Lawyering Compliance with International Law:
Legal Advisors and the Legalization of International Politics

Dissertation

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By

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Abstract

Why do states comply with international law? Most answers to this question have not taken due notice of relatively recent transformations in both the international system and its units (i.e. sovereign states). The legalization of interstate relations reflects the discursive hegemony of international law and, consequently, the juridification of international legitimacy. Within the state, foreign-policy making has lawyerized, as legal advising has been (to varying degrees) institutionalized as a prominent function within the decision-making process. In states with highly lawyerized foreign-policy machineries, legal advisors have become the internal agents of compliance with international law. As lawyerization diffuses worldwide, this mechanism of compliance has the potential of providing the primary source of the effectiveness of international law under anarchy.

This dissertation elaborates an organizational theory of compliance based on lawyerization, understood as the structural empowerment of legal advisors in decision making. The theory is empirically applied in the realm of international security. The explanatory potential of the theory is confirmed through the use of process tracing in the cases of NATO’s intervention in Kosovo in 1999 and the U.S. detention and interrogation programs during the first decade of the “War on Terror” (2001-2011).
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CHAPTER 1
Introduction: International Law in a Legalized World

In October 2001, the CIA tracked the Taliban leader Mullah Omar to a building in a residential area of Kabul. The plan was to kill Omar with an air strike. The strike, however, had to be called off because a lawyer at the U.S. Central Command headquarters in Tampa, Florida, was concerned about violating humanitarian law given the risk of disproportionate civilian casualties. He was performing his duty, but the incident left Defense Secretary Donald Rumsfeld “kicking a lot of glass and breaking doors.”¹ Since then, Rumsfeld fiercely pushed for a reduction in the number of lawyers in uniform – but did not succeed.² Just a few weeks later, Air Force pilots reported that in at least ten occasions they had had the enemy in their sights but had been unable to act in time because of similar legalistic hurdles.³

Law’s meddling in the conduct of war is but one example of the more generalized presence that international law has progressively acquired in the foreign policy of states over the years. By extension, international law has become pervasive in world politics as a whole. It is very suggestive in this sense that the legal fabric of international relations has both widened and deepened significantly over time, especially after the Second World War. Not only has the number of treaties grown exponentially and judicial organs

¹ Hersch 2004: 38.
² Byers 2005:121.
³ Ricks 2001.
with regional or global jurisdiction been created; the practical impact of these institutions has augmented as well. With increasing frequency, states have sought a judicial resolution to interstate conflicts and thus the legal framing of those conflicts has become paramount. States’ general commitment to the judicial settlement of disputes has also increased. This is reflected, for example, in the rising number of treaties containing a “compromissory clause” conferring compulsory jurisdiction to the International Court of Justice (ICJ) over any dispute that may arise in relation to the treaty in question. Furthermore, 66 states – i.e. one in three – have already granted the ICJ compulsory jurisdiction over any dispute that may arise in the future (under Article 36.2 of the Statute of the Court). That number has grown steadily since the creation of the Court, when only seven states had assumed said commitment. (See figures 1.1 and 1.2)
The realm of international security has always been considered the hard case in any study about the impact of international law on the behavior of states. Interestingly, even security matters show this trend of legalization. In effect, international legal instruments for the regulation of armed conflict have proliferated over time and today virtually every state is a party to the main treaties regulating warfare – i.e. the four 1949 Geneva Conventions and Protocols. To this must be added the recognized status of many of these norms as international customary law binding for every state. Finally, a permanent international court in charge of applying international criminal law – namely, the International Criminal Court – was established in 2002 and more than half the states have already placed their nationals under its jurisdiction. (See figure 1.2)
1.1 The legalization of international politics

This picture of the increasing international legal entangling of states is only a part of the phenomenon of the legalization of international politics. Very interesting in this respect is the discursive predominance of international law evinced in state interactions. When states decide to use force against another state, they justify their actions principally under international law: Saddam Hussein attempted to legally justify the invasion of Kuwait in 1990;[^4] Bill Clinton, Tony Blair and Jacques Chirac attempted to legally justify the bombing of Serbia in 1999;[^5] George W. Bush and Tony Blair attempted to legally justify the invasion of Iraq in 2003;[^6] Vladimir Putin attempted to legally justify the invasion of Georgia in 2008.[^7] The same is true of states criticizing the use of force by another state: Russia and Serbia turned to international law to criticize NATO’s bombing of Serbia in 1999 and Kosovo’s subsequent declaration of independence in 2008;[^8] Georgia and the U.S. denounced the illegality of the Russian intervention in South Ossetia in 2008.[^9]

In this sense, public debates over international security have been progressively turned into exchanges of legal claims and counterclaims. That both sides of the debate argue from a legal point of view, even when they are not in a courtroom or writing for an international law journal, is a sign that international law is becoming the authoritative point of view, even for matters of international security, even in the context of political

[^7]: Borgen 2009a.
[^8]: Johnstone 2003; Borgen 2009a.
[^9]: Borgen 2009a.
discussions. It is true that international law has been present and publicly invoked at least since the Middle Ages,\textsuperscript{10} but it is in the last few decades that its discourse has become so prominent and hegemonic in international relations.

This is the context in which it seemed sensible for opponents of the Iraq conflict to frame their opposition in legal terms. The war, they said, was illegal. […] it is hard to imagine Napoleon consulting a lawyer to discuss targeting. In the same way, it would have been bizarre to oppose Hitler’s invasions – let alone the Holocaust – principally because they were illegal.\textsuperscript{11}

This growing predominance of the legal discourse can also be seen in the National Security Strategy (NSS) of the United States. The NSS is a public document prepared by the Executive for Congress which outlines the major national security concerns and the plans to deal with them. It serves as a security policy statement by the leading power for the rest of the world. If one looks at the language of these documents, one need not go very far into the past to notice the discursive evolution of national security. Threats, problems and solutions are conceived very differently as one moves over time. In just twenty years, a discourse of Realpolitik has been taken over by a legal discourse, as shown in figures 1.3A and 1.3B.

\textsuperscript{10} Grewe 2000.
\textsuperscript{11} Kennedy 2006: 8.
Figure 1.3A
The U.S. discourse of national security

Figure 1.3B
The U.S. discourse of national security
Because interpretation and enforcement are, to an important extent, decentralized in the international legal system and performed by the legal subjects themselves, the question of compliance with international law is a classic puzzle of International Relations (IR). In the absence of a global sovereign – a world judiciary to interpret and apply the law and a world police to enforce it – why do governments comply with international law? In short, why do sovereign states follow international law under anarchy? Over the years, different answers have been offered to explain this puzzle, and today we have a much better understanding than before as to why states comply (to the extent they do). But the phenomenon of legalization just described suggests new mechanisms, ignored by extant theories, which may help us understand even better why states comply with international law. In this work I present a new theory of compliance that, relying on international legalization as the background, proposes to make one of these overlooked mechanisms the leading explanation of compliance with international law in today’s world.

As used here, legalization refers to the discursive hegemony of the law in politics. Interesting though discursive structures may be in themselves, my contention is that discourse and behavior are intimately linked. It is by now an established fact that they constitute each other, in the sense that practices sustain, consolidate or otherwise transform discourses, and discourse provides the meanings, conceptual categories and relations in reference to which actors think and carry out their actions.\(^\text{12}\) From the

\(^{12}\) The term “discourse” refers to the argument that language is not merely a way of describing external reality – a technique for labeling objects – but acts to signify generalised, socially constructed categories of thought to which important social meanings and values are attributed. Discourses promote particular categories of thought and belief that guide our responses to the prevailing social environment. In this sense,
perspective of political science, to study international legalization is important to the extent it helps us explain why states behave as they do.

In the realm of politics, legalization occurs when the constitutive rules of the political game are defined in and by the legal order, when the political sphere is organized by legal means. When we say that domestic politics is legalized, we are saying that the basic rules of the game – who are the actors? what are their capabilities and limitations? what are the legitimate strategies? – are laid out in the form of legal rules (as found in a written constitution, for example) and enacted by actors legally invested with political authority. Consequently, the game of politics becomes a legal game: the law does not determine by itself what actors do, but it does determine who can do what and how. It is still politics, but a very different kind of politics. It is legalized politics.

The legalization of politics has profound implications. When a political system becomes legalized, one should expect a very different “game”, played by different actors with different capacities and interests and, perhaps most important, with very different power resources. As stated above, legalization reconstitutes political authority, and this is a direct result of the reconstitution of political power. Consequently, the power relations that form the fabric of politics are transformed into legal relations – i.e. relations in which power comes from the law.

As expected of a legalized international system, state interactions have acquired a recognized legal meaning. For instance, in the past wars were a purely political phenomenon, subject only to the scrutiny of political prudence; today, the international discourses lend structure to our experiences and to the meanings we give to our experiences” (Evans 2005: 1049).
use of force (and even some internal uses of force) constitute lawful or unlawful conduct. In short, analyses of the legality of war did not make much sense in the past but have now become a legitimate inquiry – in both theory and practice.\textsuperscript{13} Gerry Simpson refers to this as the displacement of the political by the legal: “Suddenly, it was not enough to be against war, one had to declare it illegal.”\textsuperscript{14} In a nutshell, we are steadily approaching a legalized international system in which it is the law, and not the prudent command of the sovereign, that entitles people to kill people.

As David Kennedy put it, “modern war reflects modern political life.” And modern politics is legalized politics: political actors are legally defined, included or excluded by law, their powers are inflated or shrunk by law, what they do often utilizes and results in legal norms.\textsuperscript{15} As a reflection of modern politics, modern war has become a legal institution. This means that warfare itself, like politics, has become an affair of legal rules and the military an increasingly “legalized” bureaucracy. There are today hundreds of lawyers in the U.S. military, and “[t]he legal dimension of conflict has at times overshadowed the armed struggle between adversaries as the nature of conflict itself has changed.”\textsuperscript{16} In this respect, as a result of legislation passed in 2006, the ability of U.S. military lawyers to provide independent legal advice without interference from military commanders or government officials is now protected by law.\textsuperscript{17} Furthermore, since 1974

\textsuperscript{13} This is not to say that international law had nothing to say about war in the past. Instead, the point here is that legal considerations used to be absent or marginal in the political debates about a specific war, whereas today they are the main constituents of the arguments presented. One of the goals of the present work is to present detailed evidence of this.

\textsuperscript{14} Simpson 2007: 138.

\textsuperscript{15} Kennedy 2006: 13.

\textsuperscript{16} Newton 2007: 877.

\textsuperscript{17} Dunlap 2009: 799.
every member of the U.S. armed forces has been required to obtain training in war law.\textsuperscript{18} As stated by Judge Advocate General James Houck, “[w]ith the law entering the realm of operations, both at the tactical and strategic levels, lawyers have become involved in ways they never were 25 years ago.”\textsuperscript{19}

There is a global recognition of the importance of “speaking law to power” at the time of making and implementing foreign policy – including war fighting. So much so that in the last fifty years or so practically all states have created legal bureaucracies in charge of performing said function. Experts in international law have become a part of the foreign policy making apparatus to perform a function increasingly recognized as necessary – namely, advising decision makers on how to formulate and implement foreign policies in accordance with international law. This organizational development seems to be sustained by a systemic necessity rather than the affinity or sensitivity of individual leaders. As a government insider wrote:

Many people think the Bush administration has been indifferent to wartime legal constraints. But the opposite is true: the administration has been strangled by law, and since September 11, 2001, this war has been lawyered to death. The administration has paid attention to law not necessarily because it wanted to, but rather because \textit{it had no choice}.\textsuperscript{20}

This institutionalization of international legal advising in the state is not a mere formality. There is a current debate in the legal profession about the possibility of filing criminal charges against legal advisors for “materially contributing” to the commission of

\footnotesize{\textsuperscript{18} Lohr & Gallotta 2003: 470.}\textsuperscript{19} Cited in Coyle 2010.\textsuperscript{20} Goldsmith 2009: 69 (emphasis added).}
war crimes.\textsuperscript{21} This is suggestive of the increasing practical importance of the responsibilities of legal advisors in foreign policy formulation.

In the United States, the position of the Legal Adviser of the State Department was created by Congress in 1931.\textsuperscript{22} The Legal Adviser is appointed by the President with the advice and consent of the Senate. He answers directly to the Secretary of State and heads an office staffed by more than 170 highly qualified lawyers. The formal authority of the office has not changed since its creation, but in practice it has undergone a remarkable transformation in the last fifty years. In effect, the Legal Adviser and office attorneys used to remain focused on relatively few and technical issues. This changed with the appointment of Abram Chayes as Kennedy’s State Department Legal Adviser in 1961. Chayes transformed the office into a proactive and involved section of the Department. Since then, the Legal Adviser has become an influential participant in the formulation and implementation of foreign policy – including matters of international security.\textsuperscript{23} The same goes for the rest of the legal offices in the government – from the Justice Department’s Office of Legal Counsel to the Defense Department’s General Counsel to the legal advisors in the National Security Agency, not to mention operational lawyers in the military. In varying degrees, the same is true elsewhere.\textsuperscript{24}

\textsuperscript{21} See, for example, Markovic 2007.
\textsuperscript{22} Some examples of the creation of a functionally analogous office in other states are: Canada 1928; the Netherlands 1945; the Philippines 1947; Mexico 1967; the U.K. 1968; France 1969; (West) Germany 1972.
\textsuperscript{23} Scharf & Williams 2010: 15-18. The seminal work for the U.S. case is Bilder 1962.
\textsuperscript{24} See, for example, the transcription of the foreign Legal Advisers’ roundtable in Scharf & Williams 2010:169-180, for the cases of the U.K., Russia, China, India and Ethiopia, and Cassese’s (1992) comparative assessment of the cases of Brazil, Bulgaria, Ireland, France, Hungary, Israel, Italy, the Netherlands, Switzerland, the U.K. and the U.S. See also Guillaume 1991 (for the French case); Frowein 2005 (for the German case); Lammers 2009 (for the Dutch case); Watts 1991 (for the British case).
The juridification of international legitimacy and the rise of lawfare

In preceding paragraphs I have provided examples of the increasing role of international law as the “lingua franca” of international politics. In light of this discursive legalization, it is very hard to make the case that legality and legitimacy are not intimately implicated in international politics. In legalized political systems (as defined above), legitimacy is directly dependent on legality. When law constitutes politics, legality constitutes legitimacy. In fact, the legalization of politics can be measured by the extent to which legitimacy is determined by legality. The more uncontested the hegemony of the legal discourse, the greater the dependence of legitimacy on legality. In the United Nations system – a politico-legal system founded on the United Nations Charter – legitimacy is principally derived from legality.

To talk about legitimacy is to talk about strategies of legitimation (and de-legitimation). In the U.N. system, states legitimize their foreign policy actions principally through international law.

[...] the art of using law as a means of pursuing national interests is the art of drawing on the obligation of another State to play its part in upholding the ideology in such a way that the rules of international law discriminate against the other party, but do so

26 Despite the profound legalization undergone by the contemporary international system, the discourse of international law is not the only source of legitimacy in international politics. But discursive predominance is not an absolute, and so what really matters is that the legal discourse prevails over other legitimacy discourses (which resist full elimination).
27 Cf. Scott & Ambler 2007. The authors assume an instrumental orientation towards legitimate action. Even though the theory advanced here is built on the strategic use of the legal discourse (i.e. with the purpose of enhancing legitimacy), I prefer to remain agnostic as to what motivates states to legitimize their actions in the first place.
in such a way as to retain the appearance of law as neutral, both in construction and in operation.\textsuperscript{28}

It is a combination of the political commitment to uphold the institution of international law, on the one hand, and the indeterminacy of that law, on the other, that allows states to (a) manipulate the legal discourse and (b) potentially obtain some political advantage from doing so.\textsuperscript{29} Far from cheating, discursive maneuvering is fair play. This is epitomized in the concept of “lawfare”. The term was introduced in 2001 by Charles Dunlap\textsuperscript{30}, then Judge Advocate of the U.S. Air Force, and refers to a method of warfare where law is the weapon. He later offered a more refined definition of lawfare: “the strategy of using, or misusing, law as a substitute for traditional military means to achieve an operational objective.”\textsuperscript{31} As a military lawyer, Dunlap is concerned with how the success of U.S. military operations is too often undermined by the enemy pointing out U.S. violations of international humanitarian law. “Military operations need to be legal both in fact and – importantly – in perception.”\textsuperscript{32} Their expert knowledge and discursive skills make military lawyers the crucial players in the game of lawfare.

In asymmetric warfare, the weak have a special interest in exploiting international law to their advantage, since they do not have many other weapons at their disposal. Al Qaida, for example, explicitly instructed its members to use lawfare strategies: “At the beginning of the trial, once more the brothers must insist on proving that torture was

\begin{footnotes}
\footnote{Scott 1998: 46.}
\footnote{Ibid.: 44.}
\footnote{Dunlap 2001. On lawfare, see the special issue of the \textit{Case Western Reserve Journal of International Law} (43:1/2, 2010).}
\footnote{Dunlap 2003: 480.}
\footnote{Dunlap 2009: 795.}
\end{footnotes}
inflicted on them by State Security [investigators] before the judge;” “Complain [to the court] of mistreatment while in prison.” In the case of Al Qaida, both its goals and methods seem at odds with the humanitarian spirit of the laws of war, and therefore their manipulation of the law to their advantage emerges as particularly cynical. But the strategic use of the law exceeds Al Qaida, the War on Terror, and the concept of “lawfare.” The law in general, and certainly international law, has always been a political tool to be manipulated by actors to advance their interests, however holy or evil, however compatible with the spirit of the law or not, they may be. As Goldsmith notes,

[...] the use of law as a weapon in war [...] is not new. Military adversaries and critics of presidential wartime action have long used domestic and international law strategically to achieve their ends. What is new is the extraordinary significance of law in war. War has become hyper-legalized, and legality has become the global currency of legitimacy for military and intelligence action. [...] All of the watchers [of presidential decisions...] use law as a measure of critique and a tool of sanction. And many of them, no doubt, do so strategically to suit their ends.34

But Goldsmith continues:

So too, though, does the executive branch. The President’s legitimate power in war to surveil, to prosecute, to detain, and to kill flows from domestic and international law. To justify these actions, the President every day invokes his constitutional, statutory, and international law authorities, and his lawyers are in constant battle [...] for their favored understandings of the law. In these contexts, the President and his lawyers interpret and employ law strategically to further their aims.35

34 2012: 224-225.
In a nutshell, then, why do states care about compliance? Given the degree of legalization that the international political system has undergone in the last several decades, and especially after the Second World War, it is virtually impossible for states to act legitimately while blatantly violating their international legal obligations. As schematized in figure 1.3, legality bounds legitimate conduct. To say that legal compliance determines legitimacy because of the legalization of international politics is a tautology, not an explanation of how the legality-legitimacy link came about. For the purposes of the present work, demonstrating the link, even if leaving it unexplained, suffices. In other words, my theory of compliance rests on the background fact that the
international system has become significantly legalized, but it can afford to remain agnostic about what produced this systemic legalization in the first place. My task is to focus on the impact that legalization has on international politics. The theory suggests that the discursive hegemony of international law shapes state behavior and that the organizational structure of the modern state has much to do with this. More precisely, I will demonstrate how the empowerment of legal bureaucracies in the foreign policy apparatus accounts for the independent causal role performed by international law in shaping foreign policy.

Jack Goldsmith and Eric Posner argue that compliance should not be explained by assuming that states have a preference for complying. This would solve the compliance puzzle by assumption.\footnote{Goldsmith & Posner 2005: 10. See also Guzman 2008: 16-17.} There is truth in this. But when international law is conceived as a tool of legitimation, to assume a preference for compliance becomes nothing more than assuming a preference for legitimating one's actions. This is not an assumption that should raise controversy. It is certainly less controversial than assuming that states are rational unitary actors, for example. Moreover, that states have an interest in legitimating their actions not only makes sense from a strategic point of view – actions regarded as legitimate elicit less resistance, \textit{ceteris paribus} – but is also supported by the fact that states “[…] feel the need to claim to observe international law”\footnote{Scott 1995: 295.} and strive to always justify, in legal terms, what they do. Besides, to assume that states prefer to legitimate their actions through international law does not, by itself, explain compliance, since (1) states have other preferences as well, and these may certainly be inconsistent with
complying and predominant, and (2) states may unintentionally fail to comply despite their preference to do so. Finally, far from assuming this preference for legitimation I will show the observable organizational structures and mechanisms in which this preference is crystallized in the state. So this assertion that states prefer to legitimize their actions, together with the premise that international legitimacy has been colonized by international law, constitutes the background of this study on compliance, but does not in itself provide an explanation. I will turn to explaining compliance next. But before unfolding a new explanation, it is important to evaluate the existing ones.

1.2 International law and state behavior

*Taking realist skepticism seriously*

In legal analysis, whether states follow international law or not may have a value in itself. In International Relations, however, the study of compliance owes its value to the fact that it implicates an inquiry into the effects of international law on state behavior. Effectiveness, rather than compliance per se, lies at the heart of compliance research. In this vein, there is little disagreement about the empirical fact that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” Disagreement arises over whether such behavior can be attributed to the law. According to the standard definition, compliance with international law refers to a state of conformity between an actor’s behavior and a specified rule.

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39 Henkin 1979: 47.
“In sum, to speak of compliance is to be agnostic about causality: compliance as a concept draws no causal linkage between a legal rule and behavior, but simply identifies a conformity between the rule and behavior. To speak of effectiveness is to speak directly of causality: to claim that a rule is “effective” is to claim that it led to certain behaviors or outcomes, which may or may not meet the legal standard of compliance.”

If there is one thing to be cherished from the realist scholarship on international law is a healthy skepticism as a preliminary stance in the study of compliance. The warning should be constantly borne in mind: rules may at first sight look more causally relevant than they really are. Realist skepticism is key to guard against what Raustiala called the danger of a “snapshot” approach to compliance. In the context of exploring the effect of international law on foreign policy, some forms of compliance are of little interest. Such is the case of norm-behavior correspondence which results from the identity between the norm and pre-existing interests. Equally uninteresting is compliant behavior which follows exclusively from coercive sanctions whose anticipation and application are not dependent on legal norms. What is missing in these cases of epiphenomenal compliance is precisely the causal link, from law to behavior, which was the subject of investigation in the first place.

For these reasons, “genuine” compliance is here narrowly understood as the non-spurious correspondence between international legal norms and state actions. In other

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41 2000: 393.
42 In other words, when “second-order” compliance (i.e. the application of law-enforcing sanctions) has extra-legal causes, so does the “first-order” compliance that occurs as a result of (the anticipation of) that “second-order” compliance. Note that this is not about motivation – i.e. the question is not why states punished that behavior, but rather whether they would have punished it had the law not existed. Again, what is missing here is a causal force truly emanating from the law itself.
words, to paraphrase Mitchell, the focus of study is circumscribed to the phenomenon of “law-induced” compliance.\(^{43}\) This means that the phenomenon of compliance, as used here, necessarily entails some deviation from law-independent conduct. If a state’s actions conform to international law only because the rules do not require that the state alter what it wanted to do anyway (either because they are in harmony with the state’s pre-existing preferences or because they are too vague or ambiguous), then that case is uninteresting and falls outside this study. “For these actors, treaty rules have been brought in line with existing or intended future behaviours, and not vice versa.”\(^{44}\) In short, to explain compliance is here to explain (1) how international law has an effect on state behavior, and (2) how that effect is oriented towards norm-behavior correspondence.

Note that this narrowed definition of compliance does not beg the compliance question by implying that international law must have an effect on state actions. Non-compliance is still a possibility which any theory of compliance should be able to account for. This definition does not presuppose any particular motivation for compliance, either. But it does exclude from the analysis norm-behavior co-relation which lacks internal causality – i.e. “A” cases in the diagram of figure 1.5.\(^{45}\) In addition, if what we are ultimately exploring is the effectiveness of international law, while it is important to exclude these “false positives” from the analysis, it is equally important not to exclude “false negatives” (“C”) – i.e. those instances in which the law had a behavioral impact.

\(^{43}\) Mitchell 1996: 5.
\(^{44}\) Ibid., p. 9.
\(^{45}\) This study is also limited to compliance with legal obligations owed by the State – i.e., compliance that takes the form of state actions, not of actions by subnational actors (such as firms).
but, being short of producing compliance, appears as causally irrelevant. As Raustiala and Slaughter put it, “[…] legal rules may change state behavior even when states fail to comply.”\(^{46}\) Finally, compliance theorists should be cautious about the charming spells of parsimony in cases where compliance is over-determined. Parsimony does not warrant that some of the factors causing an over-determined outcome be treated as lacking explanatory power and thus as theoretically negligible. In these cases, Occam’s razor will be misused if it leads to the conclusion that international law was ineffective simply because the other factors involved were sufficient to explain the behavioral outcome.

1.2.1 Three logics of compliance

Extant theories of compliance, developed by both International Relations and International Law scholars, rely on three distinct logics. Namely, the strategic, normative and organizational logics of compliance. The first two remit to what is known in the literature as the logic of expected consequences and the logic of appropriateness,

\(^{46}\) 2002: 539.
respectively. These two bases of action provide a volitional account of why actors do what they do. It is volitional because actions are seen as choices made by an autonomous, unitary actor – although made for very different reasons.

According to the logic of consequences, actors choose among available courses of action by evaluating their likely consequences in light of the actor’s pre-existing goals. In situations of strategic interactions, reaching one outcome or another depends on what the actor does but also on what others do. The value of each alternative action therefore depends not just on the actor’s pre-given preferences over outcomes, but also on her expectations of what others will do. In short, under a consequentialist logic, the actor does what it does because, given what others are expected to do, doing so is likely to bring about the actor’s preferred outcome.

When actions are interpreted through the logic of appropriateness, on the other hand, they are seen as rule-based. Rules of conduct – prescribing or proscribing certain actions – bind identities or roles to particular situations. An actor with a given identity who finds herself in a given situational context, does what it does because that is what she has to do – i.e. what is appropriate for someone like her in a situation like that one. In this sense, the actor is less an optimizer than a role-player, and explaining what she does “[…] involves evoking an identity or role and matching the obligations of that identity or role to a specific situation.”

Note how under these two logics of action, the actor preserves his autonomy – his “free will,” if you would – and his choosing is only constrained by external factors (what

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48 Ibid., p. 951.
will others do? What is someone playing this role expected to do in this situation?). In contrast, an organizational logic of action relies on constraints on what the (organizational) actor can do in virtue of his internal composition. Organizations, such as the state, are made up of individuals in charge of performing certain institutional functions according to established rules. What the organization does is the result of what its components do; shortly put, it is the result of the organizational process. To the extent this process is driven and constrained by the constitutive rules of the organization, those rules can account for the actions of the organization. It would be natural to ask, at this point, why, if the organization’s actions are determined by the rules that constitute it, these actions cannot be accounted for through the logic of appropriateness. Isn’t the organizational action so described, after all, just another example of rule-based action? Here one must not conflate the individual actors that make up the organization, on the one hand, and the organizational actor itself, on the other. While performing an organizational function, individuals do act on the basis of appropriateness or utility maximization. They are autonomous actors playing a role on the basis of a set of established organizational rules. The same cannot be said of the organization itself. The organization is not an autonomous actor that chooses to follow its internal rules and thereby decides to act in a particular way. The rules on which appropriate action is based are rules about how to act in the external (social) world, not rules about how the actor’s internal components should be assembled and work together to produce an organizational decision. They are, in short, social rules about what to do, not “anatomical” rules about how to function internally. This is why organizational rules may evoke the logic of
appropriateness when the action to be explained is that of the individuals that make up
the organization, but those same rules evoke an entirely different logic – the
organizational logic – when it is the actions of the organization itself what one is trying to explain.

One major reason to focus on organizational factors of compliance is that these factors, when present, become the dominant cause of compliance, as they have an endurance and invariability that interests – be they instrumental or normative – lack. Leaders come and go; alternation in power between very differently-minded characters is not rare – indeed, it is the rule in many countries. The organizational structure of the state, on the other hand, tends to change only occasionally and gradually. While the three logics may converge in the production of compliance, when rationalist and normative mechanisms falter in a particular case, organizational structure stays put as the enduring cause of compliance.

Organizational decision-making is less consequentialist and introspective than decision-making by a rational or a normative actor, respectively. It has more to do with standard procedures and routines and the playing of bureaucratic or professional roles. However, organizational theories do not necessarily deny rational or normative decision making. In effect, there are three different ways in which organizational theories may easily incorporate rationality and normativity in their explanations. First, rational calculation or normative pull may be part and parcel of the organizational process. For instance, legal advising consists in drawing the boundaries of the legally permissible and not simply in informing policy-makers what those pre-fixed boundaries are. This creative
enterprise carried out by legal advisors does not take place in a vacuum. It is guided by
the policy preferences of those they are advising. These preferences, which may certainly
be the result of cost-benefit calculations or assessments of appropriateness, call for legal
interpretations that are compatible with them. Thus, organizational theories need not strip
their causal mechanism of rationality or normativity.

Second, once the boundaries of legal permissibility have been drawn and
transmitted to the policy-makers, the choice is still to be made from the legally
permissible alternatives. This choice of a particular policy may certainly be determined
by a (bounded) maximization of material interests or a pull towards doing the right thing.
Organizational theories typically seek to explain compliance, not the specific form of
compliance that is chosen. In other words, based on internal constraints on the ultimate
decision maker’s autonomy, the organizational logic is more useful to explain why
certain actions were not chosen than why the actor chose to do what she actually did. In
this sense, and insofar as the decision maker still enjoys some degree of autonomy, an
explanation based on the organizational logic is usually a first-cut explanation to be
complemented by an account relying on consequentialism or appropriateness. That said,
when used to explain compliance, this explanatory insufficiency of the organizational
logic is not really a problem. This is because, insofar as the theory does not claim that
international law determines foreign policy, solving the compliance puzzle takes showing
why the state chose not to breach the law rather than why it chose one particular form of
compliance over another.
Third, organizational theories need not deny that rationality or normativity may be the overarching operating logic behind the institutionalization of organizational processes. Legal advisors may be empowered ultimately as a way of safeguarding utility-maximizing or appropriate foreign policies in the future. In this sense, nothing precludes that organizational structures be rationalized or “normativized.” Goldsmith and Posner, for example, admit as much when they refer to the delegation of authority to bureaucracies charged with ensuring compliance. They characterize the resulting “routine bureaucratic compliance” as “based on an aggregate cost-benefit analysis.”\textsuperscript{49}

Finally, there is also a more practical reason why organizational-process theories should be welcome: they typically have an empirical advantage. Causal mechanisms driven by instrumental or normative interests – i.e. the maximization of expected utility or the assessment of appropriateness, respectively – ultimately “happen” in an individual’s head. They rely on the state of mind of the rational or normative choice-maker. But states are organizations, not individuals, and present a comparative advantage for the empirical researcher precisely because of that. Organizational processes happen out there. There is no need to assume or infer their occurrence, what they look like or what they bring about. They are observable in ways cognitive processes are not. Organizational-process theories thus tend to work with more fine-grained observable hypotheses. It is hard to explain what states do if we do not come to terms with what states really are. Moreover, treating states as what they are is easier, from the practical

\textsuperscript{49} 2005: 105.
point of view of empirical research, than reducing them to the level of individuals – as personality theories of compliance do.

A note on habits

It has been noted in the literature that states, like individuals, act habitually, not reflectively, on a regular basis. Some have argued that this kind of “unthought” behavior implicates a different logic of action – a logic of habit. Compliance with certain international legal rules may certainly become a habitual practice, i.e. conduct virtually indistinguishable from the unconscious behavior of an automaton. In practice, however, we expect that habits which clash with important interests or normative preferences of the state will lose their “non-reflectiveness” and be subjected to conscious scrutiny. As a result, they will be discarded or, alternatively, they will be maintained for the same reasons they became habits in the first place – namely, instrumental or normative reasons. “Other things being equal, habits and practices are likely to emerge as simplifying devices in coping with compliance problems that exhibit the following characteristics: (1) marginal importance or low intensity, (2) frequent recurrence, and (3) little tendency to change over time.”

In addition, it may certainly be the case that practices originally adopted for their utility or normative value become locked-in by bureaucratic procedures derived, over time, from the practice itself. In that case, the habitual practice, despite its instrumental or normative disvalue, is maintained not because it operates behind the veil of

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50 Hopf 2010.
51 Young 1979: 24, emphasis added.
consciousness – so there is no need to think of the actor as an automaton to uncover the logic of his actions – but simply as a result of the organizational logic that drives the corporate actor. In short, what sustains habitual practices of considerable importance, therefore, is not a distinct logic of action (i.e. a “logic of habit”) but the logics of consequences, appropriateness and/or organizational process.

In what follows, I discuss the most prominent theories of compliance out there. Most theories that rely exclusively on the strategic or normative logics are shown to have some problems surmounting the challenge of the realist skeptic – i.e. that international law is an epiphenomenon and ultimately ineffective. Moreover, those that portray compliance as organizational have convincingly shown that, under not uncommon conditions, the strategic or normative logics are constrained by organizational mechanisms that work as a pre-filter of strategic or normative decision making. In this sense, the organizational logic pre-conditions and bounds the other two logics of compliance. Also, to the extent the posited organizational mechanisms are sensitive to international law per se – as legal advising obviously is – these theories can weather realist skepticism better and more convincingly demonstrate the effectiveness of international law.

Strategic compliance

The strategic logic of compliance is the preferred one in International Relations. Mainstream theories of compliance, both realist and institutionalist, share a commitment to rationalism, which portrays states as instrumental actors and foreign policy as the outcome of their calculations of expected advantage. The rational state chooses the policy
that is expected to yield the greatest utility (expected utility maximization). In rationalist
code, state behavior will conform to international law insofar as the behavior required by
the law is the one expected to generate the most preferred outcome. To the extent this
condition does not hold, noncompliance should be expected. This explains compliance,
but does not necessarily distinguish law-induced from spurious compliance. In order to
distinguish one from the other, it must be shown that the law-conforming behavior was
expected to yield the highest payoff because it conformed to the law. Interest-induced
compliance is also law-induced compliance only when the law has an independent effect
on how those given interests are best realized – i.e. an independent effect on the state’s
preferences over policies.

How does international law induce states to comply with it according to
rationalists? For realists, the short answer is that it does not. Realists argue that the
observed correspondence between legally prescribed and actual behavior is spurious.
Legality has nothing to do with that correspondence. Self-interest and coercion, by
themselves, do all the explanatory work. In most instances, law and behavior coincide
because they share the same source: the interests of great powers. International law
reflects what great powers want, which explains what they do. As for weaker states, they
do what the law prescribes because they must do what the powerful want – or else they
will be coerced to. In short, international law, at best and for the most part, is endogenous
to state interests and descriptive of what states (both weak and strong) would do
anyway.\footnote{Goldsmith & Posner 2005: 13.}
Some realists do admit the possibility of genuine, albeit limited, compliance. For Goldsmith and Posner, for example, international law may have an independent effect in providing an initial solution (focal point) to a coordination problem. However, once that solution is implemented coordination ensues and becomes self-sustaining, making the legal rule obsolescent. Coordination will persist because states have no interest in deviating from it (no matter what the law says). When they have an interest to deviate, and to the extent they can, they will.\textsuperscript{53}

Institutional theories start with the possibility of joint gains of cooperation which cannot be secured automatically but instead require mutual behavioral adjustments by the states pursuing them.\textsuperscript{54} When common interests exist, international law, to the extent it is complied with, can help states achieve (and sustain) cooperation. International law can be useful in providing information. It can communicate not only focal points to solve coordination games,\textsuperscript{55} but also clarify which actions count as cooperation or defection. This latter function is important because it affects the key factor in institutionalist explanations of compliance: the (expected) reactions of others. For one, noncompliance generates a bad reputation, which makes future cooperation (and thus the realization of mutual interests) less likely. In addition, noncompliance may be met with reciprocal noncompliance or even punishment from others. While some institutionalist accounts (like the managerial model\textsuperscript{56}) emphasize reputation and others (like enforcement

\textsuperscript{53} Ibid., pp. 84-88. See also Krasner 1991.
\textsuperscript{54} Keohane 1984: 51-55.
\textsuperscript{55} But recall the realist observation that the utility of international law in these cases is ephemeral, at best. See also Krasner’s critique (1991) pointing out that most coordination problems implicate distributional conflicts and thus require more than a focal point to be solved.
\textsuperscript{56} Chayes & Chayes 1995. See also Guzman 2008.
theory\textsuperscript{57} emphasize reciprocity and sanctions, all of them rest on how expected reactions from others neutralize the violator’s ability to enjoy the gains of cooperation and thus make noncompliance unreasonable. In a nutshell, then, breaches of international law can bring about reputational costs and reciprocal defection or punishment from others, which undermine the ability to secure future gains of cooperation. Rational states comply with international law because compliance stabilizes mutual expectations of cooperative behavior, which are necessary to reach the path of cooperation, stay on it, and thus collect the desired cooperative surplus. For a schematic representation, see figure 1.6.

The success of institutionalism at explaining interstate cooperation under certain anarchic conditions can hardly be overstated. But to draw from these theories of cooperation a successful demonstration of why international law matters is a different story. As Simmons admitted, they “[…] concentrate on why states obligate themselves rather than why they comply with their obligations […].”\textsuperscript{58} Ironically, a pure rationalist approach to compliance may easily be accused of confirming the realist skeptic’s critique that international law is epiphenomenal and compliance spurious. Consider the following illustrative example:

The simplest explanation for why a state might comply with a treaty, and the explanation we generally emphasize, is that it fears retaliation or some other failure of cooperation or coordination if it does not. Suppose that two states share a fishery and have ratified a treaty that limits each state to a sustainable yield. Each state complies with the treaty because it fears that if it violates the treaty by overfishing, the other state will retaliate by overfishing, and the cooperative surplus will be dissipated. In

\textsuperscript{57} Downs at al 1996; Downs 1998. For a critique, see O’Connell 2011.  
\textsuperscript{58} 1998: 81.
Figure 1.6
Three logics of compliance: Basic structure of compliance explanations
this example, the treaty has no force beyond the underlying strategic situation: the parties could, in principle, cooperate without a treaty, but the treaty is useful because it clarifies the actions that count as cooperation and defection, and it works because of the logic of retaliation in the face of defection.\textsuperscript{59}

Why would it matter which actions \textit{count} as defection? After all, a rational state will react against overfishing because this action hurts its interests, not because it is violative of the agreement. In other words, cooperation and defection are not measured through the law, they are measured through the collected payoffs – \textit{Did you help us get the cooperative surplus or did you not?} By assumption, states do not seek to be in compliance with the agreement; they seek not to behave in ways that will lead the other party to defect. Avoiding retaliation or reciprocal defection, on the one hand, and complying with the treaty, on the other, both converge in the same behavior (i.e. “refrain from overfishing”), but it is important to distinguish the two analytically in order to be able to isolate the behavioral impact of the law (if any). Would overfishing elicit defection even if overfishing was not in violation of the agreement? The strategic setting suggests that it would, and that therefore, in order to secure the cooperative surplus, with or without the treaty the states would refrain from overfishing. Here compliance is not law-induced. Conversely, if reciprocal defection or retaliation would only follow a legal breach – or, more generally, if the legal status of the action affects the likelihood that it will be reciprocated or retaliated – then this can only be because the law itself alters the cost of punishing. That is, it is less costly to punish overfishing when overfishing is unlawful than when it is lawful. Consequently, punishment will be more expected in the

\textsuperscript{59} Goldsmith & Posner 2005: 100 (emphasis added).
former scenario than in the latter, and therefore, when there is a treaty involved, the state will have more incentives not to overfish. Here compliance would be law-induced. But, from a purely strategic perspective, why would this be the case? If law compliance does not have an intrinsic, non-instrumental value, why would it be cheaper, all other things being equal, to enforce the law than to enforce one’s interests?

Reputation is no less problematic. It can be argued that, even when reputational concerns are decisive, the reputation that matters, from a rationalist perspective, is reputation for cooperative rather than law-abiding behavior. This is because, by assumption, it is cooperation, not law compliance per se, what states are ultimately interested in. If so, the whole rationalist story clings on an expected reputational payoff the calculation of which has little to do with international law (if at all).

Reputation as a reason to comply with international law has yet another problem. If states act rationally, and they know that other states act rationally, then they must know that when a state complies with the law it does so because it is in its best interest to do so, not because it has a (normative?) propensity to abide by the law. In this sense, to the extent compliance is strategic and not a preference in itself, past compliance says nothing about future compliance if the strategic settings differ from case to case. What would a bad compliance reputation say about a state? That it does not feel as obligated by international law as other states (with better reputations) feel? In this case, compliance would cease to be purely instrumental. If reputation is a measure of a state’s general “willingness to comply with its international legal obligations”60 – a willingness that has

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60 Guzman 2008: 34.
nothing to do with the maximization of interests – then we are already outside the consequentialist logic. Compliance is no longer strategic; compliance is, at least in part, a preference in itself. To say that states comply with international law ultimately because they have an (unexplained) preference to do so is not very enlightening. The only kind of reputation compatible with a strategic approach is reputation for rationality. But rationality is assumed, and therefore reputation for rationality is not allowed to vary in these accounts.

The point of this critique is not that institutionalist theories necessarily fail to demonstrate the effectiveness of international law. The point is that, when they do show that international law matters, they tend to (tacitly) impute a non-strategic value to law compliance. And doing so invites the criticism that they are, at least partially, assuming

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61 To defend that compliance is still purely strategic even when it depends on reputational concerns, one could argue that each state believes that it is the only rational actor, while ascribing some degree of this “legalist sensitivity” to others. Of course, this belief is not an assumption easy to accept. In any case, to my knowledge, no rationalist explanation of compliance makes this argument.


63 In his reputation-based theory of compliance, Andrew Guzman suggests that we think of reputation as an estimate of a state’s discount rate. The better its reputation for compliance, the less the state is expected to discount future gains of cooperation (i.e. the greater the “shadow of the future”).

“If improving one’s reputation can yield value in the form of higher payoffs, then states have an incentive to develop and maintain a good reputation. They can do so by complying with existing obligations even when, absent a concern for reputation, it might be in their interest to violate them. One can think of decisions to comply in these situations as costly signals that serve to enhance a state’s reputation for compliance.” (2008: 36)

This argument is internally inconsistent. If, absent a concern for reputation, it is in the state’s interest to breach the law, this necessarily implies a high discount rate (hence the low present value of complying). In this situation, the argument goes, the state will still choose to comply so that it will develop a good reputation, because a good reputation will increase the state’s ability to collect cooperative surpluses in the future. But why would the state care about future cooperation if it has a high discount rate in the first place? A concern for reputation implies a significant shadow of the future; but then it is the gains from future cooperation, and not a concern for reputation, that makes compliance the state’s preferred policy. As Guzman admits, “[i]f states do not value their reputations, of course, no incentive for compliance is generated” (40). But if states do value their reputations, then reputational concerns are no longer needed to explain compliance. In short, reputation does nothing to explain compliance – unless with reputation one smuggles in a non-strategic logic of behavior.
that which they claim to explain. Note that it is not problematic to assert, in the context of explaining compliance, that states have a preference for complying with international law; but it is problematic to assume it. By assuming a preference for compliance, the theory fails to explain the compliance puzzle. The puzzle is assumed away.

This last note may be less pertinent to those theories of compliance that, while also relying on a strategic logic, focus less on the strategic interactions between rational states seeking to realize common interests, and more on domestic politics. The liberal strand of the rational-choice paradigm explains compliance by relying on domestic political costs that governments sometimes face when they fail to comply with rules of international law. Be it for material, instrumental reasons or for more normative ones, domestic interest-groups may prefer that the state conforms to the law. The government expects their support when complying and their punishment when failing to comply. To the extent the interest-group’s preference is oriented not to a specific policy but to legal compliance itself, the government’s strategic choice to comply is law-induced. Otherwise, the same critique made above to institutionalist theories applies here too. This compliance factor is arguably stronger in liberal democracies, where interest-groups tend to be more politically empowered.64

Constructivists (especially the most empirically oriented ones) have also relied on instrumentalism to explain compliance.65 These scholars typically show how norms are strategically used by certain actors to alter states’ preferences over policies – what some

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64 Slaughter 1995.
call “strategic social construction.” Given the newly signaled consequences of (not) complying, the state’s best strategy is now to comply with the norm. In short, what norm entrepreneurs and bottom-up and horizontal pressure do is not to change the interests of the state – i.e. its preferences over outcomes. They simply alter the strategic setting so that, based on new expectations about others and thus new expected consequences of compliance, complying becomes the preferred strategy for the state (whose preferences over outcomes remain the same). There is no reconstitution of the state’s identity or anything of the sort. There are only new expectations about others, derived from new information these others have successfully conveyed. Not surprisingly, the most interesting part of these explanatory accounts becomes the “norm cascade” phase – that is, the part of the story in which (given) norm entrepreneurs amass sufficient support to create a new norm-promoting actor with sufficient power to be taken into account by states. Looking at this through the prism of realist skepticism, the interesting question becomes whether international law had anything to do with that persuasion cascade. If so, how does the invocation of legal rules contribute to persuading others (i.e. to “social learning”)? And, again, can international law contribute to persuasion if compliance itself does not have any non-strategic value?

A key aspect of the constructivist accounts just referenced is their contention that what is at first simple learning by the state eventually becomes complex learning. As described, simple learning implies that states acquire new information as a result of interaction, and then use this information to alter their strategic choices (while their given

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66 Checkel 2001: 559.
preferences over outcomes remain constant). Complex learning, on the other hand, is a process whereby states’ interests are themselves reconfigured through and during interaction. Consequently, strategic choices change not due to changes in expectations about consequences, but instead due to a new understanding by the learning state of what is good for itself (i.e. due to a re-ordering of the possible outcomes).\textsuperscript{67} Compliance explained through complex learning, however, is only slightly different from the compliance explained by institutionalism. The difference between the two lies not in the link between interests and the compliance-choice – which remains a strategic, consequentialist link – but rather in the genesis of the explanatory interests. While these are exogenous in institutionalist accounts, they (and their capacity to change) are explained by constructivists. The key question remains whether international law is a relevant or a negligible factor in the process of complex learning, because on that hinges whether the resulting compliance is genuine or spurious. Norms and normative argumentation are typically important in complex learning, but this is usually embedded in a different, non-instrumental logic of social action.

\textit{Normative compliance}

Theories of compliance that rely on the logic of appropriateness argue that states, as normative actors or role-players, comply with international law because they find it is the “right” thing to do. Norms are understood as "prescriptions for action in situations of choice, carrying a sense of obligation, a sense that they ought to be followed."\textsuperscript{68} Through

\textsuperscript{67} Ibid., pp. 560-562.
\textsuperscript{68} Chayes & Chayes 1995: 113.
interactions with others, norms are internalized by the state and, “[o]nce internalised, norms are enacted automatically by actors.”\textsuperscript{69}

In this sense, these norm-oriented theories explain compliance based on a preference to comply with international law - that is, either a general predisposition to abide by the law or a preference to follow particular rules. The core task of these theories is to explain why states have such a preference that leads to compliance, where that preference comes from.

Managerial theories of compliance start with "the background assumption of a general propensity of states to comply with international obligations."\textsuperscript{70} Managerialists argue that this assumption is safe to make because of theoretical and empirical reasons. Empirically, the propensity to comply, they hold, is "the basis on which most practitioners carry out their work."\textsuperscript{71} Theoretically, they argue that states would not endorse a binding agreement if they did not intend to honor it.\textsuperscript{72} Of course, there are multiple reasons why this is not true. To mention an obvious one, a state may bind itself without the intention to follow through simply because endorsing the agreement sends a deceitful signal to the other parties, which will elicit their cooperation. In any case, managerialism reverses the puzzle. Compliance is expected. What is puzzling is noncompliance. The latter is "endemic rather than deliberate," by which they mean that noncompliance, for the most part, is either apparent (i.e. compliance miscategorized due to rule ambiguity or premature measurement) or a result of a state's incapacity to comply.

\textsuperscript{69} Armstrong et al 2007: 98.
\textsuperscript{70} Chayes & Chayes 1993: 178.
\textsuperscript{71} Ibid., p. 178.
\textsuperscript{72} Ibid., p. 184.
Note, however, that compliance is no longer puzzling by assumption, not because it has been explained away. In short, making an eclectic appeal to both appropriateness and instrumentality, managerialism “explains” compliance as normal because rules reflect state interests, or because they carry with them an obligation to comply that states internalize, or both. Consequently, noncompliance, when genuine, is unintended and can be fixed through capacity building.\(^73\)

On a similar vein, much of the scholarship in International Law explains compliance as the adoption of a certain course of action in conformity with a rule because of the rule’s validity, which is usually derived from the legitimacy of the process through which the rule was created. Here compliance is backward-looking in that it looks at where the rule came from, rather than reflect on its substantive contents or anticipate the consequences of complying with it. According to Franck’s legitimacy theory, for example, rules exert a compliance-pull on states determined by the rule-making process and certain qualities of the rule itself.\(^74\)

One comparative disadvantage of these normative-choice theories is that the causal mechanism that connects the internalized norm and the law-conforming behavior is typically assumed as automatic and left underspecified. Indeed, a norm is considered internalized when it achieves a “[…] ‘taken-for-granted’ quality that makes conformance with the norm almost automatic.”\(^75\) While we know how cost-benefit calculations are (supposed to be) made, we know little about how appropriateness is assessed in a given

\(^73\) The value of managerialism is better appreciated when understood as a complement of enforcement theory (each applying under complementary scope conditions) rather than an alternative to it.
\(^74\) Franck 1990.
\(^75\) Finnemore & Sikkink 1998: 904.
situation – a process which one would expect to be quite complex. Consequently, while it is easy to objectively point to mistakes in utility-maximizing calculations, it is very hard to spot flaws in the process of evaluating the normative rightness of an action. Not just the input but input-processing itself seems to be subjective, and this raises epistemological issues – how can we tell if an assessment of appropriateness was behind the action at all?

Some constructivists have enriched the approach significantly by theorizing and tracing empirically how norms become internalized. In an early stage of socialization, states behave as instrumental actors and compliance results from normative coercion, which raises the cost of noncompliance through social sanctions (both domestic and international), or from genuine persuasion which leads to “simple learning,” or a combination of both. Later, once the norm has been internalized, the state starts to act as a normative actor and compliance results from the appropriateness of observing the specific norm. Norm socialization, which causes and therefore precedes norm internalization, is however no substitute for the explanatory mechanism that links the norm, once internalized, to behavior. Normative-choice theories, in general, are rather limited as expounders of how compliance with international law occurs, even though they have become very successful at explaining how norms become internalized. In this sense, these theories are better at accounting for the construction, diffusion and stability of norms than at explicating their behavioral consequences – i.e. compliance proper.

