Introduction

Contesting the International Rule of Law

In the closing years of World War II, German jurist and diplomat Wilhelm Grewe wrote: 'After this war has ended, a newly founded, politically balanced world order will also bring forth a new international legal order.'[1] Grewe was then undertaking the formidable task of periodising 'epochs' of international law (IL) defined by the rise and decline of great powers.[2] As Spain, France and Britain in turn enjoyed global predominance, so each was shown to mould prevailing international legal doctrines according to distinctive national ideologies. An 'American century'[3] thus seemed on the rise in the post-war years, in which the United States articulated a new legal order defined by 'the rule of law' in international affairs.[4] President Truman, in authorising the 1950 Korean War, argued: 'A return to the rule of force in international affairs would have far-reaching effects. The United States will continue to uphold the rule of law.'[5] President Eisenhower, in his 1959 State of the Union address, expressed hope that 'the rule of law may replace the rule of force in the affairs of nations'.[6] Perhaps most memorably, in his 1991

[1] Cited in Bardo Fassbender, 'Stories of War and Peace on Writing the History of International Law in the "Third Reich" and After' (2002) 13 *European Journal of International Law* 479, p. 482.

[2] Wilhelm G. Grewe, *The Epochs of International Law: Translated and Revised by Michael Byers* (Walter de Gruyter, 2000). The original book manuscript was completed in Germany during 1944 and has been criticised for being influenced by that ideological context: See Martti Koskenniemi, 'Book Reviews: *The Epochs of International Law*. By Wilhelm Grewe. Translated and Revised by Michael Byers' (2002) 51 *International and Comparative Law Quarterly* 746.

[3] Henry R. Luce, 'The American Century' (1941) 17 February *Life Magazine* 61.

[4] For an early review of these pronouncements see William W. Bishop, 'The International Rule of Law' (1961) 59 *Michigan Journal of International Law* 553, pp. 554–5 & 562–3.

[5] Harry S. Truman, 'Statement by the President on the Situation in Korea', 27 June 1950, www.presidency.ucsb.edu/node/230845.

[6] Dwight D. Eisenhower, 'Annual Message to the Congress on the State of the Union', 9 January 1959, www.presidency.ucsb.edu/node/235339.

national address at the commencement of the Persian Gulf War, President Bush envisioned 'the opportunity to forge for ourselves and for future generations a new world order – a world where the rule of law, not the law of the jungle, governs the conduct of nations'.[7] This book explains how commitments to 'the international rule of law' are informed by long-established and competing American foreign policy ideologies that structure profoundly contested meanings between American policymakers and their global counterparts and among American policymakers themselves.

The puzzling aspect of these presidential statements is that they set a benchmark inviting systematic charges of hypocrisy: that America has failed to honour the ideal of the international rule of law, with practice instead fraught with contradiction and distorted by beliefs in 'exceptionalism'. The standard inventory starts with the United States presenting itself as architect and chief advocate of the League of Nations after World War I (WWI) and then failing to join the organisation. After World War II (WWII) it again assumed this leadership role in the creation of the United Nations (UN), this time as a founding member. Yet the United States has subsequently become a conspicuous critic of the institution and was the greatest defaulter on UN dues by the close of the twentieth century. The United States has repeatedly used military force outside of UN prohibitions, including notoriously in the 2003 Iraq War, and has withdrawn consent to jurisdiction before the International Court of Justice (ICJ) in part for ruling to that effect.[8] More broadly, the United States has occupied a central role in efforts to create the International Criminal Court (ICC), ban anti-personnel landmines[9] and establish the *United Nations Convention on the Law of the Sea* (1982), while in each case failing to ratify the relevant treaties. Conversely, ratification of the 2015 Paris Climate Agreement served only to highlight apparent fickleness when the United States declared its intention to withdraw a mere nine months later.[10]

In *Lawless World*, British jurist Philippe Sands launched an influential critique of contemporary American legal policy by asking the question:

[7] George H. W. Bush, 'Address to the Nation Announcing Allied Military Action in the Persian Gulf', 16 January 1991, www.presidency.ucsb.edu/node/265756.

[8] See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States of America)* (1984) *ICJ Rep* 392.

[9] *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* (1999).

[10] Concluded under *The United Nations Framework Convention on Climate Change* (1994).

'How could it be that a country as profoundly attached to the rule of law and principles of constitutionality as the United States could have so little regard for international law?'[11] Reviewing US rejection of the founding statute of the ICC, Sands charged that US policy came down to a question of: 'When can brute political power override the rule of law and legal processes?'[12] For Michael Mandel, references to the rule of law in American ICC policy constitute mere 'hypocrisy' in the sense that the United States 'claims to be acting for some principled reason, but in fact has something less noble in mind'.[13] Criticism between lawyers is no less intense within the United States itself. Then legal adviser to the Department of State William Taft IV argued that America's use of force in the 2003 Iraq War 'was and is lawful',[14] yet in the same period Taft's eventual successor Harold Koh characterised the Iraq policy as a violation of IL that set the United States against its historical vision for 'a multilateral world under law'.[15] These contested claims of fidelity to law form the puzzle animating this book: What does the 'international rule of law' mean for American legal policymakers even as they advocate competing commitments to international legal order?

