Conclusion

Between Power and Transcendent Values

United States! the ages plead,—
Present and Past in under-song,—
Go put your creed into your deed,—
Nor speak with double tongue.

—RALPH WALDO EMERSON, 1857

Ideological Limits of the International Criminal Court

In 1964, Judith Shklar identified a motive behind the Nuremberg trials as 'a desire to do something for the future of the rule of law in international relations'.[1] Yet the extraordinary circumstances in the aftermath of WWII suggested to Shklar that the Nuremberg achievements were unlikely to be replicated in a standing international criminal court: '[N]othing effective along these lines is even imaginable at present.' To expect otherwise 'was unreasonable, an extravagance of the legalistic imagination'.[2] The twentieth anniversary of the adoption of the Rome Statute in 2018, for a court tracing its lineage to Nuremberg, seemed to vindicate the possibility of real progress toward the international rule of law.

Evidence from a quarter-century of American ICC policy does suggest that progress is possible in terms of strengthening the institutional architecture of international criminal justice. Moreover, the United States has demonstrated a practical capacity to work with other states to fight impunity and advance accountability for perpetrators of 'atrocity crimes'.[3] However, this book has found no emerging 'new transatlantic consensus on the role and scope of the international legal system',[4] or evidence of progress toward

[1] Judith N. Shklar, *Legalism* (Harvard University Press, 1964), p. 176.
[2] Ibid., p. 177.
[3] The term is Scheffer's in reference to the slate of ICC crimes: David J. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012), p. 2.
[4] William H. Taft IV & Frances G. Burwell, *Law and the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law* (Policy Paper, The Atlantic Council of the United States, April 2007), p.15.

a universal conception of the 'international rule of law'. Rather, the court, as realised, uncomfortably straddles the interstices and political compromises between competing and often incompatible ideologies. Legalism and the four American ideological types each crystallise interests and beliefs in internally coherent but mutually conflicting concepts of IL. Fletcher and Ohlin reviewed the trajectory of US ICC policy to conclude:

> The more the ICC becomes like a real criminal court, operating under the rule of law, the more American politicians are likely to shelve their fears of politicized prosecution and support the ICC as an important instrument of international peace and harmony.[5]

The clear lesson from US engagement with the ICC, however, is that barriers to progress have not been a product of the special history of the court, or the idiosyncrasies of presidencies and legal policymakers, but are fundamental to the nature of the international rule of law.

The importance of interpreting American ICC policy through foreign policy ideology becomes clear in Jürgen Habermas's 2004 interpretation of US policy contradictions. Habermas agreed, consistent with this book, that Kagan's characterisation of a transatlantic divide was too crude for legal analysis.[6] For Habermas, the greatest conflicts over the conception of IL 'occurred, not between the continents, but, rather, within American policy itself':

> Kagan is suggesting a false continuity. The newly-elected Bush administration's definitive repudiation of internationalism has remained its keynote: The rejection of the (since established) International Criminal Court was no trivial delict. One must not imagine that the offensive marginalizing of the United Nations and the cavalier contempt for international law which this administration has allowed itself to be guilty of, represent the expression of some necessary constant of American foreign policy.[7]

However, Habermas departed from the insights of this book in citing policymakers such as Woodrow Wilson and Franklin D. Roosevelt as examples of a countervailing commitment to legalism in American diplomatic history. For him, the question at the end of the Cold War was whether 'the one remaining superpower would turn away from its

[5] George P. Fletcher & Jens David Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3 *Journal of International Criminal Justice* 539, p. 561.

[6] Referring to Robert Kagan, *Of Paradise and Power* (Vintage Books, 2004). See Chapter 1, pp. 32–3, *supra*.

[7] Jürgen Habermas, 'America and the World: A Conversation with Jürgen Habermas', *Logos*, 2004, www.logosjournal.com/habermas_america.htm.

leading role in the march toward a cosmopolitan legal order, and fall back into the imperial role of a good hegemon above international law'. ICC history provides scant evidence that American policymakers were ever committed to an international rule of law founded on cosmopolitan values. As in Max Weber's analogy, policy switched between the finite number of tracks provided by American ideologies, each of which contests global legal power.

Continuity and Change in the Trump Administration

The question of ICC progress loomed large in April 2018 when, following a nearly twelve-year interlude since the first term of the Bush 43 administration, John Bolton became National Security Adviser to President Trump and thereby, during a short but eventful tenure, once again the central figure in US ICC policy. Whereas the Trump administration had barely engaged with the issue,[8] Bolton had maintained resistance throughout the intervening years, writing that the court 'constitutes a direct assault on the concept of national sovereignty, especially that of constitutional, representative governments like the United States'.[9] In his first speech for the administration, Bolton confirmed a return to the United States actively opposing the very principle of the ICC – a court pronounced 'already dead to us'. Elements of an illiberal nationalist rule of law were reprised, including the supremacy of US judicial power: 'We believe in the rule of law, and we uphold it. We don't need the ICC to tell us our duty, or second-guess our decisions.'[10] Pragmatic cooperation with the court was rejected in favour of measures up to and including denying visas to ICC judges and prosecutors seeking entry to the United States, and threatening penalties against them ranging from financial sanctions to criminal prosecutions. Institutionalised governance through IL was once again confirmed as an existential threat to US values and interests. Within

