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To my parents.

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Abbreviations

AG	Attorney General
AP	Additional Protocol
AUMF	Authorization for Use of Military Force
CEO	Chief Executive Officer
CIA	Central Intelligence Agency
CIT	Customary International Law
DoD	Department of Defense
DoJ	Department of Justice
DNI	Director of National Intelligence
FBI	Federal Bureau of Investigation
FDR	Franklin Delano Roosevelt
FPA	Foreign Policy Analysis
FPDM	Foreign Policy Decision-Making
GATT	General Agreement on Tariffs and Trade
GCs	Geneva Conventions
GWOT	Global War on Terror
JFK	John Fitzgerald Kennedy
IAC	International Armed Conflict
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IL	International Law
IMF	International Monetary Fund
IR	International Relations
IS	Islamic State
ISIS	Islamic State in Iraq and Syria
LBJ	Lyndon B. Johnson
MBA	Master of Business Administration
NATO	North Atlantic Treaty Organization
NDS	National Defense Strategy
NGO	Non-Governmental Organization

NIAC	Non-International Armed Conflict
NLM	National Liberation Movement
NSA	National Security Adviser
NSC	National Security Council
NSS	National Security Strategy
OLC	Office of Legal Counsel
Patriot Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act
POW	Prisoner of War
R2P	Responsibility to Protect
SOTU	State of the Union Address
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
US	United States
USA	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
VP	Vice President
WMDs	Weapons of Mass Destruction
WPA	War Powers Act
WTO	World Trade Organization
WWI	World War I
WWII	World War II

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Introduction

> September 11 requires us to make difficult choices. The law does not give us all the answers. The law requires our elected leaders to make policy judgments. That is how it should be. … we should also not lose the sight of the benefits – for it is more than luck that has allowed our government, to date, to frustrate and disrupt terrorist efforts to carry out another 9/11.[1]

Why do states comply with international law? This interdisciplinary doctoral research in International Relations (IR) and International Law (IL) aims at answering this question by analyzing a legal concept, compliance, in the framework of the IR subfield of foreign policy analysis (FPA). This approach steams from the very definition of international law. Numerous IL definitions outline the merger between international relations imperatives and legal norms characteristic of this branch of law. European and American approaches to IL differ largely as to what they identify as the defining element of international law: politics or law.[2] One German scholar emphasizes the legal element by defining IL as "the legal order which is meant to structure the interaction between entities participating in and shaping international relations."[3] On the other side of the Atlantic, Jack Goldsmith and Eric Posner emphasize the political element by defining international law as "politics, but a special kind of politics, one that relies heavily on precedent, tradition, interpretation, and other practices and concepts familiar from domestic law"[4] and that is "binding and robust, … only when it is rational for states to comply with it."[5] According the American approach therefore international law compliance is not necessarily determined by law's inherent binding power, but by states' rational calculations looking to "maximize their interests, given their perceptions of the interests of other states and the distribution of state power."[6] International law thus becomes a foreign policy tool.

The decentralized character of international law brought compliance to the attention of both IL and IR scholars. The "international" in international law is of the essence in this

[1] John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006), pp. 202-203.
[2] For a detailed discussion on the relation between law and politics (and the influence of morality on both), see Michael Byers, "Introduction," in *The Role of Law in International Politics: Essays in International Relations and International Law*, ed. Michael Byers (Oxford: Oxford University Press, 2000), 1-3, p. 2.
[3] Rüdiger Wolfrum, "International Law," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: November 2006, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1424?rskey=dsJZV4&result=10&prd=MPIL (accessed July 30, 2020), para. 1 (citing Samantha Besson, "Theorizing the Sources of International Law," in *The Philosophy of International Law*, eds. Samantha Besson and John Tasioulas (New York: Oxford University Press, Inc.), 163-165, p. 163).
[4] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, Inc., 2005), p. 202.
[5] Ibid.
[6] Ibid., p. 3.

regard: the international arena lacks the state-like division of powers (a legislative to pass the laws, an executive to enforce them, and a judiciary to balance the relationship between the previous two); what is more, international law almost completely lacks the mechanisms of authority and control[7] available to national law enforcement institutions. Moreover, states tend to be reluctant towards IL given its effect on state sovereignty.[8] The following questions therefore arise: does international law exert an independent influence on international affairs with international rules and norms generating obligations that become patterns of state behavior? Or is compliance a mere foreign policy decision of states, decision which oftentimes obeys more to national security and foreign policy imperatives than to the constraining character of law and therefore transforms IL compliance into the "legal consideration of foreign policy?"[9]

The relationship between international law and foreign policy had long been the topic of debates between scholars and practitioners alike. In the words of Lord Wright of Richmond, law is both an "integral tool in the conduct of foreign policy"[10] and a benchmark against which to measure policy.[11] On the other hand, the distinguished Finnish international lawyer, Martti Koskenniemi, argues that international law is weakened since it is penetrated by politics; this continuously forces a "distinction between legal disputes and political tensions."[12] Law and politics nevertheless merge differently depending on the branch of international law. With a rather realist and pragmatic view on IL,[13] international law scholar, Michael Byers, is of the opinion that "in the field of international peace and security, at least, law is a marginal consideration."[14] It is precisely in the field of international peace and security (that touches upon core national security interests of states) where the relationship between law and politics becomes all the more relevant in the case of great powers. In the words of Sir Arthur Watts, international lawyer, diplomat, and former Chief Legal Adviser to the Foreign Office, who outlines the relationship between great powers and international law:

