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THE ANXIETY OF SOVEREIGNTY: BRITAIN, THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

DOUGLAS E. EDLIN*

Abstract: This Article examines the development of the International Criminal Court, outlines the positions of and disagreements between Britain and the United States concerning the ICC, and analyzes the specific objections to the ICC raised by the United States. In this discussion, the Article argues that the contrasting positions of Britain and the United States toward the ICC can be understood in terms of each nation's differently configured perception of its own sovereign power. For various reasons, Britain's sovereignty is tested most acutely by its relationship with the European Union, while the United States feels its sovereignty encroached primarily by its relationship with the United Nations. Britain and the United States share a commitment to constitutionalism and this commitment has grounded Anglo-American support for international war crimes tribunals in the past. In the end, the ICC raises the question whether constitutionalism is a domestic or a universal conception.

INTRODUCTION

The United States and Britain disagree about several legal issues with a political dimension, or political issues with a legal dimension, ranging from landmines to climate change.¹ But unlike disagreements over the Ottawa Convention and the Kyoto Protocol, given both na-

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¹ See, e.g., The Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, early draft reprinted at 37 I.L.M. 22 [hereinafter the Kyoto Protocol] (ratified by Britain but not by the United States); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 [hereinafter the Ottawa Convention] (ratified by Britain but not by the United States).

tions' shared cultural, historical, and constitutional commitments to the rule of law and judicial independence as a means of securing fundamental values and governmental accountability, the disagreement between Britain and the United States over the International Criminal Court (ICC) seems especially unexpected. As this Article will explain, the nations' divergent positions toward the ICC are perhaps not as surprising as it first appears.

This Article examines the development of the International Criminal Court, outlines the positions of, and disagreements between, Britain and the United States concerning the ICC, and analyzes the specific objections to the ICC raised by the United States. This Article will argue that the contrasting positions of Britain and the United States toward the ICC can be understood in terms of each nation's differently configured perception of its own sovereign power. For various reasons, Britain's sovereignty is tested most acutely by its relationship with the European Union (EU),² while the United States feels its sovereignty encroached primarily by its relationship with the United Nations.³

I. THE ORIGINS AND JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

The ICC traces its antecedents back, ultimately, to the Nuremberg Trials (Nuremberg).⁴ British leaders had grave doubts about the efficacy of an international tribunal; the official British position toward the punishment of identified war criminals from 1943 until the end of

² See generally *R v. Sec'y of State for Transport, ex parte Factortame Ltd. (No. 2)*, [1991] 1 AC 603; DANNY NICOL, *EC MEMBERSHIP AND THE JUDICIALIZATION OF BRITISH POLITICS* 178-227 (2001); Paul Craig, *Britain in the European Union*, in *THE CHANGING CONSTITUTION* 61, 69-79 (Jeffrey Jowell & Dawn Oliver eds., 2000).

³ See, e.g., Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 HARV. J. ON LEGIS. 299, 308 (2002) ("[T]he United Nations' attempts to institutionalize intrusions into United States decision-making present a threat every bit as real to United States sovereignty as was posed previously by the Soviet Union."); Winston P. Nagan, *International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 127, 138 n.46 (1995).

⁴ See generally Andrew Clapham, *Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court*, in *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 30-67 (Philippe Sands ed., 2003) [hereinafter *FROM NUREMBERG TO THE HAGUE*]; Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 346-54 (1999).

the war was summary execution.⁵ Nevertheless, Nuremberg and the aftermath of World War II generated international awareness of and momentum for the creation of an international legal tribunal to prosecute and punish those responsible for war crimes.⁶ After Nuremberg, and in light of persistent questions about the legal legitimacy of those proceedings,⁷ the United Nations (U.N.) General Assembly appointed a body of experts to organize and codify international legal principles. In particular, this International Law Commission (ILC) was asked to draft a statute instituting an international criminal court along with an international criminal code, the so-called “Nuremberg Principles,” which would be enforced by the international criminal tribunal.⁸

These efforts culminated in the ILC’s draft statute for the creation of an international criminal court in 1994. Two years later, the ILC completed its draft international criminal code. As background to the ILC’s work, international pressure was building for the creation of tribunals to try individuals in connection with the human rights atrocities in the former Yugoslavia. This was followed in 1994 by a United Nations Security Council resolution to create a second *ad hoc* tribunal as a result of the genocidal activities in Rwanda.⁹

Building on the ILC’s draft statute and referencing the two *ad hoc* tribunals as prototypes, the U.N. General Assembly issued resolutions that led to the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which met in Rome beginning on June 15, 1998.¹⁰ On July 17, 1998, the Rome Statute of the International Criminal Court was signed by 120 states, with twenty-one abstentions and seven objections, including that of the United States.¹¹ The ICC was formally created upon the ratification of the Rome Statute by sixty states and entered into force on July 1, 2002.¹²

⁵ See Richard Overly, *The Nuremberg Trials: International Law in the Making*, in FROM NUREMBERG TO THE HAGUE, *supra* note 4.

⁶ See generally GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE 149–73 (2000).

⁷ See generally JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 155–79 (1986).

⁸ See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 8 (2nd ed. 2004).

⁹ *Id.* at 11.

¹⁰ Background Information, <http://www.un.org/icc/index.htm> (last visited Nov. 8, 2005).

¹¹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, [hereinafter Rome Statute].

¹² International Criminal Court, Historical Introduction, <http://www.icc-cpi.int/about/ataglance/history.html> (last visited Nov. 8, 2005).