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76 See fn 65.
77 Alkoby 2008.
There is yet another problem with constructivist scholarship on norms. Most constructivist accounts refer to the content of norms, not to their status. It is the content that is ultimately internalized into the value set of states and re-defines their interests. For example, in typical constructivist accounts of compliance a state will not practice genocide because such a practice is not right, not because it has ratified the Genocide Convention. Moreover, the “no genocide” norm is internalized through a process of socialization which has little (if anything) to do with international law per se. In short, it is not clear that international law has any independent effect on norm internalization, and, once the norm is internalized, international law still has no independent effect on behavior. The content of the norm does all the work, not its legal status. Paradoxically, most constructivist works on norms end up confirming the realist critique of the epiphenomenality of international law. Compliance turns out to be merely apparent, as the law-conforming behavior is not caused by the law but by the normative preferences of the state (themselves shaped by socialization where legality plays apparently no part).

Were the treaty to disappear, behavior would remain the same. International law is complied with because it happens to match internalized norms, not because it matters per se. This problem vanishes, however, with a foundational norm like pacta sunt servanda, a generic prescription to conform to the law. If this “norm of norms” is internalized, the state feels compelled to obey the law (whatever its content). Now the new problem is how to account for instances of non-compliance – but managerialism may have the answer, as explained above. So now the real task becomes an empirical one: to provide

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80 Finnemore 2000.
evidence that such a profoundly consequential meta-norm is, in fact, internalized by states. To do this, the best strategy is to look at the state’s internal constitution and at the organizational process through which decisions are actually made.

**Organizational compliance**

Most theories of compliance seek to explain the state’s choice (not) to comply. This is reflected in the opening of one of the seminal works on legal compliance:

> The issue of compliance invariably poses problems of choice for those who are subject to specific behavioral prescriptions. This is so whether a given actor ultimately chooses to comply or not to comply, either on the basis of conscious calculations or of subconscious forces. Consequently, the phenomenon of compliance is amenable to analysis in terms of various theories of choice.\(^{81}\)

But not all the mechanisms of compliance studied necessarily rely on a volitional logic of the implied sort. Organizational theories of compliance posit that compliance is not caused by a single, unitary choice – be it of a utilitarian or a normative nature – but rather by a process. The process ultimately culminates in a choice, but this choice cannot be fully accounted for without looking at the process the choice is the result of. What other theories tend to reduce to a more or less minimalist mental process – call it “expected utility maximization” or “assessment of appropriateness” – organizational theorists bring to the center of their explanations and empirical research. Scrutinizing the causal mechanism itself is here the main theoretical and empirical task.

Roger Fisher grasped this distinct logic of compliance back in 1962. He argued that besides instrumental or normative incentives that make violations of the law.

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\(^{81}\) Young 1979: 1.
unreasonable or wrong, respectively, certain barriers may produce compliance by making violations difficult to carry through. “We may seek to control a horse by a judicious use of the carrot and the stick – or we may build a fence.” 82 The decision to build “compliance fences” may certainly be the result of instrumental calculations or normative considerations, but the causal process through which a fence generates compliance cannot be described as either strategic or normative. In the case of states, these “fences” are typically institutional rules which regulate how policy decisions are made. 83 As Fisher argued, the rules which hold the state apparatus together, which make it be what it is and function as it does, cannot easily be overridden by any one individual, even an individual on top. 84 These rules can constitute decision-making mechanisms that make noncompliance difficult to occur.

Michael Barnett and Martha Finnemore have argued that international bureaucracies (such as the European Central Bank) can develop this kind of organizational mechanisms – as well as normative ones – that make it hard for states not to comply with certain rules of international law. 85 Due to the prevalence of state sovereignty and international anarchy, however, the organization within which these “fencing” mechanisms operate is typically a domestic one – be it the state itself or a part thereof, such as the executive branch, the military, or the Supreme Court. In this sense,

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82 Fisher 1962: 106.
83 In this sense, a better analogy would substitute the external fence with some restraining device internal to the horse (genetic engineering?).
certain organizational processes function as a domestic system of compliance with international law.\(^86\)

The most prominent – and promising – theories of organizational compliance are second-image theories\(^87\) that I will group as “domestication theory.” At the core of domestication theory lies the notion that “[…] one of the best ways of causing respect for international law is to make it indistinguishable from domestic law.”\(^88\) This is especially true in the case of states with strong domestic legal systems, a characteristic which has been linked by liberal theorists to the type of political regime.\(^89\) “World Society” scholars have accounted for the global diffusion of these organizational mechanisms. They posit a world cultural model that imposes an institutional template which states adopt due to a mix of normative and organizational imperatives.\(^90\) Anne-Marie Slaughter and Walter Mattli studied compliance with decisions of the European Court of Justice and argue that supranational rulings are complied with because of the institutional linkage between the regional court and domestic courts. Governments simply cannot ignore the judgments of their domestic courts that incorporate the supranational ruling.\(^91\) In the context of this legal integration, the supranational ruling is complied with because it has become a

\(^{86}\) Short of providing a full theorization of it, Keohane has made reference to organizational process as a source of compliance in what he called “institutional enmeshment.” Institutional enmeshment was defined as “a situation in which domestic decision making with respect to an international commitment is affected by the institutional arrangements established in the course of making or maintaining the commitment” (1992: 180). This points to regime-specific compliance systems within or across states. See also Henkin 1979: 60-68.

\(^{87}\) In International Relations, the “second image” corresponds to explanations that locate the explanatory variables at the level of the state. First- and third-image theories, on the other hand, explain international phenomena in virtue of characteristics of the individual and the international system, respectively.

\(^{88}\) Fisher 1981: 141.

\(^{89}\) Slaughter 1995.


\(^{91}\) Burley & Mattli 1993. See also Kratochwil 1985; Slaughter & Burke-White 2006.
domestic one. Similarly, the “transnational legal process” approach developed by Koh accounts for compliance ultimately by reference to the internalization of international law. The transnational legal process, mainly driven by a normative logic, culminates with the integration of international legal rules into national law. These rules are then obeyed by the state because they have acquired the status of internally binding domestic legal obligations enforced by the courts.\textsuperscript{92} Koh refers to this as “internalized compliance.”

When compliance occurs through domestication, however, compliance with international law as such becomes somewhat epiphenomenal.\textsuperscript{93} As Thomas Franck stated in a commentary on Koh, “[…] national law makes real that which, as international law, is mere aspiration.”\textsuperscript{94} The “domestication” approach enjoys the empirical support conferred by an increasing internalization of international law. It is also theoretically robust in that it provides not only the causal mechanisms that explain how international legal rules become internalized (which it borrows from constructivism), but also those organizational ones that explain how, once internalized, the norm generates compliance. In this sense, this approach has an explanatory completeness superior to most other compliance theories. But notice that the legal-process explanation of compliance ultimately hinges on the internalization of a specific rule rather than that of a general compliance mechanism. Because it deals with domesticated international law, there is no

\textsuperscript{92} Koh 1998.

\textsuperscript{93} To the extent domestic law is modified as a result of international legal obligations, domestication theory does pass the realist skeptic’s test. This is clearly the case, for example, when domestic courts apply international rules directly or turn to international rulings for interpretive guidelines. However, unless international law enters the domestic legal process as such, the causal power of international law is rather fleeting. Being its domestic correlate the one affecting behavior, international law is causally numb after it is incorporated into the domestic legal system.

\textsuperscript{94} Franck 1998: 685.
need to look for and explicate such an internal mechanism of international law compliance. The traditional mechanisms of domestic law compliance do all the work. But what about non-internalized international law? How is that complied with (to the extent it is)? Is it really true that, in order for compliance to occur, we need to “bring international law home”?95

The theory I propose here is centered on the institutional empowerment of legal bureaucracies in the government and the military. Legal advisors steer the decision-making process towards compliance with international law.96 Their organizational duty is to guard the international legitimacy of foreign policy decisions by reducing the dissonance between those policies and international legal expectations. Because legal advisors work with international law as such (be it domesticated or not), and affect even those foreign-policy matters that fall outside the competence of the courts, this theory is a good complement to domestication theory.

Summing up, the strategic and normative logics of compliance implicate a decision-maker whose choice to comply or not is only constrained by external forces, be it the expected reactions of others (domestic or transnational actors, states) or their ex-ante socializing power. An organizational logic of compliance entails a mechanistic, rather than a volitional, path through which the compliance decision is reached. In the case of organizational mechanisms operating within the state – second-image theories – their intrusion in the decision-making process tends to make the volitional logics of compliance – both strategic and normative – less adequate and the theories based on them

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96 Johnsen (2007) refers to legal advisors as the internal legal constraints on the U.S. Presidency.
less useful to understand why compliance happens. By the time the final decision is made, non-compliance is already unlikely or even off the table. The reason why compliance is no longer volitional is not that international anarchy has been overcome and international law is now being effectively imposed on the state from a supranational authority. The reason is that international law is being imposed from within, through authoritative organizational structures internal to, and constitutive of, the very decision-maker (i.e. the state). Because international law is empowered in certain organizational elements that structure how decisions are made, international law has partially colonized the very “will” of the state. Under these conditions, choosing to comply is no longer a matter of assessing appropriateness or calculating costs and benefits. It is a matter of applying the authoritatively established process through which decisions are made. Being authoritatively established, this process is not applied as a matter of (strategic or normative) choice. This is why the resulting compliance is less volitional than it is determined by the “gears” of the decision-making machinery. For its theoretical completeness and empirical robustness, domestication theory stands out as providing the most satisfactory explanatory accounts of compliance with international law. The theory I develop here – lawyerization theory – should be seen as an extension of domestication theory, bringing to the fore an internal organizational mechanism of compliance relatively neglected in extant explanations.
1.2.2 The discursive construction of compliance

Benedict Kingsbury once said that the concept of legal compliance cannot have any meaning “except as a function of prior theories of the nature and operation of the law to which it pertains.” It is equally true that explaining why states comply is conditioned by how compliance itself is understood. So before unfolding my theory of compliance in the next chapter, it is important that I spend some time clarifying – and justifying – how I propose to think about compliance with international law.

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Compliance refers to a relationship between facts and norms. The compliance literature treats these two elements in strikingly different ways. International law is always given and fixed, and thus variation in compliance is always exclusively given by variation in behavior. Behavior is the moving factor, and explaining compliance becomes showing why and how behavior moves closer to the law or further away from it. The present work, however, attempts to show that compliance results from what states do onto the facts and what they do onto the law. The relationship between foreign policy and international law is affected by the behavior of states and its legal meaning. The legal meaning of state actions is constructed through the interpretations of the law that states try to persuade others about.

What is “compliance”?

In International Relations, compliance typically implicates an objective quality of the actions of states. This objective quality is more or less easily appraised. All it takes is to know the facts and to know the law. Put law and facts together – if they are compatible, there is compliance; if not, a legal breach has occurred. As a general formula, this is a good starting point. Its only problem is being too simplistic. In effect, it simplifies away what is most important to understand the political nature of international law compliance.

And yet, even when acknowledging on the side the irreducible indeterminacy of the law and its dependence on necessarily subjective interpretation, most compliance studies center on an “objectified” version of norm-fact correspondence. Consider, for example, the following clarification made by Mitchell:
While recognizing that treaties may induce positive behavioural change that nonetheless fails to achieve an established standard, I exclude from my definition [of “treaty-induced compliance”] the notion of ‘compliance with the spirit of an agreement’ which introduces unnecessary subjectivity into empirical analyses.98

The author implies that there is a categorical difference between, on the one hand, the relationship between behavior and a specified treaty provision, and, on the other hand, the relationship between behavior and the “spirit” of the treaty. Unlike the latter relationship, which depends on the subjective interpretation of what the “spirit” of the treaty really is, the former relationship rests on such an “established standard” that it can be treated as an objective correspondence between facts and norms. Facts and norms speak for themselves as to how much they are in harmony with each other.

Let us concede for a moment that norms and behavior are “brute facts” that can exist in isolation.99 How does a State demonstrate compliance? Quite simply, it presents the relevant facts and the applicable law. With the raw facts in front of them, the others will see the self-evident compatibility this beholder sees. In short, demonstrating that an action is in compliance with international law would not be unlike demonstrating that this ink is black.

State practice in this regard, however, shows a more complex process of compliance demonstration. Rather than simply expose brute facts for the world to see, states create the social fact of compliance by engaging in a practice of legal

98 1996: 5.
99 John Searle (1995) calls “brute facts” those facts that, like mountains, can exist independently of any perceiver or mental state. Searle distinguished brute facts from social facts, which, like winks, cannot exist apart from shared beliefs, desires or intentions (i.e. collective intentionality). A subclass of social facts, which he calls “institutional facts,” require human institutions for their very existence. I argue that the legal status of state actions, which compliance implicates, is an institutional fact – although treated as a brute fact by much of the literature.
argumentation. In this sense, international law is a process. “Actors assume the existence of a set of socially sanctioned rules, but international law ‘lives’ in the way in which they reason argumentatively about the form of these rules, what they prescribe or proscribe, [...] and about whether a certain action or inaction is covered by a given rule.”\textsuperscript{100} This is a collective act. States (and other relevant actors) construct, as a group, a given action as being in compliance (or not) with international law. In the context of this collective enterprise, a state’s individual contribution to the discussion, if persuasive, can be crucial in determining the outcome of the collective reasoning.

This “compliance” is ontologically very different from the raw-factual conception of compliance commonly used in scholarly research. As further developed in this section, there are two important implications contained in this rethinking of what compliance is. First of all is the conceptual necessity that compliance refers to action and not merely to behavior. While behavior can be objectively appraised, “action” is behavior that cannot exist apart from a social context. Second, and consequently, an action is what the collectivity makes of it. What does compliance refer to in this context? It refers to a behavior which, through collective legal reasoning, becomes widely regarded as falling within the boundaries of what international law prescribes and outside the boundaries of what it proscribes. This \textit{becoming} depends on what states do and argue. In a nutshell, when it is so conceived, the very nature of compliance highlights the importance of arguing as much as behaving.

\textsuperscript{100} Reus-Smit 2004: 41. See also Kratochwil 1989: 40-43.
Compliance and the practice of legitimation

Let me take one step back and build on the assertion made in Section 1.1 that, in a legalized world, to comply with international law is to legitimate one’s behavior. I just suggested that legitimation is not automatic but constructed by choosing a successful combination of behavior and legal arguments. As Clark puts it, “the way in which general principles are applied to particular cases tells us much about legitimacy as an actual practice, not simply as an abstract idea.”\(^{101}\) Note in this respect that the legitimizing force of complying with international law comes from the international legal system as a whole.\(^{102}\) It is to the system rather than specific norms that states profess unquestioned allegiance to. However, whereas legitimacy refers to the idea of international law, legality is derived from specific legal norms. Thus, compliance depends on the success of a particular practice of legitimation – that of demonstrating a correspondence between behavior and concrete legal rules which denotes support for the international rule of law.

What does it mean to say that compliance results from a successful practice of legitimation? First off, practices here are much more than behavior. Practices are constituted by actions, and actions are defined as meaningful behavior. Practices therefore have both a behavioral and a discursive component – the latter giving meaning to behavior and transforming it into a particular action. As Adler and Pouliot put it, “[…] practice weaves together the discursive and material worlds.”\(^{103}\)

\(^{101}\) Clark 2005: 14.  
\(^{102}\) Scott 1994: 317; Brunnée & Toope 2010: 53.  
\(^{103}\) 2011: 7.
Just as action is different from mere behavior, so practices might be differentiated from (other) actions. Following Adler and Pouliot, practices can be defined as “patterned actions that are embedded in particular organized contexts,” or, more extensively, as “socially meaningful patterns of action, which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world [i.e. the realm of behaviors].”

In the case of the practice of constructing legal compliance, the institutional context is the set of principles, rules and organizations that make up international law. Arguing the legality of behavior is a process embedded in and patterned by these elements. The action is performed on a regular basis with the purpose of establishing that what the state did (or is planning to do) is an act of compliance.

By invading the Falklands/Malvinas, for instance, Argentina failed to perform competently the practice of legitimation. This is not simply because the invasion (as behavior) was contrary to international law. It is because the legal arguments used by many to condemn the invasion were very persuasive, whereas the legal reading of the

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104 Scott Cook and John Seely Brown illustrate the differences: “In the simplest case, if Vance’s knee jerks, that is behavior. When Vance raps his knee with a physician’s hammer to check his reflexes, it is behavior that has meaning, and thus is what we call action. If his physician raps his knee as part of an examination, it is practice. This is because the meaning of her action comes from the organized contexts of her training and ongoing work in medicine (where it can draw on, contribute to, and be evaluated in the work of others in her field)” (cited in Adler & Pouliot 2011: 5, fn. 2).
106 In explicating practice as “competent performance”, Adler and Pouliot state that “practice is more or less competent in a socially meaningful and recognizable way. The structured dimension of practice stems […] primarily] from the fact that groups of individuals tend to interpret its performance along similar standards. Social recognition is thus a fundamental aspect of practice; its (in)competence is never inherent but attributed in and through social relations. The notion of performance implies that of a public, of an audience able to appraise the practice” (2011: 6-7). Particularly important for the present work is that the standards through which the practice is appraised by the relevant audience refer to what the authors call “background knowledge,” which in this context can be primarily read as legal expertise.
situation held by Argentina failed to persuade the international community. In the
competition over the fixation of the legal meaning of the invasion, Argentina lost. The
corollary being that the military adventure was unlawful and, consequently, illegitimate.

The example shows that compliance (or legal breach) is not inherent in behavior.
It is a quality that emerges from a particular combination of behavior and argumentation.
In other words, an action, not just a behavior, can be said to be in compliance with or in
violation of international law. Behavior is the brute fact on which compliance is to be
built. The construction of an action out of a behavior takes us to the discursive dimension
of the practice of building compliance. This seemingly innocuous conceptual move –
from behavior to action/practice – has profound implications for understanding how
international law affects international politics. First, if looking at behavior alone is not
sufficient to establish whether a state has acted lawfully or not, then attention to discourse
becomes necessary and inevitable. Second, by placing discourse hand in hand with
behavior as the focus of study, framing and arguing (and their persuasiveness) become,
together with behavior, the determinants of lawfulness. Thus law by itself is
indeterminate as a source of legitimacy – i.e. its legitimating stamp is discursively
contested.\footnote{Scott 2004: 121-131. This discursive negotiation over the legal meaning of foreign-policy actions is
somewhat evocative of the “logic of arguing” in IR (Risse 2000). That being said, the Habermasian
approach to social action tends to focus on the interactive stage of “truth-seeking” negotiation – what could
be called, in this context, “international legal diplomacy.” As a theory of the role of international law in
foreign policy making and implementation, the present work focuses on the unilateral stage of that
international negotiation. The stage of multilateral deliberation enters the picture only as anticipated by
foreign-policy decision makers. In this sense there is no actual interstate arguing in this theory but only the
anticipation of it. Legal advisors are important precisely to inform these expectations about the
international debate one’s actions will be subjected to – they can reliably anticipate the chances that one’s
legal rhetoric will become the “reasoned consensus” in the international public sphere; in other words, the
chances that the practice of legitimation (compliance building) will be performed competently.} Naturally, the involvement of international legal experts is critical in this
competition over the legal meaning of foreign policies. In short, compliance is not only manifested behaviorally; it is also discursively constructed. Compliance is the result of a practice, and as such it cannot be reduced to either behaving or arguing alone.

Let me synthesize what I have established so far. First off, what effectively counts as compliance is not fully given prior to complying.\(^{108}\) A particular behavior is \textit{not} performed as an act of compliance; it \textit{becomes} an act of compliance (or not). Between behavior and compliance stands the behavior’s legal meaning. Second, this legal meaning is not automatic or self-generated. It is determined by a relevant audience—namely, the society of states. The audience collectively interprets the behavior and transforms it into an act of compliance with (or a breach of) international law. Third, this collective interpretation—on which the behavior’s legality depends—is forged through a process of argumentation in which states offer different legal claims and counter-claims with the purpose of fixing the legal meaning of the behavior in question. The relative persuasiveness of the competing arguments determines the \textit{resulting} compatibility between the behavior and the law—i.e. compliance. And fourth, because legitimacy depends on legality, as already discussed, the process of compliance construction results in the international (de)legitimation of the conduct in question—hence compliance as the

\(^{108}\) Note the points of contact here with the policy-oriented legal theory of the New Haven school (McDougal & Lasswell 1959; McDougal 1960; McDougal & Reisman 1983). A major difference between their conception of compliance and mine is that for McDougal and his followers the boundary of what counts as compliance and what does not can never really be known—in fact, it can never really \textit{exist}. Subjects of international law are ultimately only obligated to engage in a collective process oriented towards finding an interpretation of the law which best serves the value of “human dignity.” That collective search for the right law never reaches its \textit{telos}. “It seems to see law not as is but as becoming, and to ask not what the law is but what it ought to be” (Henkin 1979: 40). This is very different from my conception of the legal process, in which the law \textit{is} and does have a meaning—even if it is not objectively given but intersubjectively constructed. In other words, I understand compliance as ontologically intersubjective but epistemologically objective. This crucial difference explains why attempting to draw a theory of compliance from the New Haven school is inevitably a stretch.
result of a practice of legitimation. In this context, explaining compliance is explaining why states tend to engage in behavior that is likely to become consistent with international law and why they tend to refrain from behavior that is likely to become inconsistent with international law.

A continuum of compliance

I have tried to establish in the preceding paragraphs that the lawfulness of state actions depends, in part, on how states use the legal discourse to frame those actions and to argue in favor or against their legality. More specifically, compliance will emerge through the persuasiveness with which states argue for it, and that persuasiveness depends on the behavior itself and the arguments used to qualify that behavior. Legally framed arguments, however, are not either persuasive or not persuasive. Instead, they produce degrees of persuasion. If lawfulness is determined by discursive persuasiveness, and persuasiveness admits degrees, then one would expect actions to be more or less lawful rather than either lawful or unlawful. In short, moving from behavior to action makes discursive framing central to the understanding of compliance; and placing discourse at the center stage dissolves the discreteness of compliance into a continuum.109 Whereas behavior has an objective existence – bombing is bombing just as blue is blue – actions are pinned to a single behavior but can be attached to several meanings derived from international law – bombing can be an act of aggression, the implementation of a UN Security Council mandate, or an exercise of the right of self-defense. The relative strength of the different legal readings will determine the degree of lawfulness that the

109 This is consistent with the managerial model (Chayes & Chayes 1993: 197-204).
foreign policy action successfully claims for itself. Figure 1.8 is a schematic representation of the conceptualization of compliance I just explained.

It may be objected that when a case is resolved in court each of the different actions considered are ruled to be either in accordance with or in violation of international law – not more or less lawful, or more or less in breach. This is true. However, when it comes to international politics, courts are not the relevant audience for states. They are relevant as a judicial authority, not as a political audience. The legal reading of a state’s action by the World Court, for example, settles the issue of the legality of that action. Authoritative as it is, the ruling definitively persuades the political audience about the true legal meaning of the action in question. Persuading the Court in one’s favor is therefore crucial for persuading the relevant audience. Once the Court has ruled, the audience is no longer up for persuasion. Any further arguing is rendered

\footnote{Scott 1995: 296; Ratner 2002: 914.}
ineffective. The point is that the Court will be more or less persuaded, but as a judicial body committed to a legal-positivist reading of reality, it is forced to translate that degree of persuasion into a categorical legal/illegal answer. In Georgiev’s words, “[i]ndeterminacy and contradictions are pushed away into the non-legal spheres.” The political audience, on the other hand, does not need to reach such a categorical verdict. In short, international law as a source of legitimacy is indeterminate and admits degrees of conformity to it. The political effects of international law materialize in the negotiated assessment made by other states (and other relevant actors) of the legality of our actions. That assessment results from the degree of persuasiveness of our arguments (and those of others) and naturally comes in different shades itself. Legal compliance therefore becomes a continuous variable. When understood as dealing with a continuum rather than a discrete phenomenon, compliance research becomes more adequate to explore all the effects that international law may have on behavior – including those falling short of “perfect” compliance (i.e. “C” in figure 1.9)."^^\footnote{111 1993: 12. \footnote{112 Raustiala & Slaughter 2002: 539.}
A note on rhetoric and behavior

Bringing discourse to the center of the study of legal compliance may contribute to some skepticism about the political relevance of international law. In effect, one might suspect international law can only explain the rhetoric of international politics (what states say), but not its actual behavioral content (what states do), and then wonder why political scientists should care about it. After all, should we not be ultimately interested in explaining political behavior? The answer I hope to have provided to this line of skepticism rests on something that is neither sophisticated nor new: discourse does not “just” frame behavior; its function in politics is not one of mere ornamentation. Being mutually constitutive, action is shaped by discourse.

Still, doesn’t such an understanding of compliance necessarily breed theories that explain the pretense of compliance rather than actual compliance? No. The pretense of compliance (i.e. making a legal argument) does not cast legitimacy on state’s actions. For

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this to happen the pretense must be *successful*, i.e. believed by the relevant audience. The international community must be persuaded that your action was legally permissible. Establishing this belief is what states seek, not mere pretense. What is the difference between “successful pretense of compliance” and actual compliance? It is the same as the difference between being innocent of a crime and persuading the jury of one’s innocence. For all practical purposes, there is no difference. There could be some difference between the two if compliance were objectively determined. If compliance is determined intersubjectively, however, does it even make sense to talk about pretense anymore?

Pretense implies portraying something as if it were something else. To the extent the international community is persuaded, was the real thing really something *else*? Or does the approval by the international community imply that the real and the pretended were one and the same thing – and, consequently, that it makes no sense to talk about pretense anymore?

You don’t need to concede as much. A lighter claim would suffice. Suppose there is a “real” legal status, and then there is the legal status the international community ascribes. For politics, only the latter matters. Because the legitimacy effect is derived from the international community’s assessment of your actions, not from their “real” legal status – just as a criminal feels the weight of the law depending on whether he was *found* guilty, not on whether he “really” is.¹¹⁴

¹¹⁴ The existence of a “real” legal status would depend on the law while at the same time be independent from the (inter)subjective interpretation of the law. This makes sense only to the extent the law itself exists prior to interpretation. This latter claim, and consequently the preceding one as well, seem to me rather mythical and untenable.
Let me stress the intersubjectivity of legal status once again. Whether an action is an act of compliance or not is not determined by the behavior itself. It is determined by how the relevant audience regards that behavior. International law does not classify state behavior. It is the international community which uses international law to classify the behavior of its members. In this sense, we should not see what states do as being compliance but rather as becoming or being turned into compliance.115 This may sound counterintuitive but in fact this mediated, non-automatic and retroactive acquisition of legal status is common to all systems of law, not just international law. Think, for instance, of the crime of murder under domestic law. Killing is not a crime when performed. It becomes a crime (or not) retroactively, when an authoritative court pronounces that verdict (based on its interpretation of the law and the facts).

The real issue here is not retroactivity, but the fact that legal status is not inherent in behavior but rather something it is invested with by the international community. Far from capricious, the international community’s assessment of the legality of an action is constrained by international law. This has two important implications. First, it implies that one can, with varying probability depending on the case, anticipate the verdict on one’s actions (if one knows the law). And second, depending on the level of indeterminacy of the applicable law, good legal argumentation might make a big difference as to how one’s action is regarded by others. In short, these two implications

115 This acquisition of legal status is not always retroactive. But it typically is, in the sense that first the action is performed and later the international community interprets and reacts to it. This order of things is not necessary, though. When a State announces publicly what it is planning to do, the international community may interpret the action described and classify it as compliance or non-compliance before the action is performed. Even in these cases, however, the “legitimacy effect” tends to materialize after performance of the action, not in advance.
underscore the importance of (i) being knowledgeable in international law, and (ii) being able to manipulate the legal discourse. This puts international lawyers in a privileged position within the interpretive community.

Does this manipulation of the law’s indeterminacy imply that the international community will classify states’ behavior in unpredictable ways? Of course not. But the point is that the opposite is not true either: not every behavior admits a single, necessary classification under international law. What matters is what action that behavior is (successfully) portrayed to constitute. Was the invasion of Afghanistan in 2001 seen as a reprisal, or was it seen as a legitimate exercise of the right of self-defense? Was the categorization self-evident or did it depend on the legal arguments and counter-arguments exchanged?

The discursive hegemony of international law is not just about the rhetoric of international politics. If I am allowed the metaphor, my argument is that international law is not just the package in which an already decided foreign policy is delivered. Foreign policy is shaped to fit in the package. It is true that the legal package is flexible, but it is also true that its flexibility is limited. For the packaging to be esthetically appealing, so to say, foreign policy will typically need some reshaping. One corollary of this is that we cannot learn about the role of international law in international politics by just looking at the “delivered item.” Such a “black box” approach will not do. It will be necessary to delve into the micro-processes behind the formulation and implementation of policy decisions.
A focus on foreign-policy action, as a phenomenon that integrates behavior and discourse, discourages the theoretical distinction between decisions, on the one hand, and their discursive framing, on the other. Moreover, the micro-processes that constitute the making and implementation of foreign policy support this rejection of the distinction. In short, both in theory and in practice, the behavioral and discursive components of foreign policy are entangled in a way that makes it very hard, if not impossible, to separate and still make sense of them.

1.3 Outline of the dissertation and methodology

With legalization and the juridification of legitimacy as background, in the next chapter I elaborate an organizational theory of compliance based on the lawyerization of foreign-policy making. Lawyerization is defined as the structural empowerment of legal advisors in the decision-making process of the state. The chapter provides the tools to identify and measure lawyerization, and explicates how legal advising (under institutional conditions of high lawyerization) produces compliance with international law.

For the most part, the theory I develop in chapter 2 treats international legal institutions – such as international customary law, treaties and jurisprudence – as exogenous, showing how their presence constrains and enables states in their foreign policy actions. I say "for the most part" because there is a caveat to this exogeneity of legal norms. When legal advisors legitimize foreign policy through legal argumentation, they not only provide a particular interpretation of facts but also a particular interpretation of norms. In this sense, to the extent they succeed in persuading the
relevant audience, they have an effect on what the norm is (at least in that context) thus endogenizing international law.116 This being said, this process of law tinkering is addressed here only with the purpose of explaining compliance. The reverse causal path – i.e. from state actions to international law – is addressed in the final chapter as suggestion for future research.

As for research design, the primary goal here is not to test variable co-variation, but instead to put the theory’s causal mechanism itself to the test through within-case process tracing.117 In this sense, internal rather than external validity is the main pursuit. A central concern of process tracing is with “[…] sequences and mechanisms in the unfolding of hypothesized causal processes. […] The goal is to establish whether the events or processes within the case fit those predicted by alternative explanations.”118 Because the theory advanced here hypothesizes a sufficient, but not necessary, cause of compliance, the cases selected must have a significant level of lawyerization of foreign-policy making. In other words, the theory calls for a “positive on cause” design.119

The two empirical chapters – i.e. chapter 3 and 4 – have very different goals, as they attempt to put to the test different theoretical claims I make here. In the preceding sections I argued that in today’s legalized international system, international law should be understood as a tool of (de)legitimation – and the predominant one. In the same vein, in chapter 2 I posit that legal advisors understand their job as one of safeguarding the legitimacy of state actions under international law. The goal of chapter 3 is to test the

117 On process tracing as a method of scientific inquiry, see, for example, Bennett 2010; Brady 2010; George & Bennett 2005; George & McKeown 1985.
118 Bennett 2010: 208.
veracity of this claim about the juridification of international legitimacy and the consequent use of international law as a tool of legitimation. NATO’s intervention in Kosovo in 1999 is in this context a useful hard case. Conventional knowledge has it that the humanitarian intervention’s legitimacy rested almost exclusively on moral grounds. The dominant strategy of legitimation was founded, the argument goes, on the appeal to non-legal discourses of legitimacy, which questions my claims about the hegemonic status of the discourse of international law and the dependence of legitimacy on legality. Moreover, the intervention was widely recognized as “illegal but legitimate,” therefore breaking with the legitimacy-legality bind that I suggested here as the hallmark of a legalized political system. The chapter explores the strategies of legitimation used by supporters of the Kosovo intervention, as well as those used by their detractors, and concludes that the conventional understanding of the intervention’s legitimacy and of how it was built is wrong. As the evidence shows, the international legitimacy of the bombing of Yugoslavia was construed through, not despite, international law. This corroborates what the Kosovo case – more than any other case – was supposed to prove false; namely, that international law is the primary tool of legitimation in international politics.

Chapter 4 delves directly into the micro-processes of foreign-policy making. There I trace the decision-making processes that built and transformed the detention and interrogation programs of war detainees implemented by the United States during the first decade of the “War on Terror” (2001-2011). I show that, confirming my theory, legal advising was omnipresent in the process. Moreover, I show how the initial policies –
widely regarded as illegitimate – were steered into compliance with legal expectations because of the structural empowerment of legal advisors. This is a hard case of compliance with international law not only because it involves the “high politics” of national security but also because it constitutes a security crisis (rather than routine business as usual). Furthermore, the Bush administration was influenced by neo-conservatism, which is particularly defiant of international legal constraints on national sovereignty. This is therefore no easy case for institutional safeguards of compliance. In addition, this is a particularly fruitful case because it is prompted by an act of defiance of organizational imperatives. Absent deviation from the normal process, organizational forces, like good health, go mostly unnoticed. But when deviation occurs, and the dogs bark, this facilitates the observation of the institutional mechanisms in action, of the organizational processes that restore policy-making to its compliance-equilibrium.

I chose the United States for the case study in chapter 4 because of the hegemonic position it has enjoyed in international politics since the end of the Second World War. From the systemic perspective of international politics, U.S. foreign policy has an impact hardly rivaled by that of any other state. In addition, using a powerful country for the empirical examination of the theory is particularly challenging (and thus the results presumably more telling) in light of the notion that powerful actors have more resources to back their choices than just legal argumentation, and therefore they face a greater range of attractive options from which to choose. Simply put, showing that a hegemonic discourse has a significant impact on a powerful state is more telling than confirming the vulnerability of the weak vis-à-vis hegemonic structures. These characteristics which
make the United States a “hard case” presumably outweigh other characteristics which may make it an “easy case” – such as the heightened legalism of American political culture. In any case, the universal applicability of the theory is not the main concern here. I welcome skepticism in this respect, and hope that those who suspect the theory to have no applicability outside the U.S. case will put their suspicion to the test and generate the empirical studies that will settle the question.
CHAPTER 2
Lawyerized compliance

“The tools belong to the man who can use them.”

*Napoleon Bonaparte*

“It is hard to imagine another time in U.S. history when legal advice has been so much blamed for the conduct associated with an armed conflict.”

*David Kaye*¹

International law is the means through which states legitimize their actions. It is not the only means, but it is the predominant one – and increasingly so. “Credible legal arguments are needed if a state wants its arguments to have any type of legitimacy.”² It is therefore convenient to think of international law not so much as an external mold that states, for whatever reasons, force upon their political relations, but rather as a discursive tool that states manipulate with the goal of garnering the support of others (or at least inhibit their opposition).

In light of this, I propose to turn the question of the effectiveness of international law on international politics into an investigation about how the law is used by the state in the contemporary world. Does international law play a non-negligible role at the time

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¹ Principal staff attorney in the Office of the Legal Adviser of the Department of State (1999-2002).
² Borgen 2009b: 775.
of making foreign policy? In other words, if international law had not been there, would the process of decision-making and its outcome have been different? If so, then *how* is it that international law makes a difference? As a mere tool, the law cannot do anything on its own. *Who* brings international law into the decision-making process? What factors determine *how* those actors use international law to shape foreign policy? What factors account for the actual imprint international law leaves on those actions?

In order to legitimate their actions states must show that these are not contrary to international law. In short, they must demonstrate legal compliance. In the previous chapter I argued that compliance is discursively constructed – an “institutional fact” open to contestation. This implies that complying with international law is not just about behaving; it is also about interpreting the law and the facts, and persuading others about the accuracy of that interpretation. In addition, if compliance is derived from discursive persuasiveness, which admits degrees, then a new possibility opens up; namely, that the compliance/non-compliance dichotomy be replaced with degrees of compliance.

Why do states ultimately argue compliance? Simply put, because with compliance comes legitimacy. As David Kennedy put it, “[a]s a lawyer, advising the military about the law of war means making a prediction about how people with the power to influence our success will interpret the legitimacy of our plans.”[^3] I do not explore here why or how political legitimation has become so predominantly dependent on international law. Consequently, the theory advanced in this chapter explicates the internal mechanisms that

generate compliance, not the systemic drivers that account for those mechanisms in the first place.

To say that legal compliance is a discursively constructed quality of states’ actions brings forth the discursive dimension of compliance and, with it, international law as a discursive tool (and not just a given set of rules). An action becomes compliance, then, when its correspondence with international law is persuasively argued. Who are the actors in charge of manipulating the legal discourse to provide persuasive legal interpretations of facts and norms that implicate compliance? Who are, in other words, the “agents of compliance” within the state?

2.1. Lawyerization as the structural empowerment of legal advisors

Under certain institutional conditions that I discuss in full detail in this chapter, the main actors that bring international law into the process of making foreign policy are the international lawyers working for the state. They are able to do so because they are a constitutive part of the organizational structure of the state. This can be thought of as the organizational adaptation to a systemic functional imperative imposed on states by the increasing legalization of the international system. States need legitimacy, and legitimacy depends on legal compliance – which is discursively constructed. In short, legal advisors are empowered, one might speculate, because at the time of making foreign-policy decisions, it has become very consequential (a) to be well informed as to what the others’ legal expectations are, in the sense of knowing which actions are legally permissible, which are prohibited, and which fall in a gray area of significant legal indeterminacy, and
(b) to be able to argue competently and persuasively for the legality of a preferred behavior, so that it will be regarded as compliance (or as being as close to compliance as possible). The resulting “lawyerization” of foreign-policy decision making operates as the internal, organizational cause of states’ compliance with international law. Figure 2.1 is the basic causal scheme of the theory.

Figure 2.1
Lawyerized compliance: Causal scheme

After distinguishing lawyerized from discretionary decision making in this section, in the next I elaborate on the lawyerization of foreign policy. I distinguish levels of structural empowerment of legal advisors, isolate its possible sources, and explain how it affects the strength of the causal mechanism, to which I turn in Section 2.3. This section explores how lawyerization generates compliance with international law. The mechanism is subsumed under the general rubric of “legal advising”. Giving legal advice to decisionmakers is more complex and far-reaching than usually thought. Depending on the level of empowerment, legal advising can go from a mere *ex post facto* justification to the formal authorization or vetoing of decisions.
The ultimate goal of the theory I develop here is to frame a qualitative analysis of the actual mechanism by which compliance with international law occurs. In this sense, the focus is put on the processes through which the hypothesized cause brings about states’ compliance with international law. Those processes constitute part of the internal logic behind the formulation and implementation of foreign policy.

From discretionary to lawyerized decision making

I argue that modern states tend to become hard-wired to comply with international law – in the sense that compliance is determined by how the state is structurally constituted. More specifically, I argue that states’ compliance international law is caused by lawyers in the foreign policy apparatus. It goes without saying that there is important variation across states’ organizational structures. The argument is not that all states are equally hard-wired in this sense. However, as reported in the previous chapter, the evidence suggests that the lawyerization of foreign policy making is an organizational attribute of the state that has diffused critically worldwide and which seems to continue to do so.

Different theories connecting state behavior with international law may explain why these legal positions have been created and undergone increasing empowerment in the context of foreign policy decision making and implementation. Perhaps the internal organization of the modern state has developed this structural form in order to make a better use of the discourse of international law – because the benefits of doing so outweigh the costs. Or perhaps legal offices have been created and empowered in order to better conform to the meta-norm of *pacta sunt servanda* – because doing so is appropriate
given who states think they are (or want to be). Or perhaps foreign policy has become
less discretionary and more lawyerized because previous legalization of domestic policy
making has created an organizational culture that rejects discretion-based decision making and
which spilled over to foreign-policy making. Put differently, the lawyerization of foreign
policy can be theoretically “rationalized”, “normativized” or even “habitualized” at a
more distant level of causation.

In what follows, by foreign policy apparatus (FPA) I will mean that part of the
state directly in charge of making or implementing foreign policy. Because I focus on
foreign-policy decisions that involve the use of force, the FPA is here made up of those
government officials that participate in the making of security-related foreign policy and,
especially for its role at the implementation stage, the military.

The lawyerization of decision making refers here to the recognition of
(international) lawyers as legitimate participants, qua legal experts, in the process of
making foreign policy. It is a contrast to discretion-based decision making. Lawyerized
decision making implies that the state, as political organization, grants decisional agency
to (some of) its legal advisors. In discretionary decision making, on the other hand, the
leaders’ practical judgment is authoritative and determinant of the decisional output.
“Discretionary” and “lawyerized” are ideal types. In reality, the making and
implementation of foreign policy manifests both kinds in varying proportions. In the
theory I propose here the relevant legal advisors are those in charge of applying
international legal norms. Legal advisors (LAs) are the lawyers in the military and those
who make up specialized government agencies (such as the State Department’s Office of
the Legal Adviser in the United States, the Ministry of Foreign Affairs’ Law and Treaty Department in China, the Legal Adviser’s Department in the Foreign and Commonwealth Office in the United Kingdom, the Ministry of Foreign Affairs’ Legal Department in Russia, and the Bureau of Legal Affairs in the Department of Foreign Affairs and Trade in Canada). In a nutshell, the argument here is that compliance with international law is the effect of a structural transformation of the foreign policy-making process within states – namely, the transition from discretionary to lawyerized decision making.

Lawyerization admits degrees, so that decisional outputs may be more or less affected by LAs. These degrees are determined by the different levels of empowerment of LAs in the FPA. Empowerment here simply refers to the capacity that LAs have to affect foreign policy. LA empowerment can be discretionary or structural. Discretional empowerment refers to the decisional power that LAs receive from decisionmakers proper. A leader’s legal sensitivity may predispose her to defer to the advice given by LAs. This is a hybrid in the discretionary-lawyerized typology of decision making, in the sense that decision making is lawyerized but this lawyerization is contingent upon discretional delegation of decisional agency. Structural empowerment, on the other hand, refers to the decisional power enjoyed by LAs whose sources are the formal and informal structures of the organization, not the leader’s will or predisposition. These structures are the set of norms (some of which are formalized) that effectively regulate the operation of the foreign-policy machinery of the state (FPA). In this sense, many aspects of the organizational culture are part of the “organizational structure” I refer to here. (See figure 2.2).
Both forms of empowerment (i.e. discretional and structural) may exist that strengthen the causal role played by LAs in terms of compliance with international law. But the theory advanced here focuses on the structural empowerment of LAs, as organizational structures are a permanent (and expanding) source of decisional power which (arguably, at this point) trumps the eventuality of discretional disempowerment.

*Lawyerization as sufficient cause of compliance*

The lawyerization of foreign policy making is hypothesized here as a *sufficient* cause of compliance. It is not, however, proposed as a *necessary* condition. Compliance with international law can result from other causes, such as a leader’s strong desire to abide by the law (even in the absence of empowered legal advisors). However, a leader’s little regard for international rule-following will not neutralize the causal power of legal
advisors if the latter are a sufficient condition for compliance. Because personalities in power change frequently (perhaps even more so than leaders) and organizational structure does not (and, in the case of legal advisors, their structural empowerment has only changed incrementally) one would expect legal compliance to be more erratic when caused by individual-level factors than when caused by organizational structure. (Unless some other factor is causing consistent personalities amongst leaders, in which case the individual-level factors would be spurious). This would explain why, while legal compliance is not a new phenomenon, a remarkable level of compliance consistency has only been observed since the empowerment of legal advisors in government and the military. Moreover, if the trend of rising decisional power of LAs continues, one would expect the level of consistency in compliance to rise in the future, thus strengthening the international legal system as a whole.

There are two caveats in relation to the proposed sufficiency of lawyerized foreign policy making as a cause of compliance. First of all, this sufficiency should be understood in light of the fact that lawyerized decision-making is an ideal type, as argued above. When foreign policy is “perfectly” lawyerized (the “ideal” case), then this is sufficient to generate compliance. In real-world cases, however, the effect of structural LA empowerment may be distorted by elements of discretionary decision-making. That distortion should become negligible the closer the case falls to the “pure” lawyerized end

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4 A good empirical test of this is developed in Chapter 4, specifically with regards to those decisions pertaining to the treatment of detainees in the “War on Terror”. The case shows how, within the same administration, policy changes were brought about as a result of LAs (and others) resisting “flawed” legal advice given in 2001-2003 and used by policymakers as the basis for a detention and interrogation program which was widely regarded as illegitimate for being in violation of human rights and international humanitarian law. By the end of the Bush administration the program had been forced to shift to a more legally defensible version of itself. See Dickinson 2007; McNeal 2009.
of the spectrum. Yet, and despite the significant levels of lawyerization reported in the previous chapter, the remaining distance between any contemporary real case and the “pure case” implies that lawyerization will operate as a “very strong” cause of compliance rather than a strictly sufficient condition.

The second caveat refers to the anomalous case of LA incompetence. This is the case in which the advice of empowered LAs affects the decisional outcome but without producing compliance. I develop this question further in Section 2.3. The point here is that the causal sufficiency of lawyerization may be attenuated also by this improbable, but hardly negligible, possibility of role fallibility.

That the theory proposed here advances a sufficient, but not necessary, condition of causality, is important to understand in what sense individual-level explanations are rival to this theory. Personality factors can certainly play a part in causing legal compliance. More precisely, they can reinforce the causal effect of lawyerization. However, if a “legalistic” leader is not a necessary condition for compliance, the question is whether it makes sense to explain compliance by two individually sufficient causes. Arguably, when two variables are postulated as individually sufficient but not necessary causes of the same phenomenon, one of them must be discarded, for the sake of parsimony, if the other is shown to be a constant (in the relevant set of positive cases).

Organizational structure is more stable over time than leaders’ personalities. Thus, prima facie, explanations based on the latter should be discarded in favor of those based on the former. Besides, and probably more important, personality factors are typically

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5 See “When legal advising fails to produce compliance” infra.
hypothesized as necessary conditions of causality, not just sufficient ones. In other words, a leader’s legalism is portrayed as sufficient to cause legal compliance, but a leader’s disregard for legal considerations is also portrayed as sufficient to generate decisions that ignore the law. Taken together, this implies that a leader’s sensitivity for the authority of the legal discourse is necessary for compliance to happen.\(^6\) The crucial point is that this necessity of individual-level causes negates the sufficiency of organizational ones. To put it simply, organizational factors will no longer suffice to cause compliance if the decisionmaker has no regard for international law – psychology trumps organization. If this is true, then a psychological account of compliance will be more reliable. If not, that is if (positive) organizational factors override (negative) personality ones, then it is an organizational account of compliance which should be regarded with greater confidence. In the case studies I provide evidence of the latter.\(^7\)

2.2. Measuring lawyerization

In order to measure the level of structural empowerment of LAs in the FPA, there are a series of key sources of decisional power to look at. I group them into three broad categories. One group of sources is contained in the constitution of the legal-advising agency – i.e. certain characteristics of the structural organization of LAs as an actor within the state. Other sources of structural empowerment are certain institutionalized rules that organize the process of decision making. The third group of sources of LA

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\(^6\) Let me remind you at this point that, as explained in Chapter 1, compliance refers here to norm-behavior correspondence that is derived from causation – thus excluding coincidental and spurious (i.e. epiphenomenal) compliance.

\(^7\) See fn. 4 supra.
empowerment refers to the institutionalized articulation between the legal offices and their members, on the one hand, and the other areas of the FPA, on the other. Some of these sources may be formalized in the organization, such as a formal requirement for military officers to have the explicit approval of a legal advisor before carrying out a military operation. Other sources may be derived from the informal structure of the organization, such as the informal requirement that LAs be law school graduates. Typically, the formalization of organizational norms makes them harder to break, and therefore a source of empowerment will carry more weight, *ceteris paribus*, when backed by the formal organizational structure.

*Sources of structural empowerment (I): Agency*

Advising the FPA on the international legal aspects of a foreign-policy issue may be performed by a single office, with one chief legal advisor at the top, or it may be decentralized in a few independent offices. The organization may even expect some outsourcing in this respect, as when private lawyers are called in to offer their views. Centralization provides for a single chain of legal communication, thereby avoiding confusion as to what is legally expected. When decentralized, legal advice might lose uniformity, especially when LAs work in isolation or even secrecy rather than communicating and discussing with each other their differing views. And the more

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8 Bilder describes the gradual centralization of legal advice within the U.S. State Department: “Despite the establishment of the Office [of the Legal Adviser] in 1931, the process of absorbing legal positions within the Department into the Office was not completed until after World War II. Prior to that time, a number of attorneys were hired by, and worked directly for, the various Departmental bureaus and were not under the direct supervision of the Legal Adviser. At present, however, most legal positions within the Department are within the Office of the Legal Adviser.” (1962: 635)
inconsistent the legal advice, the weaker its impact on the decisional process. This is because inconsistent advice allows the FPA to make a decision based entirely on non-legal considerations, and then cherry-pick the legal advice that best suits that decision, so that legal advising ends up having no independent effect on the output of the decision-making process. In other words, fragmented and contradictory legal advice may give rise to a situation in which structural empowerment is coupled with discretion.

disempowerment, in the sense that the function of legal advising is structurally empowered but at the same time some particular LAs are disempowered at the discretion of the policymakers proper. Thus, the more centralized the function of legal advising and the more it results from a collaborative process, the greater the empowerment of LAs.

The number of LAs may be important as far as empowerment is concerned because it affects the division of labor and consequently the readiness of legal advice on a specific issue. In effect, a foreign-policy matter may be introduced into the FPA’s agenda about which no lawyer has much to say (as they have been concentrating on other issues). By the time legal advice is ready, it may be too late for LAs to affect significantly the decisional output. The likelihood of this scenario depends on the size of the office(s) in charge of giving international legal advice to the FPA. Thus, even though a large staff may heighten the risk of inconsistent advice, the greater the number of LAs, the greater their empowerment.

Perhaps more important is the recognition of professional authoritativeness throughout the foreign-policy machinery. The organization may require certain

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9 I thank Zoltan Buzas for bringing this to my attention.
professional qualifications for LAs. Typically, LAs are lawyers with (varying degrees of) expertise in international law. In the case of U.S. judge advocates, for example, in addition to a law degree, they must attend a course specialized in international humanitarian law in one of the four JAG schools. The professional knowledge of LAs makes them particularly reliable to assess the legitimacy of a foreign-policy action (in a legalized international environment), to anticipate the reaction of others to it, and to evaluate its chances of success. When international legal questions are under discussion, they enjoy a professional authority that probably no one else in the FPA enjoys. This professional prestige is enhanced by the role LAs frequently play in the international negotiation of treaties, which gives them access to critical information about how other states view and interpret particular legal obligations. In short, because of their professional status, if international law matters, their opinions matter. Recognition of this may be enhanced within the FPA by the organizational culture. The more the organizational structure underscores the professional authority of LAs, the greater their empowerment.