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[7] Barbara Delcourt, "Compliance, Theory of," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: September 2013, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1043?rskey=Lh7v42&result=1&prd=MPIL (accessed July 30, 2020), para. 6.
[8] See Lord Wright of Richmond, "Foreword," in *The Role of Law in International Politics*, ed. Michael Byers, v-viii, pp. vii-viii.
[9] Barbara Delcourt, "Compliance, Theory of," para. 5.
[10] Lord Wright of Richmond, "Foreword," p. vii.
[11] Ibid., p. vi.
[12] Martti Koskenniemi, "Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations," in *The Role of Law in International Politics*, ed. Michael Byers, 17-34, p. 21.
[13] Michael Byers, "Introduction," p. 3.
[14] Ibid., p. 1.

> Those with real international power seldom pay much attention to the law: for them, rather than international law being the framework which controls what they may do, it is their actions which shape the law. The constraints imposed by the law can be as unwelcome as they are sometimes unexpected.[15]

Nevertheless, in Sir Watts's opinion, the obligation states feel to offer legal justifications for their actions stands as proof of the relevance they provide to international law:

> It is striking that virtually without exception States seek always to offer a legal justification for their actions, even in extreme circumstances where the action is manifestly contrary to international law - … However valid or invalid the attempted justification may be, it is the very fact of advancing it which demonstrates the value attached by States to compliance with international law.[16]

Several theoretical models have been developed to explain states' compliance with international law (or the lack thereof).[17] Some theoretical models perceive compliance as the result of a cost-benefit analysis (with costs being both economic and political). Notwithstanding, compliance depends on decision-makers' perception of those costs and benefits: acting in an environment of uncertainty and error, decision-makers perceive and rank political advantages and disadvantages. In the words of renowned IL scholar, diplomat, and practitioner, Martti Koskenniemi, law is dependent upon the "subjective value judgment by the relevant decision-making authority."[18] International law, heavily influenced by political considerations, is therefore dependent upon the value judgments of political decision-makers who decide on a certain course of action, i.e., policy, with international law implications. Such value judgment can be labeled as the political equivalent of the process of judicial interpretation by which the judiciary applies the law to the facts of a certain case.[19]

In this research, I treat international law compliance in the framework of foreign policy analysis as the result of value judgments of political decision-makers, i.e., as the result of foreign policy decision-making (FPDM) influenced by the personal characteristics of decision-makers, the roles they enter into as well as the institutional prerogatives of those roles. I identify decision-makers as main the drivers of compliance by starting from the

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[15] Sir Arthur Watts, "The Importance of International Law," in *The Role of Law in International Politics*, ed. Michael Byers, 5-16, p. 6.
[16] Ibid., p. 7.
[17] Information on compliance inducing measures from Michael Bothe, "Compliance," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: October 2010, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e46?rskey=KQRbMF&result=7&prd=MPIL (accessed July 30, 2020), paras. 100-144. See also Barbara Delcourt, "Compliance, Theory of," paras. 7 & 25.
[18] Martti Koskenniemi, "Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations," p. 29.
[19] In this case, three aspects are relevant: the facts of the matter, the law applicable to them, and the actual process of application of the law to those facts, i.e., judicial interpretation. For information, see Christine Gray, *International Law and the Use of Force*, 3rd ed. (Oxford, New York: Oxford University Press, 2008), p. 166.

premise that states are nothing more than bureaucratic constructs: in and of themselves, states do not decide whether to comply or not with international law; individuals, as decision-makers, do. As human beings do not always decide rationally and as their preferences are not always given but acquired through life experiences or social interactions and constraints, in this research I do not take the rational approach to decision-making. While focusing on decision-makers as drivers of compliance, I try to uncover some of the factors influencing their decision-making processes. To do so, I employ a foreign policy analysis concept, namely the concept of operational code, whose conceptualization I expand beyond the understanding provided by existing literature. I thus define a new type of operational code and reinterpret two existing ones. In doing so, I outline once more this research's interdisciplinarity by merging the International Relations and International Law disciplines part of this research.

As shall be made evident by the literature review on the concept of operational code, this concept was originally defined by Nathan Leites during the 1950s. It became known to the foreign policy analysis literature during the 1960s when Alexander George defined it as a set of beliefs leaders hold about history politics, political conflict or strategy. Those beliefs shape leaders' understanding of the surrounding environment by providing them with a cognitive map that helps them perceive that environment. By doing so, operational codes influence leaders' choices in terms of preferred courses of action. Consequently, operational codes influence the process of foreign policy decision-making and the outcome of that process, i.e., policies. Given that in this research I treat international law compliance as a foreign policy behavior of states, behavior which results from a foreign policy decision-making process, the operational code thus influences states' compliance with international law (with international law being subsumed to foreign policy).