Four crimes may be prosecuted before the ICC: genocide, crimes against humanity, war crimes, and aggression.¹³ These crimes are understood to possess an intrinsic international dimension as a result of their scope and extraordinary inhumanity, which raise a concern for all nations.¹⁴ The jurisdictional limitation of the ICC to these four crimes links it to its historical predecessor at Nuremberg because all four of these crimes were also prosecuted in some form at the Nuremberg Trials.¹⁵ Also, like Nuremberg, the ICC was created to provide a forum for prosecution of leaders and organizers most responsible for these crimes, not lower-level functionaries.¹⁶ Indeed, the Rome Statute specifically rejects official capacity as a bar to prosecution and highlights the potential criminal responsibility of commanders and other superiors.¹⁷ At the same time, the ICC hearkens back to Nuremberg by expressly precluding exculpation for core crimes through the defense that someone was “just following orders.”¹⁸ Finally, the ICC contains explicit provisions that preclude the legal and theoretical challenges raised concerning the legitimacy of Nuremberg. By specific, separate articles, the ICC incorporates the principles of *nulum crimen sine lege*, *nulla poena sine lege* and a prohibition against *ex post facto* criminalization.¹⁹

The ICC is most sharply distinguished from its predecessor tribunals by its jurisdictional mandate. Unlike the Nuremberg tribunal and the Yugoslav and Rwandan *ad hoc* tribunals,²⁰ the ICC’s jurisdiction is consensual and complementary. In other words, the states that have consented to the jurisdiction of the ICC have consented to permit prosecutions of crimes committed on their soil or by their citizens in a supranational court.²¹ The ICC’s jurisdiction, however, only complements or supplements the authority of a state’s national courts.²² The

¹³ Interestingly, there was overwhelming support for including the first three crimes within the ICC’s jurisdiction. The crime of aggression was ultimately included, “despite the knowledge that no agreement could be reached at the [Rome] conference either on its definition or on the role of the Security Council.” Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 30 (1999).

¹⁴ See SCHABAS, *supra* note 8, at 26.

¹⁵ See *id.* at 26–27.

¹⁶ *Id.* at 29.

¹⁷ See Rome Statute, *supra* note 11, arts. 27–28.

¹⁸ See *id.* art. 33.

¹⁹ See *id.* art. 11. The English translation of the phrase *nulum crimen sine lege* is “no crime without law,” and the translation of the phrase *nulla poena sine lege* is “no penalty without law.”

²⁰ See Arsanjani, *supra* note 13, at 24 n.13.

²¹ *Id.* at 26.

²² *Id.* at 24.

ICC assumes jurisdiction over trials for the four core crimes when, and only when, the national judiciary of the state in question is unwilling or unable to proceed.²³

II. BRITISH AND AMERICAN POSITIONS REGARDING THE ICC

Britain's support was pivotal to the creation of the ICC. Beginning with the formative discussions in 1997 of the Preparatory Committee on the Creation of an International Criminal Court (PrepCom), Britain agreed to withdraw the demand that ICC proceedings would depend upon prior U.N. Security Council approval. This dramatic shift altered the course of the negotiations and was a departure from the American position,²⁴ although the issue of predicate referral would return and remain contentious in Rome.²⁵ In addition, in contrast to other Security Council members, Britain joined the so-called "like-minded group" (LMG) of smaller and mid-level states that wished the ICC to be a strong and influential court.²⁶ Britain signed the Rome Statute on November 30, 1998 and ratified it on October 4, 2001.²⁷

As the varying and contradictory formal postures of the United States toward the ICC indicate, American attitudes toward the ICC have been decidedly ambivalent. This ambivalence is further demonstrated by the decision of the United States to vote against the Rome Statute when it was initially adopted on July 17, 1998. The United States then chose to sign the Rome Statute on the final day it remained open for signature, December 31, 2000.²⁸ The United States then reversed its position again and "unsigned" the Rome Statute on May 6, 2002.²⁹

²³ See Rome Statute, *supra* note 11, art. 17(1)(a). The conditional nature of ICC jurisdiction is referred to as "complementarity" or "admissibility." See generally SCHABAS, *supra* note 8, at 68; Arsanjani, *supra* note 13, at 24–25, 27–28.

²⁴ See Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 429 n.225 (1998). The United States believed that prosecution before the ICC should be predicated upon a referral by the Security Council or a state party to the treaty. See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 15 (1999).

²⁵ See Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 8 (1999). In the end, referral was maintained in the Statute. ICC jurisdiction depends upon a referral from the Security Council, a state party, or the ICC independent prosecutor. See Rome Statute, *supra* note 11, art. 13.

²⁶ Kirsch & Holmes, *supra* note 25, at 4; Arsanjani, *supra* note 13, at 23.

²⁷ SCHABAS, *supra* note 8, at 419.

²⁸ Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 97 (2003).

²⁹ See T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 2000 (2004).

The United States followed its repudiation of the ICC with the enactment of the American Servicemembers' Protection Act (ASPA), which ensures (so far as U.S. domestic law and policy are concerned) that no American soldier or government official will be subject to ICC jurisdiction.³⁰ In fact, section 7423 of ASPA specifically precludes any American court, state entity, or agency from supporting or assisting the ICC, and it prevents any agent of the ICC from conducting any investigative activity on American territory.³¹ Where American and allied forces conduct joint operations in which an American is under the command of a state party national, ASPA authorizes the President to attempt to reduce the risk of American exposure to ICC jurisdiction.³² As a preemptive tactic, the United States has entered into bilateral agreements with dozens of nations in an effort to guarantee that these nations will never refer any American for prosecution before the ICC and has conditioned American participation in multinational military operations upon international immunization from ICC prosecution.³³

III. UNITED STATES OBJECTIONS TO THE ICC

American reluctance to join the ICC might seem peculiar, given that the ICC was originally an American idea.³⁴ The ICC has been accepted by the other Allied nations and Security Council members that formed the Nuremberg tribunal (Britain, France, Russia), every NATO nation (except Turkey) and Mexico. Nevertheless, the ICC was perceived by certain influential government officials as a "threat to American sovereignty and international freedom of action."³⁵ This perceived threat related, at least according to these officials, to the prospect of the ICC restricting the United States (regardless of whether the United States subjected itself to ICC jurisdiction) from pursuing certain forceful responses to acts of aggression out of fear of prosecution before the ICC. As these officials put it, "the last thing America's leaders need is an

³⁰ American Servicemembers' Protection Act, 22 U.S.C. §§ 7401–7433 (2005).