Sources of structural empowerment (II): Process

Formally or informally, the organization may conceive of the function of legal advising in very different ways. For instance, LAs may participate in the decision-making process simply as outside providers of information (about the legal aspects of the issue at hand), or they may take an active part in policy discussions, or they may even be in

10 Dickinson 2010: 11.
charge of providing clearance on policy decisions. The more limited and “outside the process” the organizational structure expects the participation of LAs to be, the less empowered they are.

Furthermore, every decisional process shows some path-dependency, so that later considerations are constrained by earlier discussions. Sometimes some aspects of the foreign-policy decision are decided at an early stage of the decision-making process and are not subject to later review. In this sense, an LA’s impact on the decisional output will depend on whether she stepped into the process at an earlier or later stage. For instance, LAs may frame the foreign-policy problem in legal terms from the outset and effectively set the tone for the subsequent deliberations. Or they may step in later on and try to inject a legal view into a discussion already framed in terms of realpolitik, where some “paths” have already been ruled out. Or they may enter the process only after the behavior has been decided and be asked to paint the best possible legal face on it. The earlier in the process LAs are expected to participate, the greater their empowerment.

On top of this, legal advice may be expected only upon request, or it can be legitimately given on the LAs’ own initiative. This latter “aggressive” form of legal advising, as Schwebel puts it, makes it harder for the other members of the FPA to keep LAs out of the decision-making process. The organizational structure may welcome not only aggressive legal advising, but even agenda-setting legal advice, in the sense that LAs are expected to bring to the attention of the FPA some foreign-policy issue that is

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13 For example, a memorandum issued by the U.S. Joint Chiefs of Staff in 1983, expanded legal review over military operations (referenced in Keeva 1991: 55). Also, in the United States the executive orders and proclamations to be issued by the President must be previously submitted to the Attorney General “for his consideration as to both form and legality” (1 CFR 19.2 (b)).

being neglected. *The more independent the organizational structure expects the initiation of legal advising to be, the greater the empowerment of LAs.*

Finally, besides legal advising proper, the organization may assign other tasks to LAs which strengthen the effect of their legal advice. For instance, military lawyers may be in charge of the legal training of troops and commanders, so that the latter will later regard the advice of LAs as more necessary and take it more seriously. Or the organization may put LAs in charge of some reactive functions, such as monitoring compliance with international legal rules in the battlefield, reporting abuse, and even recommending prosecution.\textsuperscript{15} This makes disregard for legal advice more costly for some critical members of the FPA. *The more the supplementary functions of this kind, the greater the empowerment of LAs.*

**Sources of structural empowerment (III): Articulation of legal and policy areas**

Giving legal advice is giving *policy* advice from the standpoint of international law. Based on his personal experience as an attorney in the State Department, Michael Young affirms that “[…] the distinction between “law” and “policy” is intrinsically hard to draw, and nowhere more so than in the case of “international law” and “foreign policy”.”\textsuperscript{16} Some organizational characteristics may exacerbate this interdependence of law and policy. When legal advisors are very integrated into the policy bureaus of the

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\textsuperscript{15} For instance, U.S. Department of Defense Directive 5100.77 (11/5/1974) established the “Law of War Program” with the purpose of ensuring that the armed forces of the United States conduct all military operations in conformity with international law. It required legal training of all members of the armed forces and monitoring of compliance. The directive makes military lawyers responsible for both. As for the form of LA participation, the directive requires that legal advisors review all operational plans and rules of engagement, formally locating LAs in the command center (Lohr & Gallotta 2003: 470-474).

foreign ministry, for example, the “policy” advice given from the ministry to the head of
government will carry with it “smuggled” legal considerations. In this sense, legal
advice will be injected into the decisional process through LAs and, indirectly, through
policy advisors as well. The more integrated LAs are into the policy or operational areas
of the organization, the greater their empowerment.

In addition, who makes up the rest of the FPA may determine its receptivity to
legal advice. Typically, lawyers are better predisposed to legal considerations than non-
lawyers. In this sense, the greater the presence of lawyers in the cabinet or the “national
security team”, for example, the deeper the penetration of legal arguments. The same
goes for the President or the Prime Minister being a lawyer herself. Similarly, the FPA
may be more responsive to legal advice when their members, even if not law school
graduates, have received some training in international law. This training may be
established by the organizational structure and carried out by LAs themselves, as
described above. More generally, the views of top decision makers concerning the role of
international law in foreign-policy making typically conditions the FPA’s predominant
idiosyncrasy. When those views are somehow selected or influenced by the
organizational process, then they constitute a source of structural LA empowerment. In
short, the more “legally minded” the FPA, the greater the empowerment of LAs.

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18 Finnemore 2000: 704.
Finally, the organizational structure may enhance the personal relationship between legal advisors and high-ranking policy officials or military commanders. For example, when military lawyers are expected to commingle regularly with commanders and go out in the battlefield with them, rapport is built between the legal advisor and the operational officer that makes the latter more attentive to the former’s advice.\footnote{Dickinson 2010: 19.}

Conversely, the relationship between LAs and those members of the FPA who wield veto power or cast the last word may be mediated by many others. The greater and more direct the institutionalized access of LAs to high-ranking decisionmakers, the greater their empowerment.

Some of these factors, such as the access to decisionmakers, the composition of the decision-making group, or the size of the agency, may be contingent upon a particular style of leadership or circumstantial composition of the cabinet. As sources of the
structural empowerment of LAs, I will look at them only insofar as they are determined by the organizational structure of the state. So, for example, if the number of LAs is relatively large but this is because of a discretional decision made by the foreign minister, and not because of a formal organizational requirement or an informal cultural rule of the organization, then the number of LAs, in that particular instance, will not contribute to the structural empowerment of LAs and will be dismissed as an example of discretional empowerment.

2.3. How empowered legal advisors produce compliance

In Chapter 1 I have shown that the international context in which foreign policies are made and carried out has been significantly legalized and that everything seems to indicate that this legalization of the international political environment continues to move forward on the same track. I will therefore take this fact as a given here. This is important because the success or failure of political actions (such as foreign policy) depends on the political environment in which they operate. The legalized nature of the contemporary international system is what ultimately determines the political importance of the juridical meaning of foreign-policy actions. If showing that an action is in compliance with international law renders that action more legitimate and thus enhances its chances of success, this is ultimately because there is a fairly consolidated international legal hegemony. Absent this discursive hegemony, the successful framing of foreign policies in legal terms would have only a negligible effect on the legitimacy of those policies.
Much of the discussion that follows about the decisional significance of legal advising depends on the presence of this international legal hegemony.\textsuperscript{20}

Many scholarly works that underscore the correspondence between international law and politics are built on the assumption that foreign-policy making is a process in which international law is the externally given factor that determines the course of action chosen by states. Shirley Scott calls this the “rule-book image” of international law:

According to the rule-book image of international law, a decision-maker faced with a decision as to how to act calls in the legal adviser. The legal adviser then consults the relevant page in this large volume, reads what it says must be done, and advises the decision-maker accordingly. The decision-maker should, of course, do as their advisers tell them to, and, if they do, the State will have “complied” with international law.\textsuperscript{21}

The role of legal advisors in this picture is that of passive, “objective expounders”\textsuperscript{22} of the law. This role depiction is inaccurate. I have argued above that international law is a malleable discursive tool, and international lawyers are the most qualified exploiters of its plasticity.\textsuperscript{23} Their work “[…] is itself part of the system which political scientists seek to explain.”\textsuperscript{24} Their role in foreign policy is anything but passive.

\textsuperscript{20} Even though I do not address how that discursive hegemony emerged in the first place, the concluding chapter will expand on how law-abiding foreign policies caused by LAs sustain that hegemony – hence my characterization of LAs as the internal “agents of legalization” of international politics. This positive feedback loop – in which the international discursive structure calls for compliance, and compliance in turn intensifies the authority of that discourse – will be suggested as a major avenue of future research.

\textsuperscript{21} 1998: 37.

\textsuperscript{22} Cassese 1992: 143.

\textsuperscript{23} Cf. Bjola 2009. The author distinguishes between a legal and what she calls a “deliberative” analysis of the legitimacy of foreign policy actions. This conceptual distinction reflects an understanding of international law as objective and not subject to discursive manipulation, very much in line with the legal-positivist view. In contrast, I argue that a legal analysis of legitimacy is necessarily a deliberative analysis as well. In other words, it is not possible to analyze legitimacy without analyzing legitim\textit{ation}.

\textsuperscript{24} Scott 1995: 292.
This legal-positivist portrayal of the nature of legal advising is sometimes reinforced by the (usually implicit) analogy with legal counsel in litigation. Simply put, the typical lawyer-client relationship depicts a person who is being, or about to be, charged with having committed some illegal act. The counselor steps in with the function of convincing the interpretive authorities of the innocence of his client. Two elements are crucial here: (a) the act in question has already been committed, and (b) the counselor has no interest and no duty other than convincingly portray the act as legal. These two elements are problematic because they do not fit within the actual practice of legal advising in foreign policy.

First of all, the litigation analogy assumes that legal advice intervenes after a foreign-policy decision has already been made. Exclusively focused on justificatory framing, the work of the legal advisor has therefore no impact on behavior but only (at best) on its meaning. This is certainly one of the functions performed by legal advisors, but actual practice shows that their role far exceeds that function. In effect, legal advising frequently occurs as part of the process of making foreign-policy decisions, and this participation frequently has a non-negligible impact on the resulting behavioral choice – not to mention the legal advisor’s role in the implementation of those decisions (such as the function of military lawyers in military operations).

Secondly, and because of the point just made, LAs have interests and duties other than simply prove the legality of a given foreign policy. In order to succeed in convincing the international community about the legality of foreign-policy actions, lawyers may have to influence the behavior itself into bringing it as close as possible to what is legally
permissible – i.e. into making it as legally defensible as possible. As Robert Beck put it, legal advising has much to do with “[…] ex ante maneuvering to facilitate post hoc justification.” In this sense, these “compliance agents” push for complying behavior not because they have a preference for law-abiding foreign policy per se, but because they want to enhance the probability of success in convincing the world that the foreign policy in question conforms to international law. This is, after all, their job.

I have framed the importance of legal advising in terms of the need to persuade others that one’s actions are legitimate. Who are those others? Who is the relevant audience to whom states must demonstrate the legitimacy of their foreign policy actions? I follow Borgen in assuming that states typically speak to three audiences. One audience is the state’s own citizenry, on which domestic political support depends. A second audience is the society of states; “[…] allied governments will need to be bolstered, neutral governments persuaded, and enemies warned of our resolve [and expectable international support].” The third main audience is made up of transnational and foreign civil societies.

For all three audiences, international law is an important frame of reference to assess legitimacy. However, most members of these audiences cannot access international law directly. They rely on their own international lawyers, which are the “interpretive communities” acting as decoders for the layman of what the law says. In other words, these audiences hold legal expectations and perform their collective law-

26 Borgen 2009b: 774.
based evaluations relying on the opinions expressed by their legal professionals. Although the feedback from all three audiences is important, when it comes to international legitimacy, states and intergovernmental organizations are its direct source, while the impact of civil society is made most significant when channeled through the state or an IGO – at least in matters of international security. For this reason, I consider the society of states the principal audience in this context. For the society of states, LAs are the major decoders of international law and the framers of its reaction to a given action/argument. In this sense, one could say that legal advising, as understood here, is about LAs trying to persuade other LAs abroad about the legitimacy of their government’s foreign policy.

It is worth reiterating at this point that legal advising implies the strategic use of international law with the purpose of enhancing the legitimacy of what states do. However, even though legal advising occurs within the state, it is strategic in the context of a game played outside the state, with the other states as co-players. In this sense, by giving their advice to decisionmakers proper, lawyers usually do not directly play the international game of politics but rather prepare the state to play that game more competently.

Legal advising as a dual strategy

The goal of legal advising is to make foreign policy actions compatible with international law. There are two ways to achieve this:
legal argumentation – i.e. to push the discursive boundaries of legality so as to enclose within them a particular behavior.

behavioral adjustment – i.e. to replace one behavior that falls outside the boundaries of legality with another that falls within.

These strategies refer to the two components of (social) actions: meaning and behavior, respectively. The first strategy is possible only because the behavior legally prescribed is not objectively fixed but discursively contested. The plasticity of the legal discourse that makes legal argumentation relevant is, however, not unlimited. As Scott puts it, “[t]he indeterminacy of international law is by no means absolute; a lawyer cannot get away with justifying as legal just any action whatsoever.” The limits of what can be achieved through legal argumentation make behavioral adjustment a necessary fallback element of successful legal advising. The two strategies complement each other, in the sense that the greater the plasticity of the legal discourse in a specific situation, the lesser the need for behavioral adjustment. In other words, the easier it is to argue the lawfulness of a preferred behavior, the greater the confidence in sticking with that behavior. But when the boundaries of legality cannot be (successfully) pushed any further and the behavior under consideration still falls outside those boundaries, some behavioral changes are called for.

The level of plasticity faced depends on the applicable law given the specifics of the case. If the case falls within an area densely regulated by international law, so that permissible behavior is highly restricted, what can be achieved through “legal

29 Scott 2004: 125.
argumentation” alone is very limited. This is even more so if the applicable international rules happen to be very precise rather than vague, or if there exist close and consistent precedents. Plasticity is a feature of both international and domestic law. Domestic legal regulations, however, are typically more developed than international ones, and therefore the room for discursive maneuvering is typically smaller under municipal law.

Summing up, that the indeterminacy of international law is always limited makes possible the systematized anticipation of the international community’s reaction. LAs are not the government’s fortune-tellers on matters of legitimacy. On the one hand, the indeterminacy of international law and the malleability of its discourse allow LAs to have a critical role in affecting the “meaning” component of foreign policy actions. But, on the other hand, the bounds of that malleability also allow legal advising to affect the “behavior” component. Behavioral adjustments may be required in order to facilitate – or even make possible – the successful construction of foreign policy as lawful and thus legitimate it internationally. In this sense, the claim that government lawyers seek to push policy towards the law turns out to be a partial, if not naïf, description of the function of legal advising. Rather, the role of LAs is to push policy towards the law as well as the law towards policy. Their goal is to reduce the perceived gap between what states do and what they are legally expected to do. The dual strategy to achieve that goal is to work on the latter expectation and on the former behavior. However, whereas legal argumentation is practically a prerogative of LAs, their control of behavioral adjustments is only indirect and shared with other members of the FPA.

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The multiformity of legal advising

The very nature of the function of legal advising will typically vary according to how much lawyerization the process of making and implementing foreign policy has undergone. Legal advising may simply consist of attempting to turn a *fait accompli* into a lawful action. Even if irrelevant as far as state behavior is concerned, *post hoc* justifications are important in terms of compliance. A clever legal framing of a decision already made may enhance its legality and therefore improve its legitimacy. Thus even this weak form of legal advising may have a non-negligible effect on compliance.

The behavioral component of foreign policy may be affected through legal advising when it takes the form of *ex ante recommendations*. In this case the legal advisor shows up before a decision has been reached, and informs the FPA about the attractiveness of the different policy options under consideration in light of international law. It is the job of LAs to maintain in harmony the relationship between foreign policy and the international legal system. In order to succeed, they exploit as best they can their extraordinary discursive capacity, making full use of their professional knowledge, expertise and creativity. But also, given that the malleability of the legal discourse is limited, that there is so much (successful) framing possible, they may tilt the balance in favor of some of the behaviors under consideration; or they may even bring to the table new behaviors for consideration.\(^{31}\) Furthermore, a foreign-policy recommendation may be an exercise in setting the FPA’s agenda. A well construed legal interpretation of an event can heighten its significance and thus move it up in the political agenda. Moreover,

\[^{31}\text{For an excellent illustration in the context of the Cuban Missile Crisis, see Chayes 1974.}\]

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once the problem is acknowledged in legal terms, legal solutions will be most suitable. And few participants (if any) in the FPA will be more qualified to propose and assess this kind of solutions than LAs.\textsuperscript{32}

[...] the very way in which policy choices are set up for the decisionmakers, the analytical framework within which they are considered, and the manner in which advantages and disadvantages of each option are rhetorically structured cannot help but deeply influence the thinking of even the most objective policymaker. Any contribution to the policy debate, even if it allegedly involves no more than the creation of an analytical framework within which to consider the problem, necessarily plays some substantive role in the resolution of that debate.\textsuperscript{33}

Sometimes, the advice of LAs may take the form of a formally or informally institutionalized prerogative in the decisional process, such as functioning as a \textit{veto} or even a required \textit{authorization} for action. In this case the organization expects that foreign-policy decisions be cleared by the legal advising authority. For instance, in the words of Sir Frank Berman, former Legal Adviser to the Foreign and Commonwealth Office in the United Kingdom:

It is considered a cardinal sin within the UK Foreign Office to put up a policy submission that did not clearly recite that the Legal Adviser or his staff had been consulted, or that did not include an analysis of the legal questions that were relevant to the decision. If the submission did not contain this, then any legitimate senior official or minister would send it back for a complete analysis to know what the law stated.\textsuperscript{34}

\textsuperscript{32} Rourke 1972: 20-23.
\textsuperscript{33} Young 1998: 139.
\textsuperscript{34} Scharf & Williams 2010: 178.
These are just some illustrative examples of the different faces that legal advising can take in the making and implementation of foreign policy – see figure 2.4. Clearly, the form in which the function of legal advising manifests itself is not independent of the level of lawyerization that characterizes the decision-making process. The potential impact of LAs with veto power, for example, is greater than what LAs can achieve when their advice can only take the form of post hoc justifications. In other words, what the FPA makes of legal advising depends on what it makes of LAs. The more the organizational structure empowers them, the greater the number of forms legal advising can take – and thus the greater the number of ways in which LAs may affect foreign policy.

Figure 2.4
Forms of legal advising
When legal advising fails to produce compliance

Even when structurally empowered, LAs may fail to increase the level of compliance of the foreign policy output. Some factors external to organizational structure may hamper the effectiveness of legal advising. An obvious one is the professional quality of the legal advisor. Being empowered by the FPA does not imply giving good counsel, even if regarded as reliable and professionally authoritative by others. Expertise in the subfield of international law used to be quite scarce in the legal profession. Reflecting this, a few decades ago the U.S. State Department’s Office of the Legal Adviser was made up of lawyers many of who lacked significant expertise in international law. With the growth of international law within the discipline this challenge has become less pressing.\footnote{For instance, Abram Chayes, Kennedy’s State Department’s Legal Adviser, had had no education in international law when he took office (Transnational Law and Contemporary Problems 1997). But his successors, especially since the 1980s, all had significant expertise in international law when appointed.} Moreover, the “professional weaknesses” of a legal advisor, or simply holding individual opinions that happen to be too parochial, may be (at least partially) neutralized by structural factors, such as an organizational habit of involving as many LAs as available and, especially, allowing those LAs with the best knowledge on the specific legal issue to chime in and shape the final legal advice. Still, professional fallibility may prevent legal advising from causing compliance – or at least disturb the causal process, delaying the compliance effect hypothesized here.

A different kind of professional flaw has to do with the neglect of professional duty in order to accommodate the leader’s preferences. The problem of the advisor’s
independence from the advisee is recurring in the literature.\textsuperscript{36} In the military, for example, \textit{esprit de corps} is an obvious cultural factor that pressures operational lawyers to give in to the views of the commander in combat. In the United States, however, the legal re-education of the military after the Vietnam War has tended to reverse the pressure exerted by \textit{esprit de corps}, making commanders more willing to accept the views of military lawyers. Sometimes the government has an internal office that evaluates the professional conduct of its legal advisors and guards against the subversion of independence – such as the Office of Professional Responsibility of the U.S. Justice Department, which concluded in 2009 that John Yoo and Jay Bybee had committed professional misconduct by advising on the legality of “enhanced interrogation techniques” on detained suspected terrorists.\textsuperscript{37} In addition, the legal profession provides external incentives to observe professional vows, especially for civilian lawyers. Professional legal associations, such as the American Bar Association or the American Society of International Law, monitor, reward and, more importantly, punish those members who fail to meet their standards. Sanctions could result in the revocation of the license to practice law.\textsuperscript{38} Moreover, the criminal justice system may also hold a legal advisor complicit in criminal conduct for legal advice “[…] intended to assist or provide a “road map” for the client in violating or circumventing the law […].”\textsuperscript{39} Not only has this possibility been seriously discussed in relation to Yoo and Bybee and the infamous

\begin{footnotes}
\item[37] OPR Report (7/29/2009).
\item[38] According to Power, “[…] there was talk of revoking John Yoo’s tenure at the University of California, Berkeley” (2009: 60).
\item[39] Bilder & Vagts 2004: 694.
\end{footnotes}
“torture memos,” but there are also precedents of actual conviction. In any case, the effectiveness of any of these disciplining mechanisms has a positive dependence on the transparency of the process of advising.

The problems just described pertaining to the content of legal advice should not conceal the fact that distinguishing an advocacy opinion from a neutral legal analysis may sometimes require some degree of arbitrariness. This is because, given the unavoidably indeterminate nature of law, “neutral” analysis has always some legitimate room for advocacy. Or, to put it differently, advice can be expected to be candid, but never truly neutral with regards to the advisor’s value system. Notwithstanding this, the room for legitimate advocacy is always constrained – in some cases very constrained. Legal advisors know when they are pushing an elephant into a closet, and so does the outside observer. In this sense, distinguishing between candid and tendentious legal advice may be hard and arbitrary in some cases, but quite straightforward in others.

Note that these remarks on the independence of LAs apply to legal advising at an early stage, when the foreign policy behavior has not been decided yet. Once that decision has been reached, and legal advising is restricted to the framing of the chosen behavior, then the nature of the legal advisor’s role changes. At this later stage she turns fully into a policy advocate – unless the policy can be reversed. As noted above, this post hoc advising does not affect behavior but it may still affect compliance. Typically,

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40 See, for example, Markovic 2007; Paust 2007.
41 Ribbentrop, for instance, was convicted at Nuremberg for having issued memoranda supporting the use of force against Norway, Denmark and the Netherlands in 1940 (Bilder & Vagts 2004: 694).
43 Yin 2009: 475.
justificatory advising does not fail to increase compliance except for cases of professional incompetence.

The question of the advisor’s independence and the expectation of candid legal advice should not be taken to imply that the advisory function should necessarily be a strictly technical one, carried out by a lawyer-machine that concentrates on the letter of the law and spares no thought for the policy implications of the advice she is formulating. In this respect, there are two main approaches to the role of the government lawyer in the literature: the “agency” approach and the “public interest” approach. Under the first approach, the LA is expected to press every plausible, non-frivolous legal argument to support the agency’s – her client’s – policy preferences. The goodness or prudence of those policies is not up for LA evaluation. The LA’s technical interpretation of the law is made in the absence of those factors which are not strictly legal, such as broader moral considerations. The “agency” approach therefore assumes an absolute demarcation between legal and policy advice, taking for granted that LAs can, and indeed must, handle the former while abstaining from the latter. This possibility of a totally “isolated” legal advice is questionable. “As the Critical Legal Studies movement and others have demonstrated, there is no such clear demarcation between law and policy. In interpreting the law, the prejudices, political preferences and moral values of the interpreter inevitably play a role, whether he admits it or not.”

Explicit or not, extralegal considerations are always at work. Alternatively, the LA can avoid the “filtering” of options by presenting the decision maker all the available options and their legal foundations. But this is

obviously very difficult to achieve. Moreover, the ultimate task of LAs is not to communicate what the law says but what the international community thinks (and can be made to think) it says.

In contrast, under the “public interest” approach the government lawyer is more committed to the rule of law and the interests of the state, than to the narrower interests of the agency she works for. Her analysis extends beyond the legality of the means and concerns itself also with the ends sought by her client. In this context, extralegal considerations are useful and welcome and the legality test is not divorced from the broader legitimacy test. Theorizing from the perspective of the political importance of legal advising, which pivots around its legitimating function, the “public interest” approach is clearly a more attuned conception of the role to be played by the lawyer in government.

2.4. Conclusion

Standard research on compliance looks exclusively at its behavioral manifestation, neglecting the meaning of state actions. That meaning, and in particular the juridical meaning, depends on the discursive dimension of foreign policy. A richer understanding of compliance should therefore overcome the implicit behaviorism of the standard notion and situate the concept in a continuum of discursive persuasiveness.

Compliance refers here to those foreign-policy actions whose conformity to international legal norms is successfully argued. To persuade the international

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47 Ibid., pp. 15-17.
community of the lawfulness of a state’s actions is to convince states that, through those actions, the state is paying tribute to international law. Demonstrating adherence to the international legal system through foreign policy is important because it makes those actions legitimate. This is precisely the job of lawyers in government and the military.

The organizational structure of the state has changed over time, increasing the decisional power wielded by lawyers in the process of making and implementing foreign policy. In other words, foreign policy-making has become more lawyerized and less discretionary over time. In countries that reached a significant level of lawyerization, compliance with international law is the result of legal advising within the foreign-policy machinery. Chapter 4 probes this mechanism, testing whether compliance effectively follows the structural empowerment of legal advisors and to what extent it can be attributed to the lawyerization of foreign policy. But before, let us put to the test the assertion that, in today’s world, international legitimacy is heavily dependent on legality and that, consequently, international law is the paramount tool of international legitimation. The next chapter takes up this challenge in the context of NATO’s intervention in Kosovo in 1999.
CHAPTER 3

Legitimacy, legal argumentation and compliance with *jus ad bellum* in the Kosovo intervention

“The Commission concludes that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.”

*IICK Report*

A year after NATO bombed Yugoslavia to put an end to the humanitarian crisis in Kosovo, the Independent International Commission on Kosovo concluded that the military intervention was “illegal but legitimate.” This became a widely shared assessment of the incident.¹ A case that is illegal but legitimate is *prima facie* hard to square with the argument made in preceding chapters that, in a highly legalized political system like that of contemporary international relations, legitimacy is heavily dependent

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¹ See, for example, the editorial comments in the *American Journal of International Law* (volume 93, 1999, pp. 824-862) and the memoranda submitted to the House of Commons Foreign Affairs Committee (published in the *International and Comparative Law Quarterly*, volume 49, 2000, pp. 876-943). For dissenting views, see Reisman 1999 and Greenwood 2000 (arguing that the intervention was legal), and Charney 1999 (questioning the legitimacy of the intervention).
on legality. After all, if NATO’s action is regarded as legitimate despite its illegality, then legitimacy appears to be independent of legality and embedded in a different kind of normative framework. In effect, most of the literature that endorses the “illegal but legitimate” verdict construes the legitimacy of the intervention on moral grounds. The use of force was ultimately legitimate, the typical argument goes, because the breach of international law was morally justified – it was necessary to break the law in order to uphold a moral imperative.

In this chapter I, too, will endorse the “illegal but legitimate” verdict. From this starting point, rather than asking why the intervention was illegal I want to explore how it turned out legitimate. More precisely, the goal is to show that legitimacy was gained through, not despite, international law. That is, the use of legal argumentation was crucial to render the intervention legitimate. Moreover, I will show that, as expected in a context in which international law is the hegemonic legitimacy discourse, the legal discourse was the predominant discourse through which states attempted to legitimize (and delegitimize) the intervention.

I begin by describing the rules of jus ad bellum applicable to the case – that is, the rules of international law that regulate the recourse to military force. On the premise that the script behind the legal arguments made comes from government legal advisers, the bulk of the chapter exposes and analyzes the legal-institutional strategies used by states to...

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2 The legitimacy of the Kosovo intervention, as referenced in this chapter, refers specifically to the legitimacy of NATO’s recourse to military force. The legitimacy of NATO’s campaign, more generally, depends also on how military force was used during the campaign (jus in bello) as well as the campaign’s actual achievements (IICK Kosovo Report). It is not the purpose of this chapter to assess the legitimacy of the Kosovo intervention, broadly understood, or how the campaign as a whole acquired such legitimacy. Instead, the purpose is to show how international law was a major determinant of the legitimacy of NATO’s recourse to military force against Yugoslavia.
legitimize or delegitimize NATO’s military attack on Yugoslavia. In order to explain the net legitimacy effect of this argumentative engagement, the strengths of the justificatory strategy are contrasted with the weaknesses of the condemnatory one. Finally, these strategies are compared to attempts made to legitimize the intervention on moral grounds. The typical strategy of legitimation that would count as evidence against my argument, in this sense, is made up of arguments that underscore the gap between legal rules and moral imperatives. A legitimation of the attack on moral grounds would rest on the moral deficit of the law and explicitly claim that the moral requirement to prevent and alleviate human suffering justifies breaching the law. This kind of argumentation was hardly used by NATO. Some arguments did focus on human suffering as opposed to legal obligation, but the little articulation of these arguments and the lower relevance of their addressees (as far as international legitimacy is concerned) confirm that international law was the main frame of reference at the time of justifying or criticizing NATO’s action.

3.1. Legal background: International legal expectations as to the international use of force

At the heart of the present international legal system lies a general prohibition on the international use of force. The illegality of interstate war is enshrined in Article 2(4) of the U.N. Charter and is complemented by a commitment to the pacific settlement of disputes in articles 2(3) and 33. The Charter explicitly admits two exceptions to this general ban: self-defense and measures authorized by the U.N. Security Council (UNSC).

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3 Article 2(4) reads: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”
The first, a customary right inherent in statehood, is codified in Article 51. The second exception remits to Chapter VII and, more specifically, to Article 42 therein.\textsuperscript{4}

The legality of the recourse to military force in self-defense depends on one necessary condition: the use of force must be exercised in response to an armed attack.\textsuperscript{5} The right of self-defense may be suspended once the UNSC has taken charge of the situation.\textsuperscript{6} These limitations apply to both individual and collective self-defense. In this regard, “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.”\textsuperscript{7}

Besides the defensive use of force, the U.N. Charter allows for coercive measures, including military action, authorized by the UNSC.\textsuperscript{8} The UNSC’s capacity to authorize the international use of force is limited by a pre-existing condition: a threat to the peace, breach of the peace, or act of aggression must be taking place.\textsuperscript{9} It is precisely to maintain

\textsuperscript{4} A minority view advanced by jurists like Michael Reisman and Myers McDougal holds that humanitarian interventions not authorized by the UNSC could still be compatible with Article 2(4): “Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved and is not only not inconsistent with the purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter, it is distortion to argue that it is precluded by Article 2(4)” (quoted in Arend & Beck 1993: 133).

\textsuperscript{5} See the ICJ Case concerning the military and paramilitary activities in and against Nicaragua (Judgment of 27 June 1986). There is debate as to whether the armed attack must be prior to the armed response or whether a pre-emptive response to an imminent armed attack would also be admissible. However, for the case concerning the present chapter the issue is irrelevant for no state alleged the occurrence of an armed attack by Yugoslavia, neither imminent at the time of NATO’s intervention nor prior to it.

\textsuperscript{6} Article 51 reads: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” (emphasis added)

\textsuperscript{7} U.N. Charter, Article 53.

\textsuperscript{8} Article 42 reads: “Should the Security Council consider that measures provided for in Article 41 [i.e. non-military measures] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

\textsuperscript{9} Cf. Fernando Tesón, arguing that, because the “promotion of human rights is as important a purpose in the Charter as is the control of international conflict,” the UNSC has a legal right to authorize the humanitarian use of force even in the absence of a threat to international peace and security (1988: 131).
or restore international peace and security that the UNSC is entrusted with this capacity.\textsuperscript{10} This factual limitation enabling UNSC involvement must be read in light of the principle of non-intervention – codified in Article 2(7) – as its purpose is to prevent the U.N. from intervening in the internal affairs of its members.\textsuperscript{11} It must be noted, however, that the application of this rule has become more lax, especially after the Cold War, and the international community’s legal expectations in this regard have shifted accordingly. One can ask, with Glennon, “Can the Security Council label something “a threat to international peace and security” that is not a threat to international peace and security and thereby escape limits upon its power to intervene?”\textsuperscript{12} However one answers that, the fact is that it has. In effect, interpretation of what constitutes a threat to international peace and security (TIPS) has been progressively expanded by the UNSC, to include such situations as a \textit{coup d’etat} against a democratic government and domestic human rights atrocities, even where the international repercussions of such domestic crises were unclear.\textsuperscript{13} In short, the UNSC is enabled by the Charter to authorize force only with the purpose of safeguarding international peace and security and not on other (e.g. humanitarian) grounds. Bound by this rule, the UNSC has turned to expanding its practical reach – with the acquiescence, if not approval, of the international community – by framing or “disguising” military interventions in ways that fit the requirements of the

\textsuperscript{10} Article 39, U.N. Charter.
\textsuperscript{11} Article 2(7) reads: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state […]; but this principle shall not prejudice the application of enforcement measures under Chapter VII” (emphasis added).
\textsuperscript{12} 2001: 101.
Charter. In other words, the letter of the U.N. Charter enshrines human rights but does not contemplate their international enforcement, and, in part as a response to this, recent UNSC practice has pushed the boundary between the applicability of Article 2(7) (internal affairs) and that of Chapter VII (TIPS), in favor of the latter.

The non-defensive use of force is subject not only to this factual enabling condition – i.e. the existence of a TIPS – but also to the procedural constraints of the rules of UNSC decision-making. The UNSC can authorize the use of force only if a majority – 9 of its 15 members – approves the motion and no permanent member opposes it. The majority rule reflects the UN’s core commitment to multilateralism. As for the establishment of Great Power vetoes in the UNSC, it has two fundamental grounds. One purpose is to delegitimize great-power wars. The veto gives Great Powers a shield against authorized military measures against any one of them (or their close allies). The other purpose is to prevent dead-letter resolutions that would expose deficits of political will in relation to the enforcement of the Charter. The veto heightens the likelihood that when the UNSC makes a decision, it is in fact implemented. It must be noted that neither of

14 As the representative of Brazil in the UNSC put it (more diplomatically): “Some observers have gone as far as to suggest that there may have been a tendency to frame emergencies under Chapter VII in recent years so as to circumvent the non-intervention principle. If this were indeed the case, we would be witnessing a distortion in the waiver provided by Article 2, paragraph 7, which would seem to be incompatible with its original purpose.” (UNSCSecurity Council 3868th Meeting (03/31/1998), S/PV.3868, p. 6)
15 Preamble and Articles 1(3), 55(c) and 56. It must be noted, also, that the most fundamental human rights (such as the right to life), as well as the jus ad bellum rules of the Charter, constitute peremptory norms – i.e. norms of jus cogens whose breach admits no justification and ineluctably constitutes an internationally wrongful act. Finally, international human rights and humanitarian law represent obligations erga omnes, i.e. owed to each and everyone, and consequently every state is obliged to respond to their violations by nonforcible means (i.e. measures of retorsion and countermeasures short of reprisals).
16 This interpretation of the veto-rule is derived from U.N./state practice, not from the actual letter of the Charter, which stipulates that UNSC decisions “shall be made by an affirmative vote of nine members including the concurring votes of the permanent members” (Art. 27(3)) – i.e. an abstention by a permanent member should technically count as a veto.
these two scenarios the veto-rule seeks to prevent can be reasonably linked to the Kosovo crisis. Lack of political will was certainly not an issue, since NATO was evidently willing to intervene. Nor was an issue the danger of a great-power war, since Yugoslavia cannot be considered a close ally of Russia or China that may have dragged Moscow or Beijing to war against NATO – as it in fact did not. A preliminary conclusion can then be that the UNSC veto-rule makes little sense in the specific context of deciding whether to authorize force against Yugoslavia in 1999 – even if it makes a lot of sense in other contexts. Be that as it may, the rule clearly did apply and imposed the main – if not the only – procedural impediment to the legalization of NATO’s intervention through UNSC authorization.

A more subtle note must be made in relation to the role played by the U.N. General Assembly (UNGA) in legitimizing the use of non-defensive military force between states. Many legal scholars, and the international community as a whole (expressing itself through the UN’s plenary organ), understand that, because the UNSC is charged with the primary (but not exclusive) responsibility for the maintenance of international peace and security, such a responsibility may be taken up by the UNGA whenever the UNSC fails to do so. This interpretation of the Charter’s allocation of competences in relation to the management of collective security was codified in Resolution 377, adopted by the UNGA in 1950 with an almost unanimous vote, known as the *Uniting for Peace* resolution. The capacity of the UNGA to recommend the

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17 Article 24(1), U.N. Charter.
18 In this resolution, the UNGA, “Conscious that failure of the Security Council to discharge its responsibilities [...] does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security, [and] Recognizing in
collective use of force against a state is hard to harmonize with the Charter – particularly with Article 12(1), which bans the UNGA from making recommendations on any dispute or situation being dealt with by the UNSC. However, the International Court of Justice has formally confirmed that the meaning of this provision banning simultaneous action has been softened by practice.\footnote{Advisory Opinion on the \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory} (I.C.J. Reports 2004, pp. 148-150, at paragraphs 25-28).} The \textit{Uniting for Peace} resolution was implicitly put into practice in 1951 (UNGA Resolution 498) when the UNGA, “[n]oting that the Security Council, because of lack of unanimity of the permanent members, has failed to exercise its primary responsibility for the maintenance of international peace and security in regard to Chinese communist intervention in Korea,” called upon all states to assist Korea against the Chinese aggression, in spite of the firm opposition to such a recommendation from one of the permanent members of the UNSC (namely, the Soviet Union).\footnote{UNGAR 498 was supported by \(\frac{3}{4}\) of its members – 44 affirmative votes, 7 negative votes, and 4 abstentions.} In short, when the “irresponsible” use of the veto prevents the UNSC from acting to maintain international peace and security (however defined) – as was arguably the case during the Kosovo crisis – the UNGA could be expected to give a subsidiary step forward and seize particular that such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security. […] \textit{Resolves} that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.”
itself of the matter. If admitted, this would constitute the last (and rather exceptional) way of legitimizing non-defensive war via the UN.

As for customary international law, it does not provide any other lawful avenue for the international use of force besides those codified and explained above. Certainly states have turned to military force in cases that do not conform to the rules just described. Particularly relevant for this chapter are past military interventions for humanitarian purposes without U.N. authorization. Cases of this sort have occurred (e.g. India/East Pakistan, Vietnam/Cambodia, Tanzania/Uganda, ECOWAS/Liberia, U.S. et al/Iraq), but they can hardly implicate the existence of an additional legal right to wage inter-state war, for two reasons. First, the number of cases is arguably still small, so that they can hardly constitute a general practice of states. Second, and perhaps more important, these military acts were justified on well-established legal grounds – typically self-defense – and not on allegedly “new” rights such as the right to enforce human rights abroad with military force. Without such a presumption that a new legal rule sustained the actions in question – i.e. without opinio juris – this observed behavior – even if it had been common enough – cannot be said to have given rise to a new rule of customary international law.

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21 I remain cautious about this mechanism because (1) it is not automatically derived from the letter of the Charter, and (2) it has been used only once to prompt a peace-enforcement measure – and even that one time, it may be argued, the UNGA merely called upon states to participate in collective self-defense, a legal right that they already had anyway. This said, Uniting for Peace is still an option to try in an effort to garner legitimacy for a non-defensive use of force rejected by a permanent member of the UNSC.

22 An exception is the intervention in Liberia in 1990.

23 As the ICJ stated in the 1986 Nicaragua case, “If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule” (p. 88, paragraph 186, emphasis added). For a dissenting view, see Glennon 2001: 56-60.
All in all, (fundamental) human rights and non-intervention in the internal affairs of other states are both peremptory norms of international law, but as far as their respective enforcement is concerned, the law is clearly biased in favor of the latter. In effect, the international use of force to enforce human rights must be authorized by the UNSC (and that assuming the situation involves international peace and security), whereas a state’s territorial sovereignty and independence can be enforced by its military automatically, in self-defense, without the need to get U.N. approval (or anyone else’s, for that matter). In the words of Rosalyn Higgins, “[…] the Charter could have allowed for [military] sanctions for gross human-rights violations, but deliberately did not do so.” As will be shown later, this inadequacy of the international legal structure in force in 1999 constituted the ultimate platform from which a breach of the law was justified as necessary to uphold the law.

3.2. Embedding Kosovo in the discourse of international law

With this background of international legal expectations, NATO and other supporters of the Kosovo intervention built a strategy of legitimation for the use of force in Yugoslavia which consisted in articulating different elements of international law. This articulation was effectuated through argumentation, diplomacy and institutional acts. Those who opposed the intervention also turned to international law in an effort to delegitimize NATO’s action. However, as will be shown in this section, their attempt to embed the Kosovo case in the discourse of international law in order to underscore the

\[24\] 1994: 255.
disharmony between legal expectations and NATO’s action was relatively unsuccessful. The strategy of the intervention’s supporters, on the other hand, was far more consistent, better backed with institutional-legal facts, and thus more persuasive. Their well-crafted and successful use of international law explains the international legitimacy of NATO’s intervention in Kosovo.

3.2.1. NATO’s legal framing of the Kosovo crisis

NATO’s strategy to embed the Kosovo intervention in the international legal discourse and emphasize the compatibility between the two can be construed as made up of seven strategic moves. This is not to say that this strategy was in fact a unitary plan, perfectly coordinated between the different states (and other actors) supporting the intervention. Even though legal advisers from different NATO governments shared and discussed their legal views on the case on a regular basis\textsuperscript{25}, this chapter does not seek to convey NATO’s legitimation strategy as a pre-agreed and pre-fashioned strategy. Independently of the extent to which this was, as a matter of fact, the case, the argumentative, diplomatic and institutional actions taken in 1998 and 1999 by the supporters of the use of force against Yugoslavia were consistent enough to construe and analyze them as part of a single strategy.

\textsuperscript{25} This was confirmed by two legal advisers at the time, one from the Department of State and one from the National Security Council (NSC) in the United States (interview with the author).
The crisis in Kosovo was successfully embedded in the international legal discourse, first, as falling within the legal category of “threats to international peace and security” (as opposed to an internal affair of Yugoslavia protected from foreign intervention), and, second, as involving gross and systematic breaches of international legal obligations by Yugoslavia. In addition, the threatened veto in the UNSC which prevented an authorization to use force under Chapter VII was delegitimized as inconsistent with the responsibility invested by the U.N. Charter in that organ, while the
condemnation of NATO’s use of force voted down in the Council was spotlighted as signaling widespread support for the intervention, as was the Council’s official endorsement of the intervention’s aftermath. This support was garnered, in part, by arguing the exceptionality of the Kosovo intervention and stripping it of any potentially dangerous precedential force. This was complemented by the pursuit of diplomatic efforts for over a year prior to the intervention, which rendered the use of force a measure of last resort. Figure 3.1 illustrates how the cumulative effect of these legal-strategic moves – analyzed one by one in what follows – made it harder for the international community to construe the Kosovo intervention as inconsistent with international law and, thus, illegitimate.

*(1) Framing the situation in Kosovo as a threat to international peace and security, not an internal affair*

If military force was to be employed in the context of the Kosovo crisis, it was clear that this would be a non-defensive use of force. Consequently, if deference to the U.N. Charter was to be conveyed, it was necessary to activate Chapter VII. In other words, a UNSC resolution had to be adopted that authoritatively stamped the situation in Kosovo as a TIPS – and thus not an internal affair of Yugoslavia.

Internal affairs (shielded from foreign or U.N. intervention by Article 2(7)) and TIPS can only be construed as mutually exclusive legal categories. Otherwise, there would arise inconsistency in the U.N. Charter between that which Article 2(7) forbids
and that which Article 39 calls for. In short, a given situation cannot be simultaneously protected from and subject to U.N. intervention.26

Was the situation in Kosovo an essentially domestic matter or a TIPS? According to the Charter, the authority to determine this is the UNSC itself. Perhaps rather carelessly, the council took the matter on its own hands before establishing that it was not a matter “essentially within the domestic jurisdiction” of Yugoslavia.27 This was pointed out during the UNSC discussion on the adoption of Resolution 1160 (imposing, under Chapter VII, an arms embargo on Yugoslavia) by the representative of Egypt:

Our delegation has noted that the Security Council candidly refers to the fact that this resolution has been adopted under the provisions of Chapter VII of the Charter without a prior reference to a determination by the Security Council that there exists a threat to international peace and security as required by the provisions of Article 39 of the Charter. Of course, it may be said that the Council is the master of its own procedures, and this is correct with regard to procedures. However, in principle, the constitutional requirements in the Charter should in general be scrupulously followed and respected. The delegation of Egypt would like to record this observation with regard to the future work of the Council.28

UNSC Resolution 1160 of March 1998, supported by everyone but China (who abstained), marked the first success in making (implicitly) the situation in Kosovo a TIPS. That the situation was not exclusively a matter of Yugoslavia’s internal jurisdiction was first explicitly established by the UNSC six months later, by Resolution 1199. There,

26 This interpretation is confirmed by UNSC discussions on Kosovo, where no member state asserted, in the context of disagreement on whether the situation in Kosovo was an internal affair (i.e. a matter essentially within Yugoslavia’s domestic jurisdiction) or a TIPS, that it was both (or neither).
27 According to the Charter (Art. 39), the UNSC must make this determination before employing Chapter VII. However, even though this determination is often explicitly made when adopting decisions under Chapter VII, nothing precludes that it be implicitly inferred from the very invocation of Chapter VII.
28 UNSC 3868th Meeting (03/31/1998), S/PV.3868, p. 29.
the UNSC classified the situation as a TIPS, legitimizing the subsequent imposition of a
series of legal obligations under Chapter VII.\textsuperscript{29} At the heart of the discussions in the
UNSC was a more general question: Can the violation of human rights by a state,
occurring \textit{exclusively on its territory and against its own people}, implicate \textit{international}
peace and security and thus constitute a TIPS?

In the context of the crisis in Kosovo, many states argued that a widespread
violation of fundamental human rights could certainly constitute a TIPS. To cite a few examples:

- Costa Rica: “Respect for human rights constitutes a fundamental value of the
  international community. As has been pointed out by the International Court of
  Justice, their violation is an offense against humankind as a whole. Thus Costa Rica
  has always maintained that \textit{safeguarding human rights is not solely and exclusively a
  matter of the internal jurisdiction of States}. […] \text{T}here are certain circumstances in
  which \textit{a violation of such fundamental rights is so serious that it constitutes, in and of
  itself, a threat to international peace and security} and therefore fully justifies the
  Security Council’s invoking the powers granted to it under Chapter VII of the
  Charter.”\textsuperscript{30}

- Czech Republic: “It is unacceptable at the threshold of the new millennium to claim
  that human rights are relative and that \textit{their violation by sovereign States on their own

\textsuperscript{29} UNSC resolutions 1199 and 1203 (see next section).
\textsuperscript{30} Mr. Sáenz Biolley, UNSC 3868\textsuperscript{th} Meeting (03/31/1998), S/PV.3868, pp. 3-4, emphasis added.
*territory is solely their internal affair* and as such may not be a subject of interest to other members of the international community.”

- United Kingdom: “[… Belgrade’s] behavior in Kosovo cannot be regarded simply as an internal matter. Serious violations of human rights, of civil liberties, of the freedom of political expression, are matters of concern to every member of the international community and cannot be regarded simply as an internal matter.”

- Slovenia: “[… The situation in Kosovo […] can no longer be described as an internal affair. Serious violations of human rights have been reported for years, and the use of force in recent weeks has triggered a wave of expressions of concern from the neighboring States and the international community at large.”

- United States: “[… This crisis is not an internal affair of the FRY. The violence is an affront to universal standards of human rights we are pledged to uphold.”

“[… T]he serious deterioration of the situation in Kosovo represents a significant threat to regional security and peace – and that is normally a justification for the ability of the international community in some form or another to take action.”

- Canada: “[… The [U.N. Security] Council’s response today is a recognition of the human dimension of international peace and security. […] We have learned in Kosovo and from other conflicts that humanitarian and human rights concerns are not just
internal matters. Therefore [...] Canada considers that such issues can and must be
given new weight in the Council’s definition of security and in its calculus as to when
and how the Council must engage.”

- Argentina: “[... UNSC Resolution 1244] represents an interpretation of the Charter
that reflects the current recognition of human rights throughout the international
community. [...] Once diplomatic efforts have been exhausted, humanitarian
tragedies of the magnitude that we have witnessed cannot, at the close of the century,
be tolerated in the context of the letter and the spirit of the Charter.”

- Japan: “[... T]he current situation in Kosovo raises serious concern in terms of peace
and security in the region [...].”

- Germany: “The explosive situation in the Kosovo region constitutes a clear threat to
international peace and security.”

- Turkey: “Turkey is gravely concerned at the situation in Kosovo and the wider
implications it may have for peace, security and stability in the region and beyond.”

- Hungary: “Hungary cannot accept that the problem of Kosovo should be dealt with as
a strictly internal matter.”

- Austria (on behalf of the European Union): “[... T]he conflict in Kosovo [...] poses a
serious threat to regional peace and security.”

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36 Mr. Fowler, UNSC 4011th Meeting (06/10/1999), S/PV.4011, p 13, emphasis added.
37 Mr. Petrella, UNSC 4011th Meeting (06/10/1999), S/PV.4011, p 19.
38 Mr. Owada, UNSC 3911th Meeting (07/21/1998), S/PV.3911, p 5.
39 Mr. Eitel, UNSC 3868th Meeting (03/31/1998), S/PV.3868, p 19, emphasis added.
40 Mr. Tanç, UNSC 3868th Meeting (03/31/1998), S/PV.3868, p 21.
41 Mr. Erdős, UNSC 3868th Meeting (03/31/1998), S/PV.3868, p 25.
42 Mr. Sucharipa, UNSC 3911th Meeting (07/21/1998), S/PV.3911, p 3, emphasis added.
The representative of Brazil in the UNSC correctly brought to the attention of the other members, in the context of discussing resolution 1160, that what was at stake was the very boundary between Article 2(7) and Chapter VII of the Charter:

Although the Charter enshrines the principle of nonintervention in matters which are essentially within the domestic jurisdiction of any State, we are all aware that this principle does not prejudice the application of enforcement measures under Chapter VII, in accordance with Article 2, paragraph 7. Perhaps it is not by coincidence that the proliferation of decisions authorized by the Security Council under Chapter VII since the end of the cold war, and of sanctions in particular, has come about in a world where conflict has often seemed to break out within the internal borders of States. Some observers have gone as far as to suggest that there may have been a tendency to frame emergencies under Chapter VII in recent years so as to circumvent the non-intervention principle. If this were indeed the case, we would be witnessing a distortion in the waiver provided by Article 2, paragraph 7, which would seem to be incompatible with its original purpose.43

In spite of this warning about a potential (illegitimate?) shift in the demarcation of the applicability of the non-intervention constraints on the UNSC, Brazil, like all the other members of the UNSC but China, voted in favor of the invocation of Chapter VII, thus acquiescing in the very interpretive shift that she had warned about.