Ideology in International Law

Critiques in the form levelled by Sands and Mandel establish a binary opposition between the legal ideal of the international rule of law and the political interests of states: contradictions in American IL policy ultimately reflect a contest between law and power. Sands characterises his examples of contradictory US legal behaviour 'as conflicts, between political values and legal rules, between competing conceptions as to the hierarchy of moral choices, between different interpretations of what the rules require'.[16] The underlying conception presents the international rule of law as a normative ideal independent of the ideological commitments and political identity of states in which 'politics is an external

[11] Philippe Sands, *Lawless World: Making and Breaking Global Rules* (Viking, 2006), p. xv.
[12] Ibid., p. 58.
[13] Michael Mandel, *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity* (Pluto Press, 2004), pp. 215 & 219.
[14] William H. Taft IV & Todd F. Buchwald, 'Preemption, Iraq and International Law' (2003) 97 *American Journal of International Law* 557, p. 557.
[15] Harold H. Koh, 'A Better Way to Deal with Iraq', *Hartford Courant,* 20 October 2002, www.courant.com/news/connecticut/hc-xpm-2002-10-20-0210200607-story.htm.
[16] Sands, *Lawless World*, p. xvi.

spectre threatening to undo its good works'.[17] In this influential view, American engagement with IL reveals the consistent logic of calculated state interests causing inconsistent compliance with legal ideals. American policymakers show tactical deference to the international rule of law where it aligns with US interests, but override its constraints wherever political expedience demands. The consequence from a legal perspective is 'continued schizophrenia about global rules and foreign policies'.[18]

This book offers a reconsideration of the relationship between law and politics, by uncovering the commitments of American legal policymakers to distinctive conceptions of the international rule of law drawn from American foreign policy ideology. Disputes between the United States and its global counterparts are thus read as a power contest fought through competing conceptions of the very meaning of the international rule of law. Foreign policy ideology crystallises political interests and cultural beliefs in interpretations of legal principle, such that contradictions are best explained as opposition at the level of competing legal ideals. These divisions extend outward between American legal policymakers and their global counterparts and inward between American legal policymakers themselves. That story is told through the history of the ICC, where divergent global interests have become more intractable than a mere political contest: they are constitutive of IL. Ideological structure thus sets predictable limits on US accommodation of international rule of law ideals advanced even by close allies, thereby offering actors who comprehend that structure a capacity to respond strategically and to plan legal affairs with greater certainty.[19]

The book's exploration of ideology is amplified by an increasingly conspicuous gap between existing accounts of American international legal practice and questions being asked by legal scholars and practitioners following the 2016 election of US President Donald Trump, including: What kind of IL is envisioned by a nationalist 'America first' foreign policy?[20] The task of getting inside the worldview of American

[17] Gerry J. Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Polity, 2007), p. 11.

[18] Sands, *Lawless World*, p. 252.

[19] Being a generally agreed advantage of the rule of law: Friedrich A. Hayek, *The Road to Serfdom* (University of Chicago Press, 1944), pp. 54 & 72–5.

[20] Donald J. Trump, 'Inaugural Address: Remarks of President Donald J. Trump', 20 January 2017, www.whitehouse.gov/inaugural-address.

legal policymakers highlights a silence in legal scholarship on the influence of foreign policy ideology over the design and development of IL. Philip Bobbitt, in his sweeping account of international legal history *The Shield of Achilles*, raises the notion that legal policy in each state is inevitably

> formed by a particular view of law, and what law ought to be, and how it ought to be enforced. Every leadership of every state has such a view – self-interested, culturally idiosyncratic, haunted by historical threats, excited by historic visions – that is its own view of international law.[21]

This book makes the case that, far from being unprecedented, the views of IL now emanating from Washington have a pedigree deeply rooted in the intellectual history of American foreign policy. Contradictions in American legal practice exhibit a clear ideological structure that goes well beyond tactical modifications to law, emerging, instead, from conflicts between alternative but internally coherent conceptions of the international rule of law. Following Martti Koskenniemi, the book accepts that international legal rules and institutions cannot be apolitical, but are understood 'only by reference to substantive ideals about the political good we wish to pursue'. In short: 'Institutions do not *replace* politics, but *enact* them.'[22] IL is thus a site for contesting international power according to competing ideologies.