³¹ *Id.* §§ 7423(b), 7423(h).

³² See Lilian V. Faulhaber, *American Servicemembers' Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537, 546 (2003).

³³ See Sean D. Murphy, *Efforts to Obtain Immunity from ICC for U.S. Peacekeepers*, 96 AM. J. INT'L L. 706, 725 (2002). See generally S.C. Res. 1497, U.N. Doc. S/RES/1497 (Aug. 1, 2003).

³⁴ Michael A. Newton, *Should the United States Join the International Criminal Court?*, 9 U.C. DAVIS J. INT'L L. & POL'Y 35, 38 (2002).

³⁵ Arthur W. Rovine, *Memorandum to Congress on the ICC from Current and Past Presidents of the ASIL*, 95 AM. J. INT'L L. 967, 967 (2001) (quoting a letter from former United States officials to U.S. Representative Tom DeLay).

additional reason not to respond when our nation's interests are threatened."³⁶

American objections to the ICC all stem, in one form or another, from perceived threats to United States sovereignty.³⁷ At hearings on the ICC held one week after the Rome Conference, Senator Rod Grams stated to the Senate Foreign Relations Committee that "the United States will not cede its sovereignty to an institution which claims to have the power to override the U.S. legal system and pass judgment on our foreign policy actions," and Senator Larry Craig claimed that the ICC represented "a fundamental threat to American sovereignty."³⁸ In an effort to clarify and analyze the United States's concerns raised by the ICC, this Part organizes the objections of the United States to the ICC in six distinct but overlapping categories: institutional, constitutional, doctrinal, security, prosecution, and symbolic.

A. *Institutional Objections*

Institutionally, the ICC is viewed by some as supplanting the U.N. Security Council.³⁹ According to the U.N. Charter, the Security Council has "primary responsibility for the maintenance of international peace and security . . ." and provides the Security Council with power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and . . . [to] decide what measures shall be taken"⁴⁰ The ICC, at least arguably, frustrates the U.N. Charter by usurping this role from the Security Council and by denying the United States its veto of Security Council measures.⁴¹ Accordingly, the United States (and others) sought prior review by the Security Council as a precondition for ICC proceedings.⁴² Absent a prior Security Council imprimatur, action by the ICC strikes some as displacing the role of the Security Council and nullifying the effect of the U.N. Charter.⁴³ Of course, the response to this point is that the requirement of Security Council permission prior to ICC action would effec-

³⁶*Id.*

³⁷ See BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 165 (2003).

³⁸ Quoted in Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 385–86 (2002).

³⁹ Amann & Sellers, *supra* note 38, at 384.

⁴⁰ U.N. Charter arts. 24(1), 39.

⁴¹ See Amann & Sellers, *supra* note 38, at 386–87.

⁴² *Id.* at 387.

⁴³ See generally *id.*

tively negate any authority the ICC could have as in independent tribunal, particularly where an investigation or prosecution of a Security Council member or its allies was deemed necessary.

B. *Constitutional Objections*

The ICC does not offer criminal procedures and protections that coincide completely with those offered under the United States Constitution. Most obviously, the ICC trial of an American need not (and will not) take place in “the State and district wherein the crime shall have been committed.”⁴⁴ Moreover, the ICC has no jury trial provision⁴⁵ and does not protect against unreasonable searches and seizures, although it does acknowledge a modified form of the exclusionary rule for improperly obtained evidence.⁴⁶ Despite the presence of many familiar, fundamental constitutional protections afforded to criminal defendants under the United States Constitution and traditional American criminal procedure (such as *Miranda*-esque warnings, the presumption of innocence, notice of charges, assistance of counsel, prompt and public trial, modified confrontation and compulsory process, a privilege against self-incrimination, and double jeopardy),⁴⁷ the ICC does not protect Americans to the same degree that the United States Constitution does.⁴⁸

In addition to these more specific constitutional reservations, there is a constitutional dimension to sovereignty itself, which some would say American subjection to the ICC would contravene. The British constitution is generally understood to grant Parliament the unfettered authority to bind Britain and its subjects to supranational jurisdiction as a condition of its constitutional authority. Put differently, the power of Parliament to submit Britain to the ICC is a demonstration of Parliament’s constitutional sovereignty. Unlike the case of the British Parliament, however, the very act of subjecting an American citizen to ICC jurisdiction might be a violation of the United States’s constitutional authority in the absence of a constitutional amendment. Without amending the Constitution, some Americans would claim that deference to the ICC is tantamount to the

⁴⁴ U.S. CONST. amend. VI; cf. Rome Statute, *supra* note 11, arts. 3(1), 62.

⁴⁵ See Rome Statute, *supra* note 11, arts. 39(2)(b)(ii), 74.

⁴⁶ See *id.* art. 69(7).

⁴⁷ See *id.* arts. 20, 55(2), 63, 66, 67.

