-icc-and-what-is-samantha-power-thinking/> (accessed March 16, 2009).
117. Thomas Weiss, 'The Politics of Humanitarian Ideas', *Security Dialogue* 31, no. 1 (2000): 15; see also Samuel J. Barkin, 'The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms', *Millennium—Journal of International Studies* 27, no. 2 (1998), 229–52.
118. See for example, Shirley V. Scott, 'Is there room for international law in *realpolitik*? Accounting for the US "attitude" towards international law', *Review of International Studies* 30, no. 1 (2004): 71–88.
119. See *Financial Times*, April 8, 2003.