The first operational code I define is very much related to the concept of international law as it is the institutional operational code regarding international law (for the purposes of this research, this operational code is the United States (US) institutional code regarding international law). Taking Louis Henkin's approach to international law, I also consider IL to be subsumed to foreign policy imperatives: there are, therefore, instances when a country's foreign policy interests do not coincide with international law requirements; in such instances, states rationally decide not to comply with IL provisions. In this research I largely define the institutional operational code regarding international law as a set of constitutionally-mandated institutional prerogatives regarding foreign policy, in general, and the use of force, in particular. Apart from these institutional prerogatives, part of this

operational code are also executive practice (with a focus on presidential war powers and Commander-in-Chief prerogatives), the view of the scholarly community regarding international law, and judicial jurisprudence (Supreme Court rulings).

The next two operational codes I employ in this research have already been defined by the operational code analysis literature. Just as Nathan Leites originally created the operational code of an entity (the operational code of the Soviet Politburo), in this research I define the public operational code also in relation to an institutional entity, namely to the role leaders acquire upon taking office (for the purposes of this research, this operational code is the public operational code of the United States President). This definition departs from the one the literature provides to the public operational code which is largely defined as the set of beliefs leaders expose in public trough their public statements. I will create this code by analyzing speeches of 13 different US Presidents from Franklin Delano Roosevelt (FDR) to Barack Obama. The speeches will be screened for the American President's perspective on foreign affairs / policy, history (with a focus on America's role in history), enemy(ies), threat(s), and international law. Given its definition, this operational code borrows from the constructivist approach in International Relations. Nicholas Onuf's 1989 "World of Our Making" and Alexander Wendt's 1992 "Anarchy is What States Make of It" laid the ground for this theory explaining how structures and agents mutually construct themselves. Constructivism therefore encompasses ideational factors and norms. It premises that states create their identity based on perceptions of self and "the other." Cultural, historical, and social factors therefore become crucial especially when it comes to the construction of threats through 'speech acts' employed to identify others as enemies or friends.[20]

The last operational code borrows from political psychology as it focuses on leaders' individual characteristics and the way they influence their decision-making styles and the outcome of their decisions, i.e., policies. The last code zooms in on the individual: the private operational code encompasses beliefs and personality traits of individuals. I therefore define the private operational code as the set of beliefs leaders acquire prior to taking office from their formative life experiences, namely from their childhood (and family), education, and previous professional backgrounds before taking office. This definition departs from the one provided by the operational code analysis literature which largely defines the private operational code of leaders as the set of beliefs they expose in private (i.e., outside of the

[20] Avril McDonald and Hanna Brollowski, "Security," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: May 2011, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e399?rskey=9AFxP5&result=1&prd=MPIL (accessed July 30, 2020), para. 9.

public eye). I create this private operational code for two US Presidents, George W. Bush and Barack Obama. I do so mostly by analyzing memoirs or political biographies written by the two leaders or by their close advisers as well as by looking at journalistic investigations or scholarly research on the two former US Presidents.

By combining the three operational codes and analyzing how they influence each other, this research presents leaders as institutionally and socially embedded and constrained individuals:[21] individuals get into elected office where their personalities leave an imprint on that office while at the same time being molded by the role they enter into and the institutional prerogatives and constraints of that role. The merger between the three operational codes shapes leaders as decision-makers and influences their decision-making processes as well as the policies that result from those processes (e.g., policies with international law implications). As those policies translate into state behavior, the three operational codes therefore influence states' compliance with international law.

Coming back to the relationship between great powers and international law, in this research I focus on the relationship between international law and a superpower, namely the United States of America. This research will analyze America's compliance with international law in the post-911 era (largely in the framework of the Global War on Terror - GWOT). More precisely, the research will focus on international law and foreign policy institutional prerogatives of the US President, the view of the US President on five concepts (foreign affairs / policy, history, enemy, threat(s), and international law), Presidents George W. Bush and Barack Obama as individuals and decision-makers, and several of their foreign policy decision-making processes regarding post-911 policies with international law implications. Given the analysis of IL compliance in the post-9/11 era, from all the branches of international law the focus will be on the law on the use of force and, to a lesser extent, the law of armed conflict (two of the branches of international law that lack the most enforcement mechanisms). The novelty of this interdisciplinary approach to decision-making and IL compliance comes not only from its interdisciplinary character, but also from the innovations brought to the concept of operational code and from the merger of multiple theoretical approaches pertaining to each operational code (the rational approach to international law part of the institutional operational code, the constructivist approach to International Relations part of the public operational code, and the political psychology approach to decision-making part of the private operational code).

[21] I want to thank Prof. Markus Kornprobst for pointing out to me the concept of socially embedded individual.