⁴⁸ See generally David M. Baronoff, *Unbalance of Powers: The International Criminal Court’s Potential to Upset the Founders’ Checks and Balances*, 4 U. PA. J. CONST. L. 800, 804 (2002).

abandonment of republican self-government.⁴⁹ According to this view, the mere existence of the ICC (should the United States ever join it) would constitute a challenge to American constitutional democracy, because for the first time in U.S. history, an institution outside the United States government would have “the ultimate authority to judge the policies adopted and implemented by the elected officials of the United States – the core attribute of sovereignty and the *sine qua non* of democratic self-government.”⁵⁰

It seems entirely plausible that American republican government permits Congress to commit the United States, on behalf of the people, to an international or supranational institution with genuine influence over U.S. policy. There is nothing inherently undemocratic about giving governmental representatives the authority to bind their constituencies in ways that the constituents find surprising or objectionable. To borrow a phrase from the British context, so long as this congressional authority is not viewed as “self-embracing,” there is no threat to American sovereignty or democracy, because not all delegations of sovereignty are derogations of sovereignty. Indeed, some would say it is the essence of constitutional democracy that the majority’s representatives may take certain actions to preserve and promote constitutional values, fundamental rights, and the rule of law, despite the majority’s disapproval.⁵¹

Another constitutional objection to the ICC concerns the legal source of its judicial authority. If the United States Senate ratified the Rome Statute, it might seem that the ICC is just another court that Congress has chosen to accept through its Article II advice and consent power⁵² rather than to create through its Article III power.⁵³ The problem is that Article III of the Constitution vests the judicial power of the United States “in one supreme Court” and grants Congress the power to ordain and establish “inferior Courts.” Joining the Rome Statute would give the ICC jurisdiction over American citizens for acts committed on American soil. Given the theoretical possibility that the ICC could prosecute an American for a crime committed in the United

⁴⁹ See Amann & Sellers, *supra* note 38, at 400–02.

⁵⁰ Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT’L L. J. 840, 843–44 (2002).

⁵¹ See, e.g., RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 15–26 (1996).

⁵² U.S. CONST. art. II, § 2, cl. 2 (stating “He [the President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties . . .”).

⁵³ *Id.* art. III, § 1.

States, and that the ICC's decision could not be reviewed by the Supreme Court of the United States, the ICC would be exercising the judicial authority of the United States in a manner not contemplated or tolerated by the Constitution.⁵⁴ Under these circumstances, the ICC could not genuinely be considered an "inferior court." The ICC's recognition as a judicial authority over American citizens by the United States government would seem to conflict with the constitutional mandate that there be "one supreme Court." Granting the ICC judicial authority over American nationals in a manner consistent with the U.S. Constitution would seem to require a constitutional amendment rather than a treaty. Depending upon one's point of view, which is likely to reflect one's national constitutional tradition, the need for a constitutional amendment prior to American acceptance of the ICC underscores the advantage (or the disadvantage) of a written constitution.

One response to these constitutional objections is that they are mistaken. Some view the protections afforded by the Rome Statute as an international codification of American criminal procedure protections, which are actually "somewhat more detailed and comprehensive than those in the American Bill of Rights."⁵⁵ The Rome Statute protects American military personnel in ICC proceedings at least to the same degree that the United States Constitution would protect them at home.

Another response to these objections is not that they are mistaken but that they are misplaced. On this view, the appropriate legal paradigm for evaluating the protections offered to potential American defendants under the Rome Statute is courts-martial not the federal courts. Military courts do not afford American citizens the same constitutional protections as are available in federal courts; consequently, constitutional objections—no matter how well founded they might be for Americans tried in the traditional criminal justice system—are inapplicable to the ICC's prosecution and adjudication of war crimes. Analogizing the ICC to American courts-martial, the protections afforded by the Rome Statute seem consistent with the American military legal tradition.⁵⁶

⁵⁴ See Casey, *supra* note 50 at 841–42.

⁵⁵ Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124, 131 (2001).

⁵⁶ See, e.g., Ruth Wedgwood, *The Constitution and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 119 (Sarah B. Sewall & Carl Kaysen eds., 2000); cf. Paul D. Marquardt, *Law Without Borders: The*

Finally, a response to the argument that the ICC is not an Article III court is that the ICC does not exercise the judicial power of the United States. The Rome Statute defines crimes, procedures, and institutions that exist independently of the United States Constitution and United States law. Accordingly, there is no proper constitutional objection to subjection of Americans to ICC jurisdiction because the language of Article III and the authority of the federal courts are not implicated by the language of the Rome Statute or by the existence of the ICC.⁵⁷

C. Doctrinal Objections

A central concern of the United States involves the ICC provision granting the ICC jurisdiction over nationals of nonparty states who are accused of crimes committed on the territory of states parties.⁵⁸ According to settled and fundamental doctrines of international law, a treaty is binding only upon the parties that sign and ratify it (unless the treaty codifies general customary international law principles).⁵⁹ The subjection of nonparties to ICC jurisdiction seems to conflict with this fundamental doctrine.⁶⁰

There are three related responses to this objection. First, American resistance to the existence of the ICC or to American participation in the ICC could not prevent Americans from being tried by a foreign tribunal if, for example, members of the United States military carrying out operations on foreign soil were accused of one of the crimes within the jurisdiction of the ICC (i.e., genocide, war crimes, or crimes against humanity). On the contrary, American military personnel who found themselves in this situation would, according to principles of interna-

Constitutionality of an International Criminal Court, 33 COLUM. J. TRANSNAT'L L. 73, 119–26 (1995).

⁵⁷ See generally Marquardt, *supra* note 56, at 101–08, 126–32.

⁵⁸ See Rome Statute *supra* note 11, art. 12.

⁵⁹ See, e.g., United Nations Convention on the Law of Treaties, May 23, 1969, arts. 34–38, 1155 U.N.T.S. 331, [hereinafter Vienna Convention]. This is sometimes expressed through the maxims of *pacta tertiis* (*pacta tertiis nec nocent nec prosunt*) or *pacta sunt servanda*. Ironically, the United States has signed, but not ratified, the Vienna Convention. See, e.g., *United States v. Yousef*, 327 F.3d 56, 94 n.28 (2d Cir. 2003). This could be understood as the United States's refusal to accept the principle that a treaty binds only its signatories, which would weaken American objections to the Rome Statute based upon this doctrinal principle. See *infra* note 64 and accompanying text.

