

AMERICAN FOREIGN POLICY
IDEOLOGY AND THE
INTERNATIONAL RULE OF LAW

American engagement with international law has long been framed by commitment to the ‘international rule of law’ that persists even across divergent political and historical eras. Yet, despite appeals to legal ideals, American international law policy is consistently criticised as fraught with contradiction and distorted by beliefs in ‘exceptionalism’. These contested claims of fidelity to law are the subject of this book: what does the ‘international rule of law’ mean for American legal policymakers even as they advocate competing commitments to international legal order? Answers are found in extensive evidence that American policymakers receive international law through established foreign policy ideologies that correspond with divisions in both legal scholarship and diplomatic history. Using the case of the International Criminal Court, the book demonstrates that the very meaning of the international rule of law is structured by competing ideological beliefs; between American policymakers and global counterparts, and among American policymakers themselves. This title is also available as open access on Cambridge Core.

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THE INTERNATIONAL
RULE OF LAW

Contesting Power through the International
Criminal Court

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FOREWORD

It is an honour to write the foreword for Malcolm Jorgensen's fine book. I have long been a believer in the need for comparative scholarship about international law. International lawyers from different states, regions and geopolitical groupings often have distinct backgrounds, influences, opportunities, incentives, networks and spheres of influence. Instead of constituting a single, uniform field, international law is produced from an amalgamation of multiple, partially overlapping fields and communities. If we truly want to understand our field, we need to be aware of what international law looks like from diverse perspectives and through different eyes.

Comparative international law often focuses attention on divisions among international lawyers located in, coming from or educated in different states, regions or geopolitical groupings. In this sense, it is often horizontal in nature, drawing comparisons across states. But to develop a really sophisticated understanding of how international law is approached within a single state, we also need vertical studies that unpack differences within a particular state. American international lawyers as a group certainly differ from Chinese or French international lawyers, but they are also not homogenous and often differ from each other. The trick is being aware of differences both across and within states.

It is this difficult horizontal and vertical work that Jorgensen achieves so brilliantly in this volume. He starts from the horizontal observation that international lawyers from inside and outside the United States often have different perspectives on America's engagement with the international rule of law. Is America a champion of the international rule of law or a flouter of it? Jorgensen then proceeds to skilfully unpack what different types of US international lawyers mean when they proclaim fidelity to the international rule of law. In doing so, he sheds light on both an internal/external disconnect and the variation within America's internal make-up. If we had more studies like this of different countries, our

understanding of different national approaches to international law and foreign policy would be greatly improved.

Jorgensen's sophisticated work takes the skill of an insider/outsider. Jorgensen has read deeply in the American literature and met and interviewed many key international lawyers, so he is able to discuss US approaches with nuance and credibility. He approaches the subject with empathy, seeking to understand what international law looks like from within the US prism. He critically analyses what he finds without seeking to condemn or dismiss. He also has the advantage of looking at American international lawyers with the eye of an outsider. This makes it possible for him to observe some aspects that American international lawyers might be unable to detect because they are rendered natural or inevitable. Not himself wanting to work for the US government, Jorgensen can also speak more freely than some of his subjects, who often rotate in and out of government and academia.

Jorgensen analyses competing conceptions of American exceptionalism and suggests breaking down US international law foreign policy approaches based on two axes. The first concerns governance: how internationalist versus nationalist is the international law policy approach? The second concerns values: how liberal versus illiberal are the values that are pursued? These questions produce four ideal types: liberal internationalism, illiberal internationalism, liberal nationalism and illiberal nationalism. While some famous US international lawyers (including Harold Koh and Anne-Marie Slaughter) are clearly liberal internationalists, this typology provides a useful way to understand the approaches of President Trump and advisers such as John Bolton who seem much more illiberal nationalist in their inclinations. America's approach to international law often represents the push and pull of actors in these different ideal types, as Jorgensen shows with respect to US policy toward the International Criminal Court.

I was asked to write a foreword for this book, *American Foreign Policy Ideology and the International Rule of Law*, at the same time as I was asked to write a blurb for Professor Congyan Cai's new book, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously*.¹ In some ways, the books could be understood as bookends.

¹ Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (Oxford University Press, 2019).

One seeks to take a deep dive into international law's most significant existing great power, while the other takes a look at the approach of international law's most significant rising (or returning) great power. Both look at national claims to exceptionalism. Given the emerging US–China rivalry internationally, it would behove all international scholars to read both books so that they can better appreciate the distinctive approaches of these two great powers whose relationship will significantly influence the development of international law and relations in the coming decades.

In my work on China and the United States, I have often been struck by the way in which they can make similar statements but mean utterly different things by them. Invocations of democracy and the rule of law are a case in point. The United States has been a strong advocate for democracy on the international stage, but by this it means that it supports states (including China) becoming democratic on a national level. In terms of international relations, however, the United States has been decidedly undemocratic in its approach to lawmaking. Far from accepting a one-state-one-vote or one-individual-one-vote approach to international lawmaking, the United States has been happy to enjoying the lawmaking advantages that have come with being the world's only superpower.