For the explanation of politics consciously displacing law to be true, it must be asserted that international lawyers, employed to develop and advise on American legal compliance, systematically disregard recognised legal ideals. If American lawyers were indeed engaged in subversion of an agreed conception of the rule of law, then repeated expressions of commitment to the principle must be interpreted as consciously 'bogus'.[23] The Trump administration conducted airstrikes on Syria in April of 2017 and 2018, generally considered to be contrary to IL, and yet justified its actions as legitimate in circumstances where 'civilized nations [had] joined together to ban chemical warfare',[24] such that alleged acts of

[21] Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (Penguin, 2003), p. 356.

[22] Martti Koskenniemi, *The Gentle Civilizer of Nations 1870–1960* (Cambridge University Press, 2001), p. 177, original emphasis.

[23] Paris noted recurrent use of this word by critics of American ICC policy: Erna Paris, *The Sun Climbs Slow: The International Criminal Court and the Struggle for Justice* (Seven Stories Press, 2009), p. 75.

[24] Donald J. Trump, 'Statement by President Trump on Syria', 13 April 2018, www.whitehouse.gov/briefings-statements/statement-president-trump-syria/.

President Bashar al-Assad were 'prohibited by international law'.[25] Conscious legal hypocrisy is a possible interpretation of what is happening, but not one that accords with the 'direct historical evidence – of which there is a great deal – of the actual motivations' of policymakers[26] and beliefs that a government legal adviser's 'key role is to promote the rule of law based on principle, not politics'.[27] More broadly, the evidence suggests that the United States genuinely 'conceives of itself as a nation dedicated to the rule of law, both at home and abroad'.[28] This is therefore not a straightforward story of political power challenging legal principle, but, rather, one of competing understandings of power constituting multiple meanings of the rule of law.

The implication for the ICC is that political interests are imbued into the law such that even principled commitment to a court designed in accordance with the 'international rule of law' will mean different things to differently situated legal policymakers. Entreaties for the United States to abandon parochialism and accept a court design guided by the rule of law rely on an artificial account of the nature of legal ideals. This observation is not to make a normative claim, that is, that, because US policymakers' divergent legal conceptions demonstrate that IL is radically contested, legal scholars and practitioners should yield to American conceptions. Rather, the book advocates that legal scholars and practitioners should take seriously the proposition that American IL policy is often guided by sincerely held beliefs about the nature of IL and its role in global governance, but that these conceptions systematically diverge according to national context. The book therefore moves beyond the many legal accounts of US omissions and failures, instead employing the ideological perspective of US legal policymakers in order to articulate substantive principles and doctrines that do comprise American conceptions of and contributions to IL. These are principles capable of

[25] Jim Mattis, 'Statement by Secretary of Defense Jim Mattis on the U.S. Military Response to the Syrian Government's Use of Chemical Weapons', 10 April 2017, www.defense.gov/News/News-Releases/News-Release-View/Article/1146758/statement-by-secretary-of-defense-jim-mattis-on-the-us-military-response-to-the/.

[26] David M. Golove, 'Leaving Customary International Law Where It Is: Goldsmith and Posner's *The Limits of International Law*' (2005) 34 *Georgia Journal of International and Comparative Law* 333, p. 348.

[27] Harold H. Koh, cited in Michael P. Scharf & Paul R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge University Press, 2010), p. xiii.

[28] David Wippman, 'The International Criminal Court', in Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge University Press, 2004), p. 162.

informing global counterparts about the type of international legal system envisioned by its most powerful voice and how to respond in a systematic way. Constructing global legal order is refocused when advocates appreciate that asserting a universal conception of the rule of law is limited not merely by preponderant American power but also by the transformation of power into legal ideals.

International Law Policy

The book's object of analysis is American *international law policy*. This original concept refers to the specific form of foreign policy concerned with the conception of and strategies taken in relation to international legal rules and institutions.[29] Foreign policy more generally has been defined as actions of governments 'directed towards objectives, conditions and actors – both governmental and non-governmental – which they want to affect and which lie beyond their territorial legitimacy'[30] and 'the strategy or approach chosen by the national government to achieve its goals in its relations with external entities'.[31] IL policy falls within these definitions as a compound concept concerned with the structure of *political* ideas about *legal* obligation. The concept necessarily weakens the conceptual bright-line between law and politics, but a distinction can nevertheless be maintained. Harold Lasswell, a cofounder of the New Haven School of jurisprudence, memorably defined politics as the determination of 'who gets what, when, how'.[32] In that sense, IL is undeniably a form of politics, since its rules and institutions represent the ongoing bargains between states about how to allocate international rights and resources. What distinguishes IL policy from general foreign policy, however, is an ongoing commitment to reconciling policy with obligations established by predetermined legal ideals, including those embodied in rules and institutions.

[29] For references to 'Soviet' and 'Russia's international law policy' see respectively: Theodor Schweisfurth, 'The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions' (1991) 2 *European Journal of International Law* 110, p. 117; George Ginsburgs, *From Soviet to Russian International Law: Studies in Continuity and Change* (Martinus Nijhoff Publishers, 1998), p. i.