⁶⁰ See Scheffer, *supra* note 24, at 18.

tional law, be subject to the jurisdiction of the courts of the state in which the operations were conducted.⁶¹

Second, and related to the previous point, the ICC's jurisdictional mandate simply incorporates the traditional jurisdictional foundations of nationality and territoriality. In other words, Article 12 merely allows the ICC to do what national judiciaries commonly do: exercise jurisdiction over their own nationals for crimes committed outside state borders and exercise jurisdiction over nationals from other states who commit crimes within the subject state's territory. These jurisdictional principles of nationality and territoriality embraced by the ICC are fully consistent with the law and practice of state judiciaries around the world. The ICC serves, from a jurisdictional perspective, only as an international supplement to the ordinary judicial authority of national courts.⁶² Moreover, some scholars question whether Article 12 actually violates the principle that treaties bind only parties. According to these writers, the ICC does not violate this principle because "[t]he ICC statute provides a forum for the prosecution of *individuals* suspected of having committed acts of genocide, crimes against humanity or war crimes. It does not place any obligations upon non-party states unless such states have consented to cooperate with the ICC."⁶³

Third, the United States has ratified several treaties that require prosecution by states parties of any individual suspected of defined criminal activity, even if the accused's home state has not ratified the treaty. These treaties apparently conflict with the notion that a treaty cannot authorize jurisdiction over nonparties, yet this did not prevent the United States from executing these treaties.⁶⁴ This raises doubts about the gravity of American objections to the ICC grounded on its purported violation of fundamental principles of international law.

One point that the second response to the American objection seems to overlook is the potential for conflicts between state obligations under the Rome Statute and so-called "Article 98 agreements," which are bilateral treaties between the United States (or another state) and a party to the Rome Statute that prevent surrender of American citizens to the ICC without American consent.⁶⁵ The United

⁶¹ Rovine, *supra* note 35, at 967–68.

⁶² See, e.g., Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 817 (2001).

⁶³ *Id.* at 818.

⁶⁴ See Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT'L L.J. 415, 420 (2004).

⁶⁵ See *id.* at 424–27.

States maintains that these treaties are consistent with the language and intent of Article 98(2) of the Rome Statute. There are some doubts about whether Article 98 and its legislative history genuinely anticipate or tolerate the blanket immunity provided by these Article 98 agreements. In addition, some view Article 98 agreements as “galling instances of U.S. double standards” and “blatant hypocrisy” given that the United States demands that Serbia and Montenegro comply with the International Criminal Tribunal for the Former Yugoslavia (ICTY) while simultaneously insisting upon “its right to advance what it conceives to be its own national interests vis-à-vis the ICC”⁶⁶ Article 98 agreements highlight the intractable conflicts created by an international treaty instrument that purports to permit jurisdiction over nonparty actors. Those nonparties, particularly in the context of an international military or political crisis, may fall under the custody of states parties. If allegations are made that a nonparty actor is guilty of a core crime, and that actor is in the custody of a state party, then that state party will have to decide whether to turn the actor over to the ICC for investigation and prosecution.

Americans who oppose the ICC would argue that there is a significant difference between Americans who are captured on foreign soil being tried for alleged crimes by that foreign nation’s courts and Americans being extradited to The Hague for trial before the ICC. The power of a nation to exercise its territorial jurisdiction over Americans who are accused of crimes allegedly committed on that nation’s soil cannot seriously be questioned (although, in practice, the United States might do so while negotiating for the release of American prisoners). But the legitimacy of an international tribunal that exercises jurisdiction over citizens of a government that does not recognize the tribunal’s authority, upon claims of criminal violations that the nonparty state may not accept (such as the ICC crime of aggression), raises grave doubts about the tribunal’s rightful power. In this respect, American objectors might argue that the ICC suffers from precisely the same defects of legal legitimacy as its predecessor at Nuremberg.

⁶⁶ *Id.* at 424–25, 427. See generally David A. Tallman, *Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict*, 92 GEO. L. J. 1033 (2004); Cosmos Eubany, *Justice for Some? U.S. Efforts Under Article 98 to Escape the Jurisdiction of the International Criminal Court*, 27 HASTINGS INT’L & COMP. L. REV. 103 (2003).

D. Security Objections

Related to ICC jurisdiction over nonparties, the United States argued in Rome and subsequently maintained that this unprecedented extension of international jurisdiction could significantly restrict military operations necessary to preserve American national security or to restore or maintain peace in politically volatile regions. For example, the United States maintains a wide-ranging commitment to pledge its forces to peacekeeping missions around the world. So this raises a not unlikely possibility:

American servicemen on duty in the 1990–1991 Persian Gulf conflict or in the operations in Somalia would be subject to frivolous charges raised in the [International Criminal] Court by Iraqi President Saddam Hussein or Somali leader General Aidid solely to deflect international criticism from their own egregious behavior. Then, in order to avoid the possibility of ‘malicious prosecution’ of this nature, the U.S. reduces its commitment to participate in crucial international peacekeeping missions, thereby increasing the risk of global instability and war. In particular, this jurisdictional element has led to the United States seeking and securing immunization from ICC prosecution prior to committing troops for international peacekeeping missions.⁶⁷

These concerns are not only raised by politicians and others who oppose any form of international influence on U.S. policymaking. Ambassador David Scheffer, who headed the U.S. delegation at the Rome conference, also considers the concern about the threat of malicious prosecutions inhibiting United States participation in international peacekeeping missions significant.⁶⁸

⁶⁷ David, *supra* note 4, at 357 (footnote omitted).

