America's Exceptionalist Tradition: From the Law of Nations to the International Criminal Court[*]

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At the end of the twentieth century, buoyed by the successes of the *ad hoc* tribunals for Yugoslavia and Rwanda, 120 countries voted to adopt the Rome Statute, the treaty to establish the International Criminal Court (hereafter the ICC or the Court). Of the seven countries that voted against, arguably the most significant was the United States. Indeed, when one considers the degree to which the ICC is a logical extension of the rules-based order that the United States was so influential in establishing post-World War Two, its ongoing lack of membership of the Court remains perplexing. In and of itself, the US' self-imposed exile from the ICC would not be important, if not for the fact that the US has promoted international law, in particular international law as it relates to international criminal justice, as if it were synonymous with American values, while at the same time emphasising the superiority of American values over international standards.[1]

But how might we explain this reticence towards the Court, especially when one considers that the Rome Statute, the Court's governing treaty, contains many of the legal protections afforded under the US legal system?[2] This article will argue that the US' relationship with the ICC is part of a longer pattern of US behaviour that can be best explained through the lens of exceptionalism. In making this argument, the article has two interrelated objectives: first, to provide an historical overview of how the US has behaved *vis-à-vis* treaty-based international legal institutions designed to moderate warfare; and second, to provide a critique of arguments that present the United States' relationship with said legal institutions as nothing more than an expression of narrowly informed national interests.

Considering the often-controversial nature associated with the use of exceptionalism as it relates to US foreign policy, it is necessary to offer two important qualifiers. First, it is not

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[1] Michael Ignatieff, 'Introduction: American Exceptionalism and Human Rights', in M. Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005), p.1.

[2] See *The Rome Statute of the International Criminal Court*, available at: http://untreaty.un.org/cod/icc/statute/romefra.htm (accessed 23rd of July 2013); see also Ruth Wedgewood, 'The Constitution and the ICC' in Sarah B. Sewell and Carl Kaysen (eds.), *The United States and the International Criminal Court: National Security and International Law* (New York and Oxford: Rowman and Littlefield, 2000), p.123. Citing James Madison's Federalist Papers, Jason Ralph argues that there is nothing more American than the ICC (Jason Ralph, 'The International Criminal Court and the State of the American Exception', in Adam Crawford (ed.), *International and Comparative Criminal Justice and Urban Governance* (Cambridge: Cambridge University Press, 2011), p.79).

being argued here that the United States is exceptional; rather, in agreeing with Hilde Eliassen Restad, 'the fact that the *belief* in exceptionalism has been strong and persistent throughout American history' is most important.[3] Second, while I have argued elsewhere that the ICC would be strengthened by the US re-signing and subsequently ratifying the Rome Statute, it is not the purpose of this article to advocate for the US joining the Court.[4] Rather, this article aims to situate and explain US conduct within a historical account of America's longstanding ambivalence towards the restraining ideals of laws of war more broadly and the ICC more specifically. In this respect, the article hopes to contribute to analysis on how the United States interacts with international legal institutions aimed at preventing and/or limiting war. To do this, this article identifies key moments in the evolution of international laws designed to moderate warfare, and in turn explores the engagement that the United States has or had with these treaty-based legal institutions.[5]

With this in mind, the article is delivered in two sections. The first explores the concept of exceptionalism as it has been applied to the United States, including an argument as to the benefits of using it as an explanatory framework. The second section is offered in three parts; first, it will trace the history of the United States' relationship with institutions of international law; second, it will provide a history of the United States' relationship with the Court; and finally, drawing on these two sections, conclude by arguing that the invocation and disregard of the ICC is reflective of a longer pattern with regards to United States' relationship with institutions of international law and, in turn, argue that this relationship is best explained through the lens of exceptionalism.

Exceptionalism

The notion of exceptionalism has deep resonance in America. At its most basic level, the conception of US exceptionalism rests upon the conviction that the United States is qualitatively different and unique from other countries. It is informed by a combination its history and experience, first as a settlement away from the rigid feudal structures and religious persecution of the Old World, then later through its War of Independence, during which Americans manifested the conviction that their nationalist revolt against Great Britain was a truly revolutionary episode and that their goal was not only to attain justice for

[3] Hilde Eliassen Restad, *American Exceptionalism: An idea that made a nation and remade the world* (London and New York: Routledge, 2015), p.18 (emphasis in original).
[4] See Matt Killingsworth, 'The International Criminal Court and Global Justice' in John Adlam, Tilman Kluttig and Bandy Lee (eds.), *Violent States and Creative States: From the Individual to the Global* (London: Jessica Kingsley Publishers), pp. 237-250.
[5] To this end, the ICC, as the first treaty based, permanent international criminal court, is the most recent, and arguably most important, aspect of the long evolution of laws designed to moderate warfare (see Matt Killingsworth, 'From St Petersburg to Rome: Understanding the Evolution of the Modern Laws of War', *Australian Journal of Politics and History*, Vol.62, No.1, 2016, pp.101-116). Importantly, the Court's jurisdiction also includes the crimes of genocide, crimes against humanity and the crime of aggression (see *The Rome Statute of the International Criminal Court*, available at: http://untreaty.un.org/cod/icc/statute/romefra.htm (accessed 23rd of July 2013).

themselves, but also to usher in a new, democratic era in human history.[6] Reinforcing notions of US exceptionalism is the uniqueness of American political and legal institutions, specifically the relationship between the executive, legislature and judiciary. Thus, as Paul Kahn notes, American exceptionalism is formed through 'an intimate relationship among American political identity, the rule of law and popular sovereignty'.[7]

As a belief, therefore, it is underpinned by three interrelated ideas: first, the United States represents a clean break from the Old World; second, that it has a unique and special role to play in shaping world history; and third, that unlike great republics of the past, it will be eternal.[8] In turn, as a belief, it is underpinned by the confidence that the nation's binding principles are rooted in qualities and capacities shared by all people, everywhere. Indeed, this premise of universalism represents one of the key tensions in the conception of exceptionalism when applied to explaining the US' often inconsistent relationship with international law.

Making the argument for the value in explaining America's human rights behaviour through a lens of exceptionalism, Michael Ignatieff identifies three types of exceptionalism, all of which are identifiable with regards to the United States' historical relationship with laws of war. The first type of exceptionalism identified, exemptionalism, is characterised by the US signing on to conventions and treaties, then exempting themselves from their provisions 'by explicit reservation, nonratification, or noncompliance'. The second type of exceptionalism is characterised by double standards; the US 'judges itself by standards different from those it uses to judge other countries, and judges its friends by standards different from those it uses for its enemies'. The third and final type identified is what Ignatieff calls 'legal isolationism'; 'American judges are exceptionally resistant to using foreign human rights precedents to guide them in their domestic opinions […] this judicial attitude is anchored in a broad popular sentiment that the land of Jefferson and Lincoln has nothing to learn about right from any other country'.[9] This is the typology adopted here.