The topicality of this research comes from the fact that, following the end of the Cold War, one of the main focuses of the IR literature has been on political leaders, with leaders' backgrounds and personal characteristics and their influence on foreign policy making as one of the most important lines of research. Analyzing leaders' biographies and identifying factors that affect their actions has been one of the literature's core concerns.[22] Moreover, this research's focus on the American presidency is also very topical. Regarding the presidency as an institution, the literature seems to be oscillating between Richard Neustadt's contention that the American presidency is a weak institution[23] and Arthur Schlesinger's post-WWII *Imperial Presidency* favoring an increasingly powerful chief executive.[24] The Constitution of the United States bestows upon the president few explicit prerogatives and provides ample space to the other two branches of government (the legislative and the judiciary) to check executive power.[25] Throughout centuries, day-to-day presidential practice resulted in a series of unwritten norms that both constrain the presidency and also enlarge the President's scope of action.[26] Given the constraints, scholars such as Neustadt consider the presidency to be a weak institution: persuasion thus becomes the President's main weapon to fulfill his agenda. As Neustadt famously put it: "In form all Presidents are leaders nowadays. In fact this guarantees no more than that they will be clerks."[27] It is in foreign affairs matters where constitutional prerogatives, executive practice, and presidential rhetoric and leadership merge to provide the chief executive with unparalleled prominence. Hence Schlesinger's view on the imperial presidency which he summarizes as follows:

> Confronted by presidential initiatives in foreign affairs, Congress and the courts, along with the press and the citizenry, often lack confidence in their own information and judgement and are likely to be intimidated by executive authority.[28]

All in all, this research will be organized as follows: Chapter I is dedicated to an overview of existing jurisprudence on the law on the use of force and the law of armed conflict. Chapter II reviews existing IR and IL literature on the concept of compliance, the factors that influence foreign policy decision-making, and the concept of operational code; the chapter also outlines this research's theoretical framework and explains the methodology. Chapter III is dedicated

[22] Daniel W. Drezner, "Immature Leadership: Donald Trump and the American Presidency," *International Affairs* 96, no. 2 (March 2020): 383-400, p. 383.
[23] See Richard Neustadt, *Presidential Power and the Modern Presidents* (New York: Free Press, 1990).
[24] See Arthur Schlesinger, Jr., *The Imperial Presidency*, 3rd ed. (Boston: Houghton Mifflin, 2004).
[25] In the words of William Howell and Terry Moe: "the Constitution sees to it—purposely, by design—that [presidents] are significantly limited in the formal powers they wield and heavily constrained by the checks and balances formally imposed by the other branches." William Howell and Terry Moe, *Relic* (New York: Basic Books, 2016), p. xvii.
[26] Daniel W. Drezner, "Immature Leadership," p. 392.
[27] Richard Neustadt, *Presidential Power and the Modern Presidents*, p. 7.
[28] Arthur Schlesinger, Jr., *The Imperial Presidency*, p. x.

to the United States institutional operational code on international law. Chapter IV coins the public operational code of the United States President regarding five concepts: foreign affairs / policy, history, threat(s), the enemy(ies), and international law. Chapter V recreates the private operational codes of George W. Bush and Barack Obama following a chronological sequence (family and childhood, education, and profession), and outlines their decision-making styles. Chapter VI merges the three operational codes and outlines their influence on compliance with the law on the use of force and international humanitarian law (IHL) by analyzing specific decision-making instances of Presidents George W. Bush and Barack Obama as well as their view on executive power. In the end, conclusions regarding the research shall be drawn around two of the following questions: is law independent or it is just an instrument employed by governments to legitimate their decisions? When useful, are international norms employed as practical tools to justify and legitimatize foreign policy decisions and actions?[29]

[29] Barbara Delcourt, "Compliance, Theory of," paras. 7 & 25.

Chapter I: The Law on the Use of Force and the Law of Armed Conflict - Overview of Legal Theory and US Practice

The main scope of this chapter is to present the legal provisions (and contentious aspects) regarding the *jus in bello* and *jus ad bellum* as they are generally recognized by the scholarly community and existing jurisprudence and to analyze America's approach towards these two branches of international law largely in the framework of the Global War on Terror. For this purpose, the chapter is divided into two main parts: while the first part is dedicated to existing legal theory (provisions and jurisprudence) on the two branches under analysis, the second part examines America's approach towards the law on the use of force and international humanitarian law in the framework of the Global War on Terror. The purpose of this chapter's second part is to outline the behavior of the United States regarding *jus ad bellum* and *jus in bello* against existing legal theory and jurisprudence presented in the first part of the chapter; America's behavior shall be further explained throughout the empirical chapters of this research. This chapter therefore sets the ground for the empirical part of the research.

As stated, this chapter is divided into two main parts: legal theory and state practice (with a focus on the United States). Given that there are two branches of international law under analysis, the legal theory part is divided into two main parts as well: one regarding the law on the use of force and another one on international humanitarian law (with each part being dedicated to general considerations on the respective branch of international law and contentious or key aspects of the same). The second part focuses on America's approach towards *jus ad bellum* and *jus in bello* in the framework of the GWOT with an accent on America's approach towards the use of force, in general, and the concept of self-defense, in particular. Regarding IHL, the analysis looks at both the US' interpretation of different IHL concepts and the relationship between terrorism and international humanitarian law. Last but not least, the summary will outline this chapter's main findings.

Treaties, or hard law,[1] are the main source of international law. The Vienna Convention on the Law of Treaties (VCLT) is the international covenant covering treaties.[2] One of the most

[1] Apart from hard law, international law scholars also identify and define soft law as "any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior." Beth A. Simmons, "International Law," in *Handbook of International Relations*, eds. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, 2nd ed. (Los Angeles, London, New Delhi, Singapore, Washington, D.C.: Sage, 2013), 352-378, p. 353.