[8] Other than naming the court among a list of multilateral institutions set for 40 per cent or more reductions, despite the United States paying nothing toward the ICC: Max Fisher, 'Trump Prepares Orders Aiming at Global Funding and Treaties', *The New York Times*, 25 January 2017, www.nytimes.com/2017/01/25/us/politics/united-nations-trump-administration.html.

[9] John R. Bolton, 'The Hague Aims for U.S. Soldiers', *The Wall Street Journal*, 20 November 2017, www.wsj.com/articles/the-hague-tiptoes-toward-u-s-soldiers-1511217136.

[10] 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.

that same month, President Trump delivered a speech to the UNGA declaring that the ICC violated 'all principles of justice, fairness, and due process. We will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy.' Directly invoking the structured ideological contest between internationalist and nationalist governance, the president concluded that, in contrast to the ICC, 'America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism.'[11]

Anxious reactions of US global counterparts have conveyed the sense of something unprecedented taking place in American foreign and IL policy. Jutta Brunnée concluded that 'compared to its predecessors, the Trump Administration's approach to international law is of another order altogether'. Specifically, the United States appears to challenge 'not only the content of specific legal norms and regimes, but the very foundations of an international rule of law'.[12] Yet, setting aside the haze of sometimes chaotic political outcomes,[13] the sets of beliefs underpinning the Trump administration's policy preferences confirm substantial continuity in the ideological structure of US IL policy, with ideas of 'populism' being pitted against those of 'globalism' and 'elitism'. The 'populist' label has become influential among opponents of President Trump, by which they identify a worldview encompassing ideas including 'nationalistic isolationism' and rejection of international cooperation.[14] In this view: 'Angry populist forces have to a large extent altered the U.S. political landscape ... In particular, existing liberal internationalist grand strategy is likely to be revised and gestured toward "neo-isolationism."'[15]

Supporters of Trump's position respond that it is elite 'globalists' who threaten US foreign policy interests, by subverting American national

[11] Donald J. Trump, 'Remarks by President Trump to the 73rd Session of the United Nations General Assembly, New York, NY', 25 September 2018, www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/.

[12] Jutta Brunnée, 'Keynote Speech Part III: Challenging International Law: What's New?', *Opinio Juris*, 19 November 2018, http://opiniojuris.org/2018/11/19/keynote-speech-part-iii-challenging-international-law-whats-new/.

[13] See Bob Woodward, *Fear: Trump in the White House* (Simon & Schuster, 2018).

[14] Ronald Inglehart & Pippa Norris, 'Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash' (August 2016) 26 *HKS Faculty Research Working Paper Series*, p. 7.

[15] Taesuh Cha, 'The Return of Jacksonianism: The International Implications of the Trump Phenomenon' (2016) 39 *The Washington Quarterly* 83, p. 84.

sovereignty to an alleged global common good.[16] For Mitchell, 'Republicans who think that globalism has not only been a disaster for the whole of . . . America but also that it is theoretically untenable will – or should – call what has happened a revolt in the name of national sovereignty, not populism'.[17] Relevantly to this book, the president is commonly characterised as an adherent of Mead's 'Jacksonian' tradition, with Trump himself seeking to associate himself with the anti-elitist populism of President Andrew Jackson.[18] The Jacksonian appellation matters substantively for IL policy precisely because international legal institutions and their proponents constitute core elements of the supposed elite targeted by the administration. Trump himself has distinguished between 'corrupt, power-hungry globalists' as a group that 'wants the globe to do well, frankly not caring about our country so much', and his own beliefs: 'I'm a nationalist.'[19] Moreover, a cross-cutting adherence to illiberal values is equally evident in Trump's articulation of commitment to a 'rule of law' and 'liberty' defined by particularistic American values. Rather than looking to universalism, American IL policy is instead informed by a 'culture built on strong families, deep faith, and fierce independence. We celebrate our heroes, we treasure our traditions, and above all, we love our country.'[20] The administration thus invokes the substantive ideological beliefs of illiberal nationalism that continue to underpin contestation between nationalist 'populism' and elitist 'globalism'.

The story of the Trump IL policy is thereby one of continuity in ideological structure – notwithstanding prominent disruptions being brought to global order. What may be new is not the type of underlying beliefs but the degree of dominance of illiberal nationalism. Although nationalist impulses have always formed a key pillar of US IL policy,

[16] On controversy surrounding the term's historical origins see Ben Zimmer, 'The Origins of the "Globalist" Slur', *The Atlantic*, 14 March 2018, www.theatlantic.com/politics/archive/2018/03/the-origins-of-the-globalist-slur/555479/.

