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.