⁶⁸ See Scheffer, *supra* note 24, at 19 (“Equally troubling are the implications of Article 12 for the future willingness of the United States and other governments to take significant risks to intervene in foreign lands in order to save human lives or to restore international or regional peace and security. The illogical consequence imposed by Article 12, particularly for nonparties to the treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions, which up to this point have been mostly shielded from politically motivated charges.”); William K. Lietzau, *International Criminal Law After Rome: Concerns From a U.S. Military Perspective*, 64 LAW & CONTEMP. PROBS. 119, 125 (2001) (“The Rome Treaty will become the single most effective brake on

Marcella David addresses this concern by evaluating American participation in peacekeeping missions in Iraq, Bosnia, and Sudan. For each intervention, she asks whether, had the Rome Statute been in force at the time, the United States would have been unfairly required to defend itself against specious charges of aggression, unfairly required to defend itself against politically-motivated charges of war crimes, or subjected to inconsistent obligations arising from the U.N. Security Council and the ICC.⁶⁹ She concludes that American operations in Iraq could conceivably raise potential aggression and war crimes charges but no obvious inconsistencies between U.N. and ICC obligations.⁷⁰ David believes American intervention in Bosnia might support a weak *prima facie* claim of aggression but not a war crime charge and no inconsistent U.N. and ICC obligations.⁷¹ Finally, David determines that American actions in Sudan would expose the United States to politically-motivated prosecutions based on unfounded claims of aggression and war crimes.⁷² Notwithstanding the belief of some Americans that David's analysis simply confirms their reservations about the ICC, she believes that, in the end, the ICC would actually reinforce U.N. commitments to international peace and security. For some Americans, though, the problem is that David bases her conclusion on her assessment that "where the United States unilaterally resorts to armed force on a questionable or contested factual record, or in non-traditional responses to acts of aggression against it, its actions may subject it to scrutiny by the International Criminal Court."⁷³ These individuals object to the ICC (and, at times, the U.N. itself) for this very reason: in their view, no entity other than the United States government can or should decide when or how the United States will defend itself and pursue its national interests.

E. Prosecution Objections

A concern closely related to the previous discussion addresses the possibility that the ICC might be used to pursue political agendas rather than war criminals. The United States sees itself as a likely target for politically-motivated prosecutions before the ICC and is therefore

international and regional peacekeeping in the 21st century." (quoting Ambassador Schef-fer's testimony before the Senate Foreign Relations Committee)).

⁶⁹ David, *supra* note 4, at 374.

⁷⁰ *Id.* at 375–81.

⁷¹ *Id.* at 382–84.

⁷² *Id.* at 384–86.

⁷³ *Id.* at 395.

reluctant to support the creation of a tribunal that might be manipulated out of such political motivations. Additionally, the United States objects to the ability of the ICC prosecutor to initiate an investigation even in the absence of any state party or Security Council complaint or reference.⁷⁴ For many members of the United States military this is the insurmountable obstacle to the United States signing the Rome Statute or complying with the ICC. As Lieutenant Colonel William Lietzau puts it:

Because the jurisdictional regime does not adequately protect U.S. troops and commanders from politically motivated prosecutions, the United States cannot sign the treaty. . . . [T]he Rome negotiators settled on a regime that fell short of U.S. objectives to maintain certain jurisdictional control over its own forces. . . . Referrals initiating such [ICC] jurisdiction can derive from any of three sources: the U.N. Security Council, a state party to the Statute, or the prosecutor acting in his or her independent capacity. The U.S. military has been much criticized for its stance on this critical aspect of the ICC Statute, but what the critics sometimes fail to recognize are the unique and vital national security responsibilities of the U.S. armed forces and the consequences of their front-line role in carrying out the nation's national security strategy. . . . [N]o other state regularly has nearly 200,000 troops outside its borders, either forward deployed or engaged in one of several operations designed to preserve international peace and security. . . . Soldiers deployed far from home need to do their jobs without exposure to politicized proceedings.⁷⁵

Other United States military personnel, such as Major General William Nash (Retired), point out that few foreign nations have accepted American assertions of exemption from ICC jurisdiction.⁷⁶ So in the event that an ICC investigation or prosecution required compliance by foreign states or actors, American opposition to the ICC is unlikely to have much effect.⁷⁷ Moreover, the military might have an interest

⁷⁴ See *id.* at 356 n.71.

⁷⁵ Lietzau, *supra* note 68, at 125–26; see also Scheffer, *supra* note 24, at 18.

⁷⁶ See William L. Nash, *The ICC and the Deployment of U.S. Armed Forces*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 153, 163 (Sarah B. Sewall & Carl Kaysen eds., 2000).

⁷⁷ See *id.*

in supporting the ICC because American forces serving overseas are at the greatest risk of becoming victims of war crimes. So it could be in the interest of the military to see war crimes investigated, prosecuted, and punished as extensively and vigorously as possible.⁷⁸

Some scholars and politicians argue further that the admissibility constraint on ICC jurisdiction—that the ICC cannot assume jurisdiction over a matter unless a state’s domestic courts cannot or will not do so—should quell American concerns about possible threats to national sovereignty or politically motivated prosecutions.⁷⁹ These individuals note that the conditional nature of ICC authority meets the concerns of the British government and so it should satisfy the United States as well.⁸⁰ One interesting and less-often noted aspect of the admissibility precondition to ICC jurisdiction, however, is that the ICC may retain jurisdiction over a matter, even if a proceeding was conducted by the judiciary of a state party, if the ICC determines that the state proceeding was undertaken “for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the [International Criminal] Court . . . there has been an unjustified delay in the [state] proceedings . . . [or] the proceedings were not or are not being conducted independently or impartially”⁸¹ This effectively authorizes the ICC to review independently state party court proceedings involving a core crime for impartiality, delay, or pretense.⁸²

F. Symbolic Objections

The final, and in some ways the most fundamental, U.S. objection to the ICC is captured by the spectacle of an American President or high-ranking military or political official standing trial before a non-American tribunal. The ICC does not recognize claims of official immunity,⁸³ and it is unclear whether the ICC would honor a national

⁷⁸ See Bass, *supra* note 6, at 282–83.

⁷⁹ Gwyn Prins, *9/11 and the Raiders of the Lost Ark*, 35 CORNELL INT’L L.J. 611, 619 (2002).