[30] Walter Carlsnaes, 'Foreign Policy', in Walter Carlsnaes, Thomas Risse & Beth A. Simmons (eds.), *Handbook of International Relations* (SAGE Publications, 2002), p. 335.

[31] Valerie M. Hudson, 'The History and Evolution of Foreign Policy Analysis', in Steve Smith, Amelia Hadfield & Tim Dunne (eds.), *Foreign Policy: Theories, Actors, Cases* (Oxford University Press, 2008), p. 12.

[32] Harold D. Lasswell, *Politics, Who Gets What, When, How* (Peter Smith, 1950).

The lens of ideology may cause policymakers to receive the reach and depth of obligations in sharply divergent ways. But commitment to foreign policy that makes its terms with processes of the international legal system remains the necessary foundation for any conception of the international rule of law. Conversely, truly lawless foreign policy is that where policymakers lack any conception of international legal obligations and any commitment to engaging on those terms.

Interdisciplinary Research

The IL policy concept is inherently interdisciplinary, strengthening legal analysis through the empirical insights of political science. IL and International Relations (IR) are prime examples of disciplines that share an overlapping 'territory' but are separated by distinct 'tribal cultures'.[33] The shared territory is a basic concern about forms of governance in the international system, but, as historical cycles of convergence and divergence demonstrate, IL and IR remain 'distinct disciplines because their fundamental objectives differ. In international relations, the objective is to understand behaviour. In international law, the objective is to direct behaviour.'[34] Legal scholars are tasked with identifying and articulating which norms have attained the status of law, while leaving explanations of state behaviour to the realm of IR. This book informs debates within and across the two disciplines but, for reasons of both analytical substance and academic convention, remains foremost a work of legal scholarship, being concerned with questions about legal norms and obligations guiding American policymakers.

The real value of interdisciplinary research is where legal scholarship is assessed on its own terms and deficiencies are revealed in areas addressed by political science. A driving purpose of legal scholarship is to identify the rights and obligations of states in order to influence policymakers towards an international rule of law. In conventional terms, this entails increasing IL 'compliance', in the sense of 'a state of conformity or identity between an actor's behaviour and a specified rule'.[35] The

[33] Tony Becher & Paul Trowler, *Academic Tribes and Territories: Intellectual Inquiry and the Cultures of Disciplines* (Open University Press, 2001), pp. 25 & 60.

[34] Charlotte Ku, *International Law, International Relations, and Global Governance* (Routledge, 2012), p. 26.

[35] Kal Raustiala & Anne-Marie Slaughter, 'International Law, International Relations and Compliance', in Walter Carlsnaes, Thomas Risse & Beth A. Simmons (eds.), *Handbook of International Relations* (SAGE Publications, 2002), p. 539.

necessary correlative of this task is that legal scholars possess some understanding of how norms are actually received within a named state and what status they hold for legal policymakers. For a universal conception of the international rule of law to be fully realised, it would require that all states internalise its constitutive norms in identical form, as part of their own commitments, and that foreign policies promote this ideal domestically and internationally. The rapidly developing field of 'comparative international law' well demonstrates that states, to the extent to which they internalise rule of law norms, do so not in a theoretically pure form but, rather, through their particular interests, culture, historical experience and ideology.[36] For this reason, Henkin reminded that IL:

> is not a self-contained abstraction, or even a distant star for nations to steer by. It affords a framework, a pattern, a fabric for international society, grown out of relations in turn. The law that is made or left unmade reflects the political forces effective in the system. Law that is made is a force in international affairs, but its influence can be understood only in the context of other forces governing the behaviour of nations and their governments.[37]

Uncovering the meaning of the international rule of law embedded in worldviews of US policymakers transforms a theoretical question, about doctrine, into an empirical analysis of the real forces of American foreign policy ideology.

Foreign Policy Analysis

The interdisciplinary approach of this book sits within the IR subfield of Foreign Policy Analysis (FPA), which is so designated because it is committed to the unit level of analysis; eschewing questions of what behaviours exist *between* states in favour of analysing how these behaviours are determined by what happens *within* each state.[38] Crucially,

[36] See Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017); Anthea Roberts et al. (eds.), *Comparative International Law* (Oxford University Press, 2018).

[37] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 1979), pp. 4–5.

[38] See Stephen G. Walker, 'Foreign Policy Analysis and Behavioral International Relations', in Stephen G. Walker, Akan Malici & Mark Schafer (eds.), *Rethinking Foreign Policy Analysis: States, Leaders, and the Microfoundations of Behavioral International Relations* (Routledge, 2011).