Independently of states’ individual opinions on whether the Kosovo crisis should be regarded as an internal affair of Yugoslavia or not, the question was settled once the UNSC treated it (resolution 1160), and explicitly classified it (resolutions 1199, 1203), as a TIPS. Such a determination was not just another opinion out there but a legally binding decision. This was a major strategic achievement by NATO, and its members did not

42 Mr. Valle, UNSC 3868th Meeting (03/31/1998), S/PV.3868, p 6.
hesitate to capitalize on it. In effect, on several occasions, when arguing in favor of the legitimacy of actions (to be) taken against Yugoslavia, explicit mention was made of the UNSC authoritative determination of the situation in Kosovo as a TIPS. A few examples:

- Slovenia:^[44] “[… R]esolutions 1199 (1998) and 1203 (1998) […] are applicable law in the case discussed today. The situation in Kosovo is defined by the Security Council as a threat to international peace and security in the region. This defines that situation as something other than a matter which is essentially within the domestic jurisdiction of a State. In other words, Article 2, paragraph 7, of the Charter clearly does not apply.”^[45]

- United Kingdom: “In adopting this resolution [1160], the Security Council sends an unmistakable message: that by acting under Chapter VII of the Charter, the Council considers that the situation in Kosovo constitutes a threat to international peace and security in the Balkans region. It says to Belgrade that repression in Kosovo will not be tolerated by the international community […].”^[46]

- Germany: “UN Security Council Resolution 1199 affirms unambiguously that the deterioration of the situation in Kosovo constitutes a serious threat to peace and security in the region.”^[47]

“Is it not the case – it is the case – that the heads of state of the nations represented in the UN Security Council have explicitly and unanimously decided that restrictions of

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^[44] Not a NATO member until 2004, but a supporter of its intervention in Kosovo.

^[45] Mr. Türk, UNSC 3988th Meeting (03/24/1999), S/PV.3988, p 19, emphasis added.

^[46] Mr. Richmond, UNSC 3868th Meeting (03/31/1998), S/PV.3868, p 12. The representative of the United Kingdom made a similar statement on behalf of the EU at the same meeting (p. 14), emphasis added.

a state’s sovereignty might be necessary for the implementation of human rights? […]

The question more pressing will be: Does the sovereignty of a state, in conflict with other principles of the UN Charter, i.e. the ban on crimes against humanity, permit to violate human rights internally?”

- United States: “I am particularly encouraged that the resolution [1199], adopted under Chapter VII of the U.N. Charter, makes clear that the deterioration of the situation in Kosovo constitutes a threat to regional peace and security.”

“In framing this resolution [1199] under Chapter VII of the U.N. Charter, the international community says with one voice that, if Belgrade does not now choose to end offensive operations in Kosovo, it must be compelled to do so.


- France: “NATO’s action finds its legitimacy in the authority of the Security Council. The resolutions of the Council concerning the situation in Kosovo (resolution 1199 […] and 1203 […] have been passed under Chapter VII of the United Nations Charter which deals with coercive actions in case of a breach of peace. These

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51 Mr. Burleigh, UNSC 3988th Meeting (03/24/1999), S/PV.3988, p 4, emphasis added.
resolutions have established that the deterioration of the situation in Kosovo constitutes a threat to peace and security in the region."

In contrast to this solid line of argumentation backed by authoritative institutional actions, the opponents of the Kosovo intervention tried to frame Kosovo as an internal affair – and thus not a TIPS. Yugoslavia insisted, from the very beginning, in interpreting the situation in Kosovo as a case of terrorist separatism which fell under its exclusive jurisdiction and was thus shielded from outside intervention by Article 27(3) of the U.N. Charter.

- Yugoslavia: "We consider that this *internal question* cannot be the subject of deliberation in any international forum without the consent of the Government of the Federal Republic of Yugoslavia. Such consent has not been granted. [...] There is not, nor has there been, any armed conflict in Kosovo and Metohija. Hence, there is no danger of a spillover, *there is no threat to peace and security and there is no basis for invoking Chapter VII of the Charter of the United Nations*. [...] It is stated in the statements of the Contact Group and the resolution of the Security Council [1160] that the situation in Kosovo and Metohija threatens international peace and security in the region. This position is not based on facts, nor on law. It is designed to justify support for separatism and flagrant *interference in the internal affairs of a sovereign country*, a Member State of the United Nations."\(^{53}\)


\(^{53}\) Mr. Jovanović, UNSC 3868\textsuperscript{th} Meeting (03/31/1998), S/PV.3868, p. 16.
"The Federal Republic of Yugoslavia has not threatened any country or the peace and security of the region. It has been attacked because it sought to solve an internal problem and used its sovereign right to fight terrorism and prevent the secession of a part of its territory that has always belonged to Serbia and Yugoslavia."\textsuperscript{54}

This framing was certainly not implausible, but it failed to address the central issue that, according to others, made the situation a TIPS. Namely, the widespread violation of fundamental human rights.\textsuperscript{55} On top of that, a heavy blow to the persuasiveness of this position came from its failure to admit interpretive defeat once the UNSC established that Kosovo was a TIPS. To invoke international law and the U.N. Charter, and at the same time ignore the interpretive authority of the UNSC, is an insurmountable inconsistency. Yugoslavia was not the only one in denial of the legal fact that Kosovo was a TIPS. Some other examples:

- India: "Under the application of Article 2, paragraph 7, the United Nations has no role in the settlement of the domestic political problems of the Federal Republic [of Yugoslavia]. Domestic political problems have to be settled peacefully by the parties concerned [...]. Foreign military intervention can only worsen matters. It will solve nothing."\textsuperscript{56}

- Cuba: "Cuba urges the international community [...] to allow that nation [Yugoslavia] to resume the peaceful course of negotiations so as to solve its internal problems —

\textsuperscript{54} Mr. Jovanović, UNSC 3988\textsuperscript{th} Meeting (03/24/1999), S/PV.3988, p. 13.
\textsuperscript{55} See the statement by the representative of Costa Rica in the next section.
\textsuperscript{56} Mr. Sharma, UNSC 3988\textsuperscript{th} Meeting (03/24/1999), S/PV.3988, p. 16, emphasis added.
matters that depend solely and exclusively on the sovereign will and self-
determination of the Yugoslav peoples."\(^{57}\)

- China: "The question of Kosovo is, in its essence, an internal matter of the Federal Republic. [...] Furthermore, it is not appropriate to bring before the [U.N. Security] Council the human rights issues in Kosovo."\(^{58}\)

"[...the question of Kosovo is an internal matter of the Federal Republic of Yugoslavia. [...] We do not see the situation in Kosovo as a threat to international peace and security. [...] UNSC resolution 1199 has invoked Chapter VII of the United Nations Charter all too indiscreetly [...]."\(^{59}\)

The Chinese position was particularly problematic as China had the institutional capacity to prevent the authoritative determination that Kosovo was a TIPS. While claiming that the situation was an internal affair, by abstaining it allowed the UNSC to activate Chapter VII and explicitly declare the existence of a TIPS. This internal inconsistency became evident when the Chinese affirmed that "[t]he question of Kosovo, as an internal matter of the Federal Republic of Yugoslavia, should be resolved among the parties concerned in the Federal Republic of Yugoslavia themselves [...]," while remarking at the same time that "[... ] it is only the Security Council that can determine whether a given situation threatens international peace and security [...]."\(^{60}\)

\(^{57}\) Statement issued by the Cuban government, read out by Mr. Rodríguez Parrilla at UNSC 3989\(^{th}\) Meeting (03/26/1999), S/PV.3989, p. 13, emphasis added.

\(^{58}\) Mr. Shen Guofang, UNSC 3868\(^{th}\) Meeting (03/31/1998), S/PV.3868, pp. 11-12.

\(^{59}\) Mr. Qin Huasun, UNSC 3930\(^{th}\) Meeting (09/23/1998), S/PV.3930, pp. 3-4.

\(^{60}\) Mr. Qin Huasun, UNSC 3988\(^{th}\) Meeting (03/24/1999), S/PV.3988, p. 12. See also UNSC 3989\(^{th}\) Meeting (03/26/1999), S/PV.3989, p. 9.
The Russian position suffered from the same inconsistency, with one aggravating element: not only did Russia not veto the activation of Chapter VII, it actually supported it. In effect, Russia voted in favor of UNSC resolutions 1160 (March 1998) and 1199 (September 1998), unsuccessfully (one could argue) attempting to have it both ways.

From the very outset, the Russian Federation has viewed the recent events in Kosovo as the internal affair of the Federal Republic of Yugoslavia. [...] The situation in Kosovo, despite its complexity, does not constitute a threat to regional, much less international peace and security. It is precisely this understanding that is reflected in the draft resolution before us today. [...] It was extremely difficult for Russia to agree with such a measure as the introduction of a military embargo. We embarked on this step only on the understanding — which is now embedded in the draft resolution — that the issue is not about punishing anyone, Belgrade in particular, but about specific measures designed to prevent an increase in tensions, to erect an obstacle to external terrorism, and to foster the political process with a view to a speedy and lasting settlement.61

Summing up, the discursive framing of the situation in Kosovo as an internal affair of Yugoslavia was severely undermined by (1) inconsistencies in the positions assumed by some of its proponents, (2) failure to prevent (and even support of) the authoritative establishment of Kosovo as a TIPS by the UNSC, and, once established, (3) failure to defer to the interpretive authority of the UNSC and instead engage in stubborn denial of what was already a legal fact. In stark contrast, the supporters of the Kosovo intervention consistently argued against the legal construction of the situation as an internal matter of Yugoslavia. Success in this first step of their legal-argumentative

61 Mr. Fedotov, UNSC 3868th Meeting (03/31/1998), S/PV.3868, pp. 10-11.
strategy was confirmed and settled by the authoritative endorsement of such a legal construction by the UNSC itself.

(2) Pointing out systematic violations of international law (including UNSC resolutions)

Any military intervention in Yugoslavia taken without the authorization of the UNSC would inevitably have a vulnerable spot: it would reveal disregard for international law (*jus ad bellum*, in particular) and for the United Nations (the authority of the UNSC, in particular). If international law is a tool for the de-legitimization of state actions, as argued here, it is no surprise that those opposing the intervention did not hesitate to underscore this inconformity between NATO’s actions, on one hand, and international law and the authority of the UNSC, on the other. Here are a few examples:
- Yugoslavia: “The decision by the NATO Council to empower its Secretary General to authorize NATO air strikes against targets in the Federal Republic of Yugoslavia represents an open threat of aggression against the sovereignty and territorial integrity of the FRY […] which is in contravention of the principles enshrined in the United Nations Charter, and in particular its Article 2, paragraph 4. As a regional agency, NATO has no authorization of the Security Council or the right to enforcement action against a sovereign and independent U.N. Member State, as explicitly stipulated in Article 53 of the U.N. Charter.”

62 Open threats by NATO

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62 Article 53 reads: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council […]."
undermine the fundamental principles of international relations, international peace and security, as well as the very foundations of the international legal order.”\(^{63}\)

- Russia: “[… T]he obvious, gross and continuing violation by the countries of the North Atlantic Treaty of at least seven of the ten founding principles of international relations set forth in the Helsinki Final Act. They include the principles of sovereign equality, respect for the rights inherent in sovereignty, non-use of force or a threat of force, the territorial integrity of states, a peaceful settlement of disputes, non-interference in internal affairs, respect for human rights, and fulfillment in good faith of international law obligations.”\(^{64}\)

“The NATO countries and the countries striving to enter this bloc tried to justify the use of force in circumvention of the Security Council by force majeure circumstances connected with the need ‘to avert a humanitarian catastrophe’. There is a simple answer to this – international law and the U.N. Charter which bluntly says that force can only be used in two cases: first, for self-defense and, second, under the U.N. Security Council mandate. In Kosovo neither is the case. References to humanitarian problems are inconsistent because there is no provision either in the U.N. Charter or in any other international document which gives permission to humanitarian intervention. What is more, in 1974 the U.N. General Assembly adopted a resolution

\(^{63}\) Statement by the Government of Yugoslavia, February 1, 1999 (reprinted in Auerswald & Auerswald 2000: 489), emphasis added.

\(^{64}\) Foreign Ministry representative to OSCE, April 23, 1999 (reprinted in Krieger 2001: 489).
which unambiguously states that *aggression cannot be justified by military, political or any other grounds.*\(^6^5\)

"The aggressive military action unleashed by NATO against a sovereign State without the authorization and in circumvention of the Security Council is a real threat to international peace and security and a *gross violation of the United Nations Charter and other basic norms of international law.* Key provisions of the Charter are being violated, in particular Article 2, paragraph 4 [...]; Article 24\(^6^6\) [...]; Article 53 [...]. [...] *The illegal use of force by NATO [...]* directly undermines the fundamental bases of the entire modern system of international relations, which is based on *the primacy of the United Nations Charter.* [...] What is in the balance now is *the question of law and lawlessness. It is a question of either reaffirming the commitment of one’s country and people to the basic principles and values of the United Nations Charter, or of tolerating a situation in which gross force dictates realpolitik.*\(^6^7\)

- Belarus: "[... T]he use of military force against Yugoslavia without a proper decision of the only competent international body, which is undoubtedly the United Nations Security Council, as well as any introduction of foreign military contingents against the wish of the Government of Yugoslavia, qualify as *an act of aggression* [...]. [...] *No* rationale, no reasoning presented by NATO can justify the *unlawful use of*

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\(^6^5\) Mr. Lavrov, *Segodnya* interview, March 25, 1999 (reprinted in Auerswald & Auerswald 2000: 744), emphasis added.

\(^6^6\) Article 24 reads: "(1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. (2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII [...]."

\(^6^7\) Mr. Lavrov, UNSC 3989\(^{th}\) Meeting (03/26/1999), S/PV.3989, pp. 5-6, emphasis added.
military force and be deemed acceptable. [...] Ignoring the primary and principal body for collective decision-making on maintaining international peace and security — and, in fact, the system itself, which was created and nurtured as a result of the Second World War — means obstructing the system, signing it off and effectively destroying it [...] ⁶⁸

- India: "[...] The sovereignty and territorial integrity of the international border of the Federal Republic of Yugoslavia is inviolable. That must be fully respected by all States. [...] The attacks against the Federal Republic of Yugoslavia that started a few hours ago are in clear violation of Article 53 of the Charter. No country, group of countries or regional arrangement, no matter how powerful, can arrogate to itself the right to take arbitrary and unilateral military action against others. That would be a return to anarchy, where might is right. Among the barrage of justifications that we have heard, we have been told that the attacks are meant to prevent violations of human rights. Even if that were to be so, it does not justify unprovoked military aggression. Two wrongs do not make a right. [...] Under the application of Article 2, paragraph 7, the United Nations has no role in the settlement of the domestic political problems of the Federal Republic. The only exception laid down by Article 2, paragraph 7, would be the “application of enforcement measures under Chapter VII”. The attacks now taking place against the Federal Republic of Yugoslavia have not been authorized by the Council, acting under Chapter VII, and are therefore completely illegal. What is particularly disturbing is that both international law and

⁶⁸ Mr. Martynov, UNSC 3988th Meeting (03/24/1999), S/PV.3988, p. 15, emphasis added.
the authority of the Security Council are being flouted by countries that claim to be champions of the rule of law [...].” 69

- Iraq: “[... T]he aggression of the United States, which started a systematic war against all the people of Yugoslavia on 24 March this year, in a flagrant violation of the Charter of the United Nations and the mandate of the Security Council.” 70

In order to undermine such a reading of the intervention and weaken its delegitimizing effects, it was important for the supporters of the intervention to persuade the international community that the military operation, rather than turning its back on the United Nations legal-institutional system, was taken to uphold the authority of the United Nations and international law. For this, a part of NATO’s argumentative strategy was to point out Yugoslavia’s systematic breaches of its legal obligations and UNSC mandates.

As for violations of general rules of international law, especially human rights law and international humanitarian law, here are some examples:

- Costa Rica: “[...C]ombating terrorism does not, as we see it, in any way justify human rights violations or the failure to respect international humanitarian law. [...] If the authorities of the Federal Republic of Yugoslavia [...] continued to violate the fundamental rights of the population, we would be obligated to consider the imposition of additional measures in order to compel them to change their illegal policies that are contrary to the principles and obligations set forth in the Charter.” 71

69 Mr. Sharma, UNSC 3988th Meeting (03/24/1999), S/PV.3988, p. 15-16, emphasis added.
70 Mr. Hasan, UNSC 4000th Meeting (05/08/1999), S/PV.4000, p. 9, emphasis added.
71 Mr. Sáenz Bolley, UNSC 3868th Meeting (03/31/1998), S/PV.3868, p. 4, emphasis added.
“We believe that the Verification Mission will be a key instrument in guaranteeing the peace process in Kosovo, in preventing new violations of human rights and for international humanitarian law in the region.”

- United Kingdom: “[… W]e are insisting on the right of the international community to police international law and that means that we have a perfect right to express concern as we have done today at extrajudicial killings and the death of eighty people without any trial or any judicial process.”

- United States: “The actions of the Federal Republic of Yugoslavia also violate its commitments under the Helsinki Final Act, as well as its obligations under the international law of human rights. Belgrade’s actions in Kosovo cannot be dismissed as an internal matter.”

- Malaysia: “[… C]ombating the so-called acts of terrorism in Kosovo does not in any way justify gross human rights violations or the failure to respect international norms and international humanitarian law.”

- European Union: “It cannot be permitted that […] the predominant population of Kosovo is collectively deprived of its rights and subjected to grave human rights abuses. […] Nor will the international community tolerate crimes against humanity.”

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72 Mr. Niehaus, UNSC 3937th Meeting (10/24/1998), S/PV.3937, p. 6, emphasis added.
74 Mr. Burleigh, UNSC 3988th Meeting (03/24/1999), S/PV.3988, p. 4, emphasis added.
75 Mr. Hasmy, UNSC 3988th Meeting (03/24/1999), S/PV.3988, p. 9, emphasis added.
76 European Council statement, read out by the representative of Germany, Mr. Kastrup, at the UNSC 3988th Meeting (03/24/1999), S/PV.3988, p. 17, emphasis added.
United Nations: “I am profoundly outraged by reports of a vicious and systematic campaign of “ethnic cleansing” conducted by Serbian military and paramilitary forces in the province of Kosovo. […] Civilian populations must never come under indiscriminate and deliberate attack. Such actions are in flagrant violation of established humanitarian law.”77

NATO: “Atrocities against the people of Kosovo by FRY military, police and paramilitary forces represent a flagrant violation of international law. Our governments will co-operate with the International Criminal Tribunal for the former Yugoslavia (ICTY) to support investigation of all those, including at the highest levels, responsible for war crimes and crimes against humanity.”78

Argentina: “Argentina’s negative vote [on the UNSC draft resolution condemning NATO’s intervention] was based on the vital need to contribute to putting an end to the extremely grave violations of human rights that are taking place in the province of Kosovo, Federal Republic of Yugoslavia. These violations are clearly documented in many reports of the Secretary-General and inspire the many principles that lie at the core of Security Council resolutions 1160 (1998), 1199 (1998) and 1203 (1998). Argentina also wishes to stress that the fulfillment of the legal norms of international humanitarian law and human rights is a response to universally recognized and

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accepted values and commitments. The obligation to protect and ensure respect for these rights falls to everyone and cannot and must not be debated." 79

The Chinese delegation was one of the few who attempted to question these violations of human rights law. It turned to a sort of cultural relativism, allegedly embedded in the international legal system, that implicated that violations of human rights – not to mention how to enforce those rights – could only be determined by the nation where those alleged breaches were occurring, and not by the international community or any foreign authority – even when fundamental human rights, like the right to life, were involved.

We believe that [...] all countries have an obligation to promote and protect the human rights and fundamental freedoms of their own peoples in accordance with the purposes and principles of the United Nations Charter and international human rights instruments, and in the light of their respective national conditions and relevant laws. But as political systems, levels of economic development, history, cultural background and values vary from country to country, it is only natural that countries should have different interpretations and even diverging views on human rights. [...] The issue of human rights is, in essence, the internal affair of a given country, and should be addressed mainly by the Government of that country through its own efforts. Ours is a diversified world. Each country has the right to choose its own social system, approach to development and values that are suited to its national conditions. 80

Fundamentally speaking, ethnic problems within a State should be settled in a proper manner by its own Government and people, through the adoption of sound policies. They must not be used as an excuse for external intervention, much less used by

79 Mr. Petrella, UNSC 3989th Meeting (03/26/1999), S/PV.3989, p. 7, emphasis added.
80 Mr. Tang Jiaxuan, UNGA 54th Session, 8th Plenary Meeting, (09/22/1999), A/54/PV.8, p.16, emphasis added.
foreign States as an excuse for the use of force. Otherwise, there will be no genuine security for States and no normal order for the world. [...] Respect for sovereignty and non-interference in each other’s internal affairs are basic principles of the United Nations Charter. [...] Those principles are by no means outdated. On the contrary, they have acquired even greater relevance. [...] In essence, the “human rights over sovereignty” theory serves to infringe upon the sovereignty of other States and to promote hegemonism under the pretext of human rights. This totally runs counter to the purposes and principles of the United Nations Charter. The international community should maintain vigilance against it.  

Supporters of the intervention in Kosovo also spotlighted breaches of other international legal obligations generated in the context of the Kosovo crisis, including those derived from legally binding UNSC resolutions. In Resolution 1199, the UNSC ordered Yugoslavia to maintain a ceasefire, to improve the humanitarian situation, to withdraw security forces used for civilian repression, to collaborate with international monitors and humanitarian organizations, to facilitate the safe return of refugees, to comply with previously made commitments, and to cooperate with ICTY investigations. UNSC Resolution 1203 obligated Yugoslavia to comply with agreements signed with the OSCE and NATO, through which it had undertaken to implement the obligations imposed by UNSCR 1199. In this context, the use of force was argued as the implementation and enforcement of those resolutions. For this, it was important to bring Yugoslavia’s disregard for these UNSC mandates to the attention of the international community.

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81 Mr. Shen Guofang, UNSC 4011th Meeting (06/10/1999), S/PV.4011, pp. 8-9.
82 Approved on September 23, 1998, with 14 votes in favor and one abstention (China).
83 Approved on October 24, 1998, with 13 votes in favor and two abstentions (China, Russia).
- United Kingdom: “Two United Nations Security Council resolutions, 1199 and 1203, […] demanded that the Serbs cease all actions against the civilian population and withdraw the security units used for civilian repression. *Milosevic has been in breach of every single part of those UN resolutions.*”

“Three times in the past year we have sponsored resolutions on Kosovo in the Security Council. Resolutions which called on President Milosevic to halt the conflict, to pull back his troops, and to admit the War Crimes Tribunal to investigate atrocities. *He has responded to none of these resolutions. It is President Milosevic, not NATO, who is challenging the authority of the United Nations.*”

- France: “[… T]he Security Council adopted very firm resolutions, under Chapter VII, i.e. the chapter of the U.N. Charter which governs the recourse to force. At that time, the Security Council’s demands – a very strong word in U.N. parlance – were extremely substantial – as were its requests. […] B]ut *none of the demands has been met.*”

“The actions that have been decided upon are a *response to the violation by Belgrade of its international obligations, which stem in particular from the Security Council resolutions* adopted under Chapter VII of the United Nations Charter.”

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84 Deputy Prime Minister Prescott in the House of Commons, March 24, 1999 (reprinted in Krieger 2001: 409, emphasis added).
85 Foreign Secretary Cook in the House of Commons, March 25, 1999 (reprinted in Krieger 2001: 411, emphasis added).
87 Mr. Dejammet, UNSC 3988\textsuperscript{th} Meeting (03/24/1999), S/PV.3988, p. 9, emphasis added.
- European Union: “[… T]he Yugoslav security forces are conducting military operations against the civilian population in Kosovo in contravention of the provisions of United Nations Security Council resolution 1199 (1998).”

- NATO: “I am writing to provide you with a further report on compliance by the parties to the conflict in Kosovo with Security Council resolutions 1199 (1998) of 23 September 1998 and 1203 (1998) of 24 October 1998 and by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) with commitments provided to NATO on 25 October 1998. The requirements of the United Nations for a ceasefire are being disregarded by both sides and President Milosevic is flouting last October’s undertakings to NATO to reduce and redeploy his forces in Kosovo.”

- United States: “[… The OSCE Chairman’s condemnation of the Racak incident on January 15] reflects the collective judgment of the international community that the FRY has not complied with the obligations it has undertaken in the agreement establishing the Kosovo Verification Mission. Belgrade has also failed to comply with the terms of U.N. Security Council Resolutions 1199, 1203, 1207 and earlier resolutions. We are particularly appalled at the continuing refusal of Serbian and FRY authorities to acknowledge the authority and jurisdictional responsibility of the International Criminal Tribunal for the former Yugoslavia (ICTY) to conduct…

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88 European Council statement, read out by the representative of Germany, Mr. Kastrup, at the UNSC 3988th Meeting (03/24/1999), S/PV.3988, p. 17, emphasis added.

89 Letter from NATO Secretary-General Solana to the President of the UNSC, March 23, 1999 (reprinted in Auerswald & Auerswald 2000: 702, emphasis added).
investigations in Kosovo. [...] The U.N. Security Council’s demand for full cooperation with the ICTY and its investigators is clear and unequivocal.”

“Acting under Chapter VII, the Security Council adopted three resolutions – 1160, 1199 and 1203 – imposing mandatory obligations on the FRY; and these obligations the FRY has flagrantly ignored. So NATO actions are being taken within this framework [...].”

- Slovenia: “This situation represents a case of massive violation of the relevant Security Council resolutions, in particular resolution 1199 (1998) of 23 September 1998, which called for an immediate end to all military activity against the civilian population. [...] It is our expectation and belief that the action which is being undertaken will be carried out strictly within the substantive parameters established by the relevant Security Council resolutions.”

- Germany: “Resolution 1199 of 23 September 1999 has been taken under Chapter VII of the UN Charter. The UN Secretary-General has stated that the addressee of the resolution, Milosevic, has not fulfilled its demands. In its decision [to use military force against Yugoslavia], NATO refers explicitly to resolution 1199 and to the necessity of preventing a humanitarian catastrophe. NATO […] has not authorized itself; NATO acts within the framework of the UN.”

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92 Mr. Türk, UNSC 3988th Meeting (03/24/1999), S/PV.3988, pp. 6-7, emphasis added.
93 Mr. Schröder, President of the Bundersat, at the Deutscher Bundestag, October 16, 1998 (reprinted in Krieger 2001: 399, emphasis added).
“[…] the threat to use military action aims at the implementation of the unanimously adopted UN Security Council resolution [1199].”

- Bosnia and Herzegovina: “A country that […] has refused to adhere to international law and numerous Security Council resolutions or to cooperate with the Tribunal for the former Yugoslavia cannot now credibly plead for the protection of international law. This indeed turns on their head morality, legality and the principles for which this institution, the United Nations, stands.”

- Netherlands: “The NATO action […] follows directly from resolution 1203 (1998), in conjunction with the flagrant non-compliance on the part of the Federal Republic of Yugoslavia. Given its complex background, we cannot allow it to be described as unilateral use of force.”

All in all, the opponents of the Kosovo intervention had a strong case based on jus ad bellum, in general, and the U.N. Charter, in particular. Without a UNSC authorization, any non-defensive use of force stands on muddy legal grounds, and NATO’s critics took good advantage of this to build a persuasive legal case against the military operation. However, the supporters of the intervention came back with a persuasive argumentation too. The very same international legal system, as well as the authority of the UNSC, had been continuously infringed by Yugoslavia for over a year, and failure to take effective action to force Yugoslavia back into compliance would become practically an act of acquiescence to such systematic defiance to the law. Not that this invalidated the

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95 Mr. Sacirbey, UNSC 3988th Meeting (03/24/1999), S/PV.3988, p. 18, emphasis added.
96 Mr. van Walsum, UNSC 3989th Meeting (03/26/1999), S/PV.3989, p. 4, emphasis added.
opponent’s arguments, but it did neutralize much of its argumentative force. After all, two wrongs do not make a right, but two wrongs can be more right than one wrong systematically getting away with it. President Clinton summarized NATO’s position in this respect in the General Assembly:

Even in Kosovo, NATO’s actions followed a clear consensus, expressed in several Security Council resolutions, that the atrocities committed by Serb forces were unacceptable and that the international community had a compelling interest in seeing them end. Had we chosen to do nothing in the face of this brutality, I do not believe we would have strengthened the United Nations. Instead we would have risked discrediting everything it stands for. By acting as we did, we helped to vindicate the principles and purposes of the United Nations Charter to give the United Nations the opportunity it now has to play the central role in shaping Kosovo’s future. In the real world, principles often collide and tough choices must be made. The outcome in Kosovo is hopeful.97

(3) Construing the veto threat in the UNSC as legal-institutional sabotage

Spotting Yugoslavia’s breaches of international legal obligations derived from customary and treaty law and UNSC resolutions was not the only way to portray the Kosovo intervention as compatible with the United Nations legal-institutional system. Another strategy used was to argue that the only reason why the UNSC failed to authorize the use of force against Yugoslavia was the misuse of the veto by two permanent members. According to this argument advanced by NATO countries and other supporters of the intervention, why was the use of veto power in this case illegitimate? Certainly not because it expressed a minority view – after all, what is the point of a veto

97 President Clinton, UNGA 54th Session, 6th Plenary Meeting, (09/21/1999), A/54/PV.6, p. 5, emphasis added.
if it is supposed to be used only in agreement with the majority? Why then? Because the veto perpetuated a situation which (1) was contrary to international law and (2) had already been *authoritatively* established to be so by the very UNSC. In other words, an institutional prerogative (i.e. the veto) was being used to undermine the very institutional framework of which it was a part. In this sense, failing to authorize the use of force was less compatible with the legal and institutional expectations, the argument goes, than was the use of force without such an authorization. Supporters of the intervention did not hesitate to denounce a series of misuses of the veto in this case and thus ultimately weaken the legal-institutional relevance of the (irresponsibly and implicitly) vetoed authorization to enforce UNSC resolutions by military force.

- Canada: “We believe that China’s decision [to veto the extension of the UN Preventive Deployment Force in Macedonia (UNPREDEP), which monitored its border with Kosovo], seemingly compelled by bilateral concerns unrelated to UNPREDEP, constitutes an unfortunate and inappropriate use of the veto.”\(^{98}\)

- Slovenia: “We regret the fact that not all permanent members were willing to act *in accordance with their special responsibility for the maintenance of international peace and security under the United Nations Charter*. Their apparent absence of support has prevented the Council from using its powers to the full extent and from authorizing the action which is necessary to put an end to the violations of its resolutions.”\(^{99}\)

\(^{98}\) Mr. Fowler, UNSC 3982\(^{th}\) Meeting (02/25/1999), S/PV.3982, p. 7, emphasis added.

\(^{99}\) Mr. Türk, UNSC 3988\(^{th}\) Meeting (03/24/1999), S/PV.3988, pp. 6-7, emphasis added.
“The responsibility of the Security Council for international peace and security is a primary responsibility; it is not an exclusive responsibility. It very much depends on the Security Council, and on its ability to develop policies that will make it worthy of the authority it has under the Charter, whether the primacy of its responsibility will actually be the reality of the United Nations.”100

- Malaysia: “My delegation would have wished that the crisis in Kosovo could be dealt with directly by the Council. It is regrettable that, given the divisions in the Council on this subject, during the past 13 months it has not been able to address the issue in any meaningful way. It is regrettable that in the absence of a consensus in the Council — thanks, or rather, no thanks, to the irreconcilable differences among permanent members — the Council has been denied the opportunity to firmly and decisively pronounce on this issue, as expected of it by the international community. We regret that in the absence of Council action on this issue it has been necessary for action to be taken outside of the Council.”101

- Denmark: “The Council has interpreted its competence under Chapter VII of the Charter to cover humanitarian situations that shock the conscience of mankind. [...] The Security Council must do its utmost to live up to its primary responsibility for the maintenance of peace, security and humanitarian decency — a primary responsibility that all the Member States have vested in the Security Council in accordance with Article 24 of the Charter. The Council’s permanent members should apply the veto only in matters of vital importance, taking into account their unique responsibility for

100 Mr. Türk, UNSC 3988th Meeting (03/24/1999), S/PV.3988, p. 19, emphasis added.
101 Mr. Hasmy, UNSC 3988th Meeting (03/24/1999), S/PV.3988, p. 10, emphasis added.
the interests of the United Nations as a whole. And they should state on what grounds they consider such a situation to be present.”

- Pakistan: “The inability of the Security Council to take effective action and to carry out its Charter responsibility has been a matter of deep concern to us. Its failure to address the issues of international peace and security in the past has only aggravated conflicts and human tragedies, as we in South Asia know well.”

- Organization of the Islamic Conference: “The Ministers for Foreign Affairs of the OIC Contact Group on Bosnia and Herzegovina and Kosovo […] regret that the Security Council has been unable to discharge its responsibility in this case, in accordance with the Charter of the United Nations, and reiterate that the Security Council has the primary responsibility for the maintenance of international peace and security and that, in carrying out its duties under this responsibility, the Security Council shall act on behalf of the Members of the United Nations […]”

- Germany: “[… I]n Rwanda, Kosovo and the Congo, decision making in the Security Council was blocked, thus rendering it unable to live up to its responsibilities enshrined in the United Nations Charter, with disastrous results for the peoples in question. […] According to the Charter, the Security Council acts with the mandate, and on behalf, of all United Nations Member States. But hitherto they have not been entitled to learn why a State has exercised its right of veto. This is not only neither democratic nor transparent, but also makes it easier for States to veto a draft

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102 Foreign Affairs Minister Petersen, UNGA 54th Session, 9th Plenary Meeting, (09/22/1999), A/54/PV.9, pp. 37, emphasis added.
103 Mr. Kamal, UNSC 4003rd Meeting (05/14/1999), S/PV.4003, p. 12, emphasis added.
104 Declaration by the OIC Contact Group on Bosnia and Herzegovina and Kosovo, April 7, 1999 (reprinted in Krieger 2001: 494, emphasis added).
resolution unilaterally for national rather than international interests. The introduction of an obligation for a State to explain to the General Assembly why it is vetoing a draft resolution would make it more difficult to do so and thus bring about substantial progress towards using the right of veto more responsibly. […] Without reforms in the area of peacekeeping, the Security Council will be circumvented more and more frequently, resulting in the erosion of the Security Council and, ultimately, of the entire United Nations system. […] We must prevent that.”

Saudi Arabia: “Resort to military force without a United Nations mandate to resolve such problems [of gross human rights violations …] becomes an unavoidable necessity whenever the Security Council, due to disunity and disagreement between its permanent Members, fails to fulfill its role in maintaining world peace and security.”

As it transpires from many of the quoted statements, an important part of the argument about the irresponsible use of the veto in the Kosovo case has to do with the fact that the UNSC has a responsibility, not a mere right, to maintain international peace and security (Art. 24.1). Preventing the council from exercising the responsibility conferred to it by the U.N. member states is failing to comply with the U.N. Charter, and thus, arguably, a violation of an international legal obligation owed to the United Nations Organization.

105 Foreign Affairs Minister Fischer, UNGA 54th Session, 8th Plenary Meeting (09/22/1999), A/54/PV.8, p. 12, emphasis added.
106 Mr. Madani, UNGA 54th Session, 19th Plenary Meeting (09/30/1999), A/54/PV.19, p. 35, emphasis added.
In a nutshell, NATO succeeded in conceptually cornering the humanitarian intervention in Kosovo so as to present it as a legal dilemma – namely, that international law required that the international community both intervene (to uphold international law) and refrain from intervening (to uphold the decision-making procedures of the U.N. Charter). What is the legitimate thing to do, NATO rhetorically asked, in such an ambivalent legal context?

- Bosnia and Herzegovina: “[… W]e are concerned by the implications of this matter: the NATO military action being undertaken without the sanction of the United Nations Security Council. However, we would be even more concerned and dismayed if the Security Council were blocked and there were no response to the humanitarian crisis and to the legal obligation to confront ethnic cleansing and war crime abuses. […] Is the Security Council now to be used as a marginalized institution to actually block or criticize the only viable response in order to bring peace and to stop vast human rights abuses? Remember, these abuses are themselves the most serious violations of the United Nations Charter. […] It seems that we cannot hope for the United Nations and the Security Council to always be effective and prompt in bringing peace. That is unfortunately the reality that we deal with. But at least we should not allow the Security Council and the United Nations to be seen as an obstacle.”


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107 Mr. Sacirbey, UNSC 3989th Meeting (03/26/1999), S/PV.3989, pp. 14-15.
This turns the truth on its head. The United Nations Charter does not sanction armed assaults upon ethnic groups, or imply that the international community should turn a blind eye to a growing humanitarian disaster.”108

- Netherlands: “If, however, due to one or two permanent members’ rigid interpretation of the concept of domestic jurisdiction, such a resolution [by the UNSC authorizing the use of force] is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur. In such a situation we will act on the legal basis we have available, and what we have available in this case is more than adequate.”109

Summing up, the supporters of the Kosovo intervention succeeded in arguing that respect for procedural rules – no matter how sound these rules are in abstract, or how legitimate their foundation – should not prevail over respect for substantive rights and obligations under international law, especially when these are fundamental human rights. The point is reinforced by allegations that the procedural rules in question were being misused to advance national interests rather than the responsibilities of the UNSC laid out in the U.N. Charter. These arguments were not dealt with in any significant, not to mention persuasive, way by NATO’s critics.

(4) Establishing the exhaustion of peaceful means

A legal expectation directly derived from the U.N. Charter is that disputes be solved peacefully and the use of force be therefore a last resort.110 It was important for those seeking to legitimate the intervention in Kosovo to be able to persuade others that

108 Mr. Burleigh, UNSC 3989th Meeting (03/26/1999), S/PV.3989, p. 5.
109 Mr. van Walsum, UNSC 3988th Meeting (03/24/1999), S/PV.3988, p. 8.
110 Articles 2(3) and 33(1), U.N. Charter.
peaceful means had been pursued and exhausted before the recourse to military force. Doing so obviously required more than legal argumentation. Some actions had to be effectively taken before the claim that force was a last resort could be advanced persuasively.

In light of this, NATO crystallized diplomatic efforts, prior to the resort to force, in the form of a series of agreements through which Yugoslavia undertook to fully respect international humanitarian and human rights law in Kosovo. In October 1998, Richard Holbrooke, U.S. especial envoy to the Balkans, negotiated an agreement with Milosevic through which Yugoslavia undertook to implement UNSCR 1199. The establishment of an OSCE air surveillance system to monitor compliance (KVM) was agreed on October 15 (with NATO) and 16 (with OSCE), which was to replace the ground verification mission operating in the area by OSCE diplomats since July (KDOM). The UNSC endorsed the agreements.

It must be noted that these agreements were the result of “coercive diplomacy,” that is negotiations in which NATO’s explicit threat to use force against Yugoslavia had an impact on the bargaining process. In effect, as early as September 1998, NATO issued an official warning:

Just a few moments ago, the North Atlantic Council approved the issuing of an ACTWARN for both a limited air option and a phased air campaign in Kosovo. The ACTWARN will take NATO to an increased level of military preparedness. In particular, the ACTWARN will allow NATO Commanders to identify the assets

113 UNSCR 1203 (October 24, 1998), approved by unanimity with two abstentions (Russia and China).
required for these NATO air operations. [...] Today’s decision is an important political signal of NATO’s readiness to use force, if it becomes necessary to do so.\textsuperscript{114}

Two days before the signing of the agreement, the Alliance heightened the military threat:

[...] Just a few moments ago, the North Atlantic Council decided to issue activation orders – ACTORDs – for both limited air strikes and a phased air campaign in Yugoslavia, execution of which will begin in approximately 96 hours.\textsuperscript{115}

Obtaining the UNSC’s formal endorsement and support of the agreements coercively concluded with Yugoslavia was particularly meaningful in that it indirectly sanctified NATO’s threat of force by welcoming the results of that threat. The U.N. endorsement certainly did not happen by chance. The German Foreign Minister, for example, explicitly mentioned that these coerced agreements would be endorsed by the UN: “The UN Security Council will confirm the agreements with the OSCE and NATO [...] Thus, the Security Council remains in control of the proceeding.”\textsuperscript{116} In effect, in its resolution 1203, the UNSC, acting under Chapter VII,

Endorses and supports the agreements signed in Belgrade on 16 October 1998 between the Federal Republic of Yugoslavia and the OSCE, and on 15 October 1998 between the Federal Republic of Yugoslavia and NATO, concerning the verification of compliance by the Federal Republic of Yugoslavia and all others concerned in Kosovo with the requirements of its resolution 1199 (1998), and demands the full and

\textsuperscript{114} Statement by NATO Secretary-General Solana, September 24, 1998 (reprinted in Krieger 2001: 289).
\textsuperscript{115} Statement by NATO Secretary-General Solana, October 13, 1998 (reprinted in Krieger 2001: 289).
\textsuperscript{116} Germany’s Foreign Affairs Minister Kinkel at the Deutscher Bundestag, October 16, 1998 (reprinted in Krieger 2001: 398).
prompt implementation of these agreements by the Federal Republic of Yugoslavia […].  

The resolution even “[u]rges States and international organizations to make available personnel to the OSCE Verification Mission in Kosovo […].” In short, by passing UNSCR 1203, NATO succeeded in introducing early on the use of coercive diplomacy without international condemnation.

In January 1999, with the express support of the UNSC, NATO attempted to negotiate an Interim Agreement on Kosovo. The agreement imposed that Yugoslavia followed a series of steps in relation to the situation in Kosovo. This draft, which Milosevic rejected, became the basis of the Rambouillet Agreement of March 15, 1999. The Rambouillet Agreement – the final attempt at working out a peaceful solution to the crisis – obligated Yugoslavia to guarantee substantial autonomy to Kosovo and allow a NATO-led international security force to guarantee the Kosovars’ security. The negotiations held for over two weeks in February 1999 failed to convince Yugoslavia to accept the NATO-led military presence on its territory, despite the explicit threat that only signing the agreement would stop NATO from launching a military campaign in the Balkans. Consequently, the agreement was rejected by Yugoslavia.

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117 UNSCR 1203.
118 Ibid.
There is little doubt that negotiations at Rambouillet were the strategic creation of a further pretext to start a more legitimized use of force. As Clinton’s top national security advisor, Sandy Berger, later recalled, if Milosevic “[…] was playing a game with us at Rambouillet by building up his forces while pretending to negotiate seriously, so were we. *We needed to demonstrate a real commitment to get a peaceful resolution in order to get the allies to go along with the use of significant force.*” This was confirmed by a close aide to the State Secretary, according to whom the purpose of Rambouillet had always been clear: “To get the war started with the Europeans locked in.” In fact, this had been an early concern of the United States, as discussions at the NSC in June testify:

Principals agreed to make a major effort to elicit British, French and German assurance that they would, if necessary, participate in NATO action without United Nations authorization. To this end, NSA Berger and Secretary Albright will contact counterparts, stressing the unacceptability of permitting Russia to veto effectively critical NATO actions in Europe.

With this background of UN-supported diplomatic action, many argued repeatedly that the legal requirement of the peaceful settlement of disputes and the use of force as last resort had been satisfied by March 1999.

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122 Butler 2012: 149.
124 Quoted in Daalder & O’Hanlon 2000, p. 89.
125 Summary of Conclusions for Meeting of the NSC Principals Committee (June 30, 1998), p. 2 [Clinton Presidential Library]. Similarly, “Principals agreed on need to build allies support for the threat of or use of NATO force in Kosovo without the need for a UNSC Resolution.” (Summary of Conclusions for Meeting of the NSC Principals Committee (August 6, 1998), p. 1 [Clinton Presidential Library]).
126 Cf. the following statement by the Russian representative: “NATO’s decision to use military force is particularly unacceptable from any point of view because the potential of political and diplomatic methods to yield a settlement in Kosovo has certainly not been exhausted.” (Mr. Lavrov, UNSC 3988th Meeting (03/24/1999), S/PV.3988, p. 3).
- United Nations: “I deeply regret that, in spite of all the efforts made by the international community, the Yugoslav authorities have persisted in their rejection of a political settlement […]. It is indeed tragic that diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace.”\(^{127}\)

- Slovenia: “Slovenia regrets that the developments in Kosovo have brought the international community to the point at which all diplomatic means have been exhausted and military action in the Federal Republic of Yugoslavia has become inevitable. The constant endeavors of the international community to achieve a diplomatic solution to the crisis and to prevent a humanitarian catastrophe of even greater extent have yielded no results.”\(^{128}\)

- Canada: “The international community has spared no effort to encourage the Federal Republic of Yugoslavia to conclude a peaceful agreement with the Albanian population of Kosovo. Many diplomatic missions have been sent to Belgrade […]. The continuing oppression in Kosovo by the Government in Belgrade, through its armed forces and police; the continuing failure on the part of the Milosevic Government to implement the agreements it has made with the OSCE and NATO; and its continuing refusal to act in compliance with the requirements of successive Security Council resolutions […] have left NATO with no choice but to take action.”\(^{129}\)

\(^{127}\) U.N. Secretary-General Annan, Statement, March 24, 1999 (reprinted in Auerswald & Auerswald 2000: 725, emphasis added).
\(^{128}\) Mr. Türk, UNSC 3988\(^{th}\) Meeting (03/24/1999), S/PV.3988, p. 6, emphasis added.
\(^{129}\) Mr. Fowler, UNSC 3988\(^{th}\) Meeting (03/24/1999), S/PV.3988, p. 5, emphasis added.
- United Kingdom: “Nobody in the light of this history can say […] that we have not tried to find a peaceful solution to this conflict […].”

“Every means short of force was used to try to avert the current situation. These efforts have failed because President Milosevic has flouted the demands of the international community, including successive Security Council resolutions, allowed his forces to continue their violent oppression of civilians in Kosovo and ignored all appeals to negotiate a political settlement.”

“In these circumstances, when diplomacy has failed, do we react just with further words? […] President Milosevic refused to engage seriously in negotiations on an agreement. His intransigence led instead to the breakdown of the Rambouillet process. […] NATO has been forced to take military action because all other means of preventing a humanitarian catastrophe have been frustrated by Serb behavior.”

- France: “All possible political means have been employed to convince the Belgrade authorities to choose a negotiated solution and peace. These means are today exhausted. Consequently, […] France has decided to participate] in the now inevitable military operations […].”

- NATO: “All efforts to achieve a negotiated, political solution to the Kosovo crisis having failed, no alternative is open but to take military action. We are taking action
following the Federal Republic of Yugoslavia Government’s refusal of the International Community’s demands […]”\textsuperscript{134}

- United States: “[…] Belgrade rejected all efforts to achieve a peaceful resolution. […] It is Belgrade’s systematic policy of undermining last October’s agreements and thwarting all diplomatic efforts to resolve the situation which have prevented a peaceful solution and have led us to today’s action. In this context, we believe that action by NATO is justified and necessary to stop the violence and prevent an even greater humanitarian disaster.”\textsuperscript{135}

- Netherlands: “[… W]ith regard to the problem of Kosovo, the diplomatic means of finding a solution are now exhausted. As stated by the Secretary-General, diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace. The Netherlands feels that this is such a time.”\textsuperscript{136}

“The use of military force is always the last resort. It is with the greatest of reluctance that the 19 members of NATO decided to start using military means. But there was truly no alternative. We had tried all diplomatic means, at the Rambouillet and Paris conferences.”\textsuperscript{137}

\begin{footnotesize}
\begin{footnotes}{134} NATO Secretary-General Solana, Statement, March 23, 1999 (reprinted in Krieger 2001: 304, emphasis added).
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\begin{footnotes}{135} Mr. Burleigh, UNSC 3988\textsuperscript{th} Meeting (03/24/1999), S/PV.3988, pp. 4-5, emphasis added.
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\begin{footnotes}{136} Mr. van Walsum, UNSC 3988\textsuperscript{th} Meeting (03/24/1999), S/PV.3988, p. 8, emphasis added.
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\begin{footnotes}{137} State Secretary for Foreign Affairs, Speech at the College of Europe, May 12, 1999 (reprinted in Krieger 2001: 406, emphasis added).
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- Argentina: “Since the peaceful settlement of disputes is one of the guiding principles of our foreign policy, we regret that the intransigence of the Belgrade Government has led to this result, which no member of this [U.N. Security] Council desires.”\textsuperscript{138}

- Japan: “Despite the tireless diplomatic efforts by the United States and various European countries, an agreement could not be reached at the Paris peace talks on Kosovo because of the uncompromising attitude of the government of the Federal Republic of Yugoslavia. It is extremely regrettable that that has led to the current situation.”\textsuperscript{139}

- Germany: “The possibilities for negotiating are exhausted. The use of force [being threatened] is an \textit{ultima ratio}.”\textsuperscript{140}

“The international community has left no stone unturned to settle the conflict in Kosovo by diplomatic means. However, \textit{all efforts to achieve a peaceful solution} foundered in the face of the ruthless intransigence of the leadership in Belgrade. With catastrophe looming, the Alliance finally \textit{had no other choice}. It had to resort to military action to make Belgrade realize the consequences of the war it was waging on its own people.”\textsuperscript{141}

\textsuperscript{138} Mr. Petrella, UNSC 3988\textsuperscript{th} Meeting (03/24/1999), S/PV.3988, pp. 10-11, emphasis added.
\textsuperscript{139} Foreign Minister Masahiko Koumura, Statement, March 25, 1999 (reprinted in Krieger 2001: 491, emphasis added).
\textsuperscript{140} Foreign Affairs Minister Kinkel at the Deutscher Bundestag, October 16, 1998 (reprinted in Krieger 2001: 398).
\textsuperscript{141} Chancellor Schröder at the Deutscher Bundestag, April 22, 1999 (reprinted in Krieger 2001: 402, emphasis added).
“We are not waging war. We are however called upon to enforce a peaceful solution in Kosovo even under the use of military means.”

Once a fact, Yugoslavia’s failure to agree to a negotiated solution to the conflict – or to honor those agreed upon – were discursively exploited, as expected. The argument was made that the start and continuation of the bombing were being brought about and decided upon by Milosevic, not NATO; the latter was only doing what it was forced to do by the former.

-NATO: “Even at this final hour, I still believe diplomacy can succeed and the use of military force can be avoided. The responsibility is on President Milosevic’s shoulders. He knows what he has to do.”

“Clear responsibility for the [NATO] air strikes lies with President Milosevic who has refused to stop his violent action in Kosovo and has refused to negotiate in good faith.”