⁸⁰ See, e.g., *id.* Of course, there is another possible explanation for the opposing British and American stances toward the ICC that I will mention but not pursue here. Perhaps Britain and the United States view the ICC differently not just based upon differing assessments of risks of prosecution attendant to relative levels of international military engagement but also based upon differing actions of military and nonmilitary operatives that might fall under the Rome Statute’s definition of core crimes.

⁸¹ Rome Statute, *supra* note 11, art. 17(2); see Scheffer, *supra* note 24, at 19.

⁸² See Rome Statute, *supra* note 11, art. 17(2); Scheffer, *supra* note 24, at 19.

⁸³ See Rome Statute, *supra* note 11, art. 27.

grant of amnesty that could shield individuals from ICC prosecution.⁸⁴ Accordingly, the concern about the spectacle and its symbolic and practical effects on American position, prestige, and power is not merely hypothetical. Its very possibility is intolerable to the sensibilities of many Americans. Of course, the response to this objection is that the prospective national embarrassment of a leader being prosecuted before the ICC is itself a salutary deterrent effect of the tribunal's existence. This is hardly a basis for American objections to the ICC.

IV. NATIONAL SOVEREIGNTY IN A GLOBAL COMMUNITY

One plausible explanation for the disparate reactions of Britain and the United States toward the ICC might be found in their reactions to the perceived sovereignty threats posed by the EU and the U.N., respectively. Britain has, after some constitutional indigestion, accepted the supremacy of EU law in two judicially relevant ways. First, Britain accepts—as all EU members ultimately must—the supranational jurisdiction of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR).⁸⁵ Given that British citizens and the British government may appear as parties before the ECJ and the ECHR, and that the decisions of those courts are binding upon Britain's national judiciary, Britain has acknowledged the judicial authority over its citizens of courts outside its borders.⁸⁶ Second, EU law is directly enforceable by the national courts of Britain. So British courts apply external legal doctrine that has been incorporated by reference into British law through, among other things, the Human Rights Act of 1998.⁸⁷ As a result of these two factors, Britain likely does not view the ICC as a challenge to the authority or autonomy of its governmental structure, in part because it has made its (sometimes uneasy) peace with its presence within the EU.

Unlike Britain and the EU, influential elements of the United States government continue to view the U.N. with measured circumspection.⁸⁸ The United States tends to be most supportive of U.N. action when that action has no direct repercussions for U.S. foreign pol-

⁸⁴ See Amann & Sellers, *supra* note 38, at 394.

⁸⁵ See PAUL CRAIG & GRAINNE DE BURCA, *EU LAW* 301–08 (3d ed., 2003).

⁸⁶ Factortame, *supra* note 2.

⁸⁷ See Craig, *supra* note 2, at 86–87.

⁸⁸ See generally van der Vyver, *supra* note 62; see also Elias Davidsson, *The U.N. Security Council's Obligations of Good Faith*, 15 FLA. J. INT'L L. 541, 563–70 (2003).

icy or when it would serve the interests of the United States.⁸⁹ Moreover, Americans tend to view their courts and their law as entirely sufficient for the expression and maintenance of legal doctrine and government accountability. Indeed, Supreme Court justices still have serious reservations about citing, to say nothing of following, decisions of foreign courts such as the ECHR.⁹⁰

Notwithstanding these differing perceptions of place in the international community, the Anglo-American commitment to the rule of law both within and beyond national borders offers a meaningful incentive to support an international court of criminal justice. In the end, as Gary Bass explains, “[A] war crimes tribunal is an extension of the rule of law from the domestic sphere to the international sphere [T]he serious pursuit of international justice rests on principled legalist beliefs held by only a few liberal governments.”⁹¹

Britain and the United States are two of these few liberal governments. Britain’s preference for execution rather than legalism after World War II was the sole aberration in the commitment of liberal states to legalism when confronting war crimes.⁹² The United States’s rejection of the ICC is now, arguably, the second. The Anglo-American commitment to the rule of law and the historical contribution of both nations to the development of due process and norms of justice enforced by an independent judiciary has, in the past, anchored a shared commitment to legalism in the pursuit of international justice.⁹³ Britain and the United States have supported international war crimes tribunals largely out of a belief in the fundamental fairness of their own tradition of constitutional protection of criminal defendants and the intrinsic value of their principles and process as a means of achieving justice domestically and internationally.⁹⁴ At Nur-

⁸⁹ See generally van der Vyver, *supra* note 62; see also Elias Davidsson, *The U.N. Security Council’s Obligations of Good Faith*, 15 FLA. J. INT’L L. 541, 563–70 (2003).

⁹⁰ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting); *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring); see also *Atkins v. Virginia*, 536 U.S. 304, 324–25 (2002) (Rehnquist, C.J., dissenting); *Atkins*, 536 U.S. at 347–48 (Scalia, J., dissenting); *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997). See generally Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality,” Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999); Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325 (1998).

⁹¹ Bass, *supra* note 6, at 7–8.

⁹² See Overy, *supra* note 5, at 3–4; see also Bass, *supra* note 6, at 147, 181.

⁹³ Bass, *supra* note 6, at 148–49, 281.