It is tempting to look at the 'leadership, followed by resistance and retreat' pattern that characterises the United States' relationship with international law as being merely informed by, as Stephen Walt argues, US interests;[10] when the treaty or convention equates with or serves US interests, they are willing to participate, but when the treaty or convention serves to constrain US interests (or even US power), it will no longer feel obligated to behave in the manner prescribed by said treaty or convention. For international relations scholars, this

[6] Paul T. McCartney, 'American Nationalism and U.S. Foreign Policy from September 11 to the Iraq War', *Political Science Quarterly*, Vol. 119, No. 4, (2004), p.402.
[7] Paul W. Kahn, 'American Exceptionalism, Popular Sovereignty and the Rule of Law', in Michael Ignatieff (ed.), p.200
[8] See Trevor B. McCrisken, 'Exceptionalism' in Alexander DeConde, Richard Dean Burns and Fredrik Logevall (eds.), *Encyclopedia of American Foreign Policy*, Vol II, 2nd ed. (New York: Scribner, 2002), pp.64-65; and Restad, p.3.
[9] Ignatieff ,'Introduction', pp.3-8.
[10] Stephen M. Walt, 'The Myth of American Exceptionalism', *Foreign Policy*, October 11, 2011; available at http://foreignpolicy.com/2011/10/11/the-myth-of-american-exceptionalism/ (accessed 5th of December, 2016)

generally represents the realist view of international law. When grudgingly acknowledging its existence, realists argue that because international law's legislative, adjudicative, and enforcement procedures operate without a central authority, it has limited effectiveness as a mechanism for establishing and maintaining order. Furthermore, only when it serves their interests to do so, without ever considering it as binding, powerful states, such as the United States, will acknowledge the existence of international law. Thus, for realists, any compliance with international law merely reflects a coincidence of interests.[11]

But the realist or *Realpolitik* argument fails to appreciate that the United States has often wanted to do more than merely maintain its power at the lowest cost to its sovereignty; for Ignatieff, the United States 'has promoted the very system of multilateral engagements […] that abridge and constrain its sovereignty'.[12] Similarly, as argued by Natsu Taylor Saito, '*Realpolitik* arguments disregard the extent to which the United States […] rely upon legal structures to further their political ends […] this critique ultimately privileges the rule of power over the rule of law by presuming that power cannot be channelled through international institutions to enforce, and reinforce, law on a global scale'.[13]

A further competing explanation for America's behaviour *vis-à-vis* treaty laws designed to constrain the behaviour of war is hegemonic international law (HIL). According to Aden Warren and Ingvild Bode, HIL has three characteristics: first, 'the hegemon holds an advantaged role in the law creating process'; second, the hegemon is generally 'disinclined to follow the constraints of treaty and customary law on its freedom of action'; and third, 'the hegemon attains *de facto* or *de jure, exceptional rights* not available – or available only in principle but not in practice – to lesser powers'.[14] In explaining the G. W. Bush and Obama administration's attempts to redefine the UN Charter's *jus ad bellum* laws concerning the restraint on the use of force as being in 'a fashion consistent with the structure of a *de facto* hegemonic international law', Warren and Bode make a compelling argument.[15] Nonetheless, this explanation of the US' behaviour is historically limited to periods when the US is the hegemon. In contrast, the application of an exceptionalism framework reveals historical continuities, and thus a more complete understanding, of the US' relationship *vis-à-vis* its obligations to modern laws of war.

The United States and the Law of Nations

[11] See Jack Goldsmith and Eric Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), pp.3-22.
[12] Ignatieff, p.13.
[13] Natsu Taylor Saito, *Meeting the Enemy: American Exceptionalism and International Law* (New York: New York University Press, 2010), p.4.
[14] Aden Warren and Ingvild Bode, *Governing the Use-of-Force in International Relations: The Post-9/11 US Challenge on International Law* (London and New York: Palgrave, 2014), pp.145-149 (emphasis in original). See also Jose E. Alvarez, 'Hegemonic International Law Revisited', *American Journal of International Law*, Vol. 97 (2003), pp.873-888.
[15] Warren and Bode, p.144.

American association with international law (or the law of nations as it was commonly referred to) goes back to before the Declaration of Independence and the Revolutionary War.[16] For Mark Janis, the prominence of the law of nations in 18th century American law meant that it was unsurprising that it served as an underpinning legal rationale for independence from Britain.[17] In asserting self-evident and inalienable rights, American revolutionaries diverted from international law as it was then understood (as law between sovereign nation states) and appealed instead to what Saito calls a 'higher law'; a natural law that recognized freedom, equality, and democracy as inherent rights.[18] In this respect, the War of Independence was simultaneously justified through reference to international law and, in turn, recast international law as it existed. This particularistic interpretation of international law, used to defend actions whilst at the same redefining what the law as it existed *really* meant, is one of the earliest expressions of US exceptionalism as it related to international law.

A driving concern for the founders was the establishment of a legal framework for their new entity. The reasons for this were many, but key amongst them was the notion that the rule of law was crucial in distinguishing the United States as belonging to the civilised, hitherto exclusively European, community of nations. This was underpinned by John Jay, the first chief justice of the U.S. Supreme Court, who noted in 1793, before the Constitution had been ratified, 'the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed'.[19] In turn, membership of international society was dependent on consistent compliance with the law of nations; Chief Justice John Marshall, declared in 1801 that 'The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted.'[20]

Most importantly to the arguments being made here, it also institutionalised the capacity for the federal government to conduct international affairs. Thus, the Constitution not only had roots in the law of nations, it also contributed towards the US' 'nineteenth century inclination towards utopian advocacy of international courts and organisations, culminating in Wilson's League of Nations'.[21]

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[16] See Mark W. Janis, *America and the Law of Nations 1776-1939* (Oxford: Oxford University Press, 2010), pp.1-23; and Saito, pp.35-75.
[17] Janis, pp.25-48.
[18] Saito, p.76.
[19] Cited in David L. Sloss, Michael D. Ramsey and William S. Dodge, 'International law in the Supreme Court, 1789–1860' in D. Sloss, M. Ramsey and W. Dodge (eds.), *International Law in the U.S. Supreme Court* (Cambridge: Cambridge University Press, 2011), p.7.
[20] Cited in David Haljan, *Separating Powers: International Law before National Courts* (The Hague: Springer, 2013), p.160.
[21] Janis, p.37.