[2] The VCLT covers all aspects related to treaty-making: conclusion and entry into force; observance, application, and interpretation; amendment and modifications; invalidity, termination, and suspension; depositaries, notifications, corrections and registration. For more information, see "Vienna Convention on the Law of Treaties (with Annex)," Vienna, May 23, 1969 (entered into force: January 27, 1980), *United Nations*

important provisions of the VCLT is Article 31(1) on the interpretation of treaties. This article helps with the understanding of treaty provisions and the obligations legal actors incur from them. A treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[3] Article 32 of the VCLT outlines "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."[4] The fix meaning of words (in the light of the context in which a treaty was drafted and the object and purpose of the treaty)[5] together with the aims pursued by the drafters are two of the most frequent tools of interpretation employed by international legal experts.[6]

Custom[7] is another source of international law. A customary norm of international law emerges when two conditions are met: state practice (objective element) and *opinio juris* (subjective element) or the belief in the binding character of international obligations. The *opinio juris* element is all the more important given the lack of enforcement mechanisms characteristic of international law: if "states do not feel the necessity to act in accordance with such rules, then there does not exist any system of international law worthy of the name."[8] Several elements constitute state practice: (1) the actual behavior of states; (2) the justification accompanying that behavior; (3) how other states respond to such behavior and justifications; (4) the public position of a state on a determined legal matter (e.g. voting record on resolutions of the General Assembly); and (5) extensive treaty practice.[9] State

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Treaty Series 1155, no. 18232 (1980): 332-353 & 467-512, https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf (accessed January 30, 2019).

[3] Article 31(1), Ibid.

[4] Article 32, Ibid.

[5] The object and purpose of a treaty as well as the drafters' aim(s) can be found in a treaty's preparatory works or *travaux preparatoires*.

[6] Christine Gray, *International Law and the Use of Force*, p. 8.

[7] The Statute of the International Court of Justice identifies the main sources of international law in its Article 38(1): "(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) … judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." "Charter of the United Nations and Statute of the International Court of Justice," San Francisco, June 26, 1945 (entered into force: October 24, 1945), *United Nations Treaty Series*, Vol., No.: N/A: 21-30 (pages containing the text of the Statute), https://treaties.un.org/doc/Publication/UNTS/No%20Volume/Part/un_charter.pdf (accessed August 19, 2020).

[8] Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), p. 5.

[9] Christine Gray, *International Law and the Use of Force*, p. 8.

practice encompasses both state action and inaction: therefore, not only direct support towards a certain norm is considered proof of state action, but also the implicit acceptance of a new norm of international law by lack of opposition or acquiescence.[10] A limited number of norms in international law are *jus cogens* or peremptory norms whose absolute character allows for no derogation.[11] Some generate obligations *erga omnes* between all States (as principal actors of the international community).[12]

Going back to legal interpretation, this is heavily influenced by the manner in which states interpret law domestically[13] and the "legal principles they invoke to defend their interests abroad."[14] For instance, the United States does not necessarily base its interpretation of international law on Articles 31(1) and 32 of the VCLT, but rather prefers a "more purposive, less textually oriented approach, most notably when interpreting the United Nations (UN) Charter."[15]

The UN Charter, in Article 2(4)[16] imposes a central obligation on states to refrain from the threat or use of force against other states (for more information, see the section on *jus ad bellum*). Interpreted in accordance with Article 31(I) of the VCLT, the UN Charter establishes a clear prohibition on the use of force between states.[17] The law on the use of force and the law of armed conflict are two branches of international law that originated from

[10] For more information on the role of state action and acquiescence in the formation of customary international law, see Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," *American Journal of International Law* 95, no. 4 (2001): 757-791; J. Patrick Kelly, "The Twilight of Customary International Law," *Virginia Journal of International Law* 40 (1999): 101-191; and Ian C. MacGibbon, "The Scope of Acquiescence in International Law," *British Year Book of International Law* 31 (1954): 143-186.

[11] As per Article 53 of the 1969 Vienna Convention on the Law of Treaties a *jus cogens* norm is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[12] For more information, see Anthony Aust, *Handbook of International Law*, 2nd ed. (New York: Cambridge University Press, 2010): customary international law, pp. iii & 6-7; *erga omnes*, pp. iii & 10; *jus cogens*, pp. iv & 10.

[13] For more information on how the US interprets law domestically, see Chapter III on the institutional operational code of the United States regarding international law. For more information on the justification behind the US' external actions, see the second part of the present Chapter, Chapter IV (an analysis of speeches of American Presidents), and Chapter VI (on the use of force in the Bush and Obama Administrations).

[14] Alyson J.K. Bailes and Anna Wetter, "Security Strategies," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: January 2013, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e986?rskey=x018IF&result=1&prd=MPIL (accessed July 30, 2020), para. 18.

[15] Michael Byers, *War Law: International Law and Armed Conflict* (London: Atlantic Books, 2005), p. 46.

[16] Article 2 of the UN Charter enumerates the principles of international law. For more information on the principles of international law, see Alexander Orakhelashvili, "Natural Law and Justice," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: August 2007, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e730?rskey=lROPuk&result=1&prd=MPIL (accessed July 30, 2020).