[17] Joshua Mitchell, 'A Renewed Republican Party' (2017) 1 *American Affairs* 7.

[18] See Walter R. Mead, 'The Jacksonian Revolt: American Populism and the Liberal Order' (2017) 96 *Foreign Affairs* 2; Matteo Dian, 'Conclusions: US Foreign Policy under Trump, Years of Upheaval', in Marco Clementi, Matteo Dian & Barbara Pisciotta (eds.), *US Foreign Policy in a Challenging World* (Springer International Publishing, 2018), pp. 395–7.

[19] Aaron Blake, 'Trump's embrace of a fraught term – "nationalist" – could cement a dangerous racial divide', *The Washington Post,* 23 October 2018, www.washingtonpost.com/politics/2018/10/23/trumps-embrace-fraught-term-nationalist-could-cement-dangerous-racial-divide/.

[20] Trump, 'Remarks by President Trump to the 73rd Session of the UNGA'.

competing foreign policy ideologies have historically tipped toward internationalism. Even in this case, IL policy continues to be partially tempered by internationalist voices. Although the president has personally advocated torture of suspected terrorists and the killing of their families,[21] he conceded, following criticism from military experts, that the United States is 'bound by laws and treaties and I will not order our military or other officials to violate those laws'.[22] Nevertheless, the alignment of nationalist and illiberal impulses has fostered the most robust expression of illiberal nationalist legal policy in the modern era. Despite their ultimately irreconcilable differences, Bolton and Trump 'shared a deep skepticism of globalism and multilateralism' that drove withdrawal from a series of significant international legal instruments during Bolton's tenure.[23] Thus, although every element defining the Trump IL policy has its roots in established traditions of thought, the particular configuration of beliefs has never before been elevated so fully and unconstrained into the realm of legal policymaking. Stated differently, however: policy has not deviated from the structure of America's historical conceptions of the rule of law and, formally at least, does not seek to eliminate IL itself from global politics.[24]

That the Trump ICC policy confirms established patterns is not a reassurance that challenges to the court have a predictable outcome. Apart from the decline of counterbalancing beliefs, circumstances have changed since the mid-2000s, especially as regards more precarious global enthusiasm for an ICC that shows signs of institutional dysfunction combined with a disappointing track record of prosecuting core crimes.[25] Thus, for global advocates, the 'new rhetorical framing and

[21] Donald J. Trump, 'The Fox News GOP Debate Transcript, Annotated', *The Washington Post*, 3 March 2016, www.washingtonpost.com/news/the-fix/wp/2016/03/03/the-fox-news-gop-debate-transcript-annotated/.

[22] Damian Paletta & Nick Timiraos, 'Trump Reverses His Stance on Torture', *The Wall Street Journal*, 4 March 2016, www.wsj.com/articles/trump-reverses-his-stance-on-torture-1457116559.

[23] Peter Baker, 'Trump Ousts John Bolton as National Security Adviser', *The New York Times*, 10 September 2019, https://www.nytimes.com/2019/09/10/us/politics/john-bolton-national-security-adviser-trump.html.

[24] Jack Goldsmith & Shannon T. Mercer, 'International Law and Institutions in the Trump Era' (2018) 61 *German Yearbook of International Law* 12, p. 31.

[25] See the statement of four former presidents of the ICC's Assembly of States Parties: Prince Zeid Raad Al Hussein et al., 'The International Criminal Court Needs Fixing', *New Atlanticist*, 24 April 2019, www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing.

policy positions genuinely risk serious damage to the ICC and the rule of law around the world, and these steps will be difficult, if not impossible, to undo'.[26] Given that the beliefs of the Trump administration are themselves nothing new, Bosco sees the main achievement as 'pushing the ICC firmly into that category of international organizations . . . whose standing in U.S. officialdom will depend very much on U.S. presidential elections'.[27] For US global counterparts, there is now a disconcerting normalisation of American IL policy switching between opposing internationalist and nationalist tracks, each pegged to partisan electoral politics. Foreign policy ideology reveals more clearly why the first term of the Bush 43 administration never really marked an outer limit for possible and desirable policy divergence between the United States and ICC states parties. The invocation of exceptionalist beliefs in the Trump campaign slogan 'Make America Great Again' has translated into an IL policy that is nationalist-populist and led by values overtly illiberal and particularistic.

Understanding Contradictions in US International Law Policy

Analysing American ICC policy through foreign policy ideology does not dispel the criticism of frequent contradiction but, instead, redefines the nature of inconsistencies. The evidence suggests far greater coherence in legal principles, but greater political incoherence than is generally posited. Legal scholarship claims jurisprudential incoherence in American policy: that policymakers have pledged fidelity to the international rule of law, but that legal principle has been subverted to tactical political compromises in designing and developing the ICC. The conclusion from this book is that charges of hypocrisy do not stand up, with strong evidence that legal policymakers have been committed to the processes of the international legal system according to distinct and internally coherent conceptions of the rule of law. Policy outcomes were often revealed to be contradictory owing to domestic ideological competition, but decision-making processes were structured by multiple coherent legal commitments, rather than by an absence of them.