China is the exact opposite. As an authoritarian state, China has strongly resisted calls by other states (including the United States) for it or other nondemocratic states to become or be made to become democratic. This viewpoint lies behind China's rejection of calls to embrace values such as human rights and doctrines such as unilateral humanitarian intervention, as well as its professed loyalty to principles such as the sovereign equality of states and the doctrine of non-intervention. At the same time, China has resisted the legitimacy of Western and US hegemony in international lawmaking, insisting (in principle, though not always in practice) that all states should be involved in lawmaking without the strong being able to impose their will on the weak. China's emphasis on sovereign equality, including equality in lawmaking, is sometimes characterised as a belief in 'democracy between states' as opposed to 'democracy within states'.²

When the United States calls internationally for democracy, it often means democracy at home but hegemony abroad. By contrast, when

² Julian Ku, 'What Does China Mean When It Celebrates the "International Rule of Law"?', *Opinio Juris*, 29 October 2014, <http://opiniojuris.org/2014/10/29/china-mean-celebrates-international-rule-law>.

China calls internationally for democracy, it seems to be embracing some concept of democracy abroad but hegemony at home. One adopts a national level of analysis; the other an international level. It would be easy to stand in the shoes of one state and simply dismiss the other state's invocation of these terms as opportunistic. But it is probably more useful to examine what policymakers in each state mean when they invoke these terms, being aware of the differences between them and the internal inconsistencies within each position. Critique is useful, but understanding is a necessary first step.

In reading both books, it was striking to me that Cai's book on China's approach to international law is replete with references to the United States, but Jorgensen's book on US approaches to international law contains only one reference to China. This observation does not amount to a critique of the book; instead, the asymmetry reflects the way in which our field has been constructed to date. One cannot be an international lawyer without knowing a lot about America. However, it has long been possible to be an international lawyer whilst writing – and, for some, even knowing – little about China. America has been central, but China has been peripheral. Knowledge of the United States has been required; knowledge of China has often been treated as optional.

Here, Jorgensen's career trajectory provides a fascinating example of how individual agendas and field dynamics are interwoven. His PhD thesis, on which this book is based, was focused on America. Yet his current writings have moved towards exploring the way in which China is seeking to craft 'geolegal orders' in areas such as the law of the sea.³ Geopolitical power has shifted and, with that, so has the field's scholarship. Jorgensen's work in both areas represents a form of comparative international law, focusing on distinctive approaches to international law both within and among states, with a particular focus on great powers. His ability to do a deep vertical dive into one state in this book and then shift tacks and do a horizontal assessment across states reflects the versatility of his comparative approach.

³ See e.g. Malcolm Jorgensen, 'Equilibrium & Fragmentation in the International Rule of Law: The Rising Chinese Geolegal Order' (November 2018) No. 21 *KFG Working Paper Series*, <https://ssrn.com/abstract=3283626>; Malcolm Jorgensen, 'Internationalizing the Monroe Doctrine: From Venezuela to Golan Heights and Back Around', *Just Security*, 4 June 2019, www.justsecurity.org/64397/internationalizing-the-monroe-doctrine-from-venezuela-to-golan-heights-and-back-around/.

FOREWORD

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I recommend that readers read this book as well as Jorgensen's related body of work. He is a very promising young scholar with much to add to our understanding of great powers and their relationships. I have learnt a lot from reading his work and from the conversations we have had. I hope others feel the same way once they have read this book.

Anthea Roberts
August 2019

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This book has been written in an era when civility of political debate in established democracies is faltering over a particular hurdle: reluctance among political opponents to acknowledge when competing norms and values are not merely rhetoric to mask self-serving interests, but represent good faith commitment to sincerely held beliefs. Assuming the calculated hypocrisy of one's opponents establishes an insurmountable barrier to constructive dialogue towards a better politics. So it is with global legal order, where recognition of competing yet sincere commitment to rule of law ideals becomes the baseline for any meaningful discourse over the rules and institutions organising international life. As in politics, learning to see through the eyes of others is not to surrender one's own conception of rightful conduct but to take seriously and engage with alternative worldviews. The people and institutions I thank here have together taught me to undertake this critical task, both in the book that follows and when looking to the world beyond.

I give thanks foremost to the Berlin Potsdam Research Group 'International Law: Rise or Decline?' and its members, whose commitment to scholarship on the politics and future of international law has made this book possible. In particular I am indebted to the leadership of Professors Georg Nolte, Heike Krieger and Andreas Zimmermann, whose innovative work I have long followed and from whom it has been an honour to learn and grow as an international lawyer during my years in Berlin. Every colleague at the group has contributed to and improved my scholarship in innumerable ways, including Professor Campbell McLachlan in furnishing me with comments during a roundtable discussion of the book, Dr Nina Reiners for reviewing draft chapters, my office mate for two years Dr Velimir Zivkovic, Dr Dana Burchardt, Dr Felix Lange, Dr James Devaney, Julian Kulaga and, finally, Kerstin Schuster and all the administrative staff and students who have provided so much support.