“Responsibility for the present crisis lies with President Milosevic. He has the power to bring a halt to NATO’s military action by accepting and implementing irrevocably the legitimate demands of the international community.”

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- Netherlands: “It is with the greatest sorrow and disappointment that the Netherlands Government is forced to note that President Milosevic is not prepared to choose the path of peace, a path which is wide open to him. And it will remain open.”\textsuperscript{146}

- United States: “We and our NATO allies have taken this action only after extensive and repeated efforts to obtain a peaceful solution to the crisis in Kosovo. But President Milosevic […] has again chosen aggression over peace.”\textsuperscript{147}

“[…] if President Milosevic will not make peace, we will limit his ability to make war.”\textsuperscript{148}

“The authorities of the Federal Republic of Yugoslavia could quickly bring NATO’s actions to a halt by ceasing their brutal attacks against the people of Kosovo and moving to a peace agreement.”\textsuperscript{149}

- European Union: “President Milosevic must now take full responsibility for what is happening [i.e. NATO’s bombing in Yugoslavia]. It is up to him to stop the military action by immediately stopping his aggression in Kosovo and by accepting the Rambouillet Accords.”\textsuperscript{150}

In short, the exhaustion of peaceful means was persuasively argued by remarking the existence of a series of agreements undertaken by Yugoslavia and backed by the UNSC, and their systematic violation by Milosevic, also reported by the UN. That these

\textsuperscript{146} Statement by the Minister of Foreign Affairs in the Lower House, March 24, 1999 (reprinted in Krieger 2001: 406, emphasis added).
\textsuperscript{147} President Clinton, Statement, March 24, 1999 (reprinted in Auerswald & Auerswald 2000: 719, emphasis added).
\textsuperscript{148} President Clinton, Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), March 24, 1999 (quoted in Butler 2012: 152).
\textsuperscript{149} Mr. Burleigh, UNSC 3989\textsuperscript{th} Meeting (03/26/1999), S/PV.3989, p. 5, emphasis added.
\textsuperscript{150} Statement by the European Council, March 24, 1999 (reprinted in Auerswald & Auerswald 2000: 725, emphasis added).
agreements were the result of coercive diplomacy was underexploited by those opposing the Kosovo intervention, not to mention their “purification” through U.N. endorsement. Yugoslavia’s failure to agree to the terms of the Rambouillet agreement was the final strategic move that successfully demonstrated that the road of peaceful means had reached a dead end.

(5) Avoiding an explicit U.N. disapproval

No authorization to use military force against Yugoslavia was formally requested at the UNSC. This was a strategic choice made for the sake of legitimacy. As advised by the NSC on July 15, 1998, “[…] under current circumstances, efforts to achieve a United Nations Security Council Resolution under Chapter VII would be counterproductive.”

The reason: with virtual certainty, China and/or Russia would have vetoed such an authorization. The impossibility of obtaining UNSC approval became evident in October 1998. An earlier draft of what would become UNSCR 1203 contained an authorization to use military force, which China demanded to have removed from the draft or else she would veto it. In effect, to make explicit the disapproval of the Unite Nations would have only weakened the legitimacy of the decision to employ military force in Kosovo.

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151 Summary of Conclusions for Meeting of the NSC Principals Committee (July 15, 1998) [Clinton Presidential Library], emphasis added.
152 The Chinese representative stated in the 3937th Security Council meeting of October 24, 1998, that: “The Chinese delegation put forward its amendments during the Council’s consultations, among which the request to delete those elements authorizing use of force or threatening to use force was accommodated” (p. 14). See also the statement of China’s Foreign Ministry Spokesman of October 25, 1998, pointing out that “[…] the draft proposed by some countries includes authorizing the use of force against Yugoslavia […]. China has pointed out that it will have to veto the draft if the authorization of force is not deleted. China’s proposals were adopted on the whole […] so it did not prevent the draft resolution from passing […]” (reprinted in Krieger 2001: 491).
It was only towards the end of 1998 that European NATO-members, thanks to Washington’s insistence, became sufficiently aware of the legitimacy costs of an explicit rejection to use force from the UNSC. In June, President Chirac stated publicly that “[w]e would also like decisions to be taken at Security Council level, hence our immediate support for the resolution requesting Security Council authorization for military action as and when necessary.” In October, the NSC agreed that “[b]ecause of Russia’s position, the United States should discourage France and the UK from pursuing an additional UNSCR specifically authorizing force. If the two countries wish to “test” Russian willingness to agree to such a resolution, we should encourage them to do so quickly and quietly.” After that month there would be no more attempts to obtain a UNSC resolution authorizing the use of “all necessary means” to deal with the situation in Kosovo.

According to the House of Commons Foreign Affairs Committee, “[…] Operation Allied Force was contrary to the specific terms of what might be termed the basic law of the international community – the UN Charter, although this might have been avoided if the Allies had attempted to use the Uniting for Peace procedures.” No authorization was sought at the UNGA, either. Discussions in the UNSC – excerpts from which have been extensively quoted above – suggest that an authorization to use force against Yugoslavia would have probably had achieved a two-thirds majority in the

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154 Summary of Conclusions for Meeting of the NSC Principals Committee (October 6, 1998) [Clinton Presidential Library], emphasis added.
council. However, Western/NATO countries are over-represented in the UNSC, and thus this counterfactual vote should not be extrapolated to the UNGA. In effect, France, the U.K. and the U.S., plus the two non-permanent members from Western Europe (and the British Commonwealth), guarantee five Western/NATO votes in the 15-member council. In the UNGA, on the other hand, Western seats, even in the most generous count, do not reach one fifth. Securing a two-thirds majority in the plenary organ would have therefore been less probable and would have required, in any event, long and costly negotiations. This made the “Uniting for Peace” option rather unattractive. In effect, turning to the “Uniting for Peace” mechanism was at the time suggested by Professor Adam Roberts to the British government, but the Foreign Office thought it was too risky a move since it was uncertain that the two thirds majority would be achieved.

In a nutshell, the defeat in the UNSC of a resolution authorizing a military intervention was certain (due to the veto); its defeat in the UNGA (where a two-thirds

\[156\] Based on the positions they consistently held on the issue, and especially on the opinions expressed at the UNSC on March 24, it is a fair prediction that a positive vote would have been obtained from ten of the fifteen members – namely, Argentina, Bahrain, Canada, France, Gambia, Malaysia, the Netherlands, Slovenia, the United Kingdom, and the United States. Even though failing to condemn a military action and authorizing it are not the same thing, the 3-12 vote on the condemnatory draft resolution of March 26 is still highly suggestive in this sense.

\[157\] In the House of Commons, Professor Roberts testified: “I actually raised that issue in a meeting at Chatham House on the day Rambouillet initially failed, in February of 1999, and I suggested that might be one possible way out of the Security Council's obvious paralysis on the question of Kosovo. At that time, the Foreign Office took the view that this was very ill advised, and I was told that really it was not very helpful of me to have talked about this. Because I think they clearly took the view (a) that it was uncertain that they would get anything like the two-thirds majority which I believe is what is required under 'Uniting for Peace', and (b) that the General Assembly is a somewhat cumbersome instrument, in that it does not meet continuously, it cannot continuously develop its policy, once you have got an agreement in the General Assembly you will be absolutely stuck with whatever that agreement is, and it is not the kind of flexible instrument that the Security Council is. Those, I think, were the arguments against going that route, I am not saying they were right, I think there was a serious case for trying that route, but that was the opinion at the time and the reason why it was not done” (House of Commons Foreign Affairs Committee 4th Report, Minutes of Evidence, 18 January 2000, Question 178). Mr. Jones Parry also confirmed that the British government had considered and rejected this option (4th Report, paragraph 128).
majority is required) was not unlikely. It was better for NATO to leave these (certain and probable, respectively) defeats unexposed.

That a resolution authorizing force would not have been approved in the UNGA does not necessarily refute what the representative of Canada stated in the UNSC: “Those who would support this draft resolution [condemning NATO’s action] place themselves outside the international consensus, which holds that the time has come to stop the continuing violence perpetrated by the Government of the Federal Republic of Yugoslavia against its own people.”\textsuperscript{158} It might as well be true that the bulk of the international community agreed to effectively put a stop to the humanitarian crisis in Kosovo, even if that broad agreement would not translate into support for a U.N. authorization to use force.\textsuperscript{159}

This created an opportunity for the opponents of the Kosovo intervention to challenge its legitimacy. Russia did bring up in a few occasions the fact that no authorization had been formally sought in the UNSC, but this argument was clearly underexploited. This was probably because the argument itself was intrinsically weak, as it was publicly known in advance that such an authorization would have been vetoed by Russia and China. In fact, that very argument could be turned around by others to fuel the omnipresent accusations of the irresponsible use of the veto in the council. Much more potential had the strategy of spotlighting NATO’s decision not to turn to the UNGA for legitimation. Such a non-action implied that the intervention was (expected to be)

\textsuperscript{158} UNSC 3989\textsuperscript{th} Meeting (03/26/1999), S/PV.3989, p. 3.
\textsuperscript{159} As explained in the following section, an unauthorized and yet uncondemned intervention could be optimal for those supporting the intervention on an exceptional basis but fearing the setting of a precedent.
rejected not just by one or two veto-wielding countries (as was the case in the UNSC) but by more than one third of the international community. This argument was never made – perhaps not to legitimize the “Uniting for Peace” procedure in the first place.

The legitimacy costs that NATO avoided by not exposing a defeat in the U.N. were precisely those that ended up being borne by the opponents of the Kosovo intervention. On March 26, 1999, right after Operation Allied Force started, Russia and Belarus introduced a draft resolution condemning the military action and demanding its cessation – hereinafter “3/26 draft resolution”. This attempt to obtain an explicit condemnation would prove to be a shot in the foot for the critics of the intervention.

From a legalistic point of view, whether a draft resolution is single-handedly vetoed or rejected by a quasi-unanimous majority in the UNSC, the effect is the same: the resolution is defeated. From a political point of view, however, that institutional defeat may acquire quite different meanings and thus exert quite different legitimacy-related effects. When the council fails to condemn a certain action, this should not be equated to the UNSC legitimizing the action by acquiescence. This is clearly apparent when such a condemnation is single-handedly vetoed by a permanent member. How a UNSC condemnation fails to be adopted, however, is crucial to interpret the meaning of this

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160 The draft resolution was also sponsored by India. Later on, Russia and China tried to introduce a mandate of “immediate cessation of all military activities” in UNSCR 1239 (5/14/99), which called for international humanitarian assistance of refugees, but the amendment was rejected (UNSC 99/5/14, China, 8; Russia, 9).

161 For instance, the UNSC failed to condemn the mining of Nicaraguan ports by the United States in the 1980s because the condemnatory draft resolution of April 4, 1984, although supported by 13 affirmative votes (and 1 abstention), was vetoed by the United States. Similarly, two UNSC draft resolutions mandating compliance with the ICJ judgment on the same dispute (of July 31 and October 28, 1986) were vetoed by the United States (although counting 11 affirmative votes and 3 abstentions). Clearly, these non-condemnations cannot be regarded as the UNSC endorsing the mining or non-compliance with the ICJ ruling.
institutional non-action. When the condemnation is blocked by a quasi-unanimous majority, rather than by a single veto, the defeated resolution does cast a veil of legitimacy over the non-condemned action. That was precisely the case with the 3/26 draft resolution. It was supported by only 3 affirmative votes (Russia, China, Belarus) and rejected by the remaining 12.\textsuperscript{162} Similarly, who supports or rejects a condemnatory draft resolution is also relevant in this respect. Impartiality carries with it a meaningful weight. If the condemnation is rejected only by the would-be condemned states and their allies, while the members more uninvolved in the dispute support it, such non-condemnation can hardly be regarded as a tacit endorsement of the action by the UNSC.\textsuperscript{163} But if the condemnation is rejected by many uninvolved states, then its failure to pass acquires overtones of legitimacy. In this sense, while it is quite meaningless that NATO members rejected the 3/26 draft resolution and that Russia and Belarus (allies of Yugoslavia) supported it, it is certainly meaningful that countries like Argentina, Bahrain, Brazil, Gambia and Malaysia cast a negative vote on it.\textsuperscript{164}

\textsuperscript{162} This was explicitly stressed by the representative of Canada in the UNSC, who stated, during the discussion of the condemnatory draft resolution, that “[t]here were no vetoes cast this morning. A veto is cast only when it overrides nine positive votes, and that was not the case this morning.” (UNSC 3989\textsuperscript{th} Meeting (03/26/1999), S/PV.3989, p. 16). The 12-vote rejection was also explicitly brought up by the representative of the Netherlands during the UNSC meeting on June 10, who stressed that such a vote was a clear majority rejection of the outdated conception of sovereignty as an absolute right (p. 12).

\textsuperscript{163} Again, the inaction of the UNSC in the Nicaragua case is a telling example.

\textsuperscript{164} Anticipating the vote on the 3/26 draft resolution, Britain publicly stressed the minority position of those opposing the Kosovo intervention: “We are in no doubt that NATO is acting within international law and our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe. NATO’s action has received support inside the UNSC from the United States, France, Argentina, Slovenia, Malaysia, Gambia, Bahrain, the Netherlands and Gabon. Outside of Russia and China, only Namibia disagreed with the military action in the Security Council, and in the wider United Nations we know of only opposition from India and understandably Belarus and the former Republic of Yugoslavia itself.” (Briefing by the Secretary of State for Defence, Mr. George Robertson, March 25 1999, reprinted in Krieger 2001: 410).

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Perhaps the strongest and most straight-forward use of this exposed failure to obtain a U.N. condemnation of the Kosovo intervention, was that of the Netherlands at the end of Operation Allied Force, when its representative went as far as arguing that the rejection of the 3/26 draft resolution not only spoke to the legitimacy of NATO’s action but also constituted evidence of an evolution of international law which, transcending the Kosovo case, favors the international enforcement of human rights.

We sincerely hope that the few delegations which have maintained that the North Atlantic Treaty Organization (NATO) air strikes against the Federal Republic of Yugoslavia were a violation of the United Nations Charter will one day begin to realize that the Charter is not the only source of international law. The Charter, to be sure, is much more specific on respect for sovereignty than on respect for human rights, but since the day it was drafted the world has witnessed a gradual shift in that balance, making respect for human rights more mandatory and respect for sovereignty less absolute. Today, we regard it as a generally accepted rule of international law that no sovereign State has the right to terrorize its own citizens. Only if that shift is a reality can we explain how on 26 March the Russian-Chinese draft resolution branding the NATO air strikes a violation of the Charter could be so decisively rejected by 12 votes to 3. […] The shift from sovereignty to human rights spells uncertainty, and we all have our difficulties with it. But the Security Council cannot afford to ignore the phenomenon. Times have changed, and they will not change back. One simply cannot imagine a replay in the twenty-first century of the shameful episode of the 1980s, when the United Nations was apparently more indignant at a Vietnamese military intervention in Cambodia, which almost all Cambodians had experienced as a liberation, than at three years of Khmer Rouge genocide. As a result of that misconception, the large majority of delegations, including my own, allowed
the Khmer Rouge to continue to occupy the Cambodian seat in the General Assembly for more than a decade.\textsuperscript{165}

All in all, then, supporters and opponents of the Kosovo intervention wanted a U.N. authorization and condemnation, respectively, for the legitimacy effects of such juridical acts. Both knew, however, that attaining this was impossible (in the UNSC) or improbable (in the UNGA). Accordingly, NATO did not seek formally an authorization, neither in the UNSC nor in the UNGA, because its anticipated rejection would undermine the argument that the intervention was carried out to uphold the authority of the United Nations and international law, and, by extension, it would weaken the legitimacy of the intervention. Some of the opponents of the intervention, on the other hand, introduced a condemnatory draft resolution in the UNSC that ended up exposing how isolated their position was. It is not clear why such a strategic mistake was made – especially since they knew, with certainty, that a 7-vote minority or one of three possible vetoes (i.e. U.S., France, or U.K.) would prevent the resolution from passing. Whatever the nature of this miscalculation, the point is that, once again, NATO succeeded in its legal-discursive defense of the Kosovo intervention by (1) avoiding an explicit U.N. disapproval of its actions, and (2) collecting the legitimacy spoils left by the opponents’ mistake.

\textit{(6) Establishing the exceptionality of the crisis}

Some have argued that many states – including some NATO members – were hesitant to seek authorization at the UNSC also because of the formal precedent such a U.N. resolution would create. This is unlikely, especially because many similar

\textsuperscript{165} Mr. van Walsum, UNSC 4011\textsuperscript{th} Meeting (06/10/1999), S/PV.4011, p. 12, emphasis added.
precedents already existed or would be created later. Concern about setting a precedent was a major issue at the time, but it was a different precedent that many feared. Namely, that of a unilateral humanitarian intervention (UHI) – i.e., the international military enforcement of human rights not authorized by the U.N. Such a precedent could build up to create a new right of states under international law. The precedential force of the action – which some argue cannot be done away with – clearly undermined its legitimacy, as many states rejected the creation of such a new right to use force unilaterally. This underbelly of the intervention in Kosovo was discursively exploited by those who opposed it.

- Russia: “This has created a dangerous precedent of the revival of the policy of military diktat, and threatened the international law and order.”

“Washington has formed a new philosophy, in keeping with which NATO is for Americans the main international authority which is not obliged to ask anyone’s permission for its actions. It is a very dangerous philosophy. It creates a precedent and sets a very bad example for other regional organizations: If NATO is permitted to

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166 See fn. 13 above.
167 I use the terms “multilateral” and “unilateral” to distinguish actions sanctioned by the U.N. (especially the UNSC) from those decided upon without U.N. approval, respectively. In this sense, collective interventions, such as those carried out by a regional organization or a “coalition of the willing,” may still be unilateral.
168 See, for example, Glennon 2001: 181-192; Glennon 2008. However, this observation (i.e. “admitting the illegality of an act has no effect in narrowing its precedent”) fails to recall that behavior alone is not sufficient to make customary international law, opinio juris (i.e. a presumption that the behavior in question acted out a right or obligation under international law) is also necessary. In this sense, denying the possible inference of opinio juris through explicit statements does constitute an effective way of preventing a practice from making law. See fn. 23 above.
adopt decisions on the use of force without asking anyone, why others cannot do the same?"\textsuperscript{170}

"Today’s vote [on the draft resolution condemning NATO's military actions] is not just on the problem of Kosovo. It goes directly to the authority of the Security Council in the eyes of the world community."\textsuperscript{171}

- **China**: "NATO seriously violated the Charter of the United Nations and norms of international law, and undermined the authority of the Security Council, thus setting an extremely dangerous precedent in the history of international relations."\textsuperscript{172}

- **Yugoslavia**: "If the aggression [of NATO against Yugoslavia] is not stopped, the precedent of such unpunished aggression will, sooner or later, lead to aggression against a number of other, smaller and medium-sized countries. The real question is: Which country is next?"\textsuperscript{173}

"The solutions which are being tried to be imposed on the Federal Republic of Yugoslavia [by UNSC Resolution 1244] set a dangerous precedent for the international community and a great encouragement to separatist and terrorist groups all over the world. [...] In adopting the present text of the draft resolution, the Security Council would [...] set a negative precedent with far-reaching consequences for overall international relations, in particular for the position of small and medium-sized developing countries."\textsuperscript{174}

\textsuperscript{170} Mr. Lavrov, \textit{Segodnya} interview, March 25, 1999 (reprinted in Auerswald & Auerswald 2000: 745).
\textsuperscript{171} Mr. Lavrov, UNSC 3989\textsuperscript{th} Meeting (03/26/1999), S/PV.3989, p. 6, emphasis added.
\textsuperscript{172} Mr. Shen Guofang, UNSC 4011\textsuperscript{th} Meeting (06/10/1999), S/PV.4011, p. 8, emphasis added.
\textsuperscript{173} Mr. Jovanović, UNSC 3988\textsuperscript{th} Meeting (03/24/1999), S/PV.3988, p. 14, emphasis added.
\textsuperscript{174} Mr. Jovanović, UNSC 4011\textsuperscript{th} Meeting (06/10/1999), S/PV.4011, p. 6, emphasis added.
- Vietnam: "The unilateral military attacks against the territorial integrity of sovereign States in the Balkans and the Gulf have set a dangerous precedent in international relations, running counter to the purposes and principles of the United Nations and in violation of the fundamental principles of international law, especially those of respect for the independence, sovereignty and territorial integrity of Member States. This presented a serious challenge to the role and effectiveness of the United Nations, as well as to its legal foundations."\(^{175}\)

Knowing that the legitimacy of the intervention was at stake, its supporters strived to establish, in anticipation or reaction to the “precedent problem,” the exceptionality of the military campaign which stripped it of any precedential force. Some examples:

- Germany: “Under the exceptional circumstances of the present crisis in Kosovo, as they are described in UN Security Council resolution 1199, the threat to use force and, if necessary, the recourse to force by NATO is justified. The German government shares this legal opinion with all the other 15 NATO partners. With its decision [to threaten the use of force] NATO has not created a new legal instrument, nor did it intend to do so, which could serve as a general authorization for subsequent NATO interventions. NATO’s decision must not become a precedent. We must not go the wrong way concerning the UN Security Council’s monopoly on the authorization to use force."\(^{176}\)

\(^{175}\) Mr. Nguyen Manh Cam, UNGA 54\(^{th}\) Session, 15\(^{th}\) Plenary Meeting (09/25/1999), A/54/PV.15, p. 17, emphasis added.

“It is important for us […] that there is no “self-authorization” of NATO in this question. I would like to underline, Mr. Kinkel, that your statement today that we have an emergency situation, an extraordinary situation, not a precedent – that fact is of great importance to us.”

“A practice of humanitarian interventions could evolve outside the United Nations system. This would be a very problematic development. The intervention in Kosovo, […] which is only justified in this special situation, must not set a precedent for weakening the United Nations Security Council's monopoly on authorizing the use of legal international force. Nor must it become a license to use external force under the pretext of humanitarian assistance. This would open the door to the arbitrary use of power and anarchy and throw the world back to the nineteenth century. The only solution to this dilemma, therefore, is to further develop the existing United Nations system in such a way that in the future it is able to intervene in good time in cases of very grave human rights violations, but not until all means of settling conflicts peacefully have been exhausted and — this is a crucial point — within a strictly limited legal and controlled framework.”

- United Kingdom: “The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. […] Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military

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177 Mr. Fischer at the Deutscher Bundestag, October 16, 1998 (reprinted in Krieger 2001: 399, emphasis added).
178 Foreign Affairs Minister Fischer, UNGA 54th Session, 8th Plenary Meeting, (09/22/1999), A/54/PV.8, p. 12, emphasis added.
intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose.”

France: “In the field of peacekeeping, it has always been our view that it is for the Security Council, in conformity with the United Nations Charter, to authorize the recourse to force in order to maintain or restore peace and international security. While the emergency in Kosovo forced a derogation from the principle – although there were three resolutions – the principle can’t be called into question by an exception. Nothing must diminish the strength of the commitments in the United Nations Charter […]… We do not wish NATO to turn into a worldwide organization, freeing itself from the universal rules of the United Nations in order to intervene when and where it wishes.”

In addition, the exceptionality of the Kosovo intervention was strengthened by some of the other aspects of NATO’s argumentative strategy described above. As Wheeler puts it,

[i]he Kosovo case is further limited as a legal precedent because it could only plausibly be invoked by other states in a context where the Security Council has already adopted Chapter VII resolutions identifying a government’s human rights abuses as creating a threat to ‘international peace and security’, and where the threat or use of the veto has prevented the Council from authorising the use of force.

Why insist so much that military intervention in Kosovo would not make international law (i.e. create a legal right of UHI)? Not because NATO was concerned

\footnote{Sir Jeremy Greenstock, UNSC 3988\textsuperscript{th} Meeting (03/24/1999), S/PV.3988, p. 12, emphasis added.}

\footnote{Prime Minister Jospin in the National Assembly, April 27, 1999 (reprinted in Krieger 2001: 397, emphasis added).}

\footnote{2002: 161.}
that such a rule could eventually backfire and be used against them – after all, who would dare launch a military attack on a NATO country or ally? Instead, insisting on the non-precedential character of the intervention had the purpose of not alienating support from the rest of the world, most of whom did have reasons to be wary that such a right of UHI could be used against them in the future. In this sense, arguing that, on the one hand, the humanitarian crisis in Kosovo was of such gravity that it triggered a humanitarian intervention contemplated by current international law, and that, on the other hand, the situation was so extraordinary that no practical legal implications would ensue, NATO once again worked within the legal discourse to enhance the legitimacy of the planned military campaign.

And once again, this legal-discursive move was successful. Consider, for example, the following reaction to the Kosovo intervention from the developing world. In September 1999, the Group of 77 formally condemned the practice of UHIs. The 132 signatories of the declaration “[…] rejected the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law.”182 Most interestingly, the list included six of the ten UNSC non-permanent members that had rejected the 3/26 condemnatory draft resolution. Does it make sense to reject a general rule of UHI while not condemning NATO’s intervention against Yugoslavia? It does, if the exceptionality of Operation Allied Force has been successfully established.

The nature of the solution to the precedent problem depended on the kind of exceptionality argument advanced by NATO. In effect, there are at least three different

182 Declaration on the occasion of the Twenty-third Annual Ministerial Meeting of the Group of 77 (New York, 24 September 1999), §69.
ways to construe the exceptionality of the Kosovo intervention in light of international legal expectations. One is to point to “extenuating circumstances” to argue that the factual background of the concrete case renders it excusable or justifiable, even if it does not alter its illegality. In other words, the existence of certain extraordinary circumstances suspends, in a circumscribed and temporary way, the applicability of the law. This sort of Schmittian exceptionality may provide some political or even moral legitimacy, but does not bring the act into conformity with international law.\(^{183}\) A second possible way of establishing the exceptionality of the case is by invoking some kind of *jus necessitatis*. That is, a legal construct—such as state of necessity, *force majeure*, or distress—that precludes the wrongfulness of an act contrary to international law. In this context, the Kosovo intervention would be a legally justified act of non-compliance with international law due to extreme humanitarian distress. In other words, it would be an exception to the general rule about the use of force, but an exception recognized by that very system of law.\(^{184}\) Unlike the previous line of argument, this logic renders the action legal without challenging the validity of the general norm.\(^{185}\) Finally, the exceptionality of the use of force can be derived from the existence of an exceptionally applicable right, such as a

\(^{183}\) See, for example, Franck & Rodley 1973: 304; Danish Institute of International Affairs 1999: 128.

\(^{184}\) It is widely recognized that in international law the logic of *jus necessitatis* does not apply to rules of *jus cogens*. These rules, in fact, are distinct in that they admit no abrogation whatsoever. The general ban on the international use of force is of this kind, which suggests that *jus necessitatis* cannot safeguard the legality of a UHI. On the other hand, it could be argued that the Kosovo intervention, given the UNSC resolutions passed on the matter, rested on the collective security mechanism of the U.N. Charter—a well-established exception to the principle of non-use of force—and that the exceptionally abrogated rule was therefore not this principle but, instead, the procedural rule related to decision making and the use of the veto in the UNSC (i.e. Art. 27(3) of the U.N. Charter). In short, the validity of establishing the exceptionality of Kosovo in terms of *jus necessitatis* is questionable, albeit still arguable.

\(^{185}\) Danish Institute of International Affairs 1999: 25.
right of UHI which applies only in the most overwhelming humanitarian crises. Here the exception invokes neither a suspension of the legal order nor the legally justified breach of a general rule. Instead, it simply invokes a legal right whose applicability – like that of self-defense, for example – is very exceptional.

What kind of exceptionality did NATO argue for Kosovo? The fact that defenders of the Kosovo intervention made repeated references to the *legality* of the military action, and their efforts to embed the action in the legal-institutional order rather than talk of the suspension of that order, seem to rule out the Schmittian, extra-juridical line of argumentation. This is obviously expected in a legalized political system. That the exceptionality of the recourse to military force in Kosovo was argued not as an exception to but an exception *within* the international legal order, speaks of the importance of legal status as a vehicle to legitimize state behavior in the international arena. That said, it is unclear whether the Kosovo intervention was portrayed as a negative exception (i.e. a legally admitted breach of a general norm) or a positive exception (i.e. the exercise of an exceptionally applicable right). Even by looking at the few statements quoted above, some argumentative ambiguity in this sense is apparent – most probably because some states (e.g. the Netherlands) were more willing than others (e.g. the United States) to create a legal right of UHI. Be that as it may, even if clear coherence was lacking, the exceptionality of NATO’s intervention was sufficiently established, through one argumentative path or another, and so was the practical neutralization of its precedential

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186 On such “exceptional rights of intervention,” see Lowe 2000: 938-941.
187 In the words of Wheeler, “At no point during the Security Council debates in March 1999 did NATO governments try to advance the arguments that the bombing of the FRY was illegal but morally justified. Rather, they emphasized that their action had the backing of international law” (2002: 154).
force. This obviously contributed to garnering support for the intervention and enhancing its legitimacy.

By contrast, those opposing the intervention underscored that it did set a legal precedent, and a very dangerous one. Yugoslavia talked of a precedent of far-reaching consequences, which legitimates the “nefarious theory of limited sovereignty” and welcomes the “unimpeded intervention and interference of the mighty and powerful in the internal affairs of other States.” China made similar remarks about the setting of a bad precedent on sovereignty permeability. The weakness of these arguments was that very few still endorsed the theory of the impermeability of state sovereignty which they were appealing to and against which precedents abound. Moreover, the timing was particularly bad for broadcasting the virtues of impermeable sovereignty, given the horror and shame that international inaction in Rwanda had caused just a few years before. Finally, insisting on the “internal affairs” rubric after the UNSC had authoritatively established the contrary could only undermine the persuasiveness of their arguments.

(7) Securing UNSC legitimation of the outcome of NATO’s military operations

The last strategic move towards the legitimization of the intervention took place in June 1999, when the military operation ended. The end of NATO’s bombing came about with Milosevic’s capitulation. Yugoslavia accepted, amongst other things, to withdraw from Kosovo and hand over the military control of the province to an international security force. NATO immediately turned the agreement into a UNSC mandate.

188 UNSC 4011th Meeting (06/10/1999), S/PV.4011, p. 6.
In its resolution 1244, approved unanimously (with China’s abstention) on June 10, the UNSC demands that Yugoslavia “[…] put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized; […] authorizes Member States and relevant international organizations to establish the international security presence in Kosovo […].”\textsuperscript{189} The responsibilities of the international security presence, which were to remain in Kosovo until the UNSC decided otherwise, included “[… d]eterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces […].”\textsuperscript{190}

This legally binding resolution did not constitute a retroactive authorization of NATO’s use of force in Yugoslavia. But it did contribute to delegitimizing criticism of the just concluded intervention by authorizing states to infringe on Yugoslavia’s sovereignty and territorial integrity – precisely the very infringements that had been pivotal to the original condemnation of Operation Allied Force. After all, if such an infringement was legally reasonable in June, how could one still argue that it was not so in March? Obtaining Russia’s approval and China’s abstention was yet another success in NATO’s legitimacy-reaping strategy – and another mistake by Russia and China.

In a backfiring move, Yugoslavia denounced that UNSCR 1244 was “[…] aimed at legalizing post festum the brutal aggression […]” and warned that, in doing so, “[…]

\textsuperscript{189} UNSCR 1244.
\textsuperscript{190} Ibid.
the Security Council and the international community would become accomplices in the most drastic violation of the basic principles of the Charter of the United Nations to date and in legalizing the rule of force rather than the rule of international law.” 191 This proclamation not only brings forth the possibility of retroactive legalization but also questions the authority of the UNSC, which can hardly add legitimacy in the context of a political system in which that authority is well established. Furthermore, questioning the authority of the council jeopardized the strongest of the arguments advanced against the Kosovo intervention – i.e., that the use of force was decided in circumvention of the UNSC. In effect, the validity of that argument depends on the taken-for-granted authority of the circumvented council.

3.2.2. International law and competing bases of legitimacy in the Kosovo case

As exposed above, the attempts to legitimize (and delegitimize) the Kosovo intervention through international law were extensive. In fact, they were more than extensive; they were predominant. To the extent the intervention was legitimized, how can we tell it was legal argumentation, and not other factors (discursive or otherwise), which effected that legitimacy? It might be contended that there was a lot of “moral talk” in the discussions on Kosovo. This is true. In fact, according to most of the literature, it

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191 UNSC 4011th Meeting (06/10/1999), S/PV.4011, p. 6, emphasis added. In May 1999, Yugoslavia had had a similar reaction to a non-binding UNSC resolution (1239) that dealt with the provision of humanitarian assistance in Kosovo: "[...] the attempt to legalize the aggression of the North Atlantic Treaty Organization against my country by means of this so-called humanitarian resolution is unjustified. The bypassing of the Security Council, the body charged with the maintenance of international peace and security, prior to the commencement of the aggression, and the subsequent attempts to get the Council on board in order to legalize the aggression deal a heavy blow to the reputation of the United Nations and sets a dangerous precedent for international relations in general" (Mr. Jovanović, UNSC 4003rd Meeting (05/14/1999), S/PV.4003, p. 11, emphasis added).
was the moral discourse that ultimately provided the legitimacy foundation of the intervention. But this assessment, made by both political scientists and legal scholars, is wrong. And the reason is conceptual, not empirical. Legal arguments are not necessarily – and they usually aren't – clear of moral overtones. In the words of Koskenniemi, “[…] international law does not contain an apolitical assessment of Kosovo, but is premised on moral intuitions.”

To expect legal arguments to be free of moral elements is a mistake. This reveals a misconception about the relationship between legality and morality. Different kinds of norms, such as social and legal norms, are frequently interdependent in their creation, interpretation and application. In other words, many legal arguments are not purely legal but instead have different, albeit convergent, discursive frames of reference. Human rights, for example, invoke morality when they are understood as "natural" rights. But when incorporated into international law, those same human rights may be also understood as legal rights. In this sense, an argument based on human rights will almost inevitably invoke both morality and legality. That said, the specific semantic field and context of the argument may certainly emphasize one discourse over the other. This is crucial to determine whether one is dealing with an essentially moral argument with legal overtones or, conversely, an essentially legal argument with moral overtones.

The systematic violations of human rights in Kosovo were sometimes brought up principally as implicating widespread human suffering. Condemning the causing of

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193 As stated in the American Bar Association Model Rules of Professional Conduct, although “a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied” (2.1).
194 Young 1979: 98.
human suffering per se, rather than as contempt for fundamental rules of international law, makes more sense within a moral, rather than a legal, discourse. Some examples do exist in which justification for the actions in Kosovo was given in clear-cut moral form:

- “We’ve seen innocent people taken from their homes, forced to kneel in the dirt, and sprayed with bullets; Kosovar men dragged from their families, fathers and sons together, lined up and shot in cold blood. This is not war in the traditional sense. It is an attack by tanks and artillery on a largely defenseless people whose leaders already have agreed to peace. Ending this tragedy is a moral imperative […].”¹⁹⁵

- “Our reasons are both moral and strategic. There is a moral imperative because what we’re facing in Kosovo is not just ethnic and religious hatred, discrimination and conflict. […] What is going on in Kosovo is something much worse and, thankfully, more rare: an effort by a political leader to systematically destroy or displace an entire people because of their ethnicity and their religious faith; an effort to erase the culture and history and presence of a people from their land. Where we have the ability to do so, we as a nation and our democratic allies must take a stand against this.”¹⁹⁶

- “We, the countries of the European Union, are under a moral obligation to ensure that indiscriminate behaviour and violence, which became tangible in the massacre at Racak in January 1999, are not repeated. We have a duty to ensure the return to their

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¹⁹⁵ Clinton, Address to the Nation on airstrikes about Serbian targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), March 24, 1999 (quoted in Butler 2012: 152).
homes of the hundreds of thousands of refugees and displaced persons. Aggression must not be rewarded.”\textsuperscript{197}

- “Our objectives in Kosovo are clear and consistent with the moral imperative of reversing ethnic cleansing and killing. […] What we are doing today will save lives, including American lives, in the future. And it will give our children a better, safer world to live in.”\textsuperscript{198}

- “Humanitarian considerations underpin our actions. We cannot simply stand by while innocents are murdered, an entire population is displaced, villages are burned and looted, and a population is denied its basic rights merely because the people concerned do not belong to the “right” ethnic group.”\textsuperscript{199}

- “The escalation of tension in Kosovo inflicts heavy suffering on innocent civilians. Over 200,000 people were forced to leave their homes as the result of armed clashes. The situation is aggravated by large-scale destruction of houses, food shortages, and the risk of epidemic disease. The threat of humanitarian catastrophe is becoming ever more real.”\textsuperscript{200}

Notwithstanding these few examples, in the case of Kosovo, as can be inferred from many of the statements quoted in the previous section, human rights were mostly invoked as obligations derived from international human rights law rather than from a sense of morality. Human rights were much more explicitly coupled with the notion of legal obligation than with that of human suffering. To recall some examples:

\textsuperscript{197} Statement from the European Council to the United Nations of March 25, 1999 (S/1999/342).

\textsuperscript{198} Clinton, Remarks at a Memorial Day ceremony in Arlington, Virginia, May 31, 1999 (quoted in Butler 2012: 154).

\textsuperscript{199} Canada’s representative at the UNSC 3988\textsuperscript{th} Meeting (03/24/1999), S/PV.3988, p. 6.

\textsuperscript{200} Clinton, Joint statement on the situation in Kosovo, September 2, 1998 (quoted in Butler 2012: 146).
- “The actions of the Federal Republic of Yugoslavia also violate its commitments under *the Helsinki Final Act*, as well as its obligations under *the international law of human rights*.”\(^{201}\)

- “Respect for *human rights* constitutes a fundamental value of the international community. As has been pointed out by *the International Court of Justice*, their violation is an offense against humankind as a whole.”\(^{202}\)

- “Civilian populations must never come under indiscriminate and deliberate attack. Such actions are in flagrant violation of established *humanitarian law*.”\(^{203}\)

- “Atrocities against the people of Kosovo by FRY military, police and paramilitary forces represent a flagrant violation of *international law*.”\(^{204}\)

- “[…] *human rights* violations or the failure to respect *international humanitarian law*. […] we would be obligated to consider the imposition of additional measures in order to compel them to change their *illegal* policies that are contrary to *the principles and obligations set forth in the Charter*.”\(^{205}\)

- “[…] an interpretation of *the Charter* that reflects the current recognition of *human rights* throughout the international community.”\(^{206}\)

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\(^{201}\) U.S. representative at the UNSC 3988\(^{th}\) Meeting (03/24/1999), S/PV.3988, p. 4, emphasis added.

\(^{202}\) Costa Rica’s representative at the UNSC 3868\(^{th}\) Meeting (03/31/1998), S/PV.3868, pp. 3-4, emphasis added.


\(^{205}\) Costa Rica’s representative at the UNSC 3868\(^{th}\) Meeting (03/31/1998), S/PV.3868, p. 4, emphasis added.

\(^{206}\) Argentina’s representative at the UNSC 4011\(^{th}\) Meeting (06/10/1999), S/PV.4011, p. 19, emphasis added.
- “Is the Security Council now to be used as a marginalized institution to actually block or criticize the only viable response in order to bring peace and to stop vast human rights abuses? Remember, these abuses are themselves the most serious violations of the United Nations Charter.”

- “The Charter, to be sure, is much more specific on respect for sovereignty than on respect for human rights […]”

- “Does the sovereignty of a state, in conflict with other principles of the UN Charter, i.e. the ban on crimes against humanity, permit to violate human rights internally?”

- “[…] a key instrument […] in preventing new violations of human rights and for international humanitarian law in the region.”

- “[…] gross human rights violations or the failure to respect international norms and international humanitarian law.”

- “[…] the fulfillment of the legal norms of international humanitarian law and human rights […]”

- “[…] we are insisting on the right of the international community to police international law and that means that we have a perfect right to express concern as

207 Bosnia and Herzegovina’s representative at the UNSC 3989th Meeting (03/26/1999), S/PV.3989, p. 15, emphasis added.
208 The Netherlands’ representative at the UNSC 4011th Meeting (06/10/1999), S/PV.4011, p. 12, emphasis added.
209 German Defense Minister Scharping at the Deutscher Bundestag, April 15, 1999 (reprinted in Krieger 2001: 400), emphasis added.
210 Costa Rica’s representative at the UNSC 3937th Meeting (10/24/1998), S/PV.3937, p. 6, emphasis added.
211 Malaysia’s representative at the UNSC 3988th Meeting (03/24/1999), S/PV.3988, p. 9, emphasis added.
212 Argentina’s representative at the UNSC 3989th Meeting (03/26/1999), S/PV.3989, p. 7, emphasis added.
we have done today at extrajudicial killings and the death of eighty people without any trial or any judicial process.”

Besides one discourse (i.e. the legal one) being more commonly invoked than the other one (i.e. the moral one), a perhaps more telling distinction should be noted in terms of the main audience addressed in each case. International law was predominantly waged in inter-state discussions – that is, addressed to what I called the “most relevant” audience in the context of legitimizing the international use of force – whereas moral considerations became pivotal only when addressing the media, opinion leaders, or the mass public – that is, what I called the “least relevant” audience.

3.2.3. Legitimacy and the discursive use of legal inadequacy

At first sight, the Independent International Commission on Kosovo (IICK) may seem to disagree with this argument that the intervention’s legitimacy was mainly fueled by legal argumentation. After all, the Commission’s verdict was that the intervention was “illegal but legitimate.” However, when read more closely, the distinction between legality and legitimacy identified by the IICK report is not, as many have interpreted, coterminous with that between law and morality – even when the latter term is explicitly invoked. Take, for instance, the following passage from the report:

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214 For the rationale behind this distinction between audiences in the context of studying international legitimation, see Chapter 2.
215 The Commission was established in August 1999 by the Prime Minister of Sweden and endorsed by U.N. Secretary-General Kofi Annan. It was made up of twelve individuals with known expertise on the matter (including many international lawyers) and chaired by Justice Richard Goldstone.
[…] the moral imperative of protecting vulnerable people in an increasingly globalized world should not be lightly cast aside by adopting a legalistic view of international responses to humanitarian catastrophes. The effectiveness of rescue initiatives would seem to take precedence over formal niceties.\textsuperscript{216}

If the second sentence helps interpret the meaning of the first, it is quite clear that the tension between legality and legitimacy in the Commission’s view is in reality one between procedural and substantive legal imperatives, respectively, rather than between law and morality per se. Clearly it is not international law writ large – from the principle of non-intervention to the torture ban – what is being referred to as a “formal nicety”. The “formal niceties” that the Commission opines should not prevail over core, substantive legal principles (such as fundamental human rights) are those rules defining formal process and other technicalities. A “legalistic” approach, in this sense, is that which would strictly stick to the letter of the law even when doing so would undermine the realization of the law’s general object or purpose. In other words, a sophisticated reading of the IICK report – and its “illegal but legitimate” verdict – shows that it does not advocate placing morality above the law, but rather reminds that technical rules (“formal niceties”) serve those substantive rules which typically capture, in legal form, some moral value that the law seeks to foster or protect. This is why, when the report explicitly reviews what the Commission deems “non-legal” or “quasi-legal” justificatory arguments, it downgrades their persuasiveness or dismisses them altogether.\textsuperscript{217} It is legal arguments (and the factual circumstances) that, in the Commission’s view, ultimately affect the legitimacy of the Kosovo intervention – some negatively and some positively.

\textsuperscript{216} IICK 2000: 176, emphasis added.
\textsuperscript{217} IICK 2000: 173-174.
In this sense, from the “illegal but legitimate” verdict, the “illegal” part is derived from a breach of procedural rules (i.e. UNSC decision-making rules), whereas the “legitimate” part comes from the intervention’s upholding of (more important) legal norms whose contents have an evident moral correlate (i.e. human rights law and international humanitarian law).\textsuperscript{218} In short, when the Commission deems the intervention illegal, it is simply stating that it was decided in violation of the procedural rules applicable in such cases. It is not stating that the intervention was inconsistent with current (non-procedural) international legal norms. The tension between the two – procedural and substantive rules – is a tension within the legal realm rather than between the law and some other, extra-legal normative system.\textsuperscript{219} This is precisely why the gap between legality and legitimacy is, in the Commission’s opinion, so inadmissible and calls for indispensable legal reform. The call is not to harmonize the law with external moral imperatives, but to harmonize the law with itself – that is, to make it adequate and internally consistent.

The intervention laid bare the inadequate state of international law. The intervention was not legal because it contravened the Charter prohibition on the unauthorized use of force. This is a troubling fact and one which the necessity and legitimacy of the action cannot conjure away. There is a standoff between incompatible principles,\textsuperscript{218} The tension identified in the report is not only between procedures and values, but also between different values – more precisely, sovereignty and non-intervention versus human rights. What makes this latter tension problematic for the Commission, however, is that the decision-making rules in the UNSC are still biased in favor of sovereignty rights. If the procedural rules were more balanced, reflecting the upgrade of international human rights law since 1945, then this tension between different legal values would be satisfactorily resolved within the legal system.

\textsuperscript{219} At the end of the day, procedural rules are still law and their breach renders NATO’s actions inevitably illegal. This is not just the Commission’s view but also that of most legal experts. This is not contested in the present work, as I am not arguing that the intervention was legal. As explained (see chapter 1), it is the legitimacy of actions, rather than their legal status \textit{per se}, what seats at the center of my analysis. International law, again, is here conceived as a political tool of legitimation. Whatever the positivistic legal/illegal verdict turns out to be after sound legal analysis, an investigation about the political role played by international law in international relations is better served by exploring \textit{how much lawful} state actions were persuasively argued to be.
those safeguarding the territorial integrity of states and prohibiting the non-defensive use of force, versus those seeking to protect the human rights of vulnerable populations within these states. [...] What is urgently needed is a code of citizenship for nations, which both protects states against unwarranted interference from outside powers, and guarantees their inhabitants remedies when their human rights are systematically abused. This ultimately implies changing the "default setting" of the UN Charter, revising the so-called inviolability of sovereign states so that sovereignty becomes conditional on observance of certain minimal but universal and clear standards of behavior.\textsuperscript{220}

It [the Kosovo intervention] exposed the limitations of the current international law on the balance between the rights of citizens and the rights of states […].\textsuperscript{221}

U.N. Secretary-General Kofi Annan expressed the need to overcome this legal inadequacy in the context of the Kosovo crisis: “[…]f, in those dark days and hours leading up to the genocide [in Rwanda], a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?”\textsuperscript{222} Professor Greenwood put it more assertively in his memorandum to the House of Commons: “[…]n interpretation of international law which would forbid intervention to prevent something as terrible as the Holocaust, unless a permanent member could be persuaded to lift its veto, would be contrary to the principles on which modern international law is based as well as flying in the face of the developments of the last 50 years.”\textsuperscript{223}

\textsuperscript{220} IICK 2000: 290-291, emphasis added.
\textsuperscript{221} IICK 2000: 297, emphasis added.
\textsuperscript{222} UNGA 54th Session, 4th Plenary Meeting, (09/20/1999), A/54/PV.4, p. 2.
\textsuperscript{223} Greenwood 2000: 930.
To be clear on this, international law proves inadequate, the argument goes, because it makes obligatory the achievement of certain ends (i.e. respect for fundamental human rights) and yet, under certain circumstances, it forbids the use of the only effective means available to achieve those ends. As Glennon put it: “[…] sometimes a rule of domestic or international law is so out of sync with what it is intended to reflect that the very principles that would otherwise lead to compliance with the law lead to its violation.”224 The persuasiveness of defending a strictly illegal action by pointing out that only a juridical inadequacy made that action strictly illegal, can be inferred from multiple statements which, made in the aftermath of the Kosovo intervention, expressed widespread belief in the deficiency of extant legal mechanisms of human rights enforcement – an interpretive deficiency in light of which the Kosovo intervention emerged as clearly legitimate. To cite some examples:

- **Italy:** “The last few years of this century have disproved the notion that people and human freedoms take second place to State sovereignty. […] The crises that have broken out in recent years have raised agonizing dilemmas and difficult questions that demand answers. It would be wrong to use the imperfections of the international system as an excuse for inaction. But it would also be wrong to ignore the new demands for certainty and the rule of law: the greatest challenge is how to relate authority to law and lay down codes of conduct and political discipline that reconcile power with legitimacy. […] W]e must perfect the instruments that uphold the international rule of law. We must spell out the duties of States. We must create a

fully fledged corpus of case law on universal human rights. We must work out rules and procedures that will justify the erosion of sovereignty in the name of global responsibility.”

- Poland: “We have come to understand that absolute sovereignty and total non-interference are no longer tenable. There is not, and there cannot be, a sovereign right to ethnic cleansing and genocide. […] Rwanda demonstrates what Kosovo might have become had we not intervened in 1999. Kosovo demonstrates what Rwanda might have been had we intervened in 1994. The burden of responsibility is enormous, the lesson clear. […] The imperative to act raises the question of the right to act. We have recognized that the walls of sovereignty cannot be used to conceal and legitimize the abuse of human rights and fundamental freedoms. […] The primacy of the human person and human rights, however, has to be adequately reflected in the application of international law. This is not an easy task […]”

- Denmark: “Kosovo and East Timor raised serious questions with regard to the classic concepts of State sovereignty, the respect for human rights and the non-use of force in international relations. How do these concepts interrelate? How do they relate to our concern for human security? And what does the interrelationship mean for the role and responsibility of the United Nations and for the Security Council? […] International law finds itself at a crossroads. We have spent the last 50 years developing an impressive body of human rights law […]. Indeed, there is no shortage

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225 Foreign Affairs Minister Dini, UNGA 54th Session, 8th Plenary Meeting, (09/22/1999), A/54/PV.8, pp. 19-20, emphasis added.
226 Foreign Affairs Minister Geremek, UNGA 54th Session, 17th Plenary Meeting, (09/29/1999), A/54/PV.17, pp. 5-6, emphasis added.
of rules. *What is lacking is effective implementation of existing rules,* in the very last resort through the use of force. We must now aim at enforcement in order to provide assistance, regardless of frontiers, to the victims of human rights violations. We must show resolve in promoting respect for the rule of law and for the institutions called upon to uphold the rule of law. A broad spectrum of actions is available; the choice of action must depend on the problem we face. The thorny question is whether and when to use military force in the face of an emerging humanitarian catastrophe, such as a planned ethnic cleansing or downright genocide. […] A main challenge for the Security Council remains that of reacting effectively against gross and systematic violations of human rights conducted against an entire population. The Council has interpreted its competence under Chapter VII of the Charter to cover humanitarian situations that shock the conscience of mankind. This augurs well for the victims of brutal oppression and ill for the dictators of today. […] Unfortunately, the Council was not able to live up to its responsibilities concerning the ethnic cleansing in Kosovo. *Should the paralysis of the Council lead to blind acceptance? No; the international community could not stand idly by and watch, while the principle of State sovereignty was misused in Kosovo to violate international humanitarian law.*”

- United Nations: “[… Kosovo] has cast in stark relief the dilemma of what has been called “humanitarian intervention”: on one side, the question of the legitimacy of an action taken by a regional organization without a United Nations mandate; on the

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227 Foreign Affairs Minister Petersen, UNGA 54th Session, 9th Plenary Meeting, (09/22/1999), A/54/PV.9, pp. 36-37, emphasis added.
other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences. The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests — universal legitimacy and effectiveness in defense of human rights — can be viewed only as a tragedy. It has revealed the core challenge to the Security Council and to the United Nations as a whole in the next century: to forge unity behind the principle that massive and systematic violations of human rights – wherever they may take place – should not be allowed to stand. […] Nothing in the Charter precludes a recognition that there are rights beyond borders. Indeed, its very letter and spirit are the affirmation of those fundamental human rights. In short, it is not the deficiencies of the Charter which have brought us to this juncture, but our difficulties in applying its principles to a new era — an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples everywhere to attain their fundamental freedoms.”