The process of ideological types competing within and between administrations demonstrates, however, that the *political* coherence of

[26] Alex Whiting, 'Why John Bolton vs. Int'l Criminal Court 2.0 Is Different from Version 1.0', *Just Security*, 10 September 2018, www.justsecurity.org/60680/international-criminal-court-john-bolton-afghanistan-torture/.

[27] David Bosco, 'Bolton Barked at the ICC, But With How Much Bite?,' *Lawfare,* 11 September 2018, www.lawfareblog.com/bolton-barked-icc-how-much-bite.

American IL policy cannot be assumed. Legal scholarship's standard explanation for contradictory outcomes is the consistent logic of US policy privileging 'considerations of self-interest above everything else'.[28] However, each ideology entails its own definition of the national interest and strategies for achieving it through IL. Owing to the same dynamic that establishes forms of legal coherence, American IL policy has exhibited contradictory outcomes over time by shifting between alternative definitions of interests. Incorporating the explanatory role of American foreign policy ideology precisely reverses the conclusions of legal analysis. Where legal scholars have seen contradictions in American fidelity to the international rule of law, they have tended to overlook underlying legal rationality. But, when they explain this as the rational process of national interests trumping law, they overlook fundamental contradictions in what policymakers believe interests are.

David Scheffer's recollection of the Rome Conference demonstrates the way that competing legal conceptions among American legal policymakers contribute to the appearance that American IL policy is bereft of any principled commitment to law. Scheffer was accompanied in the Rome negotiations by Senator Helms' staffers, whom he was expected to accommodate as a courtesy to the US legislature.[29] Unsurprisingly, Scheffer found himself correcting misperceptions among foreign diplomats that Helms' confrontational illiberal nationalist language represented the true US position, rather than the accommodating language in official communications.[30] Such internal conflicts signal to other states that official US statements mask a degree of hypocrisy, thereby increasing wariness toward making negotiated concessions. Clearer understanding by global counterparts of the competing legal commitments of US policymakers can facilitate more constructive engagement with dominant ideologies.[31]

Shifts between contradictory ideologies may also yield incoherent outcomes that fail to satisfy the interests of any legal policymaker. The aspirational Clinton decision to sign the Rome Statute was done with the strategic objective of bolstering US credibility and support for transnational legal development. Yet the Bush 43 reversal toward illiberal nationalism

[28] Johan D. van der Vyver, *The International Criminal Court: American Responses to the Rome Conference and the Role of the European Union* (Inst. für Rechtspolitik, 2003), p. 4.
[29] Scheffer, *All the Missing Souls*, p. 229.
[30] Ibid., p. 188.
[31] For a complementary study seeking to reduce US misunderstanding of European motivations see Caroline Fehl, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford University Press, 2012), pp. 7–8.

transformed the conspicuous act of signing into an especially potent symbol of the US exception once the statute was conspicuously unsigned. The comparatively muted response to the Trump administration reaffirming that act likely owes much to the Obama decision not to formally 're-sign' the Rome Statute in the interim period. Similarly, institutional obstructions such as 'hard-to-reverse consequences of path dependency' likely frustrated desired course changes by the Bush 43 and Obama administrations, who 'both violated and shaped' IL, yet were unable to fully realise 'starkly different goals for international law and institutions'.[32] These cases emphasise the limitation of drawing conclusions about legal principles or political interests from ICC policy outcomes, and the need to engage with ideological beliefs at the level of decision-making processes.

Contesting American ICC Policy

The significance of these arguments is to reconceive US disputes with the ICC as a battle *internal to* law rather than as an *external* battle against politics. Exhortations to honour formalised obligations, sovereign equality and the separation of international legal powers were not rejected by American policymakers merely as politically undesirable but as contrary to received understandings of an ICC designed in conformity with the international rule of law. Charges of hypocrisy in American ICC policy more often projected legalist beliefs on to American policymakers and then levelled the charge of incoherence when US policymakers failed to meet that imputed ideal.

ICC history reveals that the key to contesting American IL policy is instead understanding the structure of American foreign policy ideology and challenging contradictions on policymakers' own terms. The concern of legalist advocates was not that the United States was breaching international criminal law with impunity through these years, but that its proposals for the international rule of law rejected institutional constraints in favour of America's own good faith adherence to exceptionalist values. Bosco notes that US legal principles were 'competing with the narrative of accountability' throughout and thus remained unconvincing outside of American policymaking. Rather, these principles appeared as 'little more than an exercise in exceptionalism: the United States wanted international justice, but only if it could control how it would be

[32] Jack Goldsmith, '*The Trump Administration and International Law*. By Harold Hongju Koh. New York, New York: Oxford University Press, 2019. Pp. viii, 221. Index,' (2019) 113 *American Journal of International Law* 408, p. 414.

applied'.[33] The veracity of exceptionalism thus lay at the heart of divergence between legalist demands for more formalised legal relations and the American defence of more flexible and contextual arrangements. Challenging US legal policy required not pointing out contradictions with legalist principles, but demonstrating incoherence in exceptionalist assumptions.