FPA is located at the level of 'human decision-makers' where ideology and legal beliefs necessarily exist.[39] This yields a further distinction in FPA's focus on '*decision-making*' rather than '*out-comes*'.[40] The advantages of arbitrating FPA into legal scholarship aligns precisely with Ku's observation that law is limited to making 'broad propositions with regard to governance', but that social science is needed to:

> test and to understand law's specific effects. We realize more and more that the functionality of a governing unit may differ dramatically in different contexts. It is therefore important to create a mode of inquiry that can explain the behaviour of actors at a fine grained level, but still maintain the ability to enhance understanding of the broader system within which these actions take place.[41]

The ideological analysis of American IL policy in this book presents such an account of legal decision-making, which is the foundation for yielding finely grained explanations of the current and future trajectory of IL policy.

Whereas 'foreign policymakers' more generally are the focus of analysis in the FPA subfield, in this interdisciplinary study the focus turns to 'legal policymakers' as a unit of analysis.[42] The concern is with the real people conferred with power to make 'authoritative' decisions about the American government's interests and strategy when engaging with IL.[43] Responsibility falls primarily to the Department of State and the Office of the Legal Adviser within,[44] but extends to the Office of Legal Counsel within the Department of Justice and legal advisers in the Department of Defense, the National Security Council and beyond. Each agency has demonstrated a distinct identity, but, even within departments, the evidence is that legal advisers hold 'a diverse array of perspectives and have differing opinions as to their role in ensuring proper adherence to

[39] Valerie M. Hudson, 'Foreign Policy Analysis: Actor-Specific Theory and the Ground of International Relations' (2005) 1 *Foreign Policy Analysis* 1, p. 2.
[40] Ibid., p. 6, original emphasis.
[41] Ku, *International Law, International Relations*, p. 14.
[42] See Valerie M. Hudson & Christopher S. Vore, 'Foreign Policy Analysis Yesterday, Today, and Tomorrow' (1995) 39 *Mershon International Studies Review* 209.
[43] On policymakers as 'authoritative decision units' see Margaret G. Hermann, 'How Decision Units Shape Foreign Policy: A Theoretical Framework' (2001) 3 *International Studies Review* 47, p. 48.
[44] David Kaye, 'The Legal Bureaucracy and the Law of War' (2006) 38 *George Washington International Law Review* 589, p. 591.

international law'.[45] Legal policymakers are tasked with authoritatively deciding US approaches toward particular international institutions and rules, and are guided in that task by foreign policy ideology.

Legal policymakers include lawyers and non-lawyers alike, but the prevalence of lawyers among senior policymakers is notable – including half of all US presidents and three-quarters of US Secretaries of State.[46] Moreover, under these senior figures sit large teams of lawyers trained to advise on international legal obligations. The significance of identifying the role of lawyers in policymaking is that these individuals are expected to adopt a distinctive approach compared to other possible stakeholders. International legal policy is not infinitely malleable and must make its terms with existing structures and methods of IL. Legal policymaking 'has points of reference in the Constitution, statutes, and court precedents' and therefore 'should be more objective and reliable'.[47] International legal policymaking is thus constrained within more pronounced structural limitations than general foreign policy. International legal policymakers are distinguished by a duty to 'ensure that, even in dangerous times, regard is given to the strategic, to the system of law by which we live – not only to the tactical, the operational, the imperative of the moment'.[48] The evidence is that US State Department legal advisers have not perceived their duty as merely implementing government directions – as they would if retained by a private client. Rather, there is recognition of 'a special or higher professional responsibility to provide a disinterested assessment, because . . . advice is not normally tested in courts of law or by other outside checks'.[49] Global efforts to establish a permanent international criminal court have accordingly presented US legal policymakers with a uniquely complex set of challenges, as they seek to reconcile national foreign policy ideologies with international criminal justice under the rule of law.

[45] Scharf & Williams, *Shaping Foreign Policy*, p. 1.
[46] Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge University Press, 2012), p. 10.
[47] Harold H. Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (University Press of Kansas, 2009), p. 1.
[48] Daniel Bethlehem, 'A Transatlantic View of International Law and Lawyers: Cooperation and Conflict in Hard Times' (2009) 103 *American Society of International Law Proceedings* 455, p. 459.
[49] Scharf & Williams, *Shaping Foreign Policy*, p. 206.

The International Criminal Court

International Criminal Courts through American History

US policy toward international criminal courts has a history extending to the earliest days of the republic's rise as a great power.[50] Indeed, the United States actively thwarted the creation of such a court in 1919, when the prospect was raised pursuant to a provision in the Treaty of Versailles. The proposed court had jurisdictional reach extending from the foot soldiers of Imperial Germany all the way up to Kaiser Wilhelm II, but American leaders rejected the proposal as an unacceptable incursion on state sovereignty.[51] The United States has nevertheless long championed the idea of an international court for prosecuting war crimes and other breaches of IL by individuals. The United States strongly advocated the creation of the Nuremberg and Tokyo War Crimes Tribunals, which reproduced key elements of due process upheld in American municipal courts. As military tribunals with jurisdiction over personnel only from the defeated enemies, these fell well short of the protections offered by regular civilian courts. Nevertheless, they were created in the face of considerable scepticism by British allies, who preferred more summary treatment of defendants, and contrary to Soviet enthusiasm for mere show trials.[52] More particularly, US advocacy for the tribunals flowed from a specific strategy for augmenting its rising political power by fostering an international rule of law that positioned the United States as the exemplar of that ideal.