- Uruguay: “We must propose new formulas to avoid the effect of blockage that in many cases produces the conspicuous right to veto, granting the Security Council the procedural means to break it […] The recent problem in Kosovo, which continues, could serve as a typical example of the aforementioned paralyzing effect of the veto in the Security Council, without forgetting the disturbing consequences that effect would have in producing the marginalization of the United Nations system of peace and security, with the resulting questioning of the Organization itself and its real

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228 U.N. Secretary-General Annan, UNGA 54th Session, 4th Plenary Meeting, (09/20/1999), A/54/PV.4, p. 2, emphasis added.
possibilities. This, naturally, requires the foresight of international law as the sole source of legitimacy, without ignoring the authentic and grave humanitarian situations that are imposed on us by the drama of the real facts at a time when they require a formal framework of timely, legitimate and efficient international action.229

- Georgia: “We have already proposed to expand the membership of the Security Council and address the issue of veto rights in order to adapt it to present-day requirements. In my view, the almost automatic use of the veto is unacceptable. […] We are encouraged by the Secretary-General’s statement that measures to reform the Security Council will be taking place shortly and that the reform will enable us to act in accordance with the norms of international law when addressing regional conflicts in the future.”230

- Sweden: “Our responsibility for international peace and security implies that necessary action by the Security Council should not be hindered by a veto. If the Security Council in an urgent situation is paralyzed by a veto or a threat of veto, this may undermine the authority and the relevance of the United Nations itself. It also presents the international community with a difficult dilemma. When human life is threatened on a massive scale, it is not possible to remain passive. Humanitarian intervention has to be assessed on a case-by-case basis, in view of the values at stake

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229 Foreign Affairs Minister Opertti, UNGA 54th Session, 11th Plenary Meeting, (09/23/1999), A/54/PV.11, p. 23, emphasis added.
230 President Shevardnadze, UNGA 54th Session, 4th Plenary Meeting, (09/20/1999), A/54/PV.4, p. 25.
and whether all other means have been exhausted. The effects on international law and international security at large have to be considered as well.”

- Jordan: “There are lessons to be drawn from this bitter human experience. On the one hand, the North Atlantic Treaty Organization’s ability to put an end to the criminal acts has given clear evidence to all those who harbor thoughts of rebelling against international law and of committing similar acts that they should not presume that their domestic military strength ensures absolute dominance, including violation of human rights. Upholding the principle of sovereignty should not overturn the obligation to observe human rights and international humanitarian law. On the other hand, as Members of this international organization, we must look into finding mechanisms that ensure the enhancement of the United Nations and its ability to be the framework that expresses the determination of the international community to prevent such crimes, and to be the umbrella for the coordination and organization of collective international action to achieve that goal.”

- Netherlands: “In 1945, the architects of this Organization included two contradictory premises: respect for territorial integrity and political independence, on the one hand; and respect for human rights and fundamental freedoms, on the other. […] At the time, the notion of human rights, although grafted onto the Charter with much conviction, was essentially at odds with classical legal thinking. […] Indeed, the Charter is much more specific on respect for sovereignty than on respect for human

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231 Foreign Affairs Minister Lindh, UNGA 54th Session, 7th Plenary Meeting, (09/21/1999), A/54/PV.7, p. 32.
232 Foreign Affairs Minister El-Khatib, UNGA 54th Session, 4th Plenary Meeting, (09/20/1999), A/54/PV.4, p. 33, emphasis added.
rights. Since 1945, the world has witnessed a gradual shift in that balance, making respect for human rights more and more mandatory and respect for sovereignty less and less stringent. An elaborate body of international human rights law has come to counterbalance the dictates of paragraphs 4 [i.e. general ban on the use of force] and 7 [i.e. non-intervention] of Article 2. Today, human rights have come to outrank sovereignty. Increasingly, the prevailing interpretation of the Charter is that it aims to protect individual human beings, not to protect those who abuse them. Today, we regard it as a generally accepted rule of international law that no sovereign State has the right to terrorize its own citizens.”

Singapore: “It is a fact that sovereignty now coexists uneasily with a different current of international law concerned with the rights of individuals. These trends have not yet been reconciled. But both trends are facts that cannot be wished away. […] Rules and objective criteria for such [humanitarian] interventions are urgently needed. Failure to do so will breed uncertainty and instability. If a new balance has to be struck between sovereignty and other values, it should be struck knowingly and with our eyes open.”

Summing up, it was the loophole provided by this legal inadequacy which NATO exploited to argue the conformity between its military campaign and international law. Very much in line with the assessment by the IICK and most of the international community, the main argumentative strategy to justify the Kosovo intervention was to

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233 Foreign Affairs Minister van Aartsen, UNGA 54th Session, 13th Plenary Meeting, (09/24/1999), A/54/PV.13, pp. 22-23, emphasis added.
234 Foreign Affairs Minister Jayakumar, UNGA 54th Session, 12th Plenary Meeting, (09/24/1999), A/54/PV.12, p. 26, emphasis added.
offer a re-articulation of the existing legal rules (non-intervention, human rights law, humanitarian law, etc.) which was conveyed as necessary to render the international legal system more coherent. This is why the supporters of the intervention abstained from referring to values alien to international law. On the contrary, it was elements found within that system of law – and at its very core – that they claimed to be exclusively upholding. In this sense, the legitimation strategy rested ultimately on the need to repair a disjuncture not between law and morality – which would have been the typical moral defense of the intervention – but between different components of the law. It was, in other words, an inadequacy internal to established international law which constituted the ultimate platform of justification.

3.3. Conclusion

In a legalized political system, legitimacy is heavily dependent on legality. Consequently, if international politics is highly legalized, as argued here, one would expect legitimate actions, like NATO’s intervention in Kosovo, to be in compliance with international law. This would implicate that states attempting to legitimize or delegitimize NATO’s action would resort, predominantly, to juridical speech-acts – i.e. legal argumentation sustained and strengthened by different kinds of actions (legal-institutional, diplomatic, etc.). This would implicate also that framings and justifications of a non-legal (e.g. moral) kind would be subsidiary, at best. This is exactly what this chapter has demonstrated. And it has done it for a case of an international military
intervention which, according to most of the literature, was contrary to international law and was legitimized, despite its illegality, on moral grounds.

NATO members and other supporters of the Kosovo intervention legitimized it by embedding it in the discourse of international law rather than some other legitimacy discourse. They framed the military action and argued their legitimacy in legal terms, rather than keeping it isolated from legal considerations. And they did this even though it was clear for all that making the intervention pass the legality threshold (strictly speaking), absent a UNSC authorization to use “all necessary means,” was very improbable. If it was virtually impossible to convince the international community that bombing Yugoslavia was “legal” (strictly speaking), why not turn away from the legal talk and embed the whole thing in a more “convenient” discourse? The chances of persuading the international community that the intervention was “moral” or “right” were, on the contrary, fairly high. So why not turn to moral talk and legitimize the action exclusively on moral grounds? The answer can be found in chapter 1: because this is not possible in a legalized political system like that of contemporary international relations. To argue that bombing Yugoslavia was in conformity with moral imperatives would simply fail to legitimize the action, especially when others would not hesitate to argue that said action flouted international law. In this context, it makes sense that the supporters’ main legitimacy-garnering strategy was to argue that the intervention was more compatible than not with international law, even if strict legality was hard to argue persuasively. As a former State Department Legal Adviser put it, “[t]he factors cited by the [Clinton] Administration […], and by NATO, are pertinent to the NATO action’s
legality, even though no single factor satisfies any specific, accepted theory for intervention.”

This resonates with the conclusion reached by the House of Commons Foreign Affairs Committee: “We conclude that, faced with the threat of veto in the Security Council by Russia and China, the NATO allies did all that they could to make the military intervention in Kosovo as compliant with the tenets of international law as possible.”

In order to put in perspective the legitimacy effects of NATO’s legal-institutional strategy, one can turn to a counterfactual scenario and ask: How differently would the international community have reacted to the Kosovo intervention if NATO had acquiesced to the framing of the Kosovo crisis as an internal affair of Yugoslavia and it had been so categorized by the UNSC (or at least not categorized otherwise); if Yugoslavia’s systematic breaches of international law had not been exposed and condemned by the UNSC under Chapter VII; if the threat to veto a UNSC authorization to use force had been acquiesced to instead of denounced as an irresponsible use of the veto power; if diplomatic efforts had not been tried to find a peaceful solution to the

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236 4th Report (1999-2000), paragraph 134. Similarly, Greenwood emphasizes that many of NATO’s strategic moves contributed to the legality of the intervention, even if the threshold of strict legality was not passed: “The three Security Council resolutions adopted before the NATO operation began [...] did not expressly authorise military action. That does not mean, however, that those resolutions were irrelevant to the question of whether NATO acted lawfully. On the contrary, they form an important part of the legal framework within which NATO acted. The three resolutions were adopted under Chapter VII of the Charter (which deals with threats to peace and security) and their principal provisions were legally binding on all States, including the FRY. They determined that the situation in Kosovo was a threat to international peace and security and thus could not be considered an internal matter for the FRY alone, notwithstanding the status of Kosovo as part of the FRY. The resolutions also established that the situation in Kosovo involved serious violations of human rights and that there was an impending humanitarian catastrophe well before the NATO action began. [...] The resolutions also imposed a number of obligations on the FRY and the KLA, requiring, inter alia, the withdrawal of Serbian security forces from Kosovo. These obligations were not met” (2000: 927-928).
conflict; if agreements had not been concluded with Milosevic to put an end to the humanitarian crisis and endorsed by the UNSC; if Milosevic’s violation of those agreements had not been publicized and condemned by the UNSC; if a formal request of authorization to use force had been explicitly defeated in the UNSC; if a formal condemnation of NATO’s action had not been explicitly defeated (by 12 votes) in the UNSC; if NATO had acquiesced to contentions that the humanitarian intervention in Kosovo was setting a dangerous precedent; if the UNSC had not approved of the intervention’s aftermath and authorized the use of “all necessary means” to implement an international security presence in Kosovo?

It is crucial for the point this chapter attempted to convey that, albeit extra-legal arguments were made to justify the Kosovo intervention – mostly appeals to human suffering – by far most of the argumentation developed to sustain it (and targeting the most relevant audience) was cast in legal terms. In effect, there was a moral narrative of NATO’s military intervention in Kosovo; however, by far the most sophisticated and nuanced one was the legal narrative. This is even truer with regards to the discourse relied on by those who attempted to delegitimize NATO’s use of force. In short, contrary to the conventional understanding of the Kosovo intervention in this respect, this chapter has provided evidence that corroborates the thesis of the discursive hegemony of international law – to which Kosovo, unlike what conventional knowledge holds, is no exception.
What’s legal advising got to do with it?

It goes without saying that the skillful hand of government legal advising agencies was behind the crafting of the legal-institutional strategy that legitimized the Kosovo intervention. Thanks to their legal advisers, the NATO allies and other supporters of the intervention succeeded in gradually constructing, through public argumentation and action, a legal meaning of the situation in Kosovo that progressively facilitated a legitimate intervention. But do legal advisers still matter when their views clash with the preferences of policy makers? How do legal advisers effect behavioral adjustments on a policy preferred by the political leaders? How do legal advisers get an illegitimate policy replaced by a more legally defensible one? These questions are explored in the next case study.

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237 This was confirmed, for the U.S. case, by two legal advisers at the time, one from the Department of State and one from the NSC (interview with the author).
CHAPTER 4
Legal advising and compliance with *jus in bello* in the “War on Terror”

“Never in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11.”

*Jack Goldsmith*¹

“Rarely in our history has our nation’s commitment to international law been so questioned as at present.”

*Richard Bilder*²

In the preceding chapters I have argued that legal advisors are the internal “agents of compliance” with international law in the contemporary state. And yet, the two epigraphs of this chapter suggest, when combined, precisely the opposite. According to Goldsmith, lawyerization in the “War on Terror” has been superlative. But despite this lawyerization, what transpires from Bilder’s assertion is that the decisions made and policies implemented were hardly regarded as legitimate in terms of international law compliance. Did legal advising fail in the “War on Terror”? And if so, why?

From the outset, the United States decided to view the fight against Al Qaeda and

¹ 2009: 129-130.
² 2006: 135.
its affiliate organizations through the legal prism of war.\(^3\) When at war, legally permissible behavior is bounded by the rules of international humanitarian law (IHL), or *jus in bello*. The main sources of this body of law are customary international law and the four 1949 Geneva Conventions (GCs) and Additional Protocols. Its main implications for matters of detention and interrogation of war captives are briefed in the next section.

Framing counter-terrorism under the war paradigm brought with it a novel liability in warfare: *lawfare*. A product of the legalization of the international system, lawfare is the use of legal discourse, rules and institutions as weapons of war. It implies formal and informal processes of de-legitimation of the enemy’s actions channeled through the legal system.\(^4\) It was not hard to anticipate that, in a conflict characterized by an abysmal asymmetry in military weapons, lawfare would be most exploited by the weaker side. To paraphrase John Yoo, lawfare would make the legal system part of the problem rather than part of the solution to the challenges of the “War on Terror” (WOT).\(^5\)

The Bush administration responded with a strategy of “reverse lawfare.” This strategy can be defined as “aggressive attempts to disable the forces that might conduct or enable lawfare against the administration: international organizations, international law, courts both foreign and domestic, and lawyers.”\(^6\) In this sense, instead of outplaying its opponents in the lawfare game, the administration’s first choice was an attempt – a

\(^3\) Domestically, the applicability of the war paradigm was shared by the President and Congress (Authorization for Use of Military Force of September 14, 2001), and confirmed by the Supreme Court (2004 *Hamdi v. Rumsfeld*; 2006 *Hamdan v. Rumsfeld*). Internationally, the legitimacy of this view was implicit in UN Security Council resolutions (1368, 1373), and NATO statements (by the North Atlantic Council in 9/12/2001). In addition, legitimation of the “armed conflict” characterization was implicit in the support given by virtually all states to the initial U.S. counter-offensive in Afghanistan (with the few exceptions of Iraq, Sudan, North Korea, Cuba, Malaysia and Iran) (Ratner 2002: 909-910).

\(^4\) For more on lawfare, see Chapter 1.

\(^5\) Yoo 2006: x.

\(^6\) Bruff 2009: 134.
doomed one, as I will show – to dismantle the more general rules on which the game was founded. The goal was not to play cautiously and well. The goal was to sabotage the game.

The administration’s primary tactic in reverse lawfare was to deny the applicability of potentially restrictive sources of law firmly and clearly, in advance of operations. […] The technique common to these efforts was the generation of secret legal opinions within the executive […]. These opinions articulated a body of law that fit the administration’s desires but were unlikely to generate agreement outside its corridors.7

A most suitable legal-theoretical tool of counter-lawfare in the context of the WOT was the Unitary Executive doctrine. Briefly stated, the doctrine asserts that, in times of war, the Commander-in-Chief powers vested in the President by the U.S. Constitution cannot be curtailed by laws inferior to the Constitution – such as federal legislation or international law.8 This theory would place the President virtually above and beyond international law during the WOT.9 The theory has supporters and critics in the United States, but has no bearing whatsoever in international law or international legal scholarship. This could not be otherwise, since the doctrine strips the “laws of war” of all legal force, reducing them to mere guidelines that a state’s leader may choose to follow or ignore. As I will show, much of the legal advice provided to President Bush

7 Ibid., p. 134.
8 The Unitary Executive theory or doctrine is much broader than this. I am focusing only on that aspect of it most relevant for the analysis that follows.
9 For a working manifesto of reverse lawfare and the Unitary Executive doctrine, see the memorandum from John Yoo to Timothy Flanigan, The President’s Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them (9/25/01), reprinted in Greenberg & Dratel 2005: 3-24.
after the September 11 attacks hinged on the Unitary Executive doctrine as a platform of reverse lawfare.

I divide the ten years under study in this chapter (2001-2011) into two parts. The initial period (Section 4.2) shows why and how legal advising failed to uphold the rules of IHL. It describes and analyzes the act of defiance that eventually triggered the compliance-restoring organizational mechanisms. The initial set up thus facilitates the observation of those organizational processes that restored policy-making to its compliance-equilibrium in the subsequent period (Section 4.3). In effect, the rest of the decade testifies to the effectiveness of certain organizational factors in generating compliance via legal advisors (LAs). Although legal advising initially deviated from organizational imperatives, it would subsequently improve, not because of a change of administration, but rather because of the continuous resistance of structurally empowered LAs. This is the “success” side of the story.

4.1. Legal background: International legal expectations as to the detention and interrogation of “War on Terror” detainees

Let us start with the common expectations, derived from international law, against which U.S. actions in the WOT would be assessed by the international community.

IHL distinguishes between two legal kinds of armed conflict: international and non-international. The first, which encompasses traditional interstate wars, are referred to in common Article 2 of the GCs (CA2), and the second in their common Article 3 (CA3). Hence, they are usually referred to as “common Article 2 conflicts” and “common Article 3 conflicts,” respectively. The maximum protections afforded to war detainees – those
reserved for “prisoners of war” (POW) and contained in the Third Geneva Convention (GC3)\(^{10}\) – apply only in international armed conflicts. However, not all detainees in an international armed conflict will receive POW protections – this is where individual status makes a difference. Only those who meet certain criteria will merit POW status upon capture.

Under IHL, there are only two categories of individual on the battlefield: combatants and civilians. In an international armed conflict, (lawful) combatants are the members of the armed forces of a party to the conflict and any others who are entitled to take a direct part in hostilities and do so. Upon capture, the lawful combatant becomes a POW and is entitled to the protections thereof.\(^{11}\) POWs are detained only to prevent their return to combat, not to be punished or to obtain intelligence – they may, of course, be tried for any unlawful act committed at war.

“Unlawful combatant” or “unprivileged belligerent” is a de facto category not present in the GCs or any other instrument of IHL. As Professor Cassese explains, “[…] ‘unlawful combatant’ is a shorthand expression useful for describing those civilians who take up arms without being authorized to do so by international law. It has an exclusively descriptive character.”\(^{12}\) Their participation in war is contrary to international law because they fail to uphold the requirements of lawful combatancy laid out in GC3.

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\(^{10}\) Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949).

\(^{11}\) POW status implicates privileges for the detainee. Namely, POWs may be interned, but not confined; are entitled to adequate food, shelter and medical treatment; are protected against all forms of abuse and coercion; enjoy immunity from prosecution (except for war crimes); their capture must be reported by the capturing state and must end upon the conclusion of hostilities. Also, the International Committee of the Red Cross (ICRC) or a neutral Protecting Power must be allowed to monitor that these protections are honored.

\(^{12}\) Cited in Solis 2010: 208.
Briefly put, they must be under the command of a person responsible for their subordinates, wear a distinctive sign recognizable at a distance, carry arms openly, and obey the laws and customs of war. Upon capture, unlawful combatants are not entitled to POW status. Those civilians who have an indirect participation in hostilities – i.e. do not fight but somehow indirectly contribute in the war effort – may also be detained if they constitute a security threat (but not as a source of intelligence). However, both civilian kinds – i.e. unlawful combatants and dangerous non-belligerents – are entitled, under customary international law, to CA3 protections, and the detention of indirect participant civilians requires review “by an appropriate court or administrative board designated by the Detaining Power for that purpose” at least twice yearly.

In non-international armed conflicts, on the other hand, there are no “combatants” and therefore no POWs. The fighters who are captured in non-international conflicts are prisoners of the detaining government and subject to prosecution (since their fighting itself was unlawful). All prisoners in these conflicts must be afforded CA3 protections.

What is the conflict status of the “war on terror,” and what is the individual status of the Taliban and members of Al Qaeda?

The WOT has potentially the entire world as its battlefield, but there are two WOT “conflicts” that deserve special attention: the war in Afghanistan (2001) and the

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13 GC3, Art. 4(A)(2).
14 CA3 mandates humane treatment for “persons taking no active part in hostilities,” including the prohibition of acts of violence to life and person, outrages upon personal dignity, convictions without due process of law, and leaving the sick or wounded uncared for.
15 Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), Arts. 43, 78, 132; Additional Protocol I, Art. 75(3) (Goodman 2009: 65).
war in Iraq (2003). Both conflicts have a first international phase followed by a longer-lasting non-international phase.

In its initial phase, the conflict in Afghanistan was an international (CA2) conflict between two state-parties to the GCs (the United States and Afghanistan). The applicable law was therefore the GCs in their entirety.\textsuperscript{16} Although they were the armed forces of the country’s \textit{de facto} government, the Taliban, \textit{arguably}, did not comply with the conditions necessary for lawful combatancy, as they did not wear uniforms or other distinctive fixed sign nor did they comply with the laws of war. They were therefore unlawful combatants with a continuous combat function who may be lawfully targeted. If captured, they did not merit POW protection and could be tried for unlawful acts committed before capture (such as shooting at the enemy), but they were still protected by CA3.

Subsequently, on December 22, 2001, the U.S.-backed Afghan Interim Authority assumed power for six months, replaced in June 2002 by the Afghan Transitional Authority until January 2004, when a new Afghan government was formed. By mid-2002, then, the international conflict had ended and the United States is since then involved in a non-international (CA3) conflict between the Afghan authorities and Taliban insurgents, assisting the former. Accordingly, CA3 is the only applicable law (as far as IHL is concerned) in this second phase of the conflict. Here Taliban fighters have become civilians. If engaged in combat, they have a continuous combat function, become unlawful combatants, and may be targeted at any time by opposing forces. They are

\textsuperscript{16} At the same time, there was in northern Afghanistan an ongoing conflict between the Taliban government and the Northern Alliance (the United Islamic Front for the Salvation of Afghanistan). This was a non-international (CA3) conflict.
criminals and, upon capture, enjoy CA3 protections but not POW status and they may be tried for unlawful acts committed before capture.17

As for the war in Iraq, this conflict was also first an international (CA2) conflict (between Iraq and the United States and others). Unlike Iraqi soldiers, any Al Qaeda member who directly participated in these hostilities was an unlawful combatant. This armed conflict, which began in March 2003, did not end when the Iraqi army was defeated. Instead, it continued during the U.S. occupation, which began in May 2003. Only after Iraqi sovereignty was reasserted by an appointed Iraqi government in June 2004, did the GCs cease to apply in their entirety. Since then any fighting was part of a non-international conflict, where only CA3 applied.18 The same can be argued about the fight against Al Qaeda elsewhere.19

This legal characterization of the armed conflicts that make up the “war on terror” is not universally accepted. Some disagreement with it can be found in international law scholarship. Even though many international law scholars defend their positions with confidence because they claim, rules of IHL cast a clear-cut characterization of the conflict, the truth is that the dissension evident in the literature suggests otherwise.20 Be that as it may, the above characterization is adequate for the purposes of this chapter, as it is conservative enough to capture what the bulk of authoritative legal characterizations

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17 Solis 2010: 211-216.
18 Ibid., p. 154.
19 Strictly speaking, the U.S. official position is that the armed conflict with Iraq began in January 1991, with Operation Desert Storm. See, for example, Memorandum from Jack Goldsmith to Alberto Gonzales, “Protected Person” Status in Occupied Iraq under the Fourth Geneva Convention (3/18/04), p. 2. [All memoranda referenced in the present chapter, unless stated otherwise, can be found on the National Security Archive of the George Washington University]
20 Bellinger & Padmanabhan 2011 (arguing that a consensus view on the applicable international legal standards of detention is lacking mostly because the GCs do not provide comprehensive and clear rules governing conflicts between states and non-state actors).
have in common. Namely, that Taliban and Al Qaeda members captured in the WOT enjoy, at least, CA3 protections. What do these protections exactly implicate with respect to detention and interrogation? Did the program of detention and interrogation of the U.S. government honor these (and other due) protections? What was the role of LAs and their advice in the formulation of these policies? To this I turn next.


Legal advising on matters of international law is decentralized in the foreign policy apparatus of the United States. Legal advisors are distributed in separate offices within the Justice Department, the State Department, the Defense Department, the National Security Council, the different branches of the military, and others. There is no figure at the top of the process which funnels down the heterogeneity of opinions coming from different legal offices and ensures that a single, uniform legal advice reaches the relevant policy-maker. However, this decentralization is checked by a well-established cultural norm in the foreign policy apparatus which requires that legal advising be an inclusive and transparent interagency process. The leitmotiv of this case study is that even though nothing precludes organizational culture from being circumvented, organizational actors tend to resist these deviations and enforce the institutional rules under attack.

As a response to the September 11 attacks, the U.S. Department of Justice (DOJ) undertook a “new paradigm” in the fight against terrorism. To the paradigm of legal prosecution was added the paradigm of prevention. The new mission of preventing
terrorism implied that DOJ would now become intimately involved in the questions of
detention, interrogation, rendition, and other future-looking moves – as opposed to the
mere collection of evidence of past crimes for prosecution.\textsuperscript{21}

The new paradigm of prevention required that captives not be “lost” to the
criminal justice system. Their indefinite detention without trial, and consequent
availability for interrogation, became the preferred policy. Certain rights of war captives,
recognized by international law as discussed in the preceding section, did not make that
policy easy to implement.\textsuperscript{22} Reverse lawfare, and thus LAs, would be most needed to
overcome “law-induced bureaucratic risk-aversion.”\textsuperscript{23}

Immediately after the September 11 attacks, five senior government LAs formed
the “War Council.” The council was in charge of setting legal policies related to the
WOT. John Yoo served in it, together with David Addington (Vice President’s Counsel),
Jim Haynes (General Counsel of the Department of Defense), Alberto Gonzales (White
House Counsel) and Gonzales’s first deputy Timothy Flanigan.\textsuperscript{24} According to
Goldsmith, the council

[...] would plot legal strategy in the war on terrorism, sometimes as a prelude to
dealing with lawyers from the State Department, the National Security Council, and
the Joint Chiefs of Staff who would ordinarily be involved in war-related interagency

\textsuperscript{21} Power 2009:43 (explaining the “new paradigm” and citing Attorney General Ashcroft on it).
\textsuperscript{22} Domestic law and institutions further complicated the picture. But here I deal only with international law
constraints and U.S. compliance with them.
\textsuperscript{23} Goldsmith 2009: 96.
\textsuperscript{24} Significantly, John Ashcroft (Attorney General), Jay Bybee (head of DOJ’s Office of Legal Counsel and
therefore Yoo’s boss), William Taft (Department of State’s Legal Adviser) and John Bellinger (Legal
Advisor to the National Security Council) were not part of the council.
legal decisions, and sometimes to the exclusion of the interagency process altogether.\textsuperscript{25}

Yoo’s participation in that select group is evidence that he enjoyed the White House’s personal trust. In addition, unlike Gonzales, Ashcroft or Bybee, he was proficient in international and constitutional law with expertise in matters of war, and so he was delegated DOJ’s responsibilities on the WOT.\textsuperscript{26} On top of this, the Office of Legal Counsel (OLC), the DOJ office from which Yoo issued his formal legal opinions, wields the institutional power, rarely contested by the (domestic) courts, of establishing what is legally permissible, thus effectively protecting state agents from (domestic) criminal liability. OLC speaks for DOJ, and it is DOJ that prosecutes criminal conduct.\textsuperscript{27}

Even if the President, acting on the advice of his White House lawyers, determined that OLC’s analysis was erroneous, the fact that OLC thought otherwise would give serious pause to the officials asked to act in the teeth of OLC’s opinion. They might believe that OLC’s legal analysis was more detached and thorough and thus a better interpretation of the law. And if a criminal restriction was in issue, they might worry that reliance on a President’s legal imprimatur in the face of an OLC opinion to the contrary would not be respected by a future Justice Department of a different administration when deciding whether to prosecute.\textsuperscript{28}

The office views itself, and is viewed by others, as an independent court inside the executive branch, and has developed powerful cultural norms which correspond with this view – norms of detachment and professional integrity that underscore the importance of

\textsuperscript{25} 2009: 22.
\textsuperscript{26} Ibid., p. 23.
\textsuperscript{27} Ibid., pp. 96-97; Harris 2005: 424; Yin 2009: 501; Koh 2005: 645.
\textsuperscript{28} Goldsmith 2009: 80.
providing the President with candid legal advice.\textsuperscript{29} In a nutshell, Yoo’s legal advising was structurally empowered by the institutional prerogatives enjoyed by OLC, and this structural empowerment was reinforced discretionally by the personal trust of the President and his entourage.

Yoo’s role in the War Council was vital. According to Goldsmith, one of the biggest obstacles to the counterterrorism policies preferred by the Bush administration were those domestic and international criminal laws, many of which emerged after and due to the Vietnam War, which governed many of the President’s war powers. These laws made intelligence officials hesitate before applying the aggression the White House’s new, “forward-leaning” paradigm deemed necessary. Yoo was crucial to surmounting this obstacle.

Unlike any of the others in the War Council, he was an OLC deputy with authority to issue legal opinions that were binding throughout the executive branch. And so after 9/11, Yoo […] wrote opinion after opinion approving every aspect of the administration’s aggressive antiterrorism efforts. These opinions gave counterterrorism officials the comfort of knowing that they could not easily be prosecuted later for the approved actions.\textsuperscript{30}

Encouraged by the White House, Yoo took full advantage of his membership in the War Council to the detriment of the normal way of operation of DOJ. While Yoo formally worked for Ashcroft, in practice he worked for Gonzales.\textsuperscript{31} His legal opinions, issued under the authority of the Attorney General, were enthusiastically received as

\textsuperscript{29} Ibid., pp. 33, 37-38; Koh 1993.
\textsuperscript{30} Goldsmith 2009: 23.
\textsuperscript{31} Ibid., p. 24.
representative of the Department as a whole, masking serious disagreements within
OLC.\textsuperscript{32}

[...] his rivals accused him of creating a back door for himself to Cheney, Addington, Gonzales, and Pentagon general counsel William Haynes in providing a legal fig leaf for what some Justice Department officials saw as a dangerously broad reading of the president’s wartime authorities.\textsuperscript{33}

One way to further insulate Yoo from the rest of the LAs was the frequent use of high security classifications. As is further developed below, Yoo and the rest of the War Council would soon learn that secrecy and the short-circuiting of legal advice was a very effective maneuver to disempower the rest of the LAs and thus monopolize legal advising. OLC’s normal practice of intensive internal vetting of draft opinions was eventually heavily curtailed. This would inevitably harm the quality of the advice OLC generated. “The office found itself giving initial advice that it then would defend to others in the executive branch as final, rather than exchanging views more freely before crafting advice that it would regard as authoritative.”\textsuperscript{34}

In a nutshell, the initial period of legal advising after the September 11 attacks, was marked by the operation of what Bruff calls “shadow governments.”

Like Ronald Reagan, George W. Bush tended to evade the massive defense, foreign policy, and intelligence bureaucracies, which both presidents distrusted. Instead, his administration formed and executed policy by means of ad hoc groups of government officials who formed small “shadow governments” within the federal government. Shadow operations have two characteristics that proved to be pernicious in the Bush administration. First, they feature coherence of purpose. [...] There was a resulting

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\textsuperscript{32} Power 2009: 77.
\textsuperscript{33} Lichtblau, cited in Power 2009: 77, fn 201.
\textsuperscript{34} Bruff 2009: 125; see also Harris 2005: 431.
\end{flushright}
descent into “groupthink,” a phenomenon that tends to bring out the most extreme views in an isolated and self-reinforcing group. […] Second, shadow governments stress secrecy, radically reducing the number of officers who know about proposals and placing the nation’s demand for wisdom on the shoulders of a relative few. Closed groups exclude competing arguments about facts, policy, and law.\textsuperscript{35}

4.2.1. Detention

As explained in Section 4.1, which rules of IHL apply to the detention of a particular detainee depends on (a) the legal status of the armed conflict in which he was captured and (b) his own legal status as a detainee. Conflict status determines the applicability of different parts of Geneva law, and, under the corresponding law, individual status determines the specific protections owed to the detainee. Determining these two legal statuses was intrinsic to the design of the detention program for the WOT.

In the context of an armed conflict, states may lawfully remove an enemy combatant from the battlefield by taking him prisoner. IHL mandates that while belligerents may be detained until the end of the armed conflict, civilians must be released (except while considered a security threat). Many of the individuals detained in the WOT – on and off active battlefields – claim that they are innocent civilians who must be released, while others claim they are lawful combatants (i.e. soldiers of the Afghan armed forces) who may be detained but must be afforded POW protections.

At the commencement of combat operations in Afghanistan, and following traditional practice, troops there were instructed to apply Geneva law on all captured individuals. Belligerents would be screened to determine whether they belonged to a

\textsuperscript{35} Bruff 2009: 116-117.
group entitled to POW status. If so, then they would be protected by GC3. If not, then they would be protected by CA3 alone. If there was doubt as to a detainee’s membership in a GC3-protected group, then POW status would be granted until a tribunal determined otherwise.\textsuperscript{36} However, the President would promptly eliminate the existence of such an enemy group whose members merited POW status upon capture, ruling out \textit{ipso facto} any possible doubt that a detainee could be entitled to such privileged status.

The Bush Administration originally designated \textit{all} members of Al Qaeda or the Taliban as “unlawful combatants,” consequently asserting the right under IHL to intern and punish them for illegal belligerency. It is not incompatible with IHL, \textit{prima facie}, that the President determines that an enemy group does not qualify for POW status because it fails to fulfill the four necessary conditions of lawful combatancy required by GC3: command by responsible individuals, wearing a fixed distinctive sign recognizable at a distance, carrying arms openly, and obeying the laws and customs of war.\textsuperscript{37} In effect, there is little guidance in the GCs on the question of status designations. GC3 mandates that, should any doubt arise as to whether a captive belongs to a group engaged in lawful combat, he should be treated as such until his status is determined by a “competent tribunal” (Article 5). However, this rule makes sense only when a lawfully belligerent group exists. Moreover, there is no much detail about what makes a tribunal competent for this purpose, or who is entitled to decide whether there is any doubt about a detainee’s status (and therefore if the rule applies in a particular case in the first place).

\textsuperscript{37} GC3, Art. 4(A)(2).
Denying POW status to al Qaeda forces was not controversial amongst LAs.\textsuperscript{38} These fighters failed to identify themselves in combat, to say the least, and therefore they could not claim to be regarded as lawful combatants. POW is a status reserved for lawful combatants only, and therefore it is not surprising that denial of this status to al Qaeda was endorsed by lawyers in DOJ as well as those in the Department of State (DOS) and the Department of Defense (DOD).\textsuperscript{39}

The choice of determining individual status \textit{a priori}, on an associational basis, was particularly problematic because it asserted that combatancy was intrinsic to being associated with the Taliban or Al Qaeda. In this sense, it assumed away the complex question of what relationship an individual must have with an enemy organization in order to become an unlawful \textit{combatant} and therefore be subject to (security) detention.\textsuperscript{40} Just as a U.S. senator is not a member of the U.S. Armed Forces, so it may be argued that not all members of the Taliban or al Qaeda are part of “the armed forces” of those nonstate players in the WOT. IHL is still not very helpful in defining this relationship between an individual and an organized armed group. Arguably, when IHL provides no sharp answer, governments are granted discretion to apply their own reasonable criteria

\textsuperscript{38} The same is less true about members of the Taliban, as will be apparent below.
\textsuperscript{39} This agreement should not veil the strong dispute amongst LAs as to why these detainees were not POWs. The differences in reasoning would result in stark disagreement on related questions. See, for example, Memorandum from William Taft to Alberto Gonzales, \textit{Comments on Your Paper on the Geneva Convention (2/2/02)}, reprinted in Greenberg & Dratel 2005, pp. 113-114.
\textsuperscript{40} As a way of rendering the detention of these individuals lawful under IHL, it was unnecessary to designate them as (unlawful) combatants. As explained above, civilians who pose a security threat may still be detained even if they did not participate directly in hostilities (i.e., even if they were not combatants of any kind) (Goodman 2009).
of membership. Once such criteria are specified, the next question is: who applies these criteria? Who decides whether an individual passes the test? Bellinger and Padmanabhan state the problem with clarity:

Legal process is needed to determine whether any particular individual is subject to detention, because of the high risk of erroneously identifying individuals as members of nonstate groups. Nonstate fighters are unlikely to wear uniforms or carry identification cards that clearly indicate membership in the group. And these fighters have every incentive to obfuscate regarding their membership: they are subject to prosecution for their belligerent acts due to a lack of combatant immunity, and are unlikely to receive prisoner-of-war privileges from admitting combatant activity.

In a nutshell, the real controversial issue was not the presumption of “unlawfulness” but rather that of “combatancy.” Combatancy, under IHL, implies direct participation in hostilities. This was particularly problematic in the cases of those many detainees that were captured off the active battlefield. For these, the nature of their membership in an enemy group was at least dubious, and therefore some form of review, with certain procedural guarantees, was expected.

In the United States, U.S. Army Regulation 190-8 allows military tribunals to inquire whether a captive is an “innocent civilian who should be immediately returned to his home or released” or “a civilian who should be detained for reasons of operational

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41 Danner 2007 (describing the category of “unlawful enemy combatant” as “a concept whose plasticity renders it unhelpful as a tool for legal regulation and whose indeterminacy vests vast discretion in the Executive” (2)).
42 Bellinger & Padmanabhan 2011: 221-222 (emphasis added).
43 According to a report on Guantanamo detainees released in 2006 and based entirely on the military’s own records, 55% of the detainees were not determined to have committed any hostile acts against the United States or its coalition allies, 37% had no definitive connection to al Qaeda at all, and 86% of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody at a time in which the United States offered large bounties for capture of suspected enemies (Denbeaux & Denbeaux 2006).
security or probable cause incident to criminal investigation,” or – albeit not applicable in this case – a lawful combatant to be detained as a POW.\textsuperscript{44} However, no tribunals of this or an equivalent form were ordered to review the relationship between detainees and enemy organizations or the nature of their participation in hostilities.

Both the factual and legal bases of this initial detention policy were provided by government LAs. In a draft memo written for DOD General Counsel – \textit{Application of Treaties (draft)} – John Yoo argued that the conflicts with the Taliban and Al Qaeda were “armed conflicts”, yet were neither CA2 nor CA3 conflicts.

[...] the Geneva Conventions were intended to cover either: a) traditional wars between Nation States (Article 2), or non-international civil wars (Article 3). Our conflict with al Qaeda does not fit into either category. The current conflict is not an international war between Nation States, but rather a conflict between a Nation State and a non-governmental organization. At the same time, the current conflict is not a civil war under Article 3, because it is a conflict of “an international character,” rather than an internal armed conflict between parties contending for control over a government or territory.\textsuperscript{45}

When conceived as a third class of armed conflict, it was not obvious what rules of IHL would be applicable in the WOT – an international conflict against non-state actors – and what protections captives would consequently merit. Yoo’s answer to this dilemma was clear: none – not even CA3 protections. According to him, the GCs were not to be applied not only due to the nature of the conflict but also because of the nature of the enemy. In the case of Al Qaeda, its status as a non-state actor renders it ineligible

\textsuperscript{44} Cited in Schoettler 2009: 9; also in Bellinger & Padmanabhan 2011: 223.
\textsuperscript{45} Memorandum from John Yoo and Robert Delahunty to William Haynes, \textit{Application of Treaties and Laws to al Qaeda and Taliban Detainees (draft)} (1/9/02) [hereinafter \textit{Application of Treaties (draft)}], reprinted in Greenberg & Dratel 2005: 49.
The same applied to the Taliban, as they could not be regarded as the government or armed forces of Afghanistan.

[…] Afghanistan was a “failed State” whose territory had been largely overrun and held by violence by a militia or faction rather than by a government. Accordingly, Afghanistan was without the attributes of statehood necessary to continue as a party to the Geneva Conventions, and the Taliban militia like al Qaeda, is therefore not entitled to the protections of the Geneva Conventions.47

Furthermore, according to Application of Treaties (draft), the President could suspend treaty obligations, including the GCs. The authors acknowledged that unilateral denouncement has no international legal effect when the protection of the human person is involved, but they still asserted that “[…] even if one were to believe that international law set out fixed and binding rules concerning the power of suspension, the United States could make convincing arguments […] in favor of suspending the Geneva Conventions […]”48 As for customary international law, the memo confirmed that, because it is not federal law (!),49 “[…] any customary international law of armed conflict in no way binds, as a legal matter, the President or the U.S. Armed Forces concerning the detention or trial of members of al Qaeda or the Taliban.”50

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46 Ibid., p. 48.
47 Ibid., p. 50.
48 Ibid., p. 70.
49 Not only is this reasoning questionable – cf. the Paquete Habana and Lola case (1900) – it is also irrelevant as far as international obligations are concerned. As Taft later objected, “[t]he memorandum fails to address the question of whether customary international law is binding on the United States as a matter of international law” (Letter attached to the Memorandum from William Taft to John Yoo, Your Draft Memorandum of January 9 (1/11/02), p. 2, emphasis added).
50 Application of Treaties (draft), p. 71.
The draft memo was shared with DOS, whose top legal advisor, William Taft, repudiated it immediately. Taft went as far as referring to Yoo’s draft memo as “seriously flawed” in both its factual assumptions and its legal analysis. A paragraph from the front-page letter attached to his commentary on the memo is worth quoting:

John, I understand you have long been convinced that treaties and customary international law have from time to time been cited inappropriately to circumscribe the President’s constitutional authority or pre-empt the Congress’s exercise of legislative power. I also understand your desire to identify legal authority establishing the right of the United States to treat the members of the Taliban Militia in the way it thinks best, if such authority exists. I share your feelings in both of these respects. I do not, however, believe that on the basis of your draft memorandum I can advise either the President or the Secretary of State that the obligations of the United States under the Geneva Conventions have lapsed with regard to Afghanistan or that the United States is not bound to carry out its obligations under the Conventions as a matter of international law. That may mean, of course, that we must determine specifically whether individual members of the Taliban Militia in our custody are entitled to POW status, and it may be that some are actually entitled to it. In previous conflicts, the United States has dealt with tens of thousands of detainees without repudiating its obligations under the Conventions. I have no doubt we can do so here, where a relative handful of persons is involved. Only the utmost confidence in our legal arguments could, it seems to me, justify deviating from the United States unbroken record of compliance with the Geneva Conventions in our conduct of military operations over the past fifty years. Your draft acknowledges that several of its conclusions are close questions. The attached draft comments will, I expect, show you that they are actually incorrect as well as incomplete. We should talk.

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51 Memorandum from William Taft to John Yoo, Your Draft Memorandum of January 9 (1/11/02) [hereinafter Taft memo I].
52 Letter attached to Taft memo I, p. 2 (emphasis added).
More specifically, speaking about the Taliban’s entitlement under the GCs to have their status determined individually, Taft commented that:

We find untenable the draft memorandum’s conclusion that this is unnecessary because (1) Afghanistan ceased to be a party to the Conventions, (2) the President may suspend the operation of the Conventions with respect to Afghanistan, and (3) customary international law does not bind the United States. As a matter of international law, […] all three premises are wrong.53

Taft pointed out that the United States and the international community never ceased to recognize Afghanistan as a state. Indeed, Afghanistan has maintained full U.N. membership at all times.54 Moreover, Taft contended that recognition of the adversary is not a prerequisite to the application of GC3,55 and that the Taliban did qualify as “regular armed forces,” so its members could possibly enjoy POW status.56 A competent tribunal could eventually determine otherwise for specific individuals, but denying a priori such status to Taliban detainees would be contrary to GC3.57

53 Ibid., p. 1.
54 Taft memo I, pp. 6-8.
55 “Essentially, the Draft Opinion’s argument turns on the premise that an existing State must continue to have a recognized, effective government or else cease to be a State. No such principle, however, exists in international law. To the contrary, it is well-established in international law and U.S. practice that the absence of a recognized government, or a government in control of territory, does not render an existing State “stateless” (Taft memo I, p. 5).
56 Taft memo I, pp. 20-21. “Department of State experts suggest that the Taliban command structure differed from the kinds of structure we might find in our own armed forces, but we do not think the structure was such as to fall outside the bounds of Article 4(A)(3) [of GC3]. Similarly, our experts report that Taliban soldiers did wear uniforms and sought additional uniforms regularly, recognizing that resources were often not available to purchase them. Moreover, the GPW requirement is not for a “distinctive uniform” but for a “distinctive sign,” and our information indicates that the Taliban soldiers did wear distinctive black turbans. […] In any event, the available information does not enable us to reach a conclusion that such a requirement was not met. Finally, we agree that Taliban forces likely committed serious violations of the laws of armed conflict during the recent conflict, including the use of civilians to shield military objectives from attack. However, the commission of crimes by some members of the force is not sufficient to demonstrate that the Taliban forces generally may not be covered under Article 4(A)(3). Rather, the question in this respect is whether the Taliban forces were unable to implement the laws of war” (pp. 20-21).
57 Ibid., pp.21-22.
Even though CA3 did not, in Taft’s opinion, apply to the conflict in Afghanistan because that was an “Article 2 conflict” (at the time), he objected Yoo’s narrow interpretation of Article 3. In combination, affirmed Taft, Articles 2 and 3 cover all kinds of armed conflict. “It would be extremely difficult to defend a U.S. position premised on the notion that the conflict in Afghanistan is not an armed conflict of any sort as contemplated under the Geneva Conventions.”

As for the opinion that the President may suspend the GCs, Taft noted this was “contrary to international law and procedurally unavailable.” Finally, with respect to the authority of customary international law, Taft opined as follows:

Were the President, as contemplated by the Draft Opinion, to act lawfully under federal law in a manner that would be inconsistent with the obligations of the United States under customary international law, the action would, notwithstanding its lawfulness under U.S. domestic law, constitute a breach of an international legal obligation of the United States. That breach would subject the United States to adverse international consequences in political and legal fora and potentially in the domestic courts of foreign countries.

In a nutshell, DOS understood that the conflict in Afghanistan (at the time) was an international (CA2) conflict to which GC3 applied and that Taliban members must presumptively be accorded POW status. In addition, it pointed out the risk of facing

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58 Ibid., p. 22.
59 Ibid., p. 2.
60 Ibid., p. 31.
61 Ibid., p. 11. “[…] the conclusion that the GPW [i.e. GC3] applies to the Taliban category does not necessarily lead to the result that all Taliban soldiers meet the requirements for POW status – they should enjoy the protection of such status until special tribunals under Article 5 determine in individual circumstances that particular persons do not meet the requirements for POW status” (p. 11).
adverse resolutions or opinions from international bodies or even criminal prosecution by foreign courts.\textsuperscript{62}

Yoo’s courtesy gesture of working with DOS lawyers would not be repeated for the rest of the War Council period. When DOJ decided to circulate its draft memo in DOS, as is the institutional practice whenever OLC is working with matters of international law, it was seeking approval, not critically constructive feedback. The DOS Legal Adviser’s harsh criticisms were virtually ignored, and the final OLC memo – Bybee’s \textit{Application of Treaties}\textsuperscript{63} – replicated the reasoning and conclusions of the rebuked draft.

One minor change was introduced to the original draft – by omission – based on Taft’s comments. Bybee maintained the assertion that customary international law was not binding as a matter of \textit{federal} law, but said nothing about its authority as a matter of \textit{international} law.\textsuperscript{64} The message to the President’s and Rumsfeld’s counsels, however, was the same as in the earlier draft: OLC was still telling the Executive they did not need to worry about customary international law.

Similarly, Bybee insisted on the President’s capacity to effectively suspend treaties as a matter of domestic law, but recognized that whether that suspension would be valid as a matter of international law was a distinct question. He cared to “[…] emphasize that the resolution of that question, however, \textit{has no bearing} on domestic constitutional issues […]. Rather, these issues are worth consideration as a means of

\textsuperscript{62} Appendix A to \textit{Taft memo I}, pp. 37-40.
\textsuperscript{63} Memorandum from Jay Bybee to Alberto Gonzales and William Haynes, \textit{Application of Treaties and Laws to al Qaeda and Taliban Detainees} (1/22/02) [hereinafter \textit{Application of Treaties}], reprinted in Greenberg & Dratel 2005: 81-117.
\textsuperscript{64} \textit{Ibid.}, pp. 111-116.
justifying the actions of the United States in the world of international politics. While a close question, we believe that the better view is that, in certain circumstances, countries can suspend the Geneva Conventions consistently with international law.”\textsuperscript{65}

Furthermore – and this is another addition in the final memo – if not suspension, at least non-compliance could be legally justified under grounds of self-defense or “infeasibility” – because GC3 “[…] contains no strict deadlines for compliance” (!).\textsuperscript{66}

Finally, even if GC3 were to apply and the President decided not to suspend it, he could still determine categorically that all Taliban prisoners fail to meet the requirements for POW status. Such determination, said Bybee correctly, would eliminate any legal “doubt” as to their status, thus obviating the need for Article 5 tribunals.\textsuperscript{67}

After Application of Treaties was completed, the President’s Counsel was ready to urge him to turn Yoo’s and Bybee’s conclusions on GC3 applicability into official policy, despite the objections raised by the Secretary of State, who had asked that the President “[…] conclude that GPW [i.e. GC3] does apply to both al Qaeda and the Taliban.”\textsuperscript{68} Commenting on Gonzales’s draft memo for the President, and consistent with Taft’s advice, Colin Powell objected that the memo endorsed OLC’s legal advice without noting “[…] that the OLC opinion is likely to be rejected by foreign governments and will not be respected in foreign courts or international tribunals which may assert

\textsuperscript{65} Ibid., p. 102.
\textsuperscript{66} Ibid., p. 110.
\textsuperscript{67} Ibid., p. 110.
\textsuperscript{68} Memorandum from Alberto Gonzales to President Bush, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (draft) (1/25/02), reprinted in Greenberg & Dratel 2005: 118-121. According to Savage, former White House officials said this memo was in fact “entirely ghostwritten” by Cheney’s lawyer, David Addington (2007: 146).
jurisdiction over the subject matter. It should also note that OLC views are not definitive on the factual questions which are central to its legal conclusions.\textsuperscript{69}

As for the consequences of deciding that GC3 does not apply to the WOT, Powell emphasized some important downsides that should be transmitted to the President.