The power of that strategy was demonstrated in the 2004 withdrawal of US demands for ICC immunity following the Abu Ghraib prisoner abuse scandal.[34] The passing of previous UNSC resolutions granting ICC immunity to US peacekeepers had been defended in terms of internationalist principles about the unequal US legal role in upholding liberal values and the merits of hegemonic privilege. The integrity of IL in both cases was assured by reference to exceptionalist beliefs in 'America as something different' and therefore its own check against abuse.[35] When the UNSC granted immunity in the 2002–3 resolutions, opposition had been expressed in terms of contravening the principle of sovereign equality and failed to resonate on each occasion.[36] In 2004, however, opponents pointed to the growing scandal as evidence that US privileges were no longer proportionate to any role in advancing international criminal justice. In American policymakers' own terms, the only means of avoiding hypocrisy became the equal application of internationally determined rights and duties to American military personnel.

The structure of exceptionalist beliefs emerges as the primary lever for influencing US responses in cases where the integrity of its own conduct is at issue. Such an opportunity seemed to be offered in the OTP's November 2017 request for authorisation to investigate the Afghanistan situation.[37] Previous ICC reports indicated alleged crimes to include

> [w]ar crimes of torture, outrages upon personal dignity and rape and other forms of sexual violence, by members of the US armed forces on the territory of Afghanistan and members of the CIA in secret detention

[33] David Bosco, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press, 2014), p. 179.
[34] See Chapter 6, *supra*.
[35] Committee on Foreign Relations, United States Senate, *Senate Committee on Foreign Relations, Nomination of Dr. Condoleezza Rice to be Secretary of State*, 1st Session 109th Congress (2005), p. 147.
[36] See SC Res 1422, UN Doc S/RES/1422 (12 July 2002); SC Res 1487, UN Doc S/RES/1487 (12 June 2003).
[37] Submitted to the ICC Pre-Trial Chamber pursuant to *Rome Statute*, Art. 15.

> facilities both in Afghanistan and on the territory of other States Parties, principally in the 2003–2004 period.[38]

In so proceeding, the OTP willingly entered uncharted territory by, for the first time, setting the authority and judicial credibility of the ICC against its most powerful and persistent critic. The ICC answered strident US objections by reiterating its character as 'an independent and impartial institution' that, 'as a court of law, will continue to do its work undeterred, in accordance with those principles and the overarching idea of the rule of law'.[39]

The entire history of US engagement with the ICC demonstrates the limits of such appeals to shared international rule of law principles. Even an ICC investigation maintaining complete integrity to the Rome Statute, including its inbuilt checks and balances, would remain a process disconnected from the ideological commitments of American legal policymakers. Bolton responded forcefully to the OTP request:

> If the ICC Prosecutor were to take the complementarity principle seriously, the Court would never pursue an investigation against American citizens, because we know that the U.S. judicial system is more vigorous, more fair, and more effective than the ICC. The ICC Prosecutor's November 2017 request of course proves that this notion, and thus the principle of complementarity, is completely farcical.[40]

This is a perverse argument from legalist conceptions, since the integrity of complementarity is said to be proven only by its inherent inapplicability to the United States. Yet the contest remains rooted in entirely different conceptions of the rule of law. Shortly thereafter, the ICC president appealed for the United States to support the Court, 'whose values and objectives are entirely consistent with the best instincts of America and her values'. This book has demonstrated why little traction was to be gained through the president's reassurances that complementarity 'does the very opposite of usurpation of national sovereignty. It actually prides and

[38] 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), p. 6; International Criminal Court, *Report on Preliminary Examination Activities* (The Office of the Prosecutor, 14 November 2016), pp. 44 & 47.

[39] ICC, 'The ICC Will Continue Its Independent and Impartial Work, Undeterred', 12 September 2018, www.icc-cpi.int/Pages/item.aspx?name=pr1406.

[40] Bolton, 'Protecting American Constitutionalism and Sovereignty from International Threats'.

underscores national sovereignty.'[41] Each side remained segregated within their own ideological conception of IL.

Against widespread expectations, the Pre-Trial Chamber denied authorisation of the investigation in April of 2019 as contrary to the 'interests of justice' under the Rome Statute.[42] The decision met with speculation that the ICC had caved to US pressure but, more tangibly, echoed forms of policy-conscious legal reasoning long advocated by the United States. 'Interests of justice' were held to encompass a pragmatic assessment that successful and timely prosecution remained unlikely in circumstances of 'scarce cooperation' by concerned parties, including the United States.[43] Thus, although relevant jurisdiction and admissibility requirements were met, the geopolitical dimensions of an effective system of criminal justice were effectively rendered a legally relevant bar to proceeding. Unsurprisingly, the decision was both condemned by NGOs and legalist scholars, and praised by US legal policymakers, with each claiming the mantel of fidelity to the rule of law.