It was in these immediate post-WWII years that the UN General Assembly (UNGA) commissioned and acted on a report by the International Law Commission (ILC) that recommended creating a permanent court.[53] A founding statute was drafted along with a code of offences, but the project ultimately stalled with the onset of the Cold War. Despite the long history of American and ILC interest in an international criminal court, it was not until 1989, in the waning years of the Cold War, that a resolution was passed in the UNGA calling once again

[50] For a history going back millennia see M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text of the Statute, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2005), pp. 3–40.

[51] Eric K. Leonard, *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (Ashgate, 2005), p. 22.

[52] Ibid., p. 24.

[53] International Law Commission, *Report of the International Law Commission on the Work of Its Forty-Second Session (1 May–20 July 1990),* UN Doc A/45/10, (1990), p. 20.

on the ILC to consider and report on the creation of a court – mindful of the Charter obligation of 'encouraging the progressive development of international law and its codification'.[54] A seeming precedent was set by US leadership creating the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, as the first such tribunal addressing individual criminal responsibility since Nuremberg, and later the International Criminal Tribunal for Rwanda (ICTR).[55] The ICC project was realised within the decade, at the 1998 *United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (Rome Conference), where 160 states convened along with 33 international governmental coalitions and more than 200 non-governmental organisations (NGOs) for negotiations that lasted five weeks through June to July. The *Rome Statute of the International Criminal Court* (Rome Statute) established a court with jurisdiction that ultimately covered four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. On 17 July 1998, 120 states voted to adopt the Rome Statute, 21 states abstained and 7 voted against – including the United States.

The 'Canary in the Coalmine'

The history of US ICC policy stands out as perhaps the most intriguing demonstration of competing conceptions of the international rule of law as they influence global legal order. The court has been described as 'the most important institutional innovation since the founding of the United Nations'[56] and as 'the central player in a contemporary battle over the place of justice in international politics'.[57] For rule of law advocates, it is seen to herald 'a new world order based on the rule of international law'[58] and, 'more so than almost any other international organisation, [it]

[54] GA Res 44/39, *Individual Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over Such Crimes,* 72nd Sess. UN GAOR, Supp. 47, UN Doc A/44/39, (1989).

[55] ICTY, UN Doc S/Res/827 (1993); ICTR, UN Doc S/Res/955 (1994).

[56] Robert C. Johansen (1997), cited in William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2011), p. x.

[57] David Kaye & Kal Raustiala, 'The Council and the Court: Law and Politics in the Rise of the International Criminal Court' (2016) 94 *Texas Law Review* 713, p. 714.

[58] Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2, p. 8.

stands for the primacy of the rule of law over injustice'.[59] Yet, the ICC now enters a critical period as a series of major signatories seek to withdraw from the project, or have already done so, including Russia, the Philippines and a cluster of African Union members. More specifically, the United States responded to a protracted ICC prosecutorial request relating to the armed conflict in Afghanistan since 2003 ("Afghanistan Situation"), which then seemed likely to result in the investigation of US military and official personnel, by reaffirming its 2002 act of 'unsigning' the Rome Statute.[60] In the weeks immediately following President Trump's inauguration, former State Department Legal Adviser John Bellinger noted that the ICC remained a topic both 'perennially controversial and divisive' yet sharply defined for the purposes of scholarly analysis. Any policy change toward the ICC therefore promised to serve as a 'canary in the mine' for the Trump administration's IL policy generally.[61]

The ICC emerges as the most prominent focal point for claims of contradiction and hypocrisy in post-Cold War American IL policy, with inconsistent approaches creating 'perhaps the classic example of an interpretive challenge to observers of international law'.[62] Schabas depicts US policy as a 'muddle of arguments',[63] while van der Vyver sees it as 'confusing' and beset by 'schizophrenia'.[64] Cohen observes incomprehension in other states at the United States refusing to participate in the ICC 'despite its seeming reification of American

[59] Heiko Maas, 'Speech by Foreign Minister Heiko Maas at the Nuremberg Forum 2018 Marking the 20th Anniversary of the Rome Statute', 19 October 2018, www.auswaertiges-amt.de/en/newsroom/news/maas-nuremberg-rome-statute/2151548.

[60] International Criminal Court, *Situation in Afghanistan: Summary of the Prosecutor's Request for Authorisation of an Investigation Pursuant to Article 15* (The Office of the Prosecutor, 20 November 2017). See John R. Bolton, 'Protecting American Constitutionalism and Sovereignty from International Threats', The Federalist Society, Washington, DC, 10 September 2018, www.lawfareblog.com/national-security-adviser-john-bolton-remarks-federalist-society. The request to investigate was ultimately rejected by the ICC Pre-Trial Chamber, although subject to further appeal.