It is thus clear that there was an equivocal support for international law amongst law makers and jurists in the years of the new republic.[22] Yet, in what becomes a pattern throughout US history, this support came with important qualifiers, the most important of these succinctly articulated by Peter Duponceau, a prominent attorney in the late eighteenth century: the rule of law, as a product of Western civilisation, 'can be overridden in the interest of the further development or expansion of civilization'.[23] In agreeing with Saito, this in turn 'has facilitated U.S. deviations from accepted international law, for when the larger goals of U.S. growth have conflicted with law, law has been "trumped" fairly consistently by the benefits to civilization said to accrue from such expansion'.[24]

The law of nations served multiple purposes for the new republic; observance of the law confirmed it as a member of a newly emerging international society, while simultaneously it is used politically, '…to justify the Revolution, buttress American sovereignty, and structure American government […] In the courts, the law of nations shielded American neutrality, calmed foreign governments'.[25] Returning to our typology, while early interactions with international law do not exhibit exemptions, nor are they characterised by legal isolationism, the enthusiasm for the law of nations is already clearly characterised by double-standards.[26]

The US and the Laws of War

The period between the middle of the 19th century and the start of the First World War bore witness to a flurry of international treaties designed to constrain behaviour during conflict. The United States, as an emerging global power, played an important role in the development of this new treaty law, most significantly through its participation in the 1899 and 1907 Hague Peace Conferences. But even here, its involvement provides us with further evidence of its participation being underpinned by exceptionalism. With regards to the first Hague Convention in 1899, US exemptionalism and double standards were again displayed when American involvement was qualified on the proviso that its ongoing war with Spain would not be addressed by the conference.[27] But, adding to the somewhat contradictory history of the US' engagement with international law, at least with respects to arguments pertaining to 'limiting US sovereignty', the US, along with Britain, were the strongest advocates for a

[22] Jordon Paust has demonstrated that the founders and framers stated repeatedly that the Congress, the executive branch, the states, the judiciary, and the people themselves were bound both by treaties and customary international law (Jordon Paust, 'In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary concerning the Binding Nature of the Customary Law of Nations', *Journal of International Law and Policy* 14 (2008), p.212.
[23] Cited in Paust, p.212.
[24] Saito, p.85.
[25] Janis, p.143.
[26] Expansion westward, informed by the idea of 'manifest destiny', and the Mexican – American War, also serve as apt 19th century examples of the tension between US enthusiasm for international law, and a failure to observe its restraining influences when advancing civilisation (see Frederick Merk, *Destiny and Mission in American History: A Reinterpretation* (Cambridge, Mass., Cambridge University Press, 1963), p.25.
[27] Saito, p.168.

permanent and universal court of arbitration.[28] While a somewhat modified permanent, temporary court of arbitration was adopted at the subsequent 1907 Hague Conference, US representatives continued to push for the establishment of a permanent court; they were successful in developing the Draft Convention Relative to the Institution of a Court of Arbitral Justice, the forerunner to first the Permanent Court of International Justice, and later the International Court of Justice.[29]

The US also played a significant role at the Hauge Conference with respect to codifying the laws of war through what was essentially an adoption of the already existing Lieber Code.[30] As it relates to explaining the US' relationship *vis-a-vis* international law, this is significant for several reasons: first, we find here one of the earliest examples of US domestic law directly influencing the creation of international law; second, as Saito identifies, the leading role assumed by the United States in the development of Hague laws of war acknowledged 'the existence of an underlying body of customary international law';[31] and third, the Hague Conferences, as identified by Chris Reus-Smit, were a step in the realisation of a civilised polity 'and thus a desirable feature of a society of civilised states';[32] US participation thus served to reinforce their membership, indeed emerging leadership, of a civilised, international society. Similarly, as identified by Calvin DeArmond Davis, it continued 'the American tradition of supporting movements to maintain peace through judicial methods'.[33] Nonetheless, American interaction with the broader international community remained 'bellicose, imperialistic and selfishly isolationist'.[34]

Returning again to our typology, there remained a duality with respect to American actions; while good intentioned, in that they informed by broader concern for peace and justice, the US' actions are nonetheless characterised by exemptionalism, whereby the enthusiasm for institutions of international law are subsequently subdued via attempts to exclude themselves from the treaty's provisions.

The US and Twentieth Century Laws of War

By the mid-twentieth century, the United States had become, according to Richard Falk, 'the principle source of order in the world, both as a great power and as an advocate for the

[28] Janis, *The American Tradition of International Law: Great Expectations 1798-1914* (Oxford: Clarendon Press, 2004), p.148
[29] Francis Anthony Boyle, *Foundations of World Order: The Legalist Approach to International Relations (1898–1922)*, (Durham, N.C.: Duke University Press, 1999), pp.42-43. See also C. DeArmond Davis, *The United States and the First Hague Peace Conference* (Ithaca: Cornell University Press, 1962).
[30] See 'Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863', available at https://ihl-databases.icrc.org/ihl/INTRO/110 (accessed 28th of August, 2018).
[31] Saito, p.170.
[32] Christian Rues-Smit, *The Moral Purpose of the State: Culture, Social Identity and Institutional Rationality in International Relations* (Princeton University Press: Princeton, 1999), p.142.
[33] DeArmond Davis, p.211.
[34] DeArmond Davis, p.211.

increased respect of juridical arrangements'.[35] It is in this context that the United States played a leading role in the establishment of post-war institutions designed to constrain the use of force.

Understandably, US enthusiasm for international law as a utopian peace mechanism was dampened by the events of the first half of the twentieth century.[36] Nonetheless, a degree of lingering utopianism was evident in Woodrow Wilson's post-World War One efforts to establish the League of Nations, underpinned as it was by Wilson's belief that its establishment would ensure 'political independence and territorial integrity to great and small states alike'.[37] Indeed, the establishment of the League 'marked a significant transition from an international legal system in which individual states were the only recognized subjects, or actors, to one in which those states had come together to create a supranational actor'.[38]

As is well documented, despite the League being the product of American diplomatic efforts, the US failed to join. Concerned in particular with Article of 10 of the League's Covenant, which committed member states to protecting all other members from external acts of aggression against their political independence or territorial integrity, prominent members of the US Senate argued that it impinged on US sovereignty and indeed encouraged belligerence, and thus failed to ratify both the Covenant and the Treaty of Versailles.[39]

The dominant narrative of the US during the inter-war years is one of isolationism, yet 'the US government continued to pursue a foreign policy based on the active promotion of international law and organisations for the rest of the world'.[40] Therefore, the US is simultaneously driving and promoting an increasingly dense regime of international law designed to constrain war, all the while either exempting themselves through non-ratification (as was the case with the League of Nations) or non-compliance (as is the case with the Kellogg-Briand Pact).[41] Thus, US efforts to reconcile their ideological support for institutionalised laws of war increasingly informed by humanitarian concerns with their own expanding national interests is, as argued throughout this article, best explained through the lens of exceptionalism.