Nevertheless, the experience of the protracted investigation and the US responses reaffirms that genuine beliefs in American exceptionalism, and not appeals to ICC integrity, form the entry point for engaging the United States toward legal compromise. President Trump framed the decision not to investigate American personnel as 'a major international victory, not only for these patriots, but for the rule of law. We welcome this decision and reiterate our position that the United States holds American citizens to the highest legal and ethical standards.'[44] That assertion is contrary to the Pre-Trial Chamber finding that the United States failed to discharge its complementarity obligations[45] – an issue that would have been conspicuously examined had the investigation proceeded and may be still, should the OTP successfully appeal the

[41] Chile Eboe-Osuji, 'ICC President's Keynote Speech "A Tribute to Robert H. Jackson – Recalling America's Contributions to International Criminal Justice" at the Annual Meeting of American Society of International Law', 29 March 2019, www.icc-cpi.int/Pages/item.aspx?name=190329-stat-pres.

[42] *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, 12 April 2019*, pars. [87]–[96].

[43] Ibid., par. [91].

[44] Donald J. Trump, 'Statement from the President', 12 April 2019, www.whitehouse.gov/briefings-statements/statement-from-the-president-8/.

[45] *Case No. ICC-02/17*, pars. [78]–[79].

decision.[46] Yet, even in his illiberal nationalist defence of the rule of law, the president was compelled to invoke US claims to implement superior prosecutorial and judicial power at the domestic level as a check on unconstrained US sovereignty. As with the Abu Ghraib case, contesting US policy ultimately resonates most powerfully by communicating not the ICC's institutional integrity but any gap between alleged US crimes and accountability on the one hand and exceptionalist conceptions of the international rule of law on the other.

The power of holding 'a mirror of conscience' up to American policymakers' own legal ideals is not a means for establishing the legalist international rule of law.[47] This is a reactive strategy that ameliorates only unambiguous cases of hypocrisy. The historical record, however, is that, in routine cases, discomfort with US policy has been a principled objection to the absence of support for independent institutions rather than recognition of actual lawlessness. Conversely, the greatest threat to the international rule of law, as conceived by any involved party, is precisely those more disruptive cases where US actions truly contradict not only legalism but American ideological commitments, too.[48] Engaging through foreign policy ideology will not align parties' conceptions of the international rule of law, but it can influence policies toward more acceptable compromises. In particular, this may entail strategically appealing to the ideas of liberal internationalism and internationalism more generally as the legal approaches having most common ground with legalism. Conversely, legal policymakers can work to delegitimise nationalist and specifically illiberal nationalist beliefs as the conceptions most incompatible with the legalist international rule of law.[49] Through this dynamic, it does ultimately matter that American legal policymakers from all persuasions are committed to dialogue over the

[46] See *Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan'*, *Case No. ICC-02/17*, 7 June 2019.

[47] Eboe-Osuji, 'ICC President's Keynote Speech'.

[48] The Congressional Research Service cites the example of the 1968 My Lai Massacre in this context: see Ellen Grigorian, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns* (Congressional Research Service, 6 January 1999), pp. 11–12, n. 46.

[49] Schabas describes the shift away from the Bush 43 administration's illiberal nationalism as a 'great diplomatic defeat for the United States': William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2011), p. 34.

meaning of the international rule of law, and that none identifies US interests in explicit lawlessness.

Contesting Power through the International Rule of Law

Beyond the ICC

Identifying the role of foreign policy ideology in the case of the ICC aspires to provide a framework capable of explaining American IL policy more generally. The beliefs shaping ICC policy are hardly confined to that court alone, with Congressional refusal to ratify the *Genocide Convention* (1948) for over forty years founded in fears that it would expose American citizens to international prosecutions. The objection was overcome only when reservations foreclosed that possibility.[50] Likewise, from 1946 to 1986, the United States accepted the compulsory jurisdiction of the ICJ subject to the 'Connally reservation', which allowed the United States to determine on a case-by-case basis whether any legal dispute was the sole province of domestic courts.[51] Where the United States was unable to rely on even this reservation to determine international legal power, it withdrew consent entirely to compulsory jurisdiction under Article 36(2), while defending its decision as 'commitment to the rule of law'.[52]

Beyond US policy toward international courts specifically, foreign policy ideology promises to shed new light on a range of puzzles in general post-Cold War IL policy. The legal policy of each president from Bush 41 onward in the 'long war with Iraq', lasting from 1990 to 2011 (and arguably longer),[53] has provoked voluminous analysis about implications for the international rule of law. Of particular interest are convergent legal justifications for the use of force against Iraq across the Clinton and Bush 43 administrations. The legality of airstrikes carried out under Clinton throughout the 1990s was based in part on implied and

[50] Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, 2008), p. 69.