[61] John Bellinger & Rosa Brooks, 'Will International Law Matter to the Trump Administration? International Law in the Trump Era: Expectations, Hopes, and Fears', Georgetown University Law Center, Washington, DC, 23 January 2017, www.youtube.com/watch?v=NHo9GeBr8pI, [1:04:06].

[62] Scott, *International Law, US Power*, p. 1.

[63] Schabas, *An Introduction to the ICC*, p. 25.

[64] Johan D. van der Vyver, 'American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness' (2001) 50 *Emory Law Journal* 775, p. 776.

values'.[65] Du Plessis describes US policy as 'ironic' where 'an important element of the United States' conception of its own national interest has been the development and maintenance of an international rule of law',[66] while Paulus notes that a record of leading establishment of the World Trade Organization dispute settlement system yet opposing the ICC reveals 'contradictory attitudes towards international adjudication'.[67] The frustration is evident in Cherif Bassiouni's statement, after negotiations establishing the court, that 'the interests of the United States in having an ICC far outweigh the marginal and far-fetched concerns that have been articulated by political opponents'.[68] Finally, Ambassador David Scheffer, as one of the most forceful advocates among US legal policymakers, has noted the contradiction of the United States creating and associating itself with the principles of the post-WWII tribunals, yet appearing 'awkwardly conflicted' by the more robust regime of the ICC. In consequence, the project 'has proven to be an enigma for Americans from its beginning to the present day'.[69]

What is not documented adequately in extensive writings on the issue is the extent to which contradictions stem from contestation over the very concept of the international rule of law – between key parties and the United States, and among American legal policymakers themselves. Opponents of US policy specifically characterise a failure to 'uphold the rule of international law'[70] and 'a profound rejection of what makes America great: our deep and abiding commitment to the rule of law'.[71] British Queens Counsel Cherie Blair and US legal policymakers Chayes and Slaughter have all described US policy as 'a high-

[65] Harlan G. Cohen, 'The American Challenge to International Law: A Tentative Framework for Debate' (2003) 28 *Yale Journal of International Law* 551, p. 572.

[66] Max du Plessis, 'Seeking an International International Criminal Court: Some Reflections on the United States Opposition to the ICC' (2002) 15 *South African Journal of Criminal Justice* 301, p. 305.

[67] Andreas L. Paulus, 'From Neglect to Defiance? The United States and International Adjudication' (2004) 15 *European Journal of International Law* 783, pp. 783 & 785.

[68] M. Cherif Bassiouni et al., 'War Crimes Tribunals: The Record and the Prospects: Conference Convocation' (1998) 13 *American University International Law Review* 1383, p. 1403.

[69] David J. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012), p. 164.

[70] van der Vyver, 'American Exceptionalism', p. 832.

[71] Leila Nadya Sadat, 'Summer in Rome, Spring in the Hague, Winter in Washington: US Policy towards the International Criminal Court' (2003) 21 *Wisconsin International Law Journal* 557, p. 596.

profile rejection of a major initiative for the rule of law in international affairs'.[72] Yet the historical record is equally clear that American attitudes to the ICC have always exhibited a continuity consistent with ideological beliefs about the nature of IL, which are systematically defended as good faith commitment to the 'international rule of law'. This book presents the case that if international legal scholarship continues to quarantine IL from the insights of foreign policy ideology, it will ultimately weaken the foundations not only of the ICC but also of IL itself.

Book Structure

Part I of the book explores the role of foreign policy ideology in meeting the interpretive challenge of contradictory American IL policy. Chapter 1 assesses the extent to which IL scholars and analysts provide compelling explanations for distinctive American IL policy. An increasing number of analyses have drawn on the pedigree of a long-established literature on 'American exceptionalism'. This chapter unpacks these accounts by focusing on three common explanations for idiosyncratic policy: the expected rational behaviour of a state with uniquely preponderant global power; distinctive American jurisprudence; and unique political culture forged in the nation's historical experiences. Reviewing this literature demonstrates the merit in each approach, but also that a fresh account is needed that maps the relationship between distinct yet clearly correlated explanations.

Chapter 2 draws insights from FPA to explain the relationships among power, beliefs and interests as causes of distinctive American IL policy. The focus is on 'foreign policy ideology' as the ideational concept best capturing the transformation of power into ideas capable of shaping global interests. A generation of empirical survey research, combined with a rich history of diplomatic thought, has shown American foreign policy ideology to be structured along two dimensions that form an influential four-part typology. A *governance* dimension measures whether American power is exercised primarily through international institutions dominated by elites, or, conversely, whether US foreign policy interests are advanced through domestic law and institutions