⁹⁴ *Id.* at 173 (“At the end of America’s most brutal war ever, the Germans would be accorded the benefit of legal procedure as it had evolved in America, because of an Ameri-

emberg, the United States had to persuade (or remind) Britain that trials alone were the only means of achieving justice for war crimes consistent with Anglo-American legalism.⁹⁵ Perhaps Britain needs to return the favor with respect to the ICC.⁹⁶

Inasmuch as Anglo-American dedication to international norms of justice enforced by international tribunals derives, at least in part, from the recognition and reinforcement of domestic rule of law values in those international norms and tribunals, it is reasonable to see Anglo-American legalism itself as a manifestation of national sovereignty. After all, “sovereignty does not arise in a vacuum, but is constituted by the recognition of the international community, which makes its recognition conditional on certain standards”⁹⁷ Just as American democracy is theoretically predicated upon a relinquishment of a measure of liberty in exchange for security and individual autonomy in a larger social context, so too can support for the ICC be viewed as the relinquishment of a measure of sovereignty in exchange for security and international respect in a global context. Put differently, supporting the ICC does not just mean sacrificing sovereignty, it also enhances sovereignty.⁹⁸

This view of sovereignty depends upon a particular view of the nature of political power. Power is more than the ability of one state to bend other states to its will through coercion; it is also the ability of one state to persuade other states that their interests align. In other words, soft power can, in certain circumstances, be more effective than hard power.⁹⁹ If the United States will achieve more, including the achievement of more of its own political goals, in a world that respects its leadership, then ongoing opposition to the ICC may engender a very real loss of American influence and, ultimately, of American sovereignty and security.¹⁰⁰ The international perception that United States opposition to the ICC tarnishes the longstanding

can belief in the rightness of its own domestic legalism.”); *id.* at 181 (“Britain would extend its domestic standards of due process to almost all German war criminals . . .”).

⁹⁵ *Id.* at 150, 180–82.

⁹⁶ See Amann & Sellers, *supra* note 38, at 404; Prins, *supra* note 79, at 619. The United States strongly supports an international court of criminal justice, just not one that would try Americans without American consent. See Amann & Sellers, *supra* note 38, at 404; Prins, *supra* note 79, at 619.

⁹⁷ BROOMHALL, *supra* note 37, at 43.

⁹⁸ See *id.* at 59.

⁹⁹ See, e.g., Orentlicher, *supra* note 64, at 430–31.

¹⁰⁰ See generally M. Tia Johnson, *The American Servicemembers’ Protection Act: Protecting Whom?*, 43 VA. J. INT’L L. 405 (2003).

American commitment to the rule of law inside and outside its borders could limit the United States's ability to influence international affairs in ways that ultimately will detract from its sovereignty.¹⁰¹

CONCLUSION

The United States's rejection of the ICC has angered its allies, increased resentment toward the United States around the world, raised doubts about American commitments to the preservation of the rule of law nationally and internationally, and seemingly distanced the United States from otherwise shared Anglo-American values of legalism and support of norms and institutions of international justice. All of these factors inevitably lead one to wonder whether the current position of the United States toward the ICC is politically prudent. Some commentators suggest that a less unilateral position toward the ICC would serve American interests for four reasons: (1) the practical risk of prosecution of American citizens before the ICC is extremely remote,¹⁰² (2) American negotiating influence would not be weakened in contexts such as the Security Council, where U.S. rejection of the ICC, among other things, led to international reluctance to support American military intervention in Iraq,¹⁰³ (3) the current U.S. policy has floundered, because of the backlash against Article 98 Agreements, the refusal of most significant powers to sign them, and the inability of the United States to alter the fundamental structure of the ICC or to influence policy relative to the ICC now that the United States is no longer a party to the Rome Statute,¹⁰⁴ and (4) the apparent inconsistency between America's commitment to rule of law values and its unwillingness to comply with the ICC as an

¹⁰¹ A further point that I cannot develop here is that the concept of sovereignty itself is fundamentally incompatible with the enforcement of international law and should be abandoned. *See generally* Thomas M. Franck & Stephen H. Yuhun, *The United States and the International Criminal Court: Unilateralism Rampant*, 35 N.Y.U. J. INT'L L. & POL. 519 (2003); Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47 (1995/1996).

¹⁰² *See, e.g.*, Nash, *supra* note 76, at 153, 159.

¹⁰³ *See, e.g.*, Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 348 (2004); Orentlicher, *supra* note 64, at 428–29. Of course, two of the other actions that increased international animosity toward the United States were its recantation of the Kyoto Protocol and its rejection of the Ottawa Convention. *See id.* at 428.

¹⁰⁴ *See* BROOMHALL, *supra* note 37, at 182; Orentlicher, *supra* note 64, at 430–31, 432 (“[I]t can hardly be doubted that the ICC is more likely to operate in accordance with America's vision of the Court if the United States participates in shaping the institution than if it declares open war against it.”).

institution dedicated to the preservation of human rights through international legal norms has eroded America's political and moral capital as a leader in international affairs.¹⁰⁵

Just as Britain's acceptance of the Ottawa Convention influenced the United States's decision not to employ landmines during joint military operations in Afghanistan after September 11, 2001,¹⁰⁶ so too can Britain's decision to join the ICC influence American actions during joint military operations. To the extent that the very existence of the ICC promotes a "culture of accountability,"¹⁰⁷ the ICC may exert an influence over American policy even if Americans are never subject to ICC jurisdiction. Of course, this influence on American policy will strike those Americans who oppose the ICC as the realization of their initial concerns, and this influence will strike American supporters of the ICC as mitigation of their misgivings over U.S. withdrawal from the ICC. In the end, the ICC raises the question of whether constitutionalism is a domestic or a universal conception.¹⁰⁸ The ICC tests the Anglo-American commitment to the rule of law, in part, by asking what law will rule. Britain and the United States share a cultural, historical, theoretical, and doctrinal commitment to the rule of law and this commitment to legalism has grounded Anglo-American support for international war crimes tribunals in the past. But Britain seems more willing than the United States to accept that, at least where the ICC is concerned, the law that will rule Britain and its leaders and citizens can sometimes be made by an institution beyond its borders, while the United States remains committed to the rule of law solely as defined and limited by the law of the United States.

¹⁰⁵ Cf. Koh, *supra* note 103, at 348 ("[B]y rejecting a legal process approach, [the United States] limited itself to coercive solutions, which have now ironically diminished its capacity for global leadership under a banner of rule of law.").

¹⁰⁶ See Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561, 598 (2003).

¹⁰⁷ BROOMHALL, *supra* note 37, at 3.

¹⁰⁸ Cf. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1991-99 (2004); Casey, *supra* note 50, at 867.