The creation of the United Nations (UN) represents arguably the starkest expression of US exceptionalism. Seeking to ensure that Wilson's post-World War One mistakes were not repeated, President Roosevelt ensured Congress was consulted and included in the pre-San

[35] Richard Falk, *The Declining World Order: America's Imperial Geopolitics* (New York: Routledge, 2004), p.111
[36] See Janis, *The American Tradition of International Law*, p.134.
[37] Woodrow Wilson, 'President Woodrow Wilson's 14 Points (1918)', available at https://www.ourdocuments.gov/doc.php?flash=true&doc=62 (accessed 8th of December, 2016).
[38] Saito, p.172
[39] Boyle, p.138
[40] Boyle, p.144. Perhaps the best example of this was the 1928 Kellogg-Briand Pact, in which the United States and sixteen other signatories agreed to renounce war as an act of foreign policy and to settle disputes peacefully.
[41] See Max Boot, *The Savage Wars of Peace: Small Wars and the Rise of American Power* (New York: Basic Books, 2002), pp.129-204 and 231-252.

Francisco negotiations and agreed to host the conference in the United States and provide a location for the UN headquarters, all which went a long way to ensure that the organisation would be imbued with American values and goals.[42] The creation of the UN had a substantive effect on the underpinnings of international law. As discussed above, for much of the modern period, international law, with several notable exceptions, was essentially considered as the practise of civilised states. Under the auspices of UN, new laws, and much of the pre-existing international law became codified, and a reinvigorated world court, the International Court of Justice, was established with jurisdiction to resolve legal disputes.

The post-war environment, described by Louis Henkin as an 'age of rights',[43] was also understandably sympathetic to the establishment of new legal mechanisms, the aims of which would be the 'punishment, through the channel of organised justice, of those guilty of or responsible for these [war] crimes'.[44] With this in mind, the United States, led by Supreme Court Justice Robert Jackson, first designed the plan for the prosecution of Axis leaders, then pressured the Allied nations to create the Charter of International Military Tribunal, the treaty authorising the Nuremburg Tribunal.

The significance of the Nuremberg Tribunal in expanding the responsibility under international law for war crimes from the state to individuals is well documented, as is the dominant role that the United States played in this expansion and redefinition of international law, and thus the new international legal order.[45] Somewhat similarly, the United States was an enthusiastic participant at the 1949 Diplomatic Conference of Geneva, which subsequently established the four Geneva Conventions (these, plus the three 1977 Additional Protocols, form the bedrock of the international humanitarian law (IHL) regime). With minor reservations, the Senate ratified the Conventions 77-0 in 1951 after minimal debate.[46] Commenting on their ratification, R. R. Baxter opined: 'It is to be hoped that the ratification of the Geneva Conventions of 1949 […] may inspire further ratifications and accessions so that the conventions may assume their rightful place as universal humanitarian law'.[47] Again,

[42] Stephen Schlesinger, *Art of Creation: The Founding of the United Nations* (Boulder: Westview, 2004), p.111-126

[43] Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990).

[44] Telford Taylor, *The Anatomy of the Nuremburg Trials: A Personal Memoir* ((New York: Knopf, 1992), p.25

[45] The US' own understanding of their role in this expansion and the indeed the increased importance of law in maintaining international order is neatly summarised by Justice Jackson, when he noted that the United States 'was not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us' (cited in Taylor, p.66).

[46] See R. R. Baxter, 'The Geneva Conventions of 1949 Before the United States Senate', *The American Journal of International Law*, Vol. 49, No. 4 (Oct.,1955), pp.550-555.

[47] Baxter, p.555. Two points of note: first, somewhat controversially, the United States, while signatories to both 1977 Additional Protocols 1 and 2 of the Geneva Conventions, have not ratified them; and second, while outside the scope of this article, the United States' rejection of aspects of the Geneva Conventions with regards to both the broader War on Terror and the torture of inmates at Guantanamo Bay is yet another example of double-standards. See, for example: Jens David Ohlin, *The assault on international law* (New York, NY : Oxford University Press, 2015); Gilles Andreani, 'The "War on Terror": Good Cause, Wrong Concept', *Survival*, vol. 46, no. 4, 2004; Andrew Hurrell, '"There are No Rules" (George W. Bush): International Order after September 11', *International Relations*, vol. 16, no. 2, 2002., pp.185-204; and Harold Hongju Koh, 'America's Jekyll – and – Hyde Exceptionalism' in M. Ignatieff (ed.), pp.111-143.

for Baxter and his ilk, the post-World War Two environment offered an opportunity for the United States to expand the scope of international law, with a focus on legal restraints with respect to the use of force, as a foundation of the post-war order, which in turn was modelled on US values.

This was again evident in the immediate post-Cold War environment, when, according to Henry Kissinger, 'for the third time in this century, America thus proclaimed its intention to build a new world order by applying its domestic values to the world at large'.[48] The first example of G. H. W. Bush's 'new world order' was the US-led, UN sanctioned response to Iraq's invasion of Kuwait. A later example, and one of particular relevance to this article, was the key role that the United States played in the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and, to a lesser extent, the International Criminal Tribunal for Rwanda (ICTR).

In 1992, the second year of the Yugoslav conflict, various humanitarian groups, including the International Committee of the Red Cross (ICRC), had documented violations of IHL. By the end of that year, in response to these reports, 'U.S. policy makers were becoming increasingly vocal' about the need for a mechanism through which to prosecute the most serious violations.[49] Indeed, according to William Schabas, 'the most enthusiastic – and ultimately decisive – support for the idea of the tribunal [came] from the United States'.[50] Similarly, the United States was able to convince the post-genocide Rwandan government of the need for an international tribunal. Likewise, it was at the behest of the United States that the two tribunals originally shared a prosecutor and appeals chamber.[51]

Hoverer, problems arose for the United States *vis-à-vis* the ICTY following the NATO intervention in Kosovo in 1999. As NATO's forces were involved in an armed conflict on the territory of the former Yugoslavia, they fell within the tribunal's jurisdiction. This increasingly became an issue as reports emerged of NATO airstrikes killing civilians, most notoriously when they partly destroyed the Chinese embassy in Belgrade. When the prosecutor, Louise Arbour, broached the subject of the bombing with then US Secretary of State, Madeleine Albright, she responded; 'I won't get into an argument of moral equivalence'.[52] Later, when the new prosecutor, Carla del Ponte, sent NATO a list of detailed questions regarding targeting policy, none of her queries were answered. In her biography, del Ponte writes:

[48] Henry Kissinger, *Diplomacy* (New York: Simon & Schuster, 1994), p.805.
[49] Michael J. Matheson and David Scheffer, 'The Creation of the Tribunals', *The American Journal of International Law*, Vol. 110, No. 2 (April 2016), p.174.
[50] William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006), p.19; see also Matheson and Scheffer, pp.176-177.
[51] See Schabas, pp.27-28.
[52] Cited in David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton: Princeton University Press, 2012), p.279

> I quickly concluded that it was impossible to investigate NATO because NATO and its member states would not cooperate with us. […] Over and above this, however, I understood that I collided with the edge of the political universe in which the tribunal was allowed to function. If I went forward with an investigation of NATO […] I would render my office incapable of continuing to investigate and prosecute the crimes committed by the local forces during the wars of the 1990s.[53]

Returning to our exceptionalism typology, del Ponte description provides a stark example of double standards, with the US 'judging itself by different standards from those it uses to judge other countries'. Again, we find evidence of the theme identified here as being present throughout the history of the United States' engagements with international law designed to constrain the use of force: the US, keen to both expand and redefine the limits of international law as a foundation of a civilised global order, while simultaneously unwilling to be constrained by its obligations.