[72] Ewen MacAskill, 'Cherie Booth Hits Out at US Over International Court', *The Guardian,* 13 June 2002, www.theguardian.com/uk/2002/jun/13/cherieblair.politics; Abram Chayes & Anne-Marie Slaughter, 'The ICC and the Future of the Global Legal System', in Sarah B. Sewell & Carl Kaysen (eds.), *The United States and the International Criminal Court: National Security and International Law* (Rowman & Littlefield Publishers, 2000), p. 238.

under popular control. A second *values* dimension measures whether US policy is constructed to promote universal liberal values through law, or whether it is used primarily to promote illiberal national security or non-universal cultural and identity values. Accordingly, IL policy can be located between *internationalist–nationalist* positions on the governance dimension and between *liberal–illiberal* positions on the cross-cutting values dimension, which together form four ideal policy types: *liberal internationalism*, *llliberal internationalism*, *liberal nationalism* and *illiberal nationalism*.

Chapter 3 revisits explanations for contradictory US policy via the ideological typology to develop a model of competing conceptions of the international rule of law. Opposition to US legal policy has converged on forms of 'legalism', as a set of beliefs that law consists of non-instrumental rules and that the international legal system should be developed by analogy with municipal law. The four ideal types, as well as legalism, are applied to reinterpret the classic Anglo-American institutional conception of the rule of law comprising three elements that, when translated to the global level, are concerned with: how to develop non-arbitrary global governance; how to define equality under IL; and how to determine the integrity of international judicial power. Each element of the rule of law has been interpreted in a distinctive form by the competing ideologies, thus establishing a structured contest over principles for designing and developing global legal institutions. The meaning of 'coherence' becomes that a legal policymaker's interpretation of any one of the three elements is a reliable indicator of positions taken on remaining elements.

Part II of the book applies this model to reconsider the history of American ICC policy in its full ideological context. Each of the post-Cold War presidencies, up to that of President Obama, is analysed in terms of ideology's impact on the three identified rule of law elements. Chapter 4 considers the Clinton administration (1992–2000), where US policy was characterised as contradictory for traversing from prominently advocating the project in the early years to conspicuously voting against the final treaty establishing the court, then signing it, but warning against Senate ratification. The dominant conception of the international rule of law is shown to be liberal internationalism, combined with competing illiberal internationalist beliefs. Despite similar policy outcomes, this represented a shift from the primarily illiberal internationalist policy of the George H. W. Bush (Bush 41) administration. The design put foward by global advocates remained structured by legalist

principles not recognised by US policymakers, such that US policy appeared contradictory for following internally coherent ideological conceptions of IL.

Chapter 5 considers the first term of the George W. Bush (Bush 43) administration (2000–4) when the United States 'unsigned' the founding ICC statute and used a combination of domestic legislation and bilateral agreements to obstruct its further development. This period demonstrates a clear rejection of both legalist and liberal internationalist conceptions of the court. The dominant rule of law conception was instead that of illiberal nationalism combined with elements of illiberal internationalism, leading to widespread global criticism that US policy was contrary to the international rule of law. US policymakers nevertheless continued to defend US compliance with legal obligations and international criminal justice, while opposing a court advancing the principles recognised by legalist advocates.

Chapter 6 turns to the second term of the Bush 43 administration (2004–8) which was characterised by more pragmatic engagement and even tacit endorsement of the court, yet also by continued insistence on legal privileges through the United Nations Security Council (UNSC). Here, the United States is shown to express illiberal internationalist conceptions that appeared more complementary with legalism, but remained distinct from it. Significantly, the negation of exceptionalist ideological beliefs by the Abu Ghraib prisoner abuse scandal led to acceptance of limited equal rights under the UNSC consistent with legalism. This episode corroborates the claim for ideology's controlling role in interpreting legal principle, but also the power of contesting American IL policy at the level of ideological beliefs.

Chapter 7 concludes analysis of the ICC with the Obama administration (2008–16), in which there was a conspicuous 'reset' of ICC policy to positive engagement. The United States attended annual meetings for the first time and contributed substantively to negotiations establishing the crime of aggression. There was no formal 'resigning' of the ICC treaty, however, the aggression definition agreed by other states was rejected and the United States continued to deny any prospect of becoming a member of the court. Here, US policy is shown to reflect an amalgam of ideologies, but predominantly that of liberalism in both its internationalist and nationalist forms. The consequence was that US re-engagement was always distinct from the legalist position, and thus it highlighted

incompatible legal ideals even as all parties pledged fidelity to the international rule of law.

The Conclusion considers the implications of these findings in the Trump era and beyond, which so far exhibits clear continuity with the ideological structure of its predecessors. The case of the ICC provides compelling evidence that foreign policy ideology structures distinct conceptions of the international rule of law among American legal policymakers and that these received principles set hard limits to reaching a universal understanding of the proper design and development of international legal order. Defining the international rule of law remains a dialectical process in which ideological visions of global order contest power through the shared space of the international legal system. Continued commitment to this contest is evidence nevertheless of the consequence of IL as a framework for sustaining discourse about global power and transcendent values.