[17] Michael Byers, *War Law*, p. 15.

international attempts to prohibit the use of force (*jus ad bellum*) and, when such prohibition is breached, to establish rules on how the parties to a given conflict are to employ force (*jus in bello*). *Jus ad bellum* establishes the conditions under which the use of force is lawful under international law. *Jus in bello*, or international humanitarian law, is applicable once there is a state of war or armed conflict.[18] The use of force, war, and armed conflict are three hotly debated concepts.[19] States can use force short of war, not all instances of use of force can be considered armed conflicts, and not all armed conflicts reach the threshold of fully-fledged wars.[20] IHL is applicable to both armed conflicts and wars. As its name indicates, international humanitarian law aims to make armed conflicts more humane (if possible), especially for innocent bystanders such as civilians. Lawful participants to an armed conflict, traditionally soldiers of regular armies, are also protected by the limitations imposed on the means of war such as the prohibition to use weapons that cause superfluous or unnecessary suffering. Moreover, once captured, they benefit from prisoner of war (POW) status. If wounded, the medical personnel alleviating their suffering is protected under IHL.

Legal Theory[21]

The Law on the Use of Force (*jus ad bellum*): Overview

Traditionally, states would safeguard their national security either through peaceful diplomatic negotiations or resort to armed force.[22] During the 19th century and the first decades of the 20th century, the legal restrictions on the use of force were rather consensual than binding. Consequently,

[18] International Committee of the Red Cross, "jus ad bellum and jus in bello," October 29, 2010, https://www.icrc.org/en/document/jus-ad-bellum-jus-in-bello (accessed September 6, 2019).

[19] As shall be seen below, the International Court of Justice provided a legal clarification of these concepts in several landmark decisions. For more information, see Abraham Sofaer, "The International Court of Justice and Armed Conflict?," *Northwestern Journal of International Human Rights* 1, Issue 1 (Fall 2004), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1003&context=njihr (accessed September 6, 2019); Christine Gray, "The ICJ and the Use of Force," in *The Development of International Law by the International Court of Justice*, eds. Christian J. Tams, James Sloan (Oxford: Oxford University Press, 2013), 237-262.

[20] One such (highly) debated threshold delineating an armed conflict from an actual state of war is the 1000 deaths per calendar year threshold. For instance, the Department of Peace and Conflict Research of the Uppsala University defines war as "a state-based conflict or dyad which reaches at least 1000 battle-related deaths in a specific calendar year." A (state-based) armed conflict is "a contested incompatibility that concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths in one calendar year." A non-state based armed conflict is one "in which none of the warring parties is a government." The use of armed force is defined as "use of arms in organised violence." Uppsala University, Department of Peace and Conflict Research, "UCDP Definitions," https://www.pcr.uu.se/research/ucdp/definitions/#Battle-related_deaths (accessed September 6, 2019).

[21] The legal theory part of this chapter (regarding *jus ad bellum* and *jus in bello*) is based on the paper written for the course "Law and War. The Use of Force, Humanitarian Law and Human Rights," Summer Semester 2015, Faculty of Law, University of Vienna, Convenor: Dr. Ralph Janik. For the purposes of this thesis, the paper has been expanded to include additional legal arguments and documents.

[22] Avril McDonald and Hanna Brollowski, "Security," para. 5.

> legal rules on the use of military force are a relatively recent development. Prior to the adoption of the UN Charter in 1945, international law imposed few constraints on the recourse to arms.[23]

The League of Nations was the first major international organization meant to constrain the use of force. The Covenant of the League of Nations (1919) though failed to prohibit the use of force;[24] it only included a management mechanism for when states would recur to force.[25] The prohibition to use force was first enshrined in a multilateral treaty in the Kellogg-Briand Pact (1928) "providing for the renunciation of war as an instrument of national policy."[26] Following the horrors of WWII, the UN Charter (1945) was the cornerstone of international efforts to outlaw the recourse to armed force in international affairs.[27] President Harry Truman eloquently summarized this new era in international relations at the Closing Session of the San Francisco Conference that concluded in the signature of the UN Charter: "We all have to recognize - no matter how great our strength - that we must deny ourselves the license to do always as we please."[28]

The prohibition on the use of force is one of the principles of international law as per Article 2(4) of the UN Charter:

> 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.[29]

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[23] Michael Byers, *War Law*, p. 2. For a detailed description of the UN's influence on the development of international law, see Martti Koskenniemi, "History of International Law, since World War II," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: June 2011, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e714?rskey=ceBcat&result=6&prd=MPIL (accessed July 30, 2020), paras. 6-12, 29-31 & 49-54.

[24] For the flaws embedded in the League of Nations, see Martti Koskenniemi, "History of International Law, World War I to World War II," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: June 2011, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e715?rskey=EtXaGE&result=1&prd=MPIL (accessed July 30, 2020), paras. 15-21. For general information on the League of Nations, see Christian J. Tams, "League of Nations," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: September 2006, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e519?rskey=9mEGuj&result=1&prd=MPIL (accessed July 30, 2020).

[25] Malcolm N. Shaw, *International Law*, p. 1222.

[26] Yale Law School - The Avalon Project: Documents in Law, History and Diplomacy, "Kellogg-Briand Pact 1928," http://avalon.law.yale.edu/20th_century/kbpact.asp (accessed January 31, 2019).