The US and the International Criminal Court

Despite it initially being supportive of the creation of a permanent international criminal court, it is well known that the United States was one of seven countries to vote against adopting the Rome Statute as the founding document for the ICC.[54] Nonetheless, President Clinton signed the Rome Statute, making a point that the United States was reaffirming its 'strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity'. But, in an important qualifier, Clinton argued that the Statute contained 'significant flaws', and recommended that his successor 'not submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied'.[55]

Post-Rome, US officials adopted a slightly revised opposition to the Court; while continuing to focus on the objectionable aspects of the Statute that they argued made it impossible for the US to join the Court, they also argued that a Court without US involvement would quickly become marginalised. In an argument that was wholly underpinned by US self-perceptions as a great power, David Scheffer argued that 'without the United States, the effectiveness of the permanent international criminal court will fall far short of its

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[53] Carla del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity: A Memoir* (New York: Other Press, 2009), p.60

[54] See Lee Feinstein and Tod Lindberg, *Means to and End: U.S. Interest in the International Criminal Court* (Washington D.C., Brookings Institute Press., 1999), p.37; see also Ruth Wedgewood, 'The Constitution and the ICC' in Sarah B. Sewell and Carl Kaysen (eds.), *The United States and the International Criminal Court: National Security and International Law* (New York and Oxford: Rowman and Littlefield, 2000), p.119; and Andrea Birdsall, 'The "Monster That We Need to Slay"? Global Governance, the United States, and the International Criminal Court', *Global Governance*, Vol. 16 (2010), pp.451-469.

[55] William Clinton, 'Statement on the Signature of the International Criminal Court Treaty', Washington DC, December 31, 2000, available at https://www.gpo.gov/fdsys/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf, (accessed 27th July, 2017).

potential'.[56] Nonetheless, between 1998 and 2001, the US maintained a cordial relationship with the nascent Court, including proactive participation at the post-Rome Preparatory Committee (PrepComm).[57]

Bush and the ICC

The outward hostility expressed towards the Court by the G. W. Bush administration is well documented. Nonetheless, it remains worthwhile revisiting the way in which the first Bush administration (2000 – 2004) aggressively sought to undermine the Court. Its first act was to 'unsign' the Rome Statute, with Under Secretary of State John Bolton informing the UN that the US now had 'no legal obligations arising from its signature on 31st December, 2000'. In coordinated messages, Marc Grossman, Under Secretary for Political Affairs, railing against Article 12 of the Rome Statute, argued that 'while sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or on their territory, the United States has never recognised the right of an international organisation to do so absent consent or a UN Security Council mandate'.[58] Echoing common conservative objections to the Court, Grossman argued that the US' opposition to the Court was premised primarily on the belief that it undermined the central role of the UN Security Council in maintaining international peace and security and that in creating a prosecutorial system that is 'an unchecked power', the Rome Statute was undemocratic.

The Bush administration had the same two concerns that Clinton's negotiating team had expressed in 1998: first, the jurisdiction of the Court; and second, the limited role proposed for the United Nations Security Council in the Court's affairs. With regards to the jurisdiction of the Court, the US delegation took umbrage to Article 12 of the Rome Statute. While they were content for the Court to have jurisdiction over nationals of state parties, the proposal (eventually adopted in the Rome Statute) that the Court be able to exercise jurisdiction over nationals of non-states parties, provided the alleged crime took place on the territory of a state party to the Statute, was non-negotiable. Arguing that such a proposal violated the Vienna Convention on the Law of Treaties, which states that a treaty is not legally binding on non-signatories, Scheffer, the head of the US negotiating team in Rome, referred to the provisions of Article 12 as 'the single most fundamental flaw in the Rome Treaty that makes it impossible for the United States to sign'.[59] Echoing these concerns, Madeline Morris argued

[56] David Scheffer, 'The U.S. Perspective on the ICC' in Sarah B. Sewell and Carl Kaysen (eds.), p.116.
[57] See David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014), pp.59-60.
[58] Marc Grossman, 'American Foreign Policy and the International Criminal Court' (remarks to the Center for Strategic and International Studies), 6th of May, 2002, available at http://2001-2009.state.gov/p/us/rm/9949.htm (accessed 9th of July, 2015).
[59] Cited in Michael P. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: a Critique of the U.S. Position', *Law and Contemporary Problems* 64, 1, 2001, p. 69.

that no such precedent for universal jurisdiction existed in international law and thus the Statute far exceeded the fundamental principles of international law.[60]

The second concern voiced by the US related to the eventual diminished role of the United Nations Security Council *vis-à-vis* the Court. The US was supportive of the original International Law Commission draft proposal for an international criminal court, which effectively subordinated the court to the United Nations Security Council. [61] However, delegates at the Rome Conference, led by the so-called like-minded group, rejected this proposal. Despite intense US lobbying, the final version of the Rome Statute provides a much more diminished role for the Security Council than that advocated for by the US.[62]

The administration's opposition to the ICC was reinforced through legislation that not only echoed the Executive's objections to the Court, but also chastened countries who supported the ICC. The American Servicemembers' Protection Act (ASPA), signed into law by President Bush in August 2002, prohibited almost all US support for and cooperation with the ICC and, most controversially, allowed the US President to use 'all means necessary and appropriate' to free Americans 'being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court' (hence often being referred to as *The Hague Invasion Act*).[63] Simultaneously, the US undertook an aggressive campaign of bilateral immunity agreements (BIAs) which committed signatories to the Rome Statute not to turn over American citizens to the Court. In a number of cases, the US linked the provision of military aid on the condition of signing a BIA.[64]

Finally, the US used its position on the Security Council to further undermine the universal jurisdiction aims of the Court, demanding a blanket immunity from ICC jurisdiction for all UN peacekeepers be a condition of its continued support for the UN Mission in Bosnia. A compromise was eventually reached; UNSC Resolution 1422 granted US peacekeepers blanket immunity for one year, with the possibility of annual renewal.[65]

The vociferous objections to the Court were thus underpinned by two broad, interrelated concerns: first, that the Rome Statute, in undermining the historically central role of the

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[60] Madeline Morris, 'High Crimes and Misconceptions: The ICC and non-party states', *Law and Contemporary Problems*, Vol. 64, No. 1, 2001, pp.13-66

[61] See Charles M. Smith and Heather M. Smith, 'Embedded Realpolitik? Reevaluating United States' Opposition to the International Criminal Court' in Steven C. Roach (ed.), *Governance, Order and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (Oxford: Oxford University Press, 2009), p.35.; also see Bosco, pp.46-47

[62] According to William Schabas, the Rome Statute represents an 'attempt to effect indirectly what could not be done directly, namely reform of the United Nations and amendment of the Charter' (William Schabas, 'United States Hostility to the International Criminal Court: It's all about the Security Council', *European Journal of International Law*, Vol. 4, 2004, p.720.