Namely:

- “It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy.”
- “It will undermine public support among critical allies, making military cooperation more difficult to sustain.”
- “Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including bringing terrorists to justice.”
- “It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops.”\textsuperscript{70}

LAs from DOJ, DOD, DOS, the Joint Chiefs of Staff (JCS), the White House, and the Office of the Vice President, had a series of discussions on these legal issues. Gonzales summarized the conclusions from those discussions in a paper. Major disagreement amongst legal advisors transpired. In general, the offices that were represented in the War Council held views contrary to those of DOS. The JCS fell somewhere in between. One question on which DOS, DOD and JCS were on the same page was regarding the use of Article 5 tribunals:

\textsuperscript{69} Memorandum from Colin Powell to Alberto Gonzales and Condoleezza Rice, \textit{Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan} (1/26/02), reprinted in Greenberg & Dratel 2005: 124.

\textsuperscript{70} \textit{Ibid.}, p. 123.
DOD, JCS and DOS lawyers believe that, in the unlikely event that “doubt should arise” as to whether a particular detainee does not qualify for POW status, we should be prepared to offer additional screening on a case-by-case basis, either pursuant to Article 5 of GPW (to the extent the Convention applies) or consistent with Article 5 (to the extent it does not).\footnote{Memorandum from William Taft to Alberto Gonzales, Comments on Your Paper on the Geneva Convention (2/2/02) [hereinafter Taft memo II], reprinted in Greenberg & Dratel 2005: 133.}

Perhaps ingenuously, Taft made the following comment on the paper:

From a policy standpoint, a decision that the Conventions apply provides the best legal basis for treating the al Qaeda and Taliban detainees \textit{in the way we intend to treat them}. It demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations.\footnote{\textit{Ibid.}, p. 129 (emphasis added).}

Lastly, he insisted that “[t]he President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States […]”\footnote{\textit{Ibid.}, p. 129.} Moreover, this conclusion, continued Taft, “[…] is consistent with the advice of DOS lawyers and, as far as is known, \textit{the position of every other party to the Conventions}.”\footnote{\textit{Ibid.}, 129 (emphasis added).} For Yoo, this demonstrated the “[…] typically conservative thinking of foreign ministries, which places a priority on stabilizing relations with other states – even if it means creating or maintaining fictions – rather than adapting to new circumstances.”\footnote{Yoo 2006: 34.}

Declaring GC3 not applicable was necessary, according to Gonzales, because it “[… s]ubstantially reduces the threat of domestic criminal prosecution under the War

\footnotesize{\textsuperscript{71} Memorandum from William Taft to Alberto Gonzales, Comments on Your Paper on the Geneva Convention (2/2/02) [hereinafter Taft memo II], reprinted in Greenberg & Dratel 2005: 133.\textsuperscript{72} Ibid., p. 129 (emphasis added).\textsuperscript{73} Ibid., p. 129.\textsuperscript{74} Ibid., 129 (emphasis added).\textsuperscript{75} Yoo 2006: 34.}
Similarly, the Attorney General explained to the President that the non-applicability of GC3 was the most convenient determination to make, given that it “[…] would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violate Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees.”

His considerations of convenience were not accompanied with considerations of appropriateness.

These lengthy discussions regarding WOT detentions culminated with the President’s official declaration that the conflict with al Qaeda (in Afghanistan or elsewhere) was outside Geneva coverage and that GC3 would, however, be applied to the conflict with the Taliban. The latter determination – a policy concession to DOS – was the result of the President declining to exercise his authority to suspend the Convention, although reserving the right to exercise that authority in that or future conflicts. Even though GC3 would be applied to the fight against the Taliban, they were determined to be unlawful combatants not qualifying for POW status – and so were members of al Qaeda, of course. This policy decision effectively eliminated the possibility of lawful combatancy on behalf of the enemy.

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77 Letter from John Ashcroft to President Bush, Justice Department’s Position on why the Geneva Convention did not apply to al Qaeda and Taliban detainees (2/1/02), reprinted in Greenberg & Dratel 2005: 126-127.
78 Memorandum from George Bush, Humane Treatment of al Qaeda and Taliban Detainees (2/7/02) [hereinafter Humane treatment memo], reprinted in Greenberg & Dratel 2005: 134, paragraph 2(b).
79 Ibid., p. 135, paragraph 2(d).
As noted already, this was consistent with the views held at OLC. On the same day the President issued his decision, Bybee sent a memo to Gonzales confirming that no member of the Taliban militia was entitled to POW status and that there was no need to convene Article 5 tribunals because blanket determination of unlawful combatancy removes any doubt that would trigger Article 5. Of course, OLC still failed to address the problem that membership in the Taliban militia may not be self-evident and that therefore some detentions may still pose an international legal problem. In Goldsmith’s words, “[w]hile it was appropriate to deny al Qaeda and Taliban soldiers POW rights, there was a big question as to whether the people at Guantanamo were in fact members of the Taliban or al Qaeda.”

In addition, Bush stated that, as a matter of policy and not of law, the detainees shall be treated “humanely” and, “[…] to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.” The decision was a reaffirmation of a prior order issued by Rumsfeld, and was reached “[…] relying on the opinion of the Department of Justice dated January 22, 2002 [i.e. Application of Treaties], and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002 The policy decision, however, left unclear what treatment

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80 Memorandum from Jay Bybee to Alberto Gonzales, Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 (2/7/02), reprinted in Greenberg & Dratel 2005: 136-143
81 2009: 118, emphasis added.
82 Humane treatment memo, p. 135, paragraph 3 (emphasis added). In legal jargon, actions are “consistent with” a policy but “in accordance with” or “pursuant to” the law (Bovarnick 2010: 11).
83 Memorandum from Donald Rumsfeld to Richard Myers, Status of Taliban and Al Qaeda (1/19/02), reprinted in Greenberg & Dratel 2005: 80.
84 Letter from John Ashcroft to President Bush, Justice Department’s Position on why the Geneva Convention did not apply to al Qaeda and Taliban detainees (2/1/02), reprinted in Greenberg & Dratel 2005: 126-127.
85 Humane treatment memo, p. 134, paragraph 2.

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detainees were to be accorded. The decision was immediately condemned worldwide as contemptuous of the rule of law.\textsuperscript{86}

Goldsmith notes that “[…] to most U.S. allies, it seemed as though a single and self-interested judge [i.e. the U.S. President] was consigning scores of people to indefinite detention without a modicum of due process.”\textsuperscript{87} Britain and France even threatened not to hand over detainees to the United States because of the lack of GC guarantees.\textsuperscript{88} Likewise, in January 2002 the Parliamentary Assembly of the Council of Europe urged its members not to extradite persons “[…] who risk being subjected to […] standards which fall below those enshrined in the Geneva Convention.”\textsuperscript{89} The Inter-American Commission on Human Rights addressed the U.S. government directly, urging it to determine detainee status by a competent tribunal.\textsuperscript{90} The International Committee of the Red Cross (ICRC) expressed similar concerns about Geneva law violations.\textsuperscript{91} In a nutshell, tensions between the initial mechanism of status determination and international legal standards were voiced almost immediately.

One would expect similar discussions as to the applicable international law in the non-international (CA3) phase of the conflict in Afghanistan, and later in Iraq. By the time Operation Iraqi Freedom started, the institutional situation had changed and legal advice had become more negotiated, consensual and uniform. But as for discussing the legal framework of detentions in Afghanistan past 2001, those discussions never

\textsuperscript{86} Savage 2007: 147.  
\textsuperscript{87} Goldsmith 2009: 118-119.  
\textsuperscript{88} Ratner 2002: 912.  
\textsuperscript{89} European Parliamentary Assembly Resolution 1271 (01/24/2002).  
\textsuperscript{90} Inter-American Commission on Human Rights, Detainees at Guantanamo Bay, Cuba, Request for Precautionary Measures (03/12/2002).  
\textsuperscript{91} Ratner 2002: 913.
happened. The members of the War Council had turned to the idea that it was more convenient to short-circuit legal advising and in that way avoid irreconcilable disagreement with the rest of the LAs.

Besides the question of how to legitimately establish whether a captive was an enemy belligerent, there is the question of how long detention may last. This “security” detention – also called military or administrative detention – should not be conflated with criminal detention (i.e. detention based on criminal charges). In the context of an international conflict, enemy combatants may be detained until the end of hostilities, or even beyond that point for security reasons. In the case of conflicts like the WOT, which may last indefinitely, the end-of-hostilities rule is impractical. And IHL does not offer a better one. However, it would be a mistake to think that, simply because IHL fails to provide well-defined rules in this respect, indefinite detention without criminal charge becomes permissible under international law. Taking this position would imply that, putting together the problems of “whom” and “for how long,” international law permits that an innocent civilian be detained for life. Strictly speaking, this may not be contrary to any specific rule of IHL, but one could hardly persuade the international community that this is compliance with international law. As Col. James Schoettler puts it, this claim is, at least, “politically vulnerable”.

In order to deal with the problem of indefinite detention, a mechanism of periodic status review – the Detainee Review Boards – was established early on in Afghanistan. It

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92 This is customary as well as treaty-based (Additional Protocol II) IHL (Bellinger & Padmanabhan 2011: 229). Civilians may also be detained for security reasons, but subject to periodic review.
94 2009: 72.
may be costly and time-consuming to reassess periodically the “dangerousness” of a detainee in order to determine whether continuation of his detention is warranted. And it is certainly not infallible. In fact, some of the individuals involved in the attempted bombing of a U.S. airliner on Christmas Day of 2009, were former Guantanamo detainees who had been released because they were considered no longer dangerous. Likewise, the system may err in the opposite sense – i.e. keeping harmless individuals in custody because they are mistakenly considered dangerous. Procedural safeguards – of which IHL said nothing – were crucial to minimize both types of error simultaneously. In addition, dangerousness review could still result in long, even life-long, detention of those considered dangerous. All in all, however, the establishment of a review mechanism is arguably a reasonable way of dealing with the problem of indefinite administrative detention, showing deference to international law and thus safeguarding international legitimacy.

Another way of regularizing the situation of detainees is to have them convicted as criminals. Discussions about how to try detainees began as early as September 2001. An interagency group, led by Pierre-Richard Prosper, the Ambassador-at-Large for war crimes issues at DOS, was set up to examine the legal alternatives. Initially, the two options were the use of regular criminal courts or courts-martial, favored by DOJ and the military lawyers from the Judge Advocate General Corps (JAGs), respectively. But then Timothy Flanigan, a War Council member from the White House Counsel’s office, proposed the use of military commissions instead. His point was that in an open court terrorism cases could prove too challenging, especially those cases in which the evidence
against the suspect was too slight or needed to be kept classified. Military commissions, on the other hand, would allow for more expeditious trials with less demanding procedural safeguards.  

Addington, who had never been fond of the discussions in the Prosper committee and who, as Mayer put it, “[…] had no time to establish guilt beyond a reasonable doubt,” liked the idea of using military commissions, and with Flanigan they started to give it concrete form while keeping everyone else out of the process. Apparently, Vice President Cheney had given the order to bypass the National Security Council (NSC) (John Bellinger), DOS (William Taft) and the JAGs.

OLC eventually joined the White House Counsel, with John Yoo recommending the avoidance of civilian courts and Patrick Philbin issuing a memo approving the use of military commissions – all this cloaked in the War Council and behind the Attorney General’s back. The memo opined that the President had the constitutional authority, as Commander in Chief, to use military commissions to try members of Al Qaeda or the Taliban. It briefly examined the relevant international law standards because “[…] if a decision is made to use military commissions, it will also be important to justify American actions to our allies and others internationally.” This notwithstanding the fact that “[t]here is, of course, no treaty to which the United States is a party that applies by its terms to the current conflict with a terrorist organization […]” and that principles of customary international law “[…] are not ‘law’ that limits the President as Commander in

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95 Meyer 2007.  
96 Mayer 2008: 82.  
98 Memorandum from Patrick Philbin to Alberto Gonzales, Legality of the Use of Military Commissions to Try Terrorists (11/6/01), p.30.
Moreover, the memo acknowledged the possible applicability of CA3 to all armed conflicts, but failed to comment on the “due process” guarantees required therein and concluded that terrorists shall not receive the protections of the GCs.

Philbin’s memo was shared with Haynes, who invited Gen. Thomas Romig, the Army JAG, to comment on it but to discuss it with only one person and not to make copies or take notes on it. Romig and Col. Lawrence Morris discussed the memo and found it “archaic,” in that it was based on a Supreme Court case from the Second World War and failed to accommodate new legal developments since then – namely, the GCs and the Uniform Code of Military Justice (UCMJ). Haynes, however, ignored the changes they suggested to strengthen procedural rules pursuant to legal obligations. Cheney met with Ashcroft and Haynes to finalize the policy memo, still giving no notice or invitation to DOS or NSC. In spite of Ashcroft’s “[…] shouting that he was the President’s top law-enforcement officer and as such he should play a part in the prosecution of terrorists […],” Cheney was impervious to his demands about DOJ due involvement. The President issued the order on November 13, 2001. Neither Powell, nor Rice, nor their legal advisors, nor the JAGs had seen the order before it was a fait accompli, nice and issued.

Vice President Cheney had been successful in excluding from the decision process anyone who might have disagreed with his draft of the order; he got his way, but the decision led to a flawed legal framework for dealing with detainees in the war on

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99 Ibid., p. 30.
100 Ibid., p. 36.
102 Mayer 2008: 82.
103 Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (11/13/01).
terror. The consequences of excluding outside input on the draft came when the Supreme Court, in *Hamdan v. Rumsfeld*, struck down the military commissions plan because it was not set up in accord with U.S. law or the Uniform Code of Military Justice [or CA3].

The order met the immediate opposition of the JAGs. Military lawyers, recounts Goldsmith, “[…] threw up roadblock after roadblock to the development of military commissions.” In the words of the Navy’s JAG at the time: “We were marginalized. We were warning them that we had this long tradition of military justice, and we didn’t want to tarnish it. The treatment of detainees was a huge issue. They didn’t want to hear it.” After long discussions with Haynes, Yoo and Philbin, the JAGs were promised some procedural improvements on military commissions. For example, presiding officers as well as prosecuting and defense counsel would be military lawyers; presumption of innocence was written in, as well as access to witnesses and evidence (unless classified); the accused would be present at proceedings (except when examining classified information); a death sentence would require unanimity. The JAGs were far from satisfied, though, and so would be the Supreme Court. The struggle between civilian and military LAs over this question would continue for years.

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105 Goldsmith 2009: 121.
4.2.2. Interrogation

Not long after the first WOT prisoners arrived at Guantanamo, several human rights organizations began to air their concerns about the treatment of detainees in the base. They all pointed out that the conditions under which the prisoners were held may amount to “cruel, inhuman or degrading treatment,” if not torture, therefore violating international regulations. Similar reports kept coming out year after year since then. Even members of the FBI themselves have reported abuses,\(^\text{109}\) and the United Nations Commission on Human Rights concluded in 2006 that the “excessive violence” used against detainees amounted to torture, which headed a list including several lesser breaches of international law.\(^\text{110}\)

Surprisingly, the interrogation program implemented in Guantanamo and other detention facilities was not designed in disregard or without the consultation of legal advisors. Quite the contrary, the LA green light was sought (and granted) from the very outset. How could LAs and human rights organizations have such contradictory legal views on the situation? On what grounds could LAs authorize an interrogation program that would spark so much international criticism?

In the summer of 2002, CIA agents were frustrated because their interrogations failed to obtain the information the Administration was pressuring them to extract from detainees. They wanted to apply harsher methods, but would not do so without legal coverage. They wanted written authorization that would shield them from criminal

\(^{109}\) Yaroshefsky 2007: 566.
prosecution. The War Council met to discuss the legality of harsh interrogation techniques, and in August Yoo produced an extensive secret document advising on the matter. The document was signed by his boss, Jay Bybee, and addressed to Alberto Gonzales.\(^\text{111}\) It was a general legal opinion on the question of interrogation of war detainees, but it was specifically meant to inform the CIA and its circulation was kept secretly restricted.

The Yoo/Bybee memo – *Interrogation I* – analyzed the prohibitions imposed by the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984 (CAT) as implemented by the Anti-Torture Act\(^\text{112}\). The statute criminalizes torture committed outside the United States. The first element of Yoo/Bybee’s advice to the President’s Counsel was that “torture” should be given a very narrow definition. As far as the nature of the act was concerned, torture was implicated only when the pain and harm inflicted were *severe*, which should be taken to mean *extreme*:

The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that *death, organ failure, or permanent damage* resulting in a loss of significant body function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause *long-term* mental harm [lasting for months or even years].\(^\text{113}\)


\(^{112}\) 18 U.S.C. §§ 2340-2340A.

\(^{113}\) *Interrogation I*, p. 183 (emphasis added). Ironic as this is, one of the sources of the definition of “severe pain” used in the memo is a statute that defines an emergency medical condition for the purpose of authorizing health benefits (p. 176).
In addition, even if the acts were so characterized, they would not constitute torture unless they were committed with the *specific intent* of inflicting severe pain. This situated outside the torture category the infliction of severe pain which was done with the intent of producing not-so-severe pain, even if severe pain was expected (!). Moreover, it also ruled out any acts carried out with a purpose other than causing severe pain:

Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering […]\(^{114}\)

Not only are these legal interpretations of the CAT (and the anti-torture statute) unconventional, at best; the authors failed to warn about the significant likelihood that those legal prohibitions be construed differently by reasonable others.

Lastly, the memo argues that even these conceptually shrunk prohibitions have no force of law when it comes to interrogating WOT detainees. In effect, the Unitary Executive doctrine, endorsed by Bybee’s OLC, renders the anti-torture statute unconstitutional if it constrains the President’s ability to command in war.

Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we would construe Section 2340A [i.e. the Anti-Torture Act] to avoid this constitutional difficulty, and conclude that *it does not apply to the*

\(^{114}\) *Ibid.*, p. 175 (emphasis added). The memo asserted this interpretation even though the CAT, unlike the Anti-Torture Act, defines torture as “[…] any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person *for such purposes as obtaining from him or a third person information or a confession, punishing him […] etc.*” (Article 1(1), emphasis added).
President’s detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.\textsuperscript{115}

This doctrine of unchecked presidential powers is particularly problematic because it is necessarily extensible to all other international legal obligations. If the torture ban, a peremptory norm,\textsuperscript{116} can be unilaterally suspended, then so can all other norms of international law.

By extension, the same reasoning “[…] preclude[s] an application of Section 2340A [i.e. the Anti-Torture Act] to punish officials for aiding the President in exercising his exclusive constitutional authorities.”\textsuperscript{117} As Koh put it, Interrogation I implied that the commander in chief could become “torturer in chief” at his own discretion.\textsuperscript{118} Besides, validating the doctrine of “just following orders” as an interrogator’s way out of criminal prosecution undermines well-established principles of criminal responsibility set forth at Nuremberg\textsuperscript{119} and contained in the CAT.\textsuperscript{120}

Finally, even if the statute were applicable and an individual had committed torture, he could still negate criminal charges, according to Interrogation I, based on

\textsuperscript{115} Interrogation I, p. 203 (emphasis added). It should be unnecessary to recall that if Congress cannot curb the President’s wartime powers, according to the Unitary Executive doctrine, neither can international law.

\textsuperscript{116} Peremptory norms, or jus cogens, are norms “accepted and recognized by the international community of States as a whole” and “from which no derogation is permitted” (Article 53, Vienna Convention on the Law of Treaties of 1969). Non-compliance with obligations derived from jus cogens – unlike most other legal obligations – admits no lawful justification, according to well-established customary international law (recently codified by the UN International Law Commission in its Responsibility of States for Internationally Wrongful Acts of 2001 (Article 26)).

\textsuperscript{117} Interrogation I, p. 204.

\textsuperscript{118} Koh 2006.

\textsuperscript{119} See, for example, the Einsatzgruppen case (U.S. v. Ohlendorf, et al., 1948).

\textsuperscript{120} CAT, Article 2(3): “An order from a superior officer or a public authority may not be invoked as a justification of torture.”
“necessity”\(^\text{121}\) (also described as “the choice of evils” defense) or “self-defense”\(^\text{122}\). This assertion has no basis in international law. In fact, the CAT could not be clearer to the contrary: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”\(^\text{123}\)

The exclusive concern for (domestic) criminal liability, and disregard for international legitimacy, is made apparent in the distinction made in the memo’s reading of the CAT between torture, on the one hand, and cruel, inhuman or degrading treatment (CIDT), on the other. According to that reading, state parties undertook not to commit CIDT or torture but to criminalize domestically only the latter. It is therefore beyond the question posed to OLC, according to Yoo/Bybee, whether the CIA interrogation program implicated CIDT – even if such implication would necessarily make those interrogations violative of international law (!).\(^\text{124}\) The following paragraph is emblematic of the contempt towards international law imparted by John Yoo to the White House:

Even if it were otherwise [i.e. if the CIA interrogation program were violative of the CAT], there is no international court to review the conduct of the United States under the Convention. In an additional reservation, the United States refused to accept the jurisdiction of the ICJ (which, in any event, could hear only a case brought by another state, not by an individual) to adjudicate cases under the Convention. Although the

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\(^{121}\) “Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing [a future terrorist …] attack, which could take hundreds or thousands of lives” (\textit{Interrogation I}, p. 208-209).

\(^{122}\) “[…] even though a detained enemy combatant may not be the exact attacker […] he still may be harmed in self-defense if he has knowledge of future attacks because he has assisted in their planning and execution” (\textit{Interrogation I}, p. 212).

\(^{123}\) CAT, Article 2(2).

\(^{124}\) \textit{Interrogation I}, p. 185. The authors go as far as interpreting that “[…] the treaty […] prohibits only the worst forms of cruel, inhuman, or degrading treatment or punishment [i.e. torture]” (p. 191).
Convention creates a Committee to monitor compliance, it can only conduct studies and has no enforcement powers.\(^{125}\)

This interpretation of the international obligations undertaken by the United States in relation to the treatment of individuals is contrary to prior statements issued by the executive branch on the matter. For example, in 1999 DOS sent a report to the U.N. Commission Against Torture affirming, unequivocally, that the prohibition against torture and CIDT is considered absolute and without exception.\(^{126}\) According to Harris, this was the typical pre-9/11 executive interpretation of the duties of the United States under CAT.\(^{127}\) By failing to review or even identify these prior authoritative interpretations, *Interrogation I* brought up what Koh calls the problem of “overruling” – that is, breaching the institutional rule adopted by OLC which bids that “[…] past precedent should be accorded a certain measure of stare decisis from administration to administration, even if those administrations represent different political parties and strikingly different political philosophies.”\(^{128}\)

Goldsmith synthesized the substance and effect of *Interrogation I*:

The message of the August 1, 2002, OLC opinion was indeed clear: violent acts aren’t necessarily torture; if you do torture, you probably have a defense; and even if you don’t have a defense, the torture law doesn’t apply if you act under color of presidential authority. CIA interrogators and their supervisors, under pressure to get

\(^{125}\) Letter from John Yoo to Alberto Gonzales (August 1, 2002), reprinted in Greenberg and Dratel 2005: 220-221.

\(^{126}\) U.S. Dept. of State, Initial Report of the United States of America to the UN Committee Against Torture (1999). Moreover, in 2003 the President made a public statement reaffirming that “freedom from torture is an inalienable human right” and that CAT forbids governments from torturing those within their custody (Statement by the President, *United Nations International Day in Support of Victims of Torture*, June 26, 2003).

\(^{127}\) Harris 2005: 440-441.

\(^{128}\) Koh 1993: 516.
information about the next attack, viewed the opinion as a “golden shield,” as one CIA official later called it, that provided enormous comfort.\textsuperscript{129}

Together with \textit{Interrogation I}, Bybee issued a memo for John Rizzo, the CIA General Counsel, authorizing the use of ten specific interrogation techniques (including the waterboard), consistent with \textit{Interrogation I}.\textsuperscript{130} The techniques were regarded as lawful because they did not constitute torture, as none of them implicated sufficiently severe physical pain or sufficiently prolonged mental harm.\textsuperscript{131} Moreover, the necessary specific intent would be lacking, as “[…] we believe that those carrying out these procedures would not have the specific intent to inflict severe physical pain or suffering. The objective of these techniques is not to cause severe physical pain.”\textsuperscript{132}

CIA agents were not the only ones under pressure to produce intelligence to prevent future terrorist attacks. Military interrogators were too.\textsuperscript{133} Just like CIA agents had done two months earlier, Lt. Col. Jerald Phifer requested on October 11, 2002 explicit authorization from his superiors to make interrogations more aggressive.\textsuperscript{134} Maj. Gen. Michael Dunlavey, commander of the Joint Task Force (170) created in February 2002 to do intelligence work in Guantanamo, consulted with his top legal advisor, Lt. Col. Diane Beaver. The LA opined that GC restrictions on treatment did not apply

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\textsuperscript{129} Goldsmith 2009: 144. Harold Koh, who would be the head of the State Department’s Office of the Legal Adviser in the Obama Administration, stated that “[…] the Bybee Opinion [i.e. \textit{Interrogation I}] is perhaps the most clearly erroneous legal opinion I have ever read” (2005: 647).
\textsuperscript{130} Memorandum from Jay Bybee to John Rizzo, \textit{Interrogation of al Qaeda Operative} (8/1/02). The document “[…] memorializes our previous oral advice, given on July 24, 2002 and July 26, 2002, that the proposed conduct would not violate this prohibition [i.e. the Anti-Torture Act]” (p. 1).
\textsuperscript{131} \textit{Ibid.}, p. 15.
\textsuperscript{132} \textit{Ibid.}, p. 16.
\textsuperscript{133} Memorandum from Alberto Mora to Albert Church, \textit{Statement for the Record: Office of General Counsel Involvement in Interrogation Issues} (7/7/04) [hereinafter Mora memo], p. 3.
\textsuperscript{134} Memorandum from Jerald Phifer to Michael Dunlavey, \textit{Request for approval of Counter-Resistance Strategies} (10/11/02), reprinted in Greenberg and Dratel 2005: 227-228.
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because detainees were not POWs, and that the proposed techniques were not in violation of the CAT or binding human rights law (given the reservations placed by the United States on those treaties, limiting the relevant prohibitions to those articulated in the U.S. Constitution). However, Beaver found that some of the techniques proposed would constitute “assault” under the UCMJ, and consequently recommended “[…] to have permission or immunity in advance from the convening authority, for military members utilizing these methods.”

\[135\] Interrogation I was still concealed from the military. The request for approval reached the Joint Chiefs of Staff later that month.\[136\] On December 2, Rumsfeld gave a formal approval for the use of twenty-four of the proposed interrogation techniques, as laid out in a memo issued by DOD’s top lawyer and based on Interrogation I. Following Haynes’s advice, the decision was that, even though they may be legally available, approval of the remaining techniques – i.e. the harshest ones proposed, including waterboarding and mock executions – was not warranted at the time. The reason given for holding off was the acknowledgement of the Armed Force’s tradition of restraint.\[137\]

Haynes did not want to go so far with military interrogators as he had gone with those from the CIA because he feared resistance from military officers, in general, and military lawyers, in particular. He was right. Alberto J. Mora, then general counsel of the Navy, has revealed the details of the intra-Pentagon clash that followed over the legal


\[137\] Memorandum from William Haynes to Donald Rumsfeld, *Counter-Resistance Techniques* (11/27/02), approved by Rumsfeld on December 2, 2002, reprinted in Greenberg and Dratel 2005: 237
boundaries of the treatment of WOT detainees.\textsuperscript{138} Mora, himself a conservative who admired Ronald Reagan,\textsuperscript{139} had served as a political appointee in the Administration of George H. W. Bush. Mora first learned about the questionable treatment of detainees on December 17, 2002, through the head of the Naval Criminal Investigative Service, David Brant. Brant’s agents, including psychologist Michael Gelles, had been assigned to gather incriminating evidence at Guantanamo to be used, eventually, against detainees in court. They were disturbed by the conduct of the military-intelligence interrogators – Dunlavey’s Task Force 170 – and reported it to their boss. What was really shocking to Mora was that the abuse was “[…] rumored to have been authorized, at least in part, at a “high level” in Washington […].”\textsuperscript{140} Far from fearing reprisal, and even though the Navy was not involved at all in interrogations, Mora felt it was his duty to state his opposition to such interrogation policies and to warn of their possible consequences. Mora checked with his counterpart in the Army, Steven Morello, to find out he was also aware of what was going on in Guantanamo. Morello supplied him with Haynes’s memo from November 27 approving several coercive techniques and Beaver’s official legal opinion that sustained that approval. Morello disagreed, like Mora, with these legal interpretations, and had tried to stop Rumsfeld to no avail.\textsuperscript{141}

Mora asked Adm. Michael Lohr, the Navy’s JAG, to prepare a legal analysis of the issues. Authorized by Gordon England, the Secretary of the Navy, on December 20, 2002, Mora met with William Haynes, the DOD general counsel. That was the first of at

\textsuperscript{138} Mora memo.
\textsuperscript{139} Mayer 2008: 213.
\textsuperscript{140} Mora memo, p. 3.
\textsuperscript{141} Mayer 2008: 220.
least three meetings Mora would have with Haynes with the purpose of stopping the interrogation program under way in Guantanamo. Complaining about the abuses contained in Haynes’s memo approved by Rumsfeld on December 2, Mora “[…] expressed surprise that the Secretary had been allowed to sign it.” To Mora, […] the memo’s fundamental problem was that it was completely unbounded – it failed to establish a clear boundary for prohibited treatment. The boundary, I felt, had to be at the point where cruel and unusual punishment or treatment began. Turning to the Beaver Legal Brief, I characterized it as an incompetent product of legal analysis, and I urged him [i.e. Bybee] not to rely on it.

Mora believed that the interrogation program would have devastating political consequences: “[…] there would be ensuing international condemnation; and, as a result, the United States would find it more difficult not only to expand the current coalition, but even to maintain the one that existed.”

Faced with Haynes’s indifference, on January 15, 2003 Mora sent him a draft memo denouncing the unlawfulness of the interrogation program and “strongly non-concurring” with the adoption of the violative techniques, and threatened to have it officially issued that afternoon unless the program was suspended and subjected to further discussion. By the end of the day, Haynes informed Mora that Rumsfeld was suspending the program and authorizing a special “working group” of a few dozen lawyers, including Mora himself, to discuss and agree on new interrogation guidelines.

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142 Mora memo, p. 7 (emphasis added).
143 Ibid., pp. 7-8.
144 Ibid., p. 10.
145 Mayer 2008: 228. For the suspension of the program approved on December 2, 2002, and the establishment of the working group, see Memorandum from Donald Rumsfeld to James Hill, Counter-
The War Council, especially Yoo and Addington, understood that the WOT was a new kind of war that could not be put under the legal framework of the existing laws of war. For this reason, the detention and treatment of enemy fighters in this war was for them essentially a matter of policy preference, not of law, and consequently they strongly resisted the involvement of military lawyers, the LAs with the most expertise in *jus in bello*.\(^{146}\) This resistance was expressed with remarkable clarity in a paper co-authored by Yoo in 2007:

> The civilian leadership, therefore, should refrain from their traditional deference to the military on these matters. The JAGs, more often than in previous conflicts, are now involved in the jus in bello of the War on Terror – not a place they are accustomed to being nor arguably one that is helpful to the ongoing conflict.\(^{147}\)

The establishment of the Pentagon Working Group was certainly not the end of this resistance to JAG involvement in the WOT. The group was headed by the General Counsel of the Air Force, Mary Walker, who had participated since 2002 in an unfinished attempt to disempower the Air Force JAG Corps by putting military lawyers under the supervision of the civilian lawyers of the General Counsel, thus filtering all the legal advice provided to Air Force officers.\(^{148}\) The Working Group was notified that OLC would prepare an overarching legal opinion that was to serve as definitive guidance

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\(^{146}\) Hansen 2009: 648-649.

\(^{147}\) Sulmasy & Yoo 2007: 30. For a critique, see Hansen 2009.

(“controlling authority”) for the discussions. The opinion turned out to be Yoo’s

*Interrogation II*.149

The 81-page memo replicated the legal reasoning of *Interrogation I*. According to its reading of the CAT/Anti-Torture Act, torture still encompassed only extreme acts committed with specific intent. If torture occurred, it could still be justified as “necessary” or “self-defense”. And the Unitary Executive doctrine, always firmly endorsed, still implied that international law could not, directly or indirectly through federal statutes, constrain the President’s wartime powers. All this was new to the JAGs’ ears, but only because they had not had access to *Interrogation I*.

After reducing the applicability and extent of the CAT obligations, and ruling out the applicability of the GCs (based on prior OLC opinions and presidential orders), *Interrogation II* tackled possible prohibitions derived from customary international law. The main issue here was not torture, since this was already defined so narrowly that it could hardly pose a problem. CIDT, on the other hand, is a necessarily broader category than torture. There was no question that at least some aspects of the U.S. interrogation program amounted to CIDT. As established in *Interrogation I*, the CAT, in virtue of the U.S. reservation, still did not preclude the United States from practicing CIDT. As a rule of customary international law, however, that prohibition would still be in force. Yoo argued in *Interrogation II* that no such prohibition existed for the United States. He did so, first, by creating a normative hierarchy whereby treaty law trumps customary law. Such a general hierarchy has no basis in international law. More specifically, Yoo argued

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149 Memorandum from John Yoo to William Haynes, *Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (3/14/03) [hereinafter *Interrogation II*].
that “[c]ustomary international law cannot override carefully defined U.S. obligations through multilateral treaties on the exact same subject.” In other words, a state could curtail (or eliminate altogether, for that matter) rules of customary law by making treaties and placing unilateral reservations on them. Under this peculiar doctrine, a state’s individual consent (expressed in a treaty) had the legal effect of overruling the international community’s collective consent (expressed in an international custom).

More cleverly, Yoo also argued that the very nature of the process of making customary law legitimizes violations of that law. The argument is phrased with clarity and worth quoting:

Indeed, there is a strong argument under international law that nations must have the ability to violate customary international law. Because the very essence of customary international law is that it evolves through state custom and practice, states necessarily must have the authority to contravene international norms. [...] Otherwise, custom itself could not change. Thus, if the President were to order interrogation methods that were inconsistent with some notion of customary international law, [...] he could [...] argue that as a matter of international law such conduct was needed to shape a new norm to address international terrorism.  

As it was laid out in Interrogation II, this argument would strip customary international law of all force of law. Be that as it may, the corollary was that the prohibition against CIDT emanating from customary international law did not affect the

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150 Ibid., p. 73.
151 Ibid., p. 74 (quotation omitted).
United States – either because the CAT (with the U.S. reservation on it) neutralizes the customary norm, or because that norm is currently “under revision”.

Going back to the Working Group at the Pentagon, *Interrogation II*, which had to be used as the “controlling authority” of the discussions, was rejected by many members of the group.

In summary, the OLC memo [i.e. *Interrogation II*] proved a vastly more sophisticated version of the Beaver Legal Brief, but it was a much more dangerous document because the statutory requirement that OLC opinions are binding provided much more weight to its virtually equivalent conclusions.

When given the opportunity to review and comment on those recommendations, the military lawyers objected to OLC’s line of reasoning and pointed out that other nations were likely to disagree with that interpretation of international law. One of their main concerns referred to the risk of subjecting uniformed personnel to criminal prosecution under UCMJ or federal law (especially by future administrations), or in foreign courts or international tribunals – acknowledging the existence of applicable international criminal laws which could be reasonably regarded as being breached by the

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152 Of course, if these arguments were not persuasive, there were always the “necessity”, “self-defense”, and “unitary executive” cards, which should trump any legal obligation, no matter its source (*Interrogation II*, pp. 47, 74-80).

153 *Mora memo*, p. 17.


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application of some of those interrogation methods. In particular, the JAGs doubted that domestic and foreign courts would be persuaded by OLC’s “necessity defense” as legitimate justification for violating international law. Another major concern was over “[…] the effect that a departure from the Geneva Convention protections would have on the United States’ standing internationally” as well as its impact on the public’s support for the war. Finally, the JAGs’ resistance reflected the constitutive role of Geneva law in the culture and self-image of the U.S. Armed Forces. Deeply rooted in the military organization since the Vietnam War, subverting that body of law through aggressive interrogation could affect the morale and discipline of the troops, as had occurred in the 1970s.

All these concerns demonstrate that, compared to Yoo, these military lawyers exercised the function of legal advising in a more legitimacy-enhancing fashion, which should not be surprising given that they had been trained to give IHL-related advice and had significant experience in the job. In other words, they had a better understanding of what is at stake when informing foreign policy. Legitimacy considerations are not extraneous to their legal analysis and consequent advice, as evidenced, for example, in a memo written by Mora for Haynes criticizing Interrogation II:

155 Air Force JAG memo I (paragraphs 2 and 3); Air Force JAG memo II (paragraph 1.c); Marine Corps JAG memo (paragraph 3.b).
157 Hansen 2009: 660; Air Force JAG memo I (paragraph 4); Air Force JAG memo II (paragraph 2); Army JAG memo (paragraph 4); Marine Corps JAG memo (paragraph 3.c); Memorandum from Rear Adm. Michael Lohr to Mary Walker, Working Group Recommendations Relating to Interrogation of Detainees (2/6/03) [hereinafter Navy JAG memo I] (paragraph 3).
158 Air Force JAG memo I (paragraph 5); Air Force JAG memo II (paragraph 1.b); Marine Corps JAG memo (paragraph 3.d); Navy JAG memo I (paragraph 4).
[...] even the misperception that the U.S. Government authorizes or condones detention or interrogation practices that do not comply with our domestic or international legal obligations... probably will cause significant harm to our national legal, political, military and diplomatic interests.\textsuperscript{159}

According to Mora, \textit{Interrogation II} displayed flawed legal reasoning, and this view was shared by other Navy LAs, both civilian and military.\textsuperscript{160} But contributions from the Working Group “[...] began to be rejected if they did not conform to the OLC guidance.”\textsuperscript{161} In effect, \textit{Interrogation II} “[...] was relied on almost exclusively.”\textsuperscript{162} This is no surprise, since Haynes had ordered the Working Group to consider the memo as the “controlling authority” on all legal issues. In addition, the speed of the process of legal revision and the division of responsibilities amongst the various participants were such – not to mention that Walker had the only copy of \textit{Interrogation II} – that it was very difficult to prepare detailed objections and discuss them with any hope of affecting the final report.\textsuperscript{163}

On February 10, 2003, Mora met with Haynes and objected to the draft report. “I believe I urged him to keep the report in draft form and not finalize it. I do recall suggesting that he should take the report, thank the Working Group leadership for its efforts, and then stick the report in a drawer and ‘never let it see the light of day again.’”\textsuperscript{164} The last draft report sent to Mora was from March 2, and it was as

\textsuperscript{159} Quoted in \textit{Mora memo}, pp. 14-15 (emphasis added).
\textsuperscript{160} \textit{Mora memo}, p. 18, fn. 12.
\textsuperscript{161} \textit{Ibid.}, p. 17.
\textsuperscript{162} \textit{Air Force JAG memo I}, paragraph 1; see also \textit{Army JAG memo} (paragraph 2).
\textsuperscript{163} \textit{Mora memo}, p. 18.
\textsuperscript{164} \textit{Ibid.}, p. 19.
 unacceptable as the prior drafts. Mora then waited for the final Working Group report to be issued anyway, anticipating disagreement with it and ready to file a formal dissent. But the report was never produced.

For about a year, Mora thought that Rumsfeld’s suspension of the interrogation program was still in effect. It was in May of 2004, after the Abu Ghraib scandal, that Mora found out that, a year earlier, Rumsfeld had signed the Working Group final report. The report, which reflected the legal opinion of Interrogation II and included a list of thirty-five interrogation techniques, had been issued without the knowledge of the critical LAs from the Pentagon and had been used, together with Interrogation II, to back Rumsfeld’s memo of April 16, 2003, which authorized the use of twenty-four of those techniques – and which Mora also was not aware of until a year later. Rumsfeld’s order was a “yellow” compromise, recommended by his top legal advisor, between OLC’s “green light” and the JAG’s “red light”.

The Working Group final report did mention that “[...] other nations and international bodies may take a more restrictive view [on the requirements of international law], which may affect our policy analysis and thus is considered elsewhere.” Similarly, the new interrogation policy memo cautioned that

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165 Ibid., p. 20.
167 Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (3/6/03) [hereinafter Working Group Report], reprinted in Greenberg and Dratel 2005: 241-359. The list of recommended techniques excluded waterboarding, but it did contain other questionable ones, such as sleep deprivation for up to four days, removal of clothing, and hooding.
168 Mora memo, p. 21, fn. 15.
[o]ther nations that believe the detainees are entitled to POW protections may consider that provision and retention of religious items (e.g., the Koran) are protected under international law (see, Geneva III, Article 34). Although the provisions of the Geneva Convention are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.\textsuperscript{171}

Mora was pleased that, at the level of policy implementation, no detainee abuses were reported since January 15, 2003 (when the original policy memo was suspended by Rumsfeld). The battle to correct legal advice had been lost, for the most part, but their efforts had apparently paid off as far as the actual treatment of Guantanamo detainees was concerned.\textsuperscript{172}

Notwithstanding this, Mora refused to leave the Working Group report and \textit{Interrogation II} as the standing legal advice. On July 7, 2004, he submitted his dissenting memo to Vice Admiral Albert Church. In addition to the commonly held criticism that the cruelty or “harshness” of the interrogation techniques under legal discussion were in clear violation of the GCs and (arguably) the CAT, Mora expressed also his concern that the authorization of cruelty toward terrorist suspects would likely result in abuse. Mora was worried as well that military personnel, acting within or beyond the authorizations laid out by OLC, could probably face criminal charges.

The interrogation program authorized for Guantanamo was quickly transferred elsewhere. In effect, when General Miller was transferred from Guantanamo to Iraq to advise on the interrogation of prisoners there, he took with him a group of interrogators

\textsuperscript{171} Memorandum from Donald Rumsfeld to James Hill, \textit{Counter-Resistance Techniques in the War on Terrorism} (4/16/03), reprinted in Greenberg and Dratel 2005: 360-365 (emphasis added).
\textsuperscript{172} Mora memo, p. 21. It is Mora’s understanding that “[…] all interrogation techniques authorized for use in Guantanamo after January 15, 2003, fell well within the boundaries authorized by law.” (p. 21)
from Guantanamo, known as the Tiger Team. They supervised all the prisons run by the United States in Iraq, including Abu Ghraib. In addition, according to a report on Abu Ghraib prepared by the Pentagon, legal advisors to the top commander in Iraq, General Ricardo Sanchez, relied on the Working Group final report (and thus on *Interrogation II*) to determine the limits of their interrogation authority.\textsuperscript{173}

Let me sum up this section by tackling an inevitable question: Why did Yoo advise decision-makers that torture was a legally permissible tool in the fight against al Qaeda?

For one, the memos genuinely flowed from Yoo’s personal views on the matters at hand. His past academic work confirms the opinion that international law is no valid constraint on the exercise of U.S. sovereignty and that the law in general cannot curtail the President’s commander-in-chief powers, as the Constitution grants him practically unlimited wartime prerogatives.\textsuperscript{174} Clearly, no one holding these views could ever succeed in legitimizing foreign policy in the eyes of the international community.

On top of Yoo’s inability to deliver – here understood in terms of the legitimacy-guarding utility of international legal advising – there was the post-9/11 atmosphere. The shock of the large-scale terrorist attacks on U.S. soil brought with it a fear of a future attack and an obsession within the administration to prevent it at all cost.\textsuperscript{175} These circumstances reinforced Yoo’s views that the President faces unconstrained options in

\textsuperscript{174} Clark 2005 (reviewing Yoo’s scholarship to provide background information on him); Goldsmith 2009: 97; Yin 2009: 491. For a most relevant piece, see Yoo 1996. See also Yoo 2001 (arguing for broad presidential powers of treaty interpretation and termination) and Yoo 2000 (interpreting the presidential war powers under the Constitution in a manner consistent with *Application of treaties*).
\textsuperscript{175} Goldsmith 2009: 165-169; Mukasey 2009: 181-184.
times of war. The same fear made those views exceptionally attractive to many administration officials. In this context, it was convenient for the White House to empower Yoo and disempower “softer” LAs, which would curb the President’s legal options due to their natural risk averseness, even if this disempowerment of LAs meant confronting organizational imperatives and generating unendurable tensions within the government and the military. Goldsmith explains this fear-inspired strategy of discretional disempowerment:

Fear explains why OLC pushed the envelope. And in pushing the envelope, OLC took shortcuts in its opinion-writing procedures. On the theory that expert criticism improves the quality of opinions, OLC normally circulates its draft opinions to government agencies with relevant expertise. The State Department, for example, would normally be consulted on the questions of international law implicated by the interrogation opinions. But the August 2002 opinion [i.e. Interrogation I], though it contained no classified information, was treated as an unusually “close hold” within the administration. Before I arrived at OLC [in October 2003], Gonzales made it a practice to limit readership of controversial legal opinions to a very small group of lawyers. And so, under directions from the White House, OLC did not show the opinion to the State Department, which would have strenuously objected. This was ostensibly done to prevent leaks. But in this and other contexts, I eventually came to believe that it was done to control outcomes in the opinions and minimize resistance to them.176

As recounted above, DOS immediately opposed OLC’s assertion that the GCs were not applicable to the WOT. Secretary Colin Powell requested the decision to be reconsidered and reversed, but the White House Counsel advised the President that the arguments for reversal were “unpersuasive”. DOS insisted, to no avail. The War Council

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176 Goldsmith 2009: 166-167 (emphasis added).
was at the time impermeable and in control. Subsequent discussions on the international legal requirements on individual status designation, would not be open to the same meddling by dissident LAs from DOS and elsewhere. Speaking about the influential administration lawyers, Alberto Mora, perhaps exaggerating, even expressed his doubts about how knowledgeable they were: “I wondered if they were even familiar with the Nuremberg trials – or with the laws of war, or with the Geneva conventions. They cut many of the experts on those areas out. The State Department wasn’t just on the back of the bus – it was left off the bus.”

Just as the DOS LAs were kept out of the advice loop, it was the intention of the War Council to do the same with civilian and military LAs from the Armed Forces. However, it was impossible to keep the military away from the implementation of the interrogation program, and so it did not take long for their lawyers to push their way into the policy-making process, as evidenced in the preceding pages.


In the first two years of the WOT, the War Council worked quite effectively as a lawyerly fortress, within the foreign-policy apparatus, capable of either monopolizing legal advice through secrecy and short-circuiting or, at least, remaining as a reliable source of impermeable, Unitary-Executive-inspired legal opinions. By the end of 2003, however, the club had lost many of its select members and the fortress had ceased to function as such. In effect, Timothy Flanigan had left the team in December 2002 for

\[177\] Quoted in Mayer 2008: 236.
reasons unrelated to politics;\textsuperscript{178} Jay Bybee – a War Council aficionado – became a federal judge in March 2003; and John Yoo, whose promotion to head of OLC was blocked by Ashcroft – apparently because Yoo had cut him out of the loop by providing a private pipeline between OLC and the White House\textsuperscript{179} – resigned from OLC in the summer of 2003. Addington, Gonzales and Haynes stayed, but their direct connection to the institutionally powerful OLC was gone.

On top of that, the war in Iraq split Addington’s legal allies. For many of them, such as OLC deputy Patrick Philbin, this war looked more like a traditional interstate war and foreign occupation than like the “new kind” not contemplated by the GCs. Consequently, they relinquished their support on the inapplicability of Geneva law to the WOT.\textsuperscript{180}

In May 2003 Bush nominated Jack Goldsmith as head of OLC, who took office in October. Goldsmith recognizes himself as a conservative intellectual who is “skeptical about the creeping influence of international law on American law.”\textsuperscript{181} His scholarship testifies to this self-characterization.\textsuperscript{182} The role he would play during his short stay at OLC has therefore little to do with a particular sensitivity or deferential predisposition towards the international legal system. Quite the contrary, certain contempt for international legal limitations on U.S. sovereignty was something he had in common with Yoo and the rest of the War Council.

\textsuperscript{178} Savage 2007: 181.
\textsuperscript{179} Ibid., p. 182.
\textsuperscript{180} Ibid., p. 183.
\textsuperscript{181} Goldsmith 2009: 21.
\textsuperscript{182} See, for example, Bradley & Goldsmith 1997; Goldsmith & Posner 1999; Goldsmith 2000; Goldsmith 2003a; Goldsmith 2003b; Goldsmith & Posner 2005.
It was therefore not Goldsmith’s legal ideology which made a difference as to the effect of legal advising on U.S. counterterrorism policies before and after October 2003. Rather, it was his deference to the organizational norms of the foreign-policy apparatus, which implied putting an end to the short-circuiting orchestrated from the White House and implemented in the War Council – a practice which had generated strong resistance from the rest of the organization. Distancing himself from the institutional maneuvers of the War Council days, Goldsmith later affirmed that he “[…] always insisted that the State Department chime in on issues of international law, even if the issues were highly classified. And though the process was often painful, it always improved my work. I also insisted, sometimes in the face of White House resistance, that more lawyers in the Justice Department be given access to classified programs so that we had the manpower to do a proper legal analysis.”

4.3.1. Detention

By the time Goldsmith replaced Bybee at OLC, a consensus had been reached on Iraq by LAs from DOS, DOD, CIA, and NSC: the conflict was (at the time) an international armed conflict, and therefore the Fourth Geneva Convention (GC4) protected all Iraqis, including terrorists. GC4 protections implied an obligation to reassess periodically the security basis of detention of civilians. OLC then confirmed that GC4 did not apply to the armed conflict against al Qaeda per se, but that it did apply to

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184 Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949).
185 Goldsmith 2009: 40.
the U.S. occupation of Iraq. The protections of the convention, however, would only be granted to Iraqi citizens or permanent residents (including unlawful combatants), to the exclusion of terrorists who were there to fight a global (CA3) armed conflict.\footnote{Goldsmith’s memo did state, significatively, that “[a]lthough Article 4 [of GC4] can be read to exclude al Qaeda operatives from the class of “protected persons,” we must acknowledge that article 4 could also be read to include such persons.”\footnote{Ibid., p. 15.} In other words, he made explicit that denying non-Iraqi al Qaeda operatives GC4 protections was open to interpretation, thus implicitly warning decisionmakers that doing so might be internationally construed as illegitimate. This kind of warning notice would become common in OLC memos and was a significant improvement from the typical opinions issued from Bybee’s OLC.}

The situation was different in Afghanistan. There, the conflict was now a non-international one, where the GCs (other than CA3) did not apply. Goldsmith certainly believed the government could detain enemy combatants, but he thought more elaborate procedures were required for identifying and detaining them.\footnote{Goldsmith 2009: 29.} In the initial, international phase of the conflict, individuals detained in Afghanistan were presumptively classified as unlawful combatants for their links to the Taliban or al Qaeda. These early detentions were solely based on intelligence examined by Detainee Review Boards (DRBs).\footnote{As mentioned above, this mechanism of status determination was more illegitimate than strictly illegal under IHL (Chesney & Goldsmith 2008). Moreover, the War Council’s triumph in persuading the President}
whether the evidence was sufficient to render the detainee an unlawful combatant. In this sense, these boards were administrative, not judicial, hearings, and their function was to determine whether detention for security purposes – but not for punishment purposes – was warranted. If the consensus was that there was not enough evidence, the board would recommend the release of the prisoner. Even when evidence was not enough to prove combatancy, however, the board would most likely not recommend the detainee’s release if he had “intelligence value.”