[51] See Sean D. Murphy, 'The United States and the International Court of Justice: Coping with Antinomies', in Cesare P. R. Romano (ed.), *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge University Press, 2009), pp. 65–6.

[52] US Department of State, cited in Marian N. Leich, 'U.S. Withdrawal of Proceedings Initiated by Nicaragua' (1985) 79 *American Journal of International Law* 431. See *Charter of the United Nations* (1945), Art. 36(2).

[53] Timothy J. Lynch, 'Obama, Liberalism, and US Foreign Policy', in Inderjeet Parmar, Linda B. Miller & Mark Ledwidge (eds.), *Obama and the World: New Directions in US Foreign Policy* (Routledge, 2014), p. 47.

revived authorisation of UNSC resolutions from the Persian Gulf War,[54] which became the explicit foundation for the 2003 invasion.[55] Yet, despite commonalities, there was a conspicuous contrast between intense criticism of the 2003 war, both domestically and externally, and moderate criticism of the Clinton airstrikes. Bellinger has argued that 'there was either legal authority to use force, or there was not . . . [and] if there was not legal authority to use force, then the legal problem did not begin in 2003 – it went all the way back through the 1990s'.[56] Focusing on ideology moves beyond doctrinal analysis to distinguish these periods according to broader systemic implications from competing conceptions of the international rule of law.

Another interesting question is whether the theorised ideological structure extends beyond the executive and legislative branches to the judiciary as 'legal policymakers': Do US judges' conceptions of IL exhibit the same ideological dimensionality and structure as general foreign policy? Within the US Supreme Court in particular, views on IL and its reception into the common law have animated intense disagreements that parallel beliefs within each administration.[57] There is some truth to Sands' description of certain members of the US Supreme Court refusing to follow IL pursuant to an 'exceptionalist and isolationist perspective that sees America as an island of law hermetically sealed off from the rest of the world'.[58] Associate Justice Anthony Kennedy's retirement during the second year of the Trump administration sparked a partisan battle shaped in part by the retiring justice's forceful advocacy for the integration of American law into transnational processes[59] and the opposing

[54] Gavin A. Symes, 'Force without Law: Seeking a Legal Justification for the September 1996 US Military Intervention in Iraq' (1997) 19 *Michigan Journal of International Law* 581, pp. 602–8.

[55] See William H. Taft IV & Todd F. Buchwald, 'Preemption, Iraq and International Law' (2003) 97 *American Journal of International Law* 557, pp. 559–60. Notably Taft conceded that this interpretation 'certainly did have a weakening effect' on the institution of the UNSC by likely increasing reluctance to pass future resolutions: see William H. Taft IV, Interview with Author (22 November 2011).

[56] John B. Bellinger III, 'Interview with John Bellinger', International Bar Association, 2011, www.ibanet.org/Article/Detail.aspx?ArticleUid=37f4f087-bc3a-4c21-a108-92f15391785c.

[57] Compare the divided views on application of Common Article 3 of the 1949 Geneva Conventions in *Hamdan* v. *Rumsfeld* (2006) 548 *U.S.* 557, at 633 per Stevens J & 718–19 per Thomas J.

[58] Philippe Sands, *Lawless World: Making and Breaking Global Rules* (Viking, 2006), p. 252.

[59] See Jeffrey Toobin, 'Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court' (2005) September 12 *The New Yorker* 42.

desire for a Republican nominee who agreed that 'reliance on foreign law or unratified treaties undermines American sovereignty'.[60]

Between Power and Transcendent Values

In 2005, Secretary of State Condoleezza Rice faced the task of redressing perceptions among allies that the early years of the Bush 43 administration signalled a retreat from the international rule of law. Rice reassured of America's

> strong belief that international law is vital and a powerful force in the search for freedom. The United States has been and will continue to be the world's strongest voice for the development and defense of international legal norms. We know from history that nations governed by the rule of law are nations that are just.[61]

The gesture, in the context of a turn from illiberal nationalism to internationalism, received a tepid response. In his concluding chapter entitled 'Window Dressing', Sands noted that these were 'important words, but they remain just that'.[62] This book has made the case that the very meaning of the international rule of law is contested such that statements of legal obligation, including that by Rice, are not mere rhetoric to mask a conscious repudiation of legal ideals but a manifestation of divergent political interests within the very meaning of the international rule of law. American legal policymakers' competing ideological commitments set the parameters of the possible in American IL policymaking and are united in accepting that the international rule of law 'cannot rest upon an unbridled faith in legalism'.[63] The political foundation of IL is confirmed by Sands' own position that he in contrast 'unashamedly makes the case for international rules' in the belief that they 'reflect common values, to the extent that these can be ascertained'.[64] Each side of this divide has the capacity to express good-faith commitment to legal principle, but the substance of those commitments remains indivisible from ideological context.