[63] American Servicemembers' Protection Act of 2000, 22 U.S.C. §2008(a) (2002), available at https://2001-2009.state.gov/t/pm/rls/othr/misc/23425.htm (accessed 31st of August, 2018).

[64] See Smith and Smith, p.37.

[65] Smith and Smith, p.38; see also Carsten Stahn, 'The Ambiguities of Security Council Resolution 1422 (2002), *European Journal of European Law*, Vol. 14, No. 1, 2003, pp.85-104.

Security Council to maintain 'international peace and security' simultaneously failed to acknowledge the 'great power' status of the United States; and second, in asserting jurisdiction over citizens of non state parties and un-ratified parties to the Statute, the very existence of the ICC threatened US sovereignty.

Before exploring possible explanations for the US' behaviour, it is worth noting that these objections remain informed by fundamental misunderstandings about the Rome Statute. First, and most importantly, the Statute is underpinned by the principle of complementarity. As Jason Ralph points out, the US Congress has passed both the War Crimes Act (1996) and the Genocide Convention Implementation Act (1997), meaning that under the complementarity principle, the ICC would most likely be satisfied that the United States could be solely responsible for prosecuting violations by US citizens of the core crimes outlined in the Rome Statute.[66] Second, the US' initial obligation that the Statute violated the Vienna Convention on the Law of Treaties was misleading, as the Rome Statute does not impose any obligations on non-parties. Thus, the Court has very little practical impact on US legal sovereignty.

Despite President Bush campaigning on his continued opposition to the Court,[67] in its first three years of operation, most of the American fears regarding the Court failed to eventuate; it had shown no interest in pursuing cases that might implicate the United States; nor had the prosecutor relied on his own power to initiate investigations. It was in this environment that the United States felt they could engage with the Court on the atrocities that were occurring in Darfur, Sudan.

Indeed, the UN Security Council referral of the situation in Darfur to the ICC represented a turning point in the US relationship with the Court. Lobbied by first France, and then Britain, who tied the US' support for peacekeeping operations to support north-south peace negotiations, US support for a Security Council referral also came from an unlikely source. Jack Goldsmith, writing in a *Washington Post* op-ed, argued that:

> The Darfur case allows the United States to argue that Security Council referrals are the only valid route to ICC prosecutions and that countries that are not parties to the ICC (such as the United States) remain immune from ICC control in the absence of such a referral. This course of action would signal U.S. support not only for the

[66] Jason Ralph, 'Between Cosmopolitan and American Democracy: Understanding US Opposition to the International Criminal Court', *International Relations*, Vol. 17, No. 2, 2003, p.201. Importantly, in U.S. military practise, 'it is procedurally difficult to charge grave breaches as war crimes'. Nonetheless, a U.S. soldier suspected of grave breaches of the Geneva Conventions 'would be charged with the corresponding Uniform Code of Military Conduct violation, no reference to law of war being necessary' (Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press: Cambridge, 2010), p.86)

[67] See 'Presidential Debate in Coral Gables, Florida, September 30, 2004', available at http://www.debates.org/index.php?page=september-30-2004-debate-transcript (accessed 12th of December, 2016).

> United Nations but for international human rights as well, at a time when Washington is perceived by some as opposing both.[68]

Nonetheless, cooperation came with important qualifications. According to Condoleezza Rice, when speaking to British Foreign Secretary Jack Straw: 'I said it depends on what 'assist' means. Would we share information and intelligence? Will we go pick [indictees] up and deliver [them] to the Court? No. Will we help facilitate what the Court wants to carry out? Yes, we would do that'.[69] Importantly, the support for the referral came with the caveat that it should not be misinterpreted as US support to re-sign the Rome Statute.[70]

Events later that year further reinforced the United States' double standards with respect to the Court. The Iraq War remained the metaphorical elephant in the room with respects to holding US service personal responsible for alleged war crimes. Thus, when in 2005, the Iraqi Human Rights Minister announced his intention to sign the Rome Statute, an act that would have meant the actions of US defence force personnel could come under the jurisdiction of the Court, American pressure very quickly ensured that this did not happen.[71]

The first Bush administration's aggressive attitude towards the Court was underpinned by what Bosco calls 'traditional American sovereignty concerns and scepticism of international institutions that was particularly strong in conservative circles'.[72] Similarly, Andrea Birdsall points out that the United States 'maintained that it opposed the ICC because it had the potential to limit state sovereignty by enforcing universal values through an international institution that was unaccountable to the UN and also to the United States'.[73] There is thus a temptation, as explored earlier, to interpret American actions *vis-à-vis* the Court as the realisation of either a realist foreign policy, or HIL. But the limitations outlined above still render these explanations unsatisfactory. Nonetheless, it should be acknowledged that the Bush administration's interactions with the Court, differed in important ways to the earlier interactions with treaty-based institutions explored in this article. In particular, the aggressive and belligerent tone of public statements and legislative language representative a type of 'hyper-exceptionalism', where the US not only refused to be held by the same standards by which it judged other countries, or that it maintained the belief that Americans service personnel should be held accountable in American courts, but that the United States remained hostilely intransigent to the widely held understanding that despite 'un-signing' the Rome Statute, the Court could still have jurisdiction over American nationals on the territory of states party to the Statute.

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[68] Jack Goldsmith, 'Support War Crimes Trials for Darfur', *Washington Post*, January 24, 2005, available at: http://www.washingtonpost.com/wp-dyn/articles/A31594-2005Jan23.html (accessed 12th of December, 2016)
[69] Cited in Bosco, p.114.
[70] Goldsmith, op. cit. Importantly, the US, along with China and Russia, abstained from the Security Council vote that referred the situation in Darfur to the Court
[71] See Bosco, p.120.
[72] Bosco, p.72.
[73] Andrea Birdsall, 'The "Monster That We Need to Slay"? Global Governance, the United States, and the International Criminal Court', *Global Governance*, Vol. 16, No. 4, 2010, p.463.