[27] Michael Byers, *War Law*, p. 3; Mary Ellen O'Connell, "Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait," *Southern Illinois University Law Journal* 15 (1991): 453-486, pp. 458-459.

[28] Citation from Harry S. Truman, "Address in San Francisco at the Closing Session of the United Nations Conference" (speech, California, June 26, 1945), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/232311 (accessed August 5, 2020). For information on the UN Charter and the use of force, see Michael Byers, *War Law*, p. 3.

[29] "Charter of the United Nations and Statute of the International Court of Justice," San Francisco, June 26, 1945 (entered into force: October 24, 1945), *United Nations Treaty Series*, Vol., No.: N/A: 1-20 (pages containing the text of the Charter), https://treaties.un.org/doc/Publication/UNTS/No%20Volume/Part/un_charter.pdf (accessed

It is also a norm of *jus cogens* and part of customary international law (CIT), which makes it mandatory on all States. The relevance of the UN Charter cannot be stressed enough: for the first time in history, a multilateral treaty did not only explicitly outlaw the recourse to armed force, but also endowed the international community with an institutional framework, the United Nations Security Council (UNSC), that could enforce the prohibition to use of force.[30]

After 1945, the UN developed a rich jurisprudence on the matter.[31] The United Nations General Assembly (UNGA) has been particularly active in this regard. Except when covering budgetary and personnel matters,[32] UNGA resolutions are not binding. They carry, nevertheless, a high degree of legitimacy as the General Assembly is the only UN body in which all UN members states, large or small, are represented and have an equal right to vote. In the resolution titled *Essentials of Peace* (1949), the UNGA, after restating the UN Charter's role in ensuring enduring peace," "*Calls upon every nation* 2. *To refrain* from threatening or using force contrary to the Charter."[33] *The Declaration on Friendly Relations* resolution (1970) determines as "essential that all States 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."[34] The *Definition of Aggression* resolution (1974), "*Calls upon* all States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United

August 19, 2020). Also, see the Helsinki Final Act, 1. (a) Declaration on Principles Guiding Relations between Participating States (II) Refraining from the threat or use of force: "The participating States will refrain in their mutual relations, as well as in their international relations in general, 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 and with the present Declaration. No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle. Accordingly, the participating States will refrain from any acts constituting a threat of force or direct or indirect use of force against another participating State. Likewise they will refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights. Likewise they will also refrain in their mutual relations from any act of reprisal by force. No such threat or use of force will be employed as a means of settling disputes, or questions likely to give rise to disputes, between them." "Conference on Security and Co-Operation in Europe Final Act," Helsinki, August 1, 1975, https://www.osce.org/files/f/documents/5/c/39501.pdf (accessed August 20, 2020).

[30] Mary Ellen O'Connell, "Enforcing the Prohibition on the Use of Force," pp. 454-455.

[31] For more information, see Christine Gray, *International Law and the Use of Force*, p. 9.

[32] See Article 17, UN Charter.

[33] United Nations General Assembly, *Essentials of Peace*, December 1, 1949, A/RES/290, https://www.refworld.org/docid/3b00f0877.html (accessed September 9, 2019).

[34] United Nations General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, October 24, 1970, A/RES/2625(XXV), https://www.refworld.org/docid/3dda1f104.html (accessed September 9, 2019).

Nations."[35] The *Declaration on the Non-Use of Force* (1987) clearly stipulates that "[t]he principle of refraining from the threat or use of force in international relations is universal in character and is binding, regardless of each State's political, economic, social or cultural system or relations of alliance."[36] Furthermore, "[n]o consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter."[37] The International Court of Justice (ICJ) in its groundbreaking decision in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986) finds that the prohibition on the use of force is a norm of customary international law. The Court found that:

> the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, …; and further by those acts of intervention … which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State.[38]

Force is prohibited either in "the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State."[39] In this landmark decision, the Court identifies two principles of customary international law: the principle of non-intervention and the principle of non-use of force. In the *Nicaragua Case*, the ICJ decided that acts breaching the principle of non-intervention, acts which could "directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations."[40] The Court reaffirmed a similar view on the use of force in the

[35] United Nations General Assembly, *Definition of Aggression*, December 14, 1974, A/RES/3314, https://www.refworld.org/docid/3b00f1c57c.html (accessed September 9, 2019).
[36] United Nations General Assembly, *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, November 18, 1987, A/42/766, https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/42/22 (accessed September 10, 2019), Annex, I(2).
[37] Ibid., Annex, I(3).
[38] International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, June 27, 1986, I.C.J. Reports 1986, 14-150, https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf (accessed September 10, 2019), para. 292 (4), pp. 146-147. Moreover, "[t]he Court finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. They therefore accept a treaty-law obligation to 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 (Art. 2, para. 4, of the Charter)." Ibid., paras. 187-201, pp. 98-106. The *Nicaragua Case* is a landmark case for international law since it acknowledged the customary character of several international law principles.
[39] Ibid., para. 205, p. 108. For further information on the Court's view on the use of force and its jurisprudence on the matter, see the four cases in which the Court judged on the merits (*Corfu Channel*, *Nicaragua*, *Oil Platforms*, *DRC v. Uganda*) and its two Advisory Opinions in which it discussed the legality of the use of force (*Nuclear Weapons* and *Wall*). For a scholarly detailed analysis on the ICJ's jurisprudence on the use of force, see Christine Gray, "The ICJ and the Use of Force," 237-262.
[40] ICJ, *Nicaragua v. United States of America*, June 27, 1986, para. 209, p. 110.