[60] Republican National Committee, *2016 Republican Party Platform*, 18 July 2016, www.presidency.ucsb.edu/ws/index.php?pid=117718.

[61] Condoleezza Rice, 'Remarks at Annual Meeting of the American Society of International Law', Lowes L'Enfant Plaza Hotel, Washington, DC, 1 April 2005, https://2001-2009.state.gov/secretary/rm/2005/44159.htm.

[62] Sands, *Lawless World*, p. 253.

[63] John M. Czarnetzky & Ronald J. Rychlak, 'An Empire of Law: Legalism and the International Criminal Court' (2003) 79 *Notre Dame Law Review* 55, p. 126.

[64] Sands, *Lawless World*, p. xviii.

This book has equally emphasised that the task of defining legal principles to guide the design and development of international institutions should not be abandoned as futile. As Koskenniemi has argued, something must be built up beyond recognition that law is politicised: 'From the fact that law has no shape of its own, but always comes to us in the shape of particular traditions or preferences, it does not follow that we cannot choose between better or worse preferences, traditions we have more or less reason to hope to universalize.'[65] Intervening to argue that foreign policy ideology is ingrained in IL is done to sharpen analytical understanding, not to defeat the political project of lawyers such as Sands looking to an international rule of law based on 'common values'. That vision ultimately emerges as the core of contestation over the international rule of law: as a paradoxical quest to reconcile global power and transcendent values. Law is inevitably 'always part of a political project that connects the present via the past to a future "utopia"'.[66] The claim made by each of the ideological types, and by legalist advocates, is to have melded power and principles within law. Yet each formulation necessarily represents partial values and particularistic interests. The international rule of law is thus revealed as a commitment to the process of contesting the meaning of non-arbitrary global governance, equality under IL, and the integrity of international judicial power.

The value of legalism remains as a vehicle for contesting imperialistic global power and its ossification in IL. What is required is a consciousness that formalised legal rules, sovereign equality and the separation of international legal powers are harnessed to a common political purpose. Moyn cautions:

> [N]o one approaches international criminal law as a political enterprise. Its supporters, almost to a man and woman, appear to believe that the best way to advance it is to deny its political essence, as if talking about international criminal law exclusively as extant law would by itself convert passionately held ideals into generally observed realities. So long as no one interested in the topic openly discusses international criminal law as a political matter . . . the project will lack plausibility.[67]

[65] Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *European Journal of International Law* 113, p. 119.

[66] Friedrich Kratochwil, 'Legal Theory and International Law', in David Armstrong (ed.), *Routledge Handbook of International Law* (Routledge, 2009), p. 56.

[67] Samuel Moyn, 'Judith Shklar versus the International Criminal Court' (2013) 4 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 473, pp. 494–5.

Shklar recognised the power of legalism to translate political values into a more desirable international order if adherents freed themselves 'from the illusions of the "rule of law" ideologists'.[68] The role of foreign policy ideology in IL, once uncovered, makes a return to the neutral conception of the rule of law impossible. In these terms, Koskenniemi reasserts the value of legalism because of, rather than despite, its political foundation in opposing imperialism: 'You need to choose the law that will be yours; you need to vindicate a particular understanding, a particular bias or preference over contrasting biases and preferences. The choice is not between law and politics, but between one politics of law, and another.'[69]

On the other hand, American conceptions of the international rule of law remain central and indispensable to the dialogue. The evidence is incontrovertible that American power put in the service of commonly agreed legal objectives has great potential for realising an operational system of law. But it is also true that strands of American legal belief stray so far from the normative views of global counterparts that they will be seen as inherently threatening and a barrier to even pragmatic compromises on global institutions. Nevertheless, in cases where US IL policy becomes conspicuously arbitrary, unequal or imperial, the promised release valve for other states remains genuine belief in American exceptionalism. For Kagan, the belief that national values are universal values means that 'Americans have been forced to care what the liberal world thinks by their unique national ideology'. Through that mechanism, policy toward the international legal system can be directed back toward politically acceptable bounds by 'the steady denial of international legitimacy by fellow democracies'.[70]

The advancement of the international rule of law remains an iterative process between irreconcilable positions that will challenge each other, occasionally align, but never converge on the precise conception of legal ideals. Yet consensus cannot be the ideal for law. The end state of each concept of IL is a utopian vision that could be realised only by levelling the rich diversity of ideological commitments and values of the real people making up the international legal system: legal utopia presupposes a form of totalitarianism. The opposition of ideologies preserves the vision of reconciling power and transcendent values precisely because it is a contest that cannot be resolved.

[68] Shklar, *Legalism*, p. 142.
[69] Koskenniemi, 'International Law in Europe', p. 123.
[70] Kagan, *Of Paradise and Power*, pp. 151–2.