Obama and the ICC

The election of Barack Obama in 2008 was greeted with optimism by Court officials in The Hague. While the Court had not featured as part of the presidential campaign, there was an expectation that the new administration would be much friendlier to the Court, confirmed when Obama employed individuals supportive of the Court to key administrative positions.[74] Nonetheless, despite the optimism, the Obama administration's relationship with the Court, while certainly not as outwardly hostile as the first Bush administration, remained characterised by qualified engagement.

In language similar to that used in the latter years of the Bush administration, the May, 2010 National Security Strategy summarised the US' relationship with the Court in the following manner:

> Although the United States is not at present a party to the Rome Statute of the International Criminal Court, 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. Although the United States is not a party to the ICC's Statute, the Obama administration has been prepared to support the court's prosecutions and provide assistance in response to specific requests from the I.C.C. prosecutor and other court officials, consistent with U.S. law, when it is in U.S. national interest to do so.[75]

There were, however, obvious differences between the two administration's engagement strategies. For example, in 2009, for the first time since 2001, the United States participated as an observer at the Assembly of State Parties (ASP) meeting and in 2010, the U.S. Ambassador-at-Large for War Crimes Issues, Stephen Rapp, announced that the US would assist the ICC to protect witnesses who testify before the Court in its proceedings on Kenya.[76] In 2011, having co-sponsored Security Council Resolution 1970, US Ambassador to the UN, Susan Rice, commented: 'We are pleased to have supported this entire resolution and all of its measures including the referral to the ICC'.[77] Arguably the most significant moment with regards to the US' relationship with the ICC occurred in March, 2013, when indicted

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[74] See Bosco, pp.153-154.
[75] U.S. Department of State, 'International Criminal Court', available at https://www.state.gov/j/gcj/icc/ (accessed 3rd of August, 2017).
[76] 'US to Help Protect Kenyan Violence Witnesses', *Voice of Africa*, February 10, 2010, available at https://www.voanews.com/a/us-to-help-protect-kenyan-violence-witnesses-84133462/159772.html (accessed 3rd of August, 2017).
[77] U.S. Department of State, 'Remarks In an Explanation of Vote on Resolution 1970 on Libya Sanctions', 26th of Feruary, 2011, available at https://2009-2017.state.gov/p/io/rm/2011/157390.htm (accessed 3rd of August, 2017). Mark Kersten has argued that subsequent to supporting the UNSCR 1970, the US did nothing to support the Court's mandate after Libya's civil war (Mark Kersten, 'Used and Abandoned: Libya, the UN Security Council and the ICC', *Justice in Conflict*, August 31st, 2011, available at https://justiceinconflict.org/2011/08/31/used-and-abandoned-libya-the-un-security-council-and-the-icc/ (accessed 4th of August, 2017).

Congolese warlord Bosco Ntaganda turned himself in at the US embassy in Rwanda, requesting to be transferred to The Hague.[78] In the same month, Rapp announced an expansion of the Rewards for Justice program, offering up to five million dollars for information that might lead to the arrest, transfer, and conviction of those wanted for arrest by the ICC, leading David Kaye to conclude that although the United States was no closer to re-signing the Rome Statute, it was 'arguably doing as much as, if not more than, member states are doing to bolster the work of the court'.[79] And finally, in its last meaningful interaction with the Court, the Obama administration issued support for France's proposed Security Council Resolution authorising the ICC to investigate alleged crimes in Syria.[80]

There remained a duality to this engagement, however. Case in point is the 2014 memo issued by the Obama administration certifying 'that members of the U.S. Armed Forces participating in the United Nations Multidimensional Integrated Stabilization Mission in Mali are without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court (ICC)'.[81] Similarly, the support for France's push for the ICC to investigate alleged crimes in Syria was only proffered after the US was assured that the prosecutor 'would have no authority to investigate any possible war crimes by Israel'.[82]

Congress also renewed its antipathy towards the Court. In 2014, the House of Representatives passed legislation making financial assistance for the Palestinian Authority unavailable if 'the Palestinians initiate an International Criminal Court judicially authorized investigation, or actively support such an investigation, that subjects Israeli nationals to an investigation for alleged crimes against Palestinians'.[83] In 2015, a seven-member delegation of senators visiting Israel, Saudi Arabia and Qatar described Palestine's decision to join the Court as 'deplorable' and 'counterproductive', with Lindsey Graham affirming that the US would 'cut off aid to the Palestinians if they filed a complaint' against Israel.[84]

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[78] See Jeffrey Gettleman, 'Rebel Leader in Congo Is Flown to The Hague, *The New York Times*, March 22, 2013, available at: http://www.nytimes.com/2013/03/23/world/africa/war-crimes-suspect-bosco-ntaganda-leaves-congo-for-the-hague.html (accessed 14th of December, 2016).
[79] David Kaye, 'America's Honeymoon with the ICC: Will Washington's Love for International Law Last?', *Foreign Affairs*, 16th of April, 2013, available at https://www.foreignaffairs.com/articles/2013-04-16/americas-honeymoon-icc (accessed 14th of December, 2016).
[80] Colum Lynch, 'Exclusive: U.S. to Support ICC War Crimes Prosecution in Syria', *Foreign Policy*, 7th of May, 2014, available at: http://foreignpolicy.com/2014/05/07/exclusive-u-s-to-support-icc-war-crimes-prosecution-in-syria/ (accessed 10th of August, 2017).
[81] The White House, 'Presidential Memorandum -- Certification Concerning U.S. Participation in the United Nations Multidimensional', 31st of January, 2014, available at https://obamawhitehouse.archives.gov/the-press-office/2014/01/31/presidential-memorandum-certification-concerning-us-participation-united (accessed 3rd of August, 2017).
[82] Lynch, op. cit.
[83] 'Consolidated and Further Continuing Appropriations Act, 2015', HR.83, 113th Congress, available at https://www.congress.gov/bill/113th-congress/house-bill/83?r=62 (accessed 31st of August, 2018).
[84] 'Senators: Palestinian Authority's Decision to Join International Criminal Court is Deplorable, Counterproductive, and Will Be Met With A Strong Response', 9th of January, 2015, available at https://www.lgraham.senate.gov/public/index.cfm/press-releases?ID=216B92F0-DF4A-1C87-37FB-03886A675A94 (accessed 3rd of August, 2017).