Because the DRB system did not give prisoners a fair chance to challenge their detention, the Supreme Court ruled in 2004 that they could do so in federal courts. In Guantanamo, Combatant Status Review Tribunals (CSRTs) were established by DOD as a response to the ruling. These military tribunals, modeled after U.S. Army Regulation 190-8, would serve as the primary mechanism for the determination of combatancy status of Guantanamo detainees. Under this scheme, a panel of three U.S. military officers, one of them a judge advocate and none involved in the apprehension of the detainee, determines the prisoner’s status. At the time, the prisoner was provided a “personal representative,” but not a lawyer, and although he was entitled to advance notice of the “unclassified factual basis” for his designation as an enemy combatant, he could be

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190 Bovarnick 2010: 16-17. As mentioned above, detention of civilians with the sole purpose of extracting information from them is contrary to IHL.


192 Memorandum from Paul Wolfowitz to Donald Winter, Order Establishing Combatant Status Review Tribunal (7/7/04); Memorandum from Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (7/29/04).
denied access to allegedly incriminating evidence and participation in the hearing when classified information was being examined.

CSRTs were denied the “lawful combatant” option. They were to decide whether the detainee was an innocent civilian or an unlawful combatant (thereby defined as to include all Taliban or Al Qaeda members and civilians with indirect participation in hostilities). This was not controversial, since none of these detainees could be a lawful combatant under the GC3 definition – although it was more problematic to assume that being associated with any of these organizations necessarily made a person a security threat to the United States and thus warranted his detention. What was unsatisfactory (in light of the Supreme Court rulings) was the thin due process afforded. In particular, denying detainees access to all the evidence relied upon to detain, the liberal use of hearsay, and the admissibility of coerced testimony made CSRTs arguably inappropriate. According to Lt. Col. Stephen Abraham, a military intelligence officer with first-hand knowledge on the matter, in these tribunals “[w]hat were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence.” In addition, Abraham denounced that the tribunal authorities, often personnel with limited or no intelligence experience, were pressured by their superiors to reach an “enemy combatant” verdict.

193 Memorandum from Paul Wolfowitz to Donald Winter, Order Establishing Combatant Status Review Tribunal (7/7/04). The order therefore assumed that (besides lawful combatants) only unlawful combatants could be detained. Actually, as mentioned above, non-belligerents who pose a security threat may also be detained under IHL, so the unconventionally broad definition of unlawful combatancy was unnecessary for detention purposes (Goodman 2009).
196 Quoted in Yaroshefsky 2007: 569.
197 Yaroshefsky 2007: 569.
As for the other task performed by DRBs – periodic review of the security need to continue detaining a civilian – DOD established, as a complement to the CSRT system, Administrative Review Boards (ARBs). These were similar to CSRTs in their constitution and procedural safeguards. After hearing the detainee’s statements as to why he was no longer a threat to the United States, the ARB made its recommendation on continuation of detention to a civilian official in DOD, who then decided whether the detainee was to be released. The Obama administration improved this mechanism with the establishment of the Guantanamo Review Task Force.

Elsewhere, DRBs changed their name since 2004, but their procedures did not change much. These procedures were even “thinner” than those of the CSRTs. The burden of proof rested on the prisoner, intelligence was presumed reliable, coerced evidence could be admitted, and detainees were still denied access to counsel and could not appear in person before the board. Only since 2008 could detainees participate in hearings. Since then, the initial review was conducted within seventy-five days of detention (down from ninety days) and then reviewed every six months (down from one year). However, the detainee had no representative or counsel to assist him, and the status designation was still influenced by the intelligence value of the detainee. The Obama administration further improved the mechanism of status determination overseas by providing the detainee with a personal representative (not a lawyer, though), the right to present all reasonably available evidence, and access to (unclassified) evidence. The

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198 OLC had recently advised that there was no international legal requirement to reassess periodically the detention of non-Iraqis, as GC4 only applied to Iraqis. However, the memo cautioned that other states could interpret that GC4 applied to all civilians detained in Iraq. It is possible that this warning influenced Rumsfeld’s decision to establish a mechanism of status review for all detainees.

detainee’s personal representative could now review the evidence classified and challenge it on behalf of the detainee.\footnote{200}

In short, the system of individual status determination and periodic review has improved over the years, both in Guantanamo and overseas. Whether it is in full compliance with international law is, of course, debatable. However, as already explained, status designation and administrative detention of enemy fighters enjoys virtually no guidelines from IHL – other than the “competent tribunal” rule from GC3 and the periodic review mandated by GC4, which only apply to international conflicts anyway. According to Bovarnick, for example, the current DRB process “[…] provides more procedural protections afforded to combatants than are required by law, international or domestic.”\footnote{201}

As for criminal detention of detainees, it took almost three years after the order establishing the use of military commissions to initiate trials for alleged WOT criminals. Rumsfeld was hesitant to start action because of the consistent opposition from the JAGs, who always favored courts-martial. JAGs understood that even unlawful combatants were protected by CA3, which prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”\footnote{202} While federal criminal courts and courts-martial would easily pass the test, military commissions would not. Of course, the Administration was back then still acting

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\textsuperscript{200} Bovarnick 2010: 18-35. \\
\textsuperscript{201} Ibid., p. 12. \\
\textsuperscript{202} GCs, Art. 3(1)(d), emphasis added.
on OLC’s opinion that the GCs (and even CA3) did not apply to the conflict with al Qaeda.

In 2004, military commissions were finally set up. These punitive trials were severely lacking in due process guarantees. The accused detainees were represented by military officers, who were not always lawyers, and they were barred from hearing all evidence against them and sometimes even barred from participating in their own trial. Also, hearsay evidence would be admitted, as well as coerced testimony. Many military lawyers involved, such as Lt. Charles Swift, Maj. Mark Bridges and Maj. Michael Mori, spoke out strongly against the prosecutorial regime in Guantanamo, in some cases facing institutional sanctions from their superiors.203 As one of them publicly stated it,

It was a political stunt. The administration clearly didn’t know anything about military law or the laws of war. I think they were clueless that there even was a UCMJ and a Manual for Courts-Martial! The fundamental problem is that the rules were constructed by people with a vested interest in conviction. [...] I hope that nobody confuses military justice with these ‘military commissions.’ This is a political process, set up by the civilian leadership. It’s inept, incompetent, and improper.204

In effect, the structure and procedure of the commissions were so below the legal standards that the Supreme Court declared in 2006 that they violated CA3, as they were not “regularly constituted courts”.205 In response to this, the military commissions’ procedural standards were raised.206 Even though coerced evidence would still be admitted, that obtained through torture (or through CIDT since 2006) would not; rules of

204 Maj. Michael Dan Mori, quoted in Mayer 2008: 89.
205 Hamdan v. Rumsfeld.
In 2008, the Supreme Court further elaborated on “due process” requirements, mandating access to lawyers, witnesses, and classified information for alleged enemy combatants.\textsuperscript{208} In January 2009, President Obama halted the military commissions system installed in the previous administration. Although he reversed that decision two years later, prosecution of WOT detainees would be carried out in improved military tribunals which could be more easily accommodated under Geneva requirements. In short, procedural safeguards of the commission system grew closer to those of courts-martial, and thus military commissions became closer to the “regularly constituted courts” required by CA3.\textsuperscript{209}

4.3.2. Interrogation

The interrogation program – especially the one designed for the prisoners in Guantanamo – met the strong resistance of those LAs closest to the implementation of those policies and most savvy about matters of IHL. Particularly remarkable in this regard was the clash in the Pentagon, in the winter/spring of 2003, amongst top military and civilian lawyers, as recounted in Section 4.2.2 above.

A few months after that, with Goldsmith now in charge of OLC, it was another OLC lawyer, who had worked closely with Yoo on counterterrorism issues since 9/11, that brought the standing interrogation memos to Goldsmith’s attention. Patrick Philbin, a

\textsuperscript{207} Corn & Jensen 2009: 182-184.
\textsuperscript{208} Boumediene v. Bush.
\textsuperscript{209} Chesney & Goldsmith 2008: 1117-1120.
longtime friend of Yoo who shared his general views on the President’s wartime powers, told Goldsmith, about six weeks after he was appointed as head of OLC, that there was an OLC opinion out there which may contain serious errors and which he had been working to correct.210 The opinion was Interrogation I.

When Goldsmith looked at Interrogation I and II, he was astounded to see “the unusual lack of care and sobriety in their legal analysis,” that they had “no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law,” that they “rested on cursory and one-sided legal arguments.”211 In short, for Goldsmith “OLC’s analysis of the law of torture [in Interrogation I and II …] was legally flawed, tendentious in substance and tone, and overbroad and thus largely unnecessary.”212

Reversing OLC opinions, however, was no easy task, as it was contrary to the office’s institutional culture.213

[…] advisers should follow a practice of adhering to prior executive branch opinions whenever possible – and they do. This reliance on the judicial principle of stare decisis constrains decision and gives opinions a life beyond the political administration in which they are generated, creating a body of law within the executive branch that endures. […] T]he disavowal of an OLC opinion by the administration that had generated it [is a rare event]. More commonly, an administration will quietly supersede opinions from earlier ones by issuing new opinions with the distinct inflection of the incumbents, modifying but not repudiating the older opinions. 214

210 Goldsmith 2009: 142.
211 Ibid., pp. 148-149.
212 Ibid., pp. 151.
Despite this cultural norm against the repudiation of previous opinions, of which he was well aware, Goldsmith decided that *Interrogation I* and *II* must be withdrawn, corrected and replaced. According to Goldsmith, he reached that decision in December 2003 based only on the opinion’s errors, before he knew about any abuse of prisoners.\(^{215}\)

My main concern upon absorbing the opinions was that someone might rely on their green light to justify interrogations much more aggressive than ones specifically approved and then maintain, not without justification, that they were acting on the basis of OLC’s view of the law.\(^{216}\)

When Yoo’s opinions on interrogation techniques were put to scrutiny, no one inside the administration, other than Addington, was willing to defend them.\(^{217}\)

Goldsmith first withdrew *Interrogation II* but allowed the Defense Department to continue to employ the twenty-four techniques approved by Rumsfeld earlier that year.\(^{218}\)

As for the techniques used by the CIA, Goldsmith was not confident about their legality. In a letter to CIA General Counsel Scott Muller, Goldsmith suspended *Interrogation I*’s authorization of water-boarding (which had not been used since early 2003 anyway).\(^{219}\)

In June 2004, he finally withdrew *Interrogation I* and resigned. In nine months he had reversed or rescinded more OLC opinions than any of his predecessors.\(^{220}\) This revisionism, rather than the actual content of his legal opinions, generated tensions Goldsmith was not willing to put up with.\(^{221}\)

\(^{215}\) Goldsmith 2009: 146.
\(^{216}\) Ibid., p. 151.
\(^{217}\) Ibid., pp. 157-158.
\(^{218}\) Ibid., p. 153.
\(^{219}\) Letter from Jack Goldsmith to Scott Muller (5/27/04).
\(^{220}\) Goldsmith 2009: 161.
\(^{221}\) Ibid., pp. 161-164.
The Abu Ghraib scandal of the spring of 2004 had much to do with the momentum for advice reversal. The scandal was the materialization of the legitimacy costs of the interrogation program approved by OLC, as warned by Colin Powell and DOS and military lawyers. Even though the abuses committed at Abu Ghraib (and elsewhere) were excesses which had not been authorized by the government, one of their underlying causes was confusion amongst soldiers, generated by the interrogation program implemented at Guantanamo and elsewhere, as to what treatment standards applied. In the words of Lt. Gen. Ricardo Sanchez, a top U.S. commander in Iraq at the time:

This presidential memorandum [i.e. the *Humane treatment memo*] constituted a watershed event in U.S. military history. Essentially, it set aside all of the legal constraints, training guidelines, and rules for interrogation that formed the U.S. Army’s foundation for the treatment of prisoners on the battlefield since the Geneva Conventions were revised and ratified in 1949. Our current detention and interrogation doctrine had been rendered obsolete and invalid in the war with al-Qaeda. According to the President, it was now okay to go beyond those standards with regard to al-Qaeda terrorists. And that guidance set America on a path toward torture.\(^\text{222}\)

The causal link between OLC’s legal advice and Abu Ghraib was later confirmed by different investigations carried out by the military.\(^\text{223}\)

[...] the government’s own investigations into the root causes of the scandal determined that one cause was an attitude that existed at the highest levels of government, that detainees can be treated aggressively. This attitude made its way

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\(^{222}\) Sanchez 2008: 144.  
down the chain of command to Abu Ghraib prison in the form of interrogation and detainee treatment provisions that looked very much like the detainee treatment provisions authorized by the Secretary of Defense for Guantanamo.\textsuperscript{224}

Aware that the agency would be blamed if the policies lost political support, nervous CIA officials began to curb their practices quite early in the process: no one was water-boarded after March 2003, and coercive interrogation methods were shelved altogether in 2005.

The replacing opinion on interrogation techniques would not be issued until December 2004, by Daniel Levin, Goldsmith’s temporary successor at OLC.\textsuperscript{225} Levin’s memo – \textit{Interrogation III} – was to supersede \textit{Interrogation I} in its entirety and was subjected to an inclusive review within the Department of Justice. The definition of torture was broadened, lowering the pain and harm bar and eliminating the intent requirement put forth by the replaced opinion. Moreover, it did not mention any presidential power to overrule torture prohibitions, and it explicitly stated that “[…t]here is no exception under the statute permitting torture to be used for a “good reason” […] (to protect national security, for example).”\textsuperscript{226} However, Levin took the care to confirm, in a footnote, that the conclusions reached by OLC’s prior opinions still held, thus implicitly obviating the need to be concerned about criminal liability for past behavior.\textsuperscript{227}

\textsuperscript{224} Hansen 2009: 655-656 (reviewing the Jones and Schlesinger reports).
\textsuperscript{225} Memorandum from Daniel Levin to James Comey, \textit{Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A} (12/30/04) [hereinafter \textit{Interrogation III}]. Before the replacement opinion, however, Levin re-authorized the (limited) use of water-boarding by the CIA (Letter from Daniel Levin to John Rizzo, 8/6/04; Letter from Daniel Levin to John Rizzo, 9/6/04).
\textsuperscript{226} \textit{Interrogation III}, p. 17.
\textsuperscript{227} \textit{Ibid.}, p. 2, fn. 8.
Notwithstanding this retroactive protective shield, the new OLC legal position on interrogations prompted Secretary Rumsfeld to revise the military’s interrogation program. In March 2005, he declared “non-operational” the Working Group final report of April 2003 – the one based on *Interrogation II* and approving several harsh interrogation techniques.\(^{228}\) Commenting on the interrogation policy, which would not undergo any further substantive changes, Goldsmith stated a few years later:

> Today the military and the CIA are barred from using techniques that were thought to be consistent with the Geneva Conventions and available to the President as recently as the 1960s. The President’s interrogation powers, like most of his other military powers, are much more constrained by law than at any time in American history.\(^ {229}\)

Steven Bradbury succeeded Levin as the acting head of OLC – his nomination never approved by the Senate. In his memo from May 2005, Bradbury applied *Interrogation III* to a list of interrogation methods to be used by the CIA. In his evaluation of these techniques vis-à-vis the anti-torture statute, he made explicit that the analysis and conclusions therein “[…] do not rely on any consideration of the President’s authority as Commander in Chief under the Constitution […] or any arguments based on possible defenses of “necessity” or self-defense.”\(^ {230}\) Excluding these lines of reasoning from the analysis avoided their legitimation – but also failed to assert their defectiveness. Finally, the closing paragraph of the 46-page memo contained the following warning:

> “We emphasize that these are issues about which *reasonable persons may disagree.*”\(^ {231}\)

\(^{228}\) Graham 2009: 343.

\(^{229}\) Goldsmith 2009: 222.


Bradbury concluded that many enhanced interrogation techniques were compatible with the anti-torture statute, including the waterboard (although subject to some restrictions).\textsuperscript{232} In another memo issued on the same day, but relative to obligations under the CAT, Bradbury reached the same conclusion. In this case, both the meaning and the applicability of the convention were deeply affected by the reservation made on it by the Senate. Insofar as the reservation limits the meaning of the term “cruel, inhuman or degrading treatment or punishment” to that treatment or punishment explicitly prohibited by the U.S. Constitution, only acts which “shock the conscience”\textsuperscript{233} would be violative of the CAT. According to Bradbury, the CIA interrogation program could not be said to shock the conscience because it was “[…] carefully limited to further the Government’s paramount interest in protecting the Nation while avoiding unnecessary or serious harm […].”\textsuperscript{234} One can only wonder which conscience needed to be shocked for the test to fail: that of the international community or that of the American people? It must be noted, however, that once again Bradbury relativized the reliability of his legal reasoning: “We emphasize, however, that this analysis calls for the application of a somewhat subjective test with only limited guidance from the [U.S. Supreme] Court. We therefore cannot predict with confidence whether a court would agree with our

\textsuperscript{232} “Applications are strictly limited to at most 40 seconds, and a total of at most 12 minutes in any 24-hour period, and use of the technique is limited to at most five days during the 30-day period we consider” (Memorandum from Steven Bradbury to John Rizzo, \textit{Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee} (5/10/05), p. 43).

\textsuperscript{233} Fifth Amendment, U.S. Constitution.

\textsuperscript{234} Memorandum from Steven Bradbury to John Rizzo, \textit{Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees} (5/30/05), p. 3.
conclusions [...].”

In any event, conscience shocks aside, the CIA interrogation program at the time (May 2005) passed the test because it was conducted exclusively outside the United States. In a memo from 2007, the CA3 memo, OLC acknowledged recent “significant changes in the legal framework applicable to the armed conflict with al Qaeda.” One of these changes had to do with the Supreme Court’s decision that CA3 did apply to the conflict after all, and that therefore the treatment of detainees could not implicate “violence to life and person” or “outrages upon personal dignity”. In this respect, Bradbury argued that the six interrogation techniques proposed for legal scrutiny by the CIA at the time were in conformity with CA3.

The interpretation of the CA3 prohibitions began by underscoring their definitional vagueness and proscriptive uncertainty, which was backed with internationally authoritative opinions. The purposeful imprecision of the language of CA3 was understood as reflecting “[…] a conscious decision to allow state parties to elaborate on the meaning of those terms as they confront circumstances unforeseen at the

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235 Ibid., p. 25.
236 The memo referred to obligations derived from Article 16 of the CAT, whereby the state undertakes to prevent torture and CIDT in any territory under its jurisdiction.
237 Memorandum from Steven Bradbury to John Rizzo, Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees (7/20/07) [hereinafter CA3 memo], p. 2.
239 Bradbury included one of his footnoted caveats here as well: “[…] although we assume in light of Hamdan that Common Article 3 applies to the present conflict, we note that the President permissibly could interpret Common Article 3 not to apply by an executive order issued under the MCA [i.e. Military Commissions Act of 2006].” (CA3 memo, p. 49, fn. 34)
240 By that time the CIA had downgraded its “enhanced” interrogation program to six techniques, having excluded altogether the waterboard and reduced sleep deprivation to a maximum of 96 hours.
time of the treaty’s drafting.”242 This contention, unless taken to imply an interpretive carte blanche, is not particularly controversial. Bradbury then construed the meaning of “violence to life and person” as acts that involve the application of physical force to an extent comparable to the four examples given in the article – i.e. murder, mutilation, torture, and cruel treatment.243

While the CIA does on occasion employ limited physical contact, the “slaps” and “holds” that comprise the CIA’s proposed corrective techniques are carefully limited in frequency and intensity and subject to important safeguards to avoid the imposition of significant pain. They are designed to gain the attention of the detainee; they do not constitute the type of serious physical force that is implicated by paragraph 1(a) [of CA3].244

As for “outrages upon personal dignity, in particular, humiliating and degrading treatment,” according to the CA3 memo none of the six techniques fell under this category insofar as they “[…] are not intended to humiliate or to degrade; rather, they are carefully limited to the purpose of obtaining critical intelligence.”245 Finally, Bradbury confirmed this interpretation of CA3 by looking at the practices of state parties – more specifically, that of the United Kingdom during the 1950s and 1960s.246

242 CA3 memo, p. 56.
243 This interpretation is supported by the ICRC Commentaries, decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the Rome Statute of the International Criminal Court (ICC), as well as domestic sources.
244 CA3 memo, p. 61.
245 Ibid., p. 69. The memo relies again on ICTY, ICC and ICRC interpretations.
246 “That for more than two decades following the enactment of Common Article 3, one of the world’s leading advocates for and practitioners of the rule of law and human rights employed techniques similar to those in the CIA program and determined that they complied with Common Article 3 provides strong support for our conclusion that the CIA’s proposed techniques are also consistent with Common Article 3. The CIA’s proposed techniques are not more grave than those employed by the United Kingdom” (CA3 memo, p. 74).
Once again, Bradbury warned that other states may reasonably hold legal expectations derived from CA3 which were different from those laid out in the memo:

The interpretation in this memorandum reflects what we believe to be the correct interpretation of Common Article 3. Because certain general provisions in Common Article 3 were designed to provide state parties with flexibility to address new threats, however, the nature of such flexibility is that other state parties may exercise their discretion in ways that do not perfectly align with the policies of the United States. We recognize Common Article 3 may lend itself to other interpretations, and international bodies or our treaty partners may disagree in some respects with this interpretation.

[…] the State Department informs us that given the past statements of our European treaty partners about United States actions in the War on Terror, and notwithstanding some of their own past practices, […] the United States could reasonably expect some of our European treaty partners to take precisely such an expansive reading of the open terms in Common Article 3.247

The President immediately mandated the application of CA3, as interpreted in Interrogation III, to detentions and interrogations carried out by the CIA, irrespective of their location. The conditions of these detentions and interrogations were to exclude torture and CIDT.248

In his last week in office, Bradbury issued a last memo withdrawing any traces of the Unitary Executive doctrine that he could find in OLC opinions from the War Council days (other than Interrogation I and II, which had already been withdrawn in their

247 CA3 memo, p. 76.
248 Executive Order 13440: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency (7/20/07).
entirety). Regarding the presidential authority to suspend treaties, as contained in *Application of Treaties* and an older OLC memo on the suspension of the ABM Treaty, Bradbury confirmed that

[...] in 2006 we advised the Legal Adviser to the National Security Council and the Deputy Counsel to the President not to rely on the two opinions identified above to the extent they suggested that the President has unlimited authority to suspend a treaty beyond the circumstances traditionally recognized.²⁵⁰

The Obama administration took the strategy of selective opinion withdrawals initiated with Goldsmith back in 2003 to its most draconian expression. In effect, on January 22, 2009, President Obama ordered:

> From this day forward, [...] officers, employees, and other agents of the United States Government [...] may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation [...] issued by the Department of Justice between September 11, 2001, and January 20, 2009.²⁵¹

In April and June, 2009, OLC formally withdrew five OLC memos related to interrogations – including the *CA3 memo* and the application of *Interrogation III* by Bradbury from May 2005.²⁵²

In addition to ruling out reliance on OLC previous legal opinions on interrogation, President Obama instructed that all interrogation practices conducted by U.S. security forces, “at any time and in any place whatsoever,” comply with CA3. Furthermore, the

²⁴⁹ Memorandum from Steven Bradbury, *Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (1/15/09).
²⁵¹ Executive Order 13491: Ensuring Lawful Interrogations (1/22/09), Section 3(c).
Executive Order was clear in establishing the requirements of CA3 as a minimum standard of treatment, which must also be consistent with the CAT “and other laws regulating the treatment and interrogation of individuals detained in any armed conflict.” Finally, the order also invoked the authority of a 2006 U.S. Army interrogation manual – Army Field Manual 2-22.3 – which lists specific tactics precluded from use under any circumstance, including “waterboarding, use of extreme cold, use of dogs, stripping persons naked, and hooding.” These directives were later publicly endorsed by Harold Koh, the DOS Legal Adviser.

4.4. Conclusion

What impact did legal advisors have in the making and re-making of the detention and interrogation program implemented by the United States in the WOT? Would that program have been different if their legal advice had been different? If legal advisors made a significant difference in the decisional process, did they also strengthen the legitimacy of its outcome? Did legal advisors guarantee the formulation of a legitimate detention and interrogation program? If not, why did legal advising fail in this sense? All in all, did legal advisors function as the state’s internal agents of compliance with international law? I will conclude this chapter by addressing these questions separately.

253 Executive Order 13491: Ensuring Lawful Interrogations (1/22/09).
255 U.S. Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (March 25, 2010).
Legal advisors and the making of foreign policy

In the formulation of the detention and interrogation program the presence of legal advisors was pervasive and their causal impact can hardly be overstated. Not only were LAs consulted before decisions were made. Their approval was sought by policymakers at all times, acquiring the functional character of a true authorization for action. This implies, and exceeds, the informal capacity of LAs to veto a policy proposal. In fact, the role of LAs as authorizers of policy was almost formalized by the institutional powers wielded by OLC. Goldsmith could not be more definitive in this respect: “In an administration bent on pushing antiterrorism efforts to the limits of the law, OLC’s authority to determine those limits made it a frontline policymaker in the war on terrorism.”

LAs were certainly not the only influential actors in the making of detention and interrogation policies. Besides that of LAs was the obvious influence of decision-makers proper – even if often their own opinions were themselves conditioned by those of their legal advisors. In addition, other actors, such as the Supreme Court or Congress, had a significant impact on the decisional process at different times. In short, there is no doubt that the decisional outcome was over-determined. But would it have been the same without the LAs?

The bulk of the detention and interrogation program was based on LA opinions, particularly on those issued from OLC. Prima facie, then, it is quite safe to conclude that

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256 2009: 42.
the program would have been different if legal advice had been different. An insider’s account supports this conclusion.

The program [of interrogation] had been approved by the National Security Council, legally blessed by the Attorney General, and briefed to Congressional leadership. But the entire interrogation edifice was built on the OLC opinions […].

The lawyers weren’t necessarily expert on al Qaeda, or Islamic fundamentalism, or intelligence, or international diplomacy, or even the requirements of national security. But the lawyers […] seemed to ‘own’ issues that had profound national security and political and diplomatic consequences. They (and, after October 2003, we) dominated discussions on detention, military commissions, interrogation, GTMO, and many other controversial terrorism policies.

Some critical turning points in the evolution of the program were, however, determined from “outside.” Specifically, certain Supreme Court decisions – in particular those establishing the applicability of CA3 protections to all detainees and striking down military commissions for their insufficient procedural safeguards at the time – partially overruled the standing legal advice and forced policy changes contrary to the opinion of LAs. One should not conclude from this, however, that the impact of LAs on policy was negligible. Rather than its weakness, this underscores some peculiarities of legal advising in this case – peculiarities related to its initial malfunctioning. To this I turn next.

Legal advisors and the legitimation of foreign policy

If LAs were so influential in the policy-making process, why did the United States come up with a program that could put innocent civilians away for life and without

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257 Ibid., p. 152.
258 Ibid., p. 130.
criminal charges, or convict people despite reasonable doubt, or torture war detainees? In short, if LAs were in fact empowered, why did they fail to generate compliance with international law?

Two factors explain why this initial deviation could occur in the first place. First, LAs exercised a heterogeneous agency. Legal opinion amongst LAs had profound, sometimes irreconcilable differences. This should not necessarily lead to legal advising failure. If the process of legal advising is centralized, transparent, inclusive and thus tends to result in a compromise, then the negative effects of the heterogeneity of views should not manifest. However – and this is the second factor – if these structural remedies are lacking, then failure may certainly ensue.

The War Council’s legal views were, in general, strikingly different from those of most LAs. It is quite likely that Yoo’s opinions were outcome driven. But even if his memos were a work of advocacy, that should not mean the advice they contained was not candid and offered in good faith. In effect, the advice was consistent with the author’s genuine legal views (parochial and even aberrant though they may be at times). Let me advance the following counterfactual analysis: Suppose that the President had preferred not to use harsh interrogation techniques but had been under pressure from Congress and others to take a tough stance in the fight against terrorism. Under these hypothetical circumstances, would Yoo have given the legal advice he gave? Would he have issued the legal memos he did? Or would he, on the contrary, have argued that the President could not be any tougher because his hands were tied by international law? The answer will inevitably be speculative, but Yoo’s pre-2001 academic work is very consistent with
the legal opinions actually issued from OLC, suggesting that there is no reason to believe that his advice would differ significantly in the counterfactual scenario.\(^{259}\) Of course, it is a different question whether the President in the counterfactual would have chosen Yoo as OLC lawyer in the first place. After all, Yoo was a political appointee hired to help carry out the Bush administration’s legal and political agenda. The ideological convergence between the administration’s agenda and Yoo’s legal views was no coincidence. Naturally, however, the same can be said about Goldsmith, Bellinger or Mora.

Legal advice under the auspices of Yoo’s OLC was committed to strengthening the Unitary Executive doctrine, and it was more concerned with judicial and domestic constraints on policies than with political and international ones. Perhaps because of his institutional seat, perhaps because of his personal convictions, perhaps because of both, the truth is he was preoccupied with avoiding criminal prosecution of state agents by domestic courts rather than safeguarding the international legitimacy of U.S. policies. Whereas a concern about negative international reaction was a driving rationale of other LAs (especially of JAGs and those in the DOS Office of the Legal Adviser, the legal advising agency specialized in international law) this kind of consideration was peripheral (if not altogether absent) in Yoo’s legal analysis. It is precisely this neglect of international legitimacy that undermined his capacity to perform competently the function of a government lawyer advising on matters of international law.

\(^{259}\) Cf. Johnsen 2007: 1584-1585 (claiming, without much justification, that in our counterfactual Yoo’s advice would have altered to accommodate the President’s preferences, whichever they happened to be).
This neglect suited the hostility that other War Council members hold toward the need to accommodate the concerns of the international community. “‘They don’t have a vote’ was how he [Addington] would invariably respond when someone – usually John Bellinger [i.e. NSC, and later DOS, legal advisor] – would object to a policy (or lack of one) by invoking allied protestations.”

Goldsmith explicitly criticized President Bush for being

“[…] almost entirely inattentive to the soft factors of legitimation – consultation, deliberation, the appearance of deference, and credible expressions of public concern for constitutional and international values – in his dealings with Congress, the courts, and allies. He has instead relied on the hard power of prerogative. And he has seen his hard power diminished in many ways because he has failed to take the softer aspects of power seriously.”

Conversely, Yoo later criticized OLC’s attentiveness to the “soft factors of legitimation” when Interrogation I and II were withdrawn: “[…] Justice Department judgments on the law had become just one more political target open to partisan attack and political negotiation. […] The leadership in the Justice Department that had replaced the team there on 9/11 was too worried about the public perceptions of its work.”

He remained under the conviction that, if the world misunderstood the law, that was the world’s problem and nothing for the U.S. government to be concerned about. This conviction could only lead to failure in safeguarding the international legitimacy of the

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261 Ibid., p. 215.
262 Yoo 2006: 182.
U.S. program of detention and interrogation of WOT prisoners. Disciplinary mechanisms, in their weakness, failed to curb the impact of this contempt on the duties performed.\textsuperscript{263}

On top of Yoo’s pre-existing legal ideology, insiders point to a more circumstantial factor that made it possible for OLC to sanction torture and other legally questionable policies: fear. In effect, the early years after the September 11 attacks were marked by an obsession with preventing future attacks. Many in the administration were afraid that an interpretation of the law that would constrain the President’s capacity to fight al Qaeda could pave the way to more American deaths in the hands of terrorists. The fear factor may certainly have exacerbated Yoo’s (and others’) negative views on legal constraints on presidential wartime powers.

Secrecy and short-circuiting in the legal advising process were factors that contributed to making Yoo’s advice available to policymakers. The opinions held by the War Council were so unconventional that it had been necessary to keep out of the loop the (other) legal experts on the issues under discussion. The fact that precautions were taken on a regular basis to prevent the free circulation of legal memos throughout the different legal agencies comprised in the FPA suggests two things. First, it suggests that those legal opinions functional to the unchaining of commander-in-chief powers from international legal constraints were far from consensual amongst LAs – and were known to be so. Second, the secretive short-circuiting suggests that resistance from other LAs was expected and, more importantly, that this resistance was not futile – and was known

\textsuperscript{263} The DOJ’s Office of Professional Responsibility did launch an investigation on Yoo and Bybee, and concluded that their advice on interrogation constituted professional misconduct (OPR Report (7/29/2009)), but it failed to authorize any more tangible punishment (such as revocation of license or criminal prosecution).
not to be. In other words, the War Council knew it was “hijacking” the advisory system, and it knew the system could strike back, hence its considerable efforts to disempower major parts of the legal-advising team.\footnote{264}

In a nutshell, despite the structural empowerment of the legal staff as a whole, discretionary disempowerment of particular LAs was successfully practiced. This allowed policymakers proper to pick and follow that legal advice which was more consistent with their policy preferences. This \textit{ex post} picking of legal opinions was combined, naturally, with the \textit{ex ante} picking of legal advisors. The political appointment of LAs is, in this sense, at least suspect.

According to Goldsmith, however, it was an “accident of fate” that Yoo was an OLC lawyer at the time. Neither Cheney nor Addington knew Yoo before he was appointed or had anything to do with placing him in OLC.\footnote{265} By the time of the attacks, however, the Vice President and his Counsel were well aware that Yoo was the one person in the government who shared their view of presidential power, hence his participation in the 5-person War Council. Yoo was picked as the primary source of legal advice on the fight against terrorism because his legal views promised OLC opinions supporting the aggressive measures deemed necessary by the White House.

\footnote{264}{All these factors – i.e. Yoo’s views of executive power, fear and pressure from decision makers to push the law, lack of transparency and intra-branch consultation, and insufficient structural remedies against this – coincide with Harris’s conclusions (2005: 441-453). One other factor that skewed the process of legal advising and deviated it from the path to compliance was, according to Harris, the problem of “lock-in,” in the sense that OLC was asked to provide an opinion on interrogation at a time when coercive interrogations were already being applied (2005: 443-445). However, he does not offer compelling evidence to prove this – although allegations of abuse do go back as early as December 2001, so lock-in may certainly be an additional factor involved (Koh 2005: 657-658). If so, this would contradict OLC’s organizational habit of seeking to be consulted \textit{before} a decision is made (Koh 1993: 515).}

\footnote{265}{Goldsmith 2009: 97}
However, the monopolization of legal advising by the War Council was not institutionally sustainable. The dispute in the Pentagon in the winter of 2003 shows how LAs could produce compliance with international law – even if they failed to formally overrule OLC’s legal advice. In effect, after Mora and the JAGs expressed, insistently, their opposition to OLC’s legal opinions and the original interrogation program, the Working Group established to solve the dispute ended up confirming, not revoking, Yoo’s Interrogation II. And yet, the interrogation program was significantly turned into a more legitimate version of itself. Moreover, Interrogation I and II were later removed by Goldsmith, and the Working Group final report was deprived of authority in March 2005.

In this vein, the Schlesinger report summarized with clarity the importance of an open and inclusive legal-advising process:

In the initial development of these Secretary of Defense policies [i.e. those approved in December 2, 2002], the legal resources of the Services’ Judge Advocates and General Counsels were not utilized to their fullest potential. Had the Secretary of Defense had the benefit of a wider range of legal opinions and a more robust debate regarding detainee policies and operations, his policy of April 16, 2003, might well have been developed and issued in early December 2002. This could have avoided the policy changes which characterized the December 2, 2002, to April 16, 2003, period.\footnote{Schlesinger report, p. 924 (emphasis added)}

Summing up, the initial and temporary deviation in this case is explained by certain structural weaknesses of the foreign-policy apparatus. Namely, organizational safeguards were lacking (or not sufficient) to prevent secrecy and short-circuiting in a decentralized system of legal advising. Without the appropriate structural remedies of
centralization and transparency, discretional disempowerment of some LAs and cherry-picking of legal advice were allowed for. If Yoo’s or Addington’s aberrant international legal views had such a determinant influence on policy after the September 11 attacks, it was only because of these structural weaknesses of the legal advising system. The evolution of legal advice and, consequently, policy, demonstrates, however, that these structural weaknesses should not be overstated. The War Council-dominated legal advice failed to generate legitimate foreign policy, but, in the longer-term picture, the compliance effect of legal advice was only delayed. It did not take long for discretional disempowerment to be neutralized. This speaks of the structural strengths, rather than weaknesses, of the legal advising system.

Legal advisors as agents of compliance in the “War on Terror”

Legal advice and policy in the War Council days were marked by the Unitary Executive doctrine. Legal advice based on this doctrine could hardly produce compliance. Such a view of the relationship between the President and international law is incompatible with upholding the authority of the international legal system. In effect, the problem was not simply an unpersuasive interpretation of the content of the applicable international norms. It was an arbitrary declaration that certain norms of international law did not even apply. Situating the Executive above international law could have no other effect but that of proclaiming the irrelevance of international law as a constraint on international politics.

It has already been established that compliance with international law should be regarded as admitting degrees. One should therefore expect to find examples of foreign
policy actions which, despite facing some criticism and resistance by the relevant audience, can still be regarded as relatively conforming to international law. The initial policy of detention and interrogation of suspected terrorists, however, is not one of those examples. As a matter of pure logic, it is impossible to uphold the authority of international law while (i) stating that, in the context of a national crisis, international law ends where the President’s will starts, and (ii) acting on that statement.

This, however, was not the end of the story. Legal advice and policy have been gradually reversed since 2003. How did this reversal come about? The reversal of legal advice was the product of a reopening of the legal advising process. Military lawyers persisted in their “war of attrition” against the War Council on matters of interrogation and criminal prosecution of detainees. Leaking untenable legal opinions to the public was another way of undermining the War Council’s control of legal advice. Critical LAs and other officials turned to whistle-blowing because of “[…] the perception within the government of illegitimate activity.” The council itself lost its most valuable enthusiasts when Yoo and Bybee left. Goldsmith became head of OLC and worked to make legal advising once again an interagency process, as dictated by the foreign-policy apparatus’s organizational culture (disdained by the War Council).

Reversing legal advice was hard because of its path-dependency. OLC opinions are tied to an informal *stare decisis* and this resulted in a significant interpretive inertia. Of course, these opinions were eventually withdrawn, but there were easier and institutionally friendlier strategies of reversing legal advice. One such strategy, used

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267 For an example, refer to the Kosovo case in the previous chapter.
consistently by Goldsmith and his successors at OLC, was to remain close to past opinions but explicitly downscale the persuasiveness of such interpretations. This generated significant policy reversals while avoiding radical departures from past legal advice.

Policy reversal in relation to the interrogation of detainees has been more substantive than the changes introduced to the detention program throughout the ten years studied. Coercive interrogation was gradually brought to a halt, and the mechanism of individual status determination and criminal prosecution was gradually improved to fit within widespread legal expectations. The question of indefinite detention, on the other hand, has not been fully resolved. This was not because legal advising failed to generate compliance but rather because the prospect of indefinite detention (as opposed to its arbitrariness) was not so questionable from the legal point of view to begin with. As Ratner sustains, when it comes to detainee treatment or individual status determination, the language of the GCs does not allow much creative interpretation. The “clarity of their policy content” much constrains what can be achieved through legal argumentation and forces LAs to rely more on behavioral adjustment. That said, when it comes to the indefinite detention of combatants, there is no explicit rule against it. In fact, the widely accepted rule is that combatants (and certain civilians) may be lawfully detained until the end of hostilities. In this sense, dissatisfaction with the detention policies may in fact be expressing dissatisfaction with the law itself rather than with a compliance deficit. The indeterminacy of IHL for the case of an indefinite armed conflict has allowed the United

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269 Ratner 2002: 915.
States to successfully argue that it is legitimate, under current legal standards, to keep enemy fighters interned for as long as they are found to be a risk for the security of the state. Periodical reassessment of detainees’ dangerousness has further bolstered the persuasiveness of this claim.

The WOT may have novel characteristics the implications of which may not be fully contemplated by the international humanitarian rules in force today. Be that as it may, the novelty of this war should be dealt with in light of a remaining constant: “International law is both the language and the grammar of international relations.”

Reverse lawfare in the form of public hostility to international law is not a viable option. Furthermore, when legality matters because of its bearing on legitimacy, the social character of the latter makes persuasiveness, not mere interpretive plausibility, the standard of successful legal advising. A legal advisor’s job consists in producing persuasive legal arguments to sustain a given policy and render it legitimate. In this sense, in a significantly legalized international system, a legal mistake is a policy mistake.

The story of the legal advising process behind the WOT detention and interrogation program is a story of the restoration of the institutional compliance-equilibrium. Despite a very high degree of lawyerization of foreign-policy making (as expressed in Goldsmith’s epigraph to this chapter), LAs failed to generate compliance with international law during the War Council days (as expressed in Bilder’s

270 Borgen 2009b: 770.
Their performance in this respect improved significantly and progressively since then. It is hard to make the case that the detention, interrogation or prosecution of WOT captives by the United States today fails to comply with the applicable international legal constraints. However, once internationally acknowledged as illegitimate, the detention and interrogation program will probably remain stigmatized for some time, no matter how consistent with international legal expectations it has in fact become.

\[^{271}\text{This does not mean, of course, that compliance would have been greater with a lower degree of lawyerization.}\]
CHAPTER 5
Conclusion

Why do states comply with international law? Is it for the same reason they
complied in the past? In the preceding pages I tried to call attention to two phenomena
that suggest new ways of thinking about the role of international law in international
politics and new explanations as to why states actions tend to conform to legal
expectations. One of these two phenomena is about the international system, while the
other one refers to its units (i.e. states).

System-level legalization points to the fact that international law has acquired a
political relevance it did not have a century ago. The legal discourse has become the
predominant frame of reference in international relations. Legal grounds prove the
goodness of international actions, justify their implementation and pull approval and
support for them. Legal rationale also reveals the wrongfulness of international actions,
condemns their occurrence and pulls opposition against them. In this sense, the very
notion of legitimacy has been penetrated by the legal discourse, so that the international
legitimacy of actions has become heavily dependent on their lawfulness. Explicit claims
that something is legitimate despite its illegality have become virtually extinct. The
discourse of international law has become so hegemonic in international politics, that
claims of this kind simply do not make sense anymore. Even in matters of international
security has international law become the paramount tool of legitimation. So much so that warfare and lawfare are hard to separate in the battlefield.

NATO’s intervention in Kosovo in 1999 stands out in the literature as the exception that confirms this rule. I have shown that it is no exception. There is little doubt that the humanitarian intervention was a breach of rules of *jus ad bellum* in force at the time. In this sense, the attack on Yugoslavia fell short of the threshold of strict legality. However, it is not true that its widely recognized legitimacy was built on extra-legal elements and *despite* international law. Quite the opposite is true. Appeals to ethical imperatives were sporadic and disorganized, especially when compared to the legal arguments offered to justify the bombing. These were nuanced and well articulated, forming a coherent strategy of legitimation. In short, even in the hard case of Kosovo, the juridification of international legitimacy imposed itself, marking the boundaries of feasible legitimation strategies in a legalized world.

The other phenomenon I tried to make conspicuous refers to significant institutional developments that are happening inside the state. The internal constitution of the modern state is undergoing a transformation in terms of foreign policy making. International legal experts have acquired a crucial role in that process - a role invested with remarkable decisional power. In some countries, this lawyerization of foreign-policy decision making has reached such a high level that many of their foreign-policy decisions have become impossible to understand unless one takes into account this new role of legal advising within the state. The United States is one of these countries.
While the presence of lawyers in decision making is frequently taken for granted, the importance of their role is usually overlooked, even when it makes itself quite clear. At the time the bombing of Yugoslavia was being discussed among NATO allies, British Foreign Secretary Robin Cook told U.S. State Secretary Madeleine Albright that he was having problems getting his lawyers’ approval without a UN Security Council authorization. Her reply became quite popular in the media: “Get new lawyers.”¹ Many drew from the anecdote the conclusion that government legal advisors are (to the extent they keep their job) nothing but policy justifiers; that lawyers do not really matter. No one noticed that Albright’s response implied that lawyers did matter. No one wondered, in this sense, why she did not reply “Why do you care about your lawyers’ approval?” or “What do you mean you have a problem? How is this a problem?” The presence of lawyers and the importance of their opinion were taken for granted by all involved – from Cook and Albright to the anecdote’s commentators.

Of course, one must agree that while lawyers’ opinions may matter, if they are systematically aligned with the pre-existing preferences of policymakers proper then their effect on the decisional outcome becomes negligible. Justifying a policy decision under international law is not a minor issue – certainly not in a legalized international system, where legitimacy is juridified. But if the claim is that legal advisors affect what states do, not just how they frame what they do, then the independence of legal advising becomes crucial. My study of the (re)making of the U.S. detention and interrogation programs during the first decade of the “War on Terror” shows that, under conditions of lawyerized

¹ Rubin 2000.
decision making, legal advisors can have a significant impact on state behavior – even in matters of security, even in the context of a crisis. Furthermore, that behavioral impact is not randomly oriented but instead clearly points in the direction of compliance with international law.

In a nutshell, the lawyerization of foreign-policy making, in a legalized international environment, stands out as a novel and enduring organizational mechanism of compliance with international law. If this institutional feature continues to diffuse throughout the globe, it may become the main compliance mechanism and provide the most robust account of the effectiveness of international law under anarchy.

Is this suggested upward trend of lawyerized compliance good news about the international rule of law? If we have reasons to believe that, over time, legal advisors are going to shrink more and more the gap between what states do and what they are legally expected to do, is this a reason to celebrate? Will international relations, even in the absence of a world state, become progressively ordered? Will the rule of law displace the arbitrary rule of power in the international system? The necessary implication of a global diffusion of state-level lawyerization is the consolidation of the international rule of law. But there are two reasons to be cautious before celebrating this. First, whether the rule of law is a good thing or not depends on the content of the law. And the goodness of the law depends on who makes it and how. Lawyerization should increase compliance and thus make international law more behaviorally effective. But there is no reason to expect that lawyerization will democratize – or otherwise improve – the process through which international legal rules are made.
The second cautionary note underscores the very special kind of compliance that is “lawyerized compliance.” On the one hand, lawyerization imposes resistance, from within, against attempts to breach the state’s international legal obligations. Even though legal advisors can manipulate the legal discourse and push the boundaries of legal permissibility to justify preferred policies and render them legitimate, there are many policy options that legal advisors are not able to legitimate because the plasticity of the law is limited. In these cases, via *behavioral adjustment*, lawyerization makes it difficult for policymakers proper to engage in unlawful conduct. This is a good thing – the first caveat aside. But on the other hand, lawyerization implies the proliferation of lawyers inside the state, which necessarily increases the capacity of states to manipulate the law – via *legal argumentation*. In other words, in a world of lawyerized states, international law becomes shallower than it is under lower lawyerization.² Compliance is greater, but, all other things being equal, it will be compliance with shallower, more permissible legal rules. Furthermore, cross-national variation in the level of lawyerization implies that some states have more capacity to maneuver the law than others, thus making the law deeper for the latter and shallower for the former. This is a bad thing. The loss in the depth of the law may be compensated by the increase in the regularity of compliance with it. But this is, of course, an empirical question. In addition, all other things do not need to remain equal. The diffusion of lawyerization could certainly foster greater precision in the rules, thus possibly offsetting the “shallowing” effect of the increase in the capacity of states to manipulate the meaning of the law.

² On shallow and deep rules, see Downs, Rocke and Barsoom 1996.
Future research

The lawyerization theory of compliance that I elaborated in the preceding pages puts new questions on the research agenda. For one, the international diffusion of state-level lawyerization stands out as an important issue in the study of the effectiveness of international law. After all, this new explanation of compliance is applicable only to those states that, like the United States, have acquired a high level of lawyerization. How common is this feature today amongst states? Given the trend of diffusion suggested in the literature, how common should we expect it to be in the foreseeable future? More empirical work in this respect should be welcome.

The diffusion of state-level lawyerization calls for an investigation on the systemic consequences of lawyerization. I have shown how lawyerization generates foreign-policy actions that are legally defensible. It is natural to expect that the more foreign-policy machineries around the globe lawyerize, the more foreign-policy actions will be coded, defended and attacked in legal parlance. And the more this happens, the greater the consolidation of the hegemony of the international legal discourse. To put it differently, this could explain how international law becomes the discursively dominant frame of reference at the time of making sense of state actions, of explaining them, justifying them, garnering support for them, as well as de-legitimizing and undermining them by garnering opposition to them. In short, this suggests a bottom-up process through which unit-level lawyerization accounts for system-level legalization.

And what about the effects of international legalization on states? It is plausible that the increasing colonization of international legitimacy by international law brings
with it a systemic pressure for states to lawyerize their decision-making machineries. The more international legitimacy is constructed and contested in legal terms, the greater the need for states to lawyer up. As the editors of the Harvard Law Review suggested back in 1984:

One can posit a cyclical process in which post hoc legal justification reinforces the influence of international law on national decisionmaking. Governments aware that other nations will expect them to justify their actions in explicitly legal terms will more likely pay heed to international law in their decisionmaking processes, if only for reasons of pure expediency. The ease with which a decision proves legally justifiable in the aftermath of an incident will tend to affect a government’s future decisionmaking in similar situations.³

So now the systemic effect (i.e. legalization) becomes the cause of lawyerization at the level of the units. This top-down process completes a self-reinforcing feedback loop. The more lawyerized the states, the more legalized international politics – and vice versa. Because this is a positive feedback loop, the internal logic of this system-unit interaction is self-sustaining and therefore would make the trend of legalization and lawyerization reversible only by the intervention of external shocks.

The potential implications for the discipline of International Relations of pursuing this avenue of research cannot be overstated. If this suggested system-unit interaction proves theoretically and empirically robust, we should expect a major transformation of some fundamentals of international politics, and lawyerization would emerge as a key element to understand this change.

³ 1984: 1211.
References