Armed Activities or the *Congo v. Uganda Case*.[41] In the *Nicaragua Case*, the ICJ also broadened the scope of the term "armed attack" to include "not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support."[42] According to the Court, "[s]uch assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States."[43] Consequently, "the Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law."[44] Furthermore, although the Court found that arming and training rebel groups could amount to threat or use of force, the mere supply of funds to rebels amounts to intervention in a country's internal affairs, but not to use of force as such.[45] Prior to the 1986 ICJ decision on Nicaragua, the UNGA *Friendly Relations Declaration* (1970) called upon States to "refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State."[46] The UNGA *Definition of Aggression* Resolution (1974) defined "(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State …, or its substantial involvement therein"[47] as aggression.

Central to upholding and enforcing the prohibition on use force is the United Nations Security Council. The Security Council passes resolutions with critical legal consequences. In the words of Marc Perrin de Brichambaut, former Secretary General of the Organization for Security and Co-operation in Europe and former judge to the International Court of Justice:

> The Security Council does play a significant role in the international legal system. It does so, not so much as an original source of law, but as an organ in charge of implementing the law, and more precisely the Charter of the United Nations. Although the Security Council does not have the power to create law, it does have the power to create rights and obligations for the

[41] For another scholarly perspective on the ICJ and the law on the use of force, see Dapo Akande, "The Contribution of the International Court of Justice to the Law of the Use of Force," EJIL: Talk! - Blog of the European Journal of International Law, entry posted November 18, 2011, https://www.ejiltalk.org/the-contribution-of-the-international-court-of-justice-and-the-law-of-the-use-of-force/ (accessed September 10, 2019).
[42] ICJ, *Nicaragua v. United States of America*, June 27, 1986, para. 195, p. 104.
[43] Ibid.
[44] Ibid., para. 209, p. 109.
[45] Ibid., para. 228, pp. 188-119. The *Nicaragua Case* is also important for clarifying the many nuances between intervention and the use of force: as it can be seen, a state can intervene in another country's internal affairs without its actions amounting to actual use of force.
[46] The Declaration continues: "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force." UNGA, *Declaration on Friendly Relations*, October 24, 1970.
[47] UNGA, *Definition of Aggression*, December 14, 1974, Article 3(g).

> member States of the United Nations. It does so on the basis of the Charter it interprets and implements. Security Council resolutions can therefore have a certain impact on the international legal order. Moreover, these new rights and obligations will sometimes supplant pre-exiting rights and obligations.[48]

As a political body, the UNSC is heavily dependent upon the political interests of its five permanent members with veto power in matters of international peace and security. Absent the political will of the US, France, Russia, China, and the United Kingdom (UK), the system set up by the UN Charter to enforce the prohibition on the use of force cannot function. This is especially the case when one of the permanent members is in breach of such prohibition or when it has political interests in an ongoing conflict.[49]

The Prohibition to Use of Force: Exceptions and Contentious Aspects

The UN Charter allows for two exceptions to the prohibition on the use of force: collective security actions approved by the UNSC under Chapter VII of the Charter (Articles 39, 41, and 42) and the right to (individual or collective) self-defense (Article 51). According to the UN Charter determining the "existence of any threat to the peace, breach of the peace, or act of aggression"[50] is the attribute of the Security Council that takes measures "in accordance with Articles 41 and 42, to maintain and restore international peace and security."[51] While Article 41 provides for a non-exclusive list of peaceful measures,[52] Article 42 provides for an equally non-exclusive list of measures involving the use of force[53] to be approved by the UNSC and implemented by UN Member States.[54]

Article 51 of the UN Charter upholds states' right to self-defense:

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[48] Marc Perrin de Brichambaut, "The Role of the United Nations Security Council in the International Legal System," in *The Role of Law in International Politics*, ed. Michael Byers, 269-276, p. 275.

[49] See, for instance, Russia's multiple vetoes on UN resolutions covering Crimea or Syria. Julian Borger and Bastien Inzaurralde, "Russian Vetoes are Putting UN Security Council's Legitimacy at Risk, Says US," *The Guardian*, September 23, 2015, https://www.theguardian.com/world/2015/sep/23/russian-vetoes-putting-un-security-council-legitimacy-at-risk-says-us (accessed September 9, 2019).

[50] Article 39, UN Charter.

[51] Ibid.

[52] "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." Article 41, Ibid.

[53] "Should the Security Council consider that measures provided for in Article 41 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." Article 42, Ibid.

[54] The phrase "by air, sea, or land forces of Members of the United Nations" should be interpreted in relation to Articles 43-47 stipulating that Member States should put at the disposal of the UNSC "armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security." Since this system of international armed forces was never put into practice, the UNSC authorizes Member States to use force in particular situations and they apply its decisions by using their own military capabilities. See Articles 43-47, Ibid.

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[55]

At this point, some clarifications regarding the notion of armed attack are in order. It must be outlined that at the time when