Thus, while the Obama administration's dealings with the Court were not as openly hostile as they were in the early years of the Bush administration, it nonetheless had what Mark Kersten has described as little more 'than a selective love for the ICC'.[85] In this respect, adopting a 'long-history' view of the US' relationship with international legal institutions concerned with moderating the use of force, the Obama administration's relationship with the Court follows the pattern identified in this article; enthusiastic engagement underpinned by broad conceptions of humanitarianism as it relates to justice, and leadership of a civilised society of states, juxtaposed against resistance to constraints imposed by the legal institution, most often expressed via the language of US national interests. Returning to the exceptionalism typology identified above, the Obama administration's activities *vis-à-vis* the ICC are characterised by double-standards; the US was willing to support the Court's activities as a mechanism of realising justice, except where US defence force personnel, or defence force personnel of US allies, as was the case with Israel, came under the purview of the Court.

Trump and the ICC

Without ever engaging directly on the topic of the ICC, it was assumed that Donald Trump's 'American First' mantra, and thus general animosity towards multilateral institutions exhibited during the campaign and his presidency, would also extend to the Court. This was confirmed in early September, 2018, when Bolton, now in his capacity as Trump's National Security Advisor, and prompted by concerns that the Pre-Trial Chamber might be about to authorise opening a situation in Afghanistan that would include investigating CIA operatives allegedly torturing suspected Taliban operatives in 'black sites' in Lithuania, Poland and Romania,[86] announced that 'the United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court. We will not cooperate with the ICC. We will provide no assistance to the ICC. We will not join the ICC. We will let the ICC die on its own'.[87] Bolton also announced that 'if the court comes after us, Israel or other US allies, we will not sit quietly […] We will ban [ICC] judges and prosecutors from entering the United States. We will sanction their funds in the US financial system, and we will prosecute them in the US criminal system'.[88] Finally, echoing previously stated objections to the ICC, Bolton argued that 'this president will not allow American citizens to be prosecuted by foreign bureaucrats, and he will not allow other nations to dictate our means of self-defence'.[89]

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[85] Mark Kersten, 'Unfortunate but Unsurprising? Obama Undermines the ICC', *Justice in Conflict*, 4th of February, 2014, available at https://justiceinconflict.org/2014/02/04/unfortunate-but-unsurprising-obama-undermines-the-icc/ (accessed 3rd of August, 2017).

[86] See 'Preliminary Investigation – Afghanistan', available at https://www.icc-cpi.int/afghanistan (accessed 12th of September 2018)

[87] John Bolton, 'Protecting American Constitutionalism and Sovereignty from International Threats', speech to the Federalist Society, 10th of September, 2018, available at: https://fedsoc.org/events/national-security-advisor-john-r-bolton-address (accessed 11th of September, 2018).

[88] Bolton, 'Protecting American Constitutionalism'.

[89] Bolton, 'Protecting American Constitutionalism'.

While it would be premature to draw conclusions about how the Trump administration's threats might play out, Bolton's pronouncements are not dissimilar to those he made previously about the Court. Therefore, and again being careful to acknowledge that the Trump administration's relationship with the Court will most probably shift from hostility to outright belligerence if the ICC chooses to investigate American citizens, the most recent activities *vis-à-vis* the Court are an extension of the US' exceptionalist attitude towards international law; specifically in this case, the belief that it is reasonable to exempt itself from obligations to which it holds others because it has a higher or more evolved domestic legal and political system which provides adequate, even superior, protection of rights.[90]

Conclusion

Writing in 2005, Anne-Marie Slaughter argued that the rise of transnational networks anchored by multilateral institutions such as the UN, the World Trade Organisation (WTO) and the European Union (EU), meant that law was no longer solely bound by the 'national'. As such, the United States could no longer remain disengaged from the increasing 'internationalisation' of law related to human rights and humanitarianism. For Slaughter, this meant that the United States would have increasing incentives to become less exceptional and to align its laws more closely with those of other states and international law.[91]

Slaughter's prediction was representative of a broader optimism for the spread and increased effectiveness of international law at the time. Yet while she was correct with her observation about the increasing reach of law beyond the national, this has certainly not resulted in the US becoming less exceptional with regards to international law. Indeed, as demonstrated throughout this article, the US' relationship with contemporary international law, and the laws of war in particular, has been remarkably consistent.

Competing explanations for this consistent behaviour include realism, with its simultaneous focus on the rational behaviour of self-interested states and the resultant limited efficacy of international law; and hegemonic international law (HIL), which, somewhat similarly to the exceptionalism framework adopted here, identifies hegemonic interactions with the development and implementation of international law that best suits the interests of hegemon (in this case, the United States). But both these alternative explanations have limited explanatory value. The reduction of state behaviour as informed by narrow interests is not only overly simplistic, it fails to adequately appreciate the degree to which US action is informed by the formative experience of 'creating' the United States. As argued throughout this article, not only has the US engaged with treaty-based legal institutions when there are no obvious interests at stake, but that engagement has been underpinned by broader conceptions of international law as an ordering principle in a society of civilised states. Further, while the reluctance of the US to be bound by international laws that it in turn demands others obey

[90] Saito, p.209.
[91] See Anne-Marie Slaughter, 'A Brave New Judicial World', in M. Ignatieff (ed.), pp.277-303.

might be viewed as hypocritical, there is a logic to the US' behaviour, informed by domestic experience, that provides a less cynical explanation:

> International law as a useful tool for creating order and securing rights abroad is hardly inconsistent with a self-understanding that sees little need for international law to limit and define its own politics of self-government. The United States will instinctively avoid application of that law to its own political order. To the rest of the world, this is bound to look hypocritical. In the United States, it will look like an insistence on democratic self-government.[92]

Ahistorical accounts of US interaction with treaty-based international law are also limited. As revealed here, an exploration of the US' history in engaging with treaty-based international laws of war, highlights a consistent pattern of behaviour: well intentioned, often enthusiastic support and leadership for international laws premised on the creation and maintenance of a civilised society of states, followed by 'resistance and retreat' when the law was seen to conflict with US national interests. Explanations with limited historical scope, such as HIL, while still useful, provide only a small view of a much larger perspective.

The aim of this article was not to pass judgement on the US' attitude towards international law. Rather, it was to argue that the pattern of exemptionalism, double standards and legal isolationism that was identified throughout the history of the US' interactions with treaty law designed to moderate warfare, is best explained through the application of exceptionalism.

The application of an exceptionalist framework that is informed by the US' formative domestic experience serves to provide the most complete explanation of the US' historical relationship with treaty-based laws of war. Furthermore, it might also serve to provide a reconciliatory explanation of the US achieving political ends through international legal institutions. The exceptionalism framework adopted here overcomes ahistorical accounts of the US' often fraught relationship with first, the law of nations, then multilateral treaty-based laws of war, and most recently, newly developed multilateral legal mechanisms designed to punish violations of the laws of war (namely the ICC). Explaining this relationship through the lens of exceptionalism also provides a more nuanced comprehension of US actions than frameworks informed and underpinned by narrow conceptions of the national interest, which, as noted above, often fail to adequately acknowledge the degree to which US national interests can be achieved through multilateral engagement.

[92] Kahn, p.221.