I also owe deep gratitude to the United States Studies Centre at the University of Sydney for its many years of scholarly, financial and personal support, without which the original research would not have been possible. I thank every one of the countless staff, students and visitors I was able to engage with, each of whom contributed to my intellectual enrichment as a scholar of American politics and foreign policy. I do single out former CEO Professor Bates Gill for his unqualified and ongoing support from the beginning, my associate PhD supervisor Dr David Smith, whose judgement and advice was impeccable every time, and, most especially, Craig Purcell, whose professionalism and friendship in equal measure always made the difference. I also thank the many other staff of the USSC who gave support in specific ways, including former CEO Professor Geoffrey Garrett, Associate Professor Brendon O'Connor, Dr Rebecca Sheehan, Dr Sarah Graham, Dr Gorana Grgic, Dr Nina Silove, Dr Thomas Adams, Dr Rob Rakove, Dr Niki Hemmer, Dr Marc-William Palen, Dr Benjamin Kahan, Dr Lizzie Ingleson, Dr Rodney Taveira, Dr Aaron Nyerges, Tom Switzer, Amelia Trial, Susan Beale, Max Halden, Jonathan Bradley, Nina Fudala, Nicole Phillips, Meghan Walters, Melissa Grah-McIntosh and Cindy Tang.

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I thank the colleagues with whom I have worked as a legal practitioner and especially those in the Legal Division of the Australian Department of Foreign Affairs and Trade in Canberra, under the leadership of then Senior Legal Advisor Katrina Cooper, where I was able to refine my first-hand understanding of the role and worldview of the international legal policymaker. I am particularly indebted to former Australian Senior Legal Advisor Richard Rowe, who provided such wise advice when making the difficult decision to leave the foreign ministry in order to complete this book. I also thank Justice Peter Applegarth of the Supreme Court of Queensland, for whom I had the honour of clerking and who continues to keep an eye over my career as one of his associate ‘children’.

I owe many thanks to the numerous former United States government officials who generously gave their time to answering my questions, both on and off the record. It was from these conversations with American international lawyers that I confirmed my sense of a genuine commitment to the ideal of the international rule of law, but one that diverged systematically from conceptions of global counterparts in ways that demanded investigation. These policymakers include, but are certainly not limited to, William Taft IV, John Bellinger III, Stephen Rapp, Edwin Meese III, Ben Rhodes, as well as Professors Michael Matheson, John Moore and Detlev Vagts. I also acknowledge the assistance of Professor Walter Russell Mead for discussing my adaptation of his foreign policy traditions to international legal scholarship.

Finally, I have been privileged in having so many magnificent friends and family in Berlin, Canberra, Sydney, Brisbane, New Zealand, the United States and beyond, who have spent so many years supporting my endeavours, and occasional misadventures, during the long years of writing this thesis and book. I am forever indebted to my parents Stephen and Elvira, who taught me from childhood to think critically about the world and always to recognise the perspectives of others. That lesson has been practised and refined ever since with my siblings Timothy, Phillip, Hugh and Astrid and, I hope one day, with my nieces and nephew Charlotte, Daniel, Vivienne and Ingrid. On behalf of all of them, the book is dedicated to my grandmothers, Chen Siu June and Rosa Elisabetta Jorgensen, née Caccioppoli, whose lives represent the sacrifice and promise that we all enjoy today. These were two strong women who could not have hailed from more different backgrounds, yet committed themselves to passing on the core values and respect for education that have allowed succeeding generations to experience privileges they never could in their own lifetimes.

ABBREVIATIONS

ASP	Assembly of States Parties
ASPA	<i>American Service-Members' Protection Act (2002)</i>
Bush 41	George H. W. Bush, 41st President of the United States of America
Bush 43	George W. Bush, 43rd President of the United States of America
CCFR	Chicago Council on Foreign Relations
CI	cooperative internationalism
CICC	Coalition for the International Criminal Court
EU	European Union
FPA	Foreign Policy Analysis
FPLP	Foreign Policy Leadership Project
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IL	international law
ILC	International Law Commission
IR	International Relations
LMS	like-minded states
MI	militant internationalism
NATO	North Atlantic Treaty Organization
NGO	non-governmental organisation
NSS	National Security Strategy
OTP	Office of the Prosecutor
P5	Permanent Five Members of the United Nations Security Council
SOFA	Status of Force Agreement
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCLOS	<i>United Nations Convention on the Law of the Sea (1982)</i>
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

US	United States
VCDR	<i>Vienna Convention on Diplomatic Relations</i> (1961)
VCLT	<i>Vienna Convention on the Law of Treaties</i> (1969)
WWI	World War I
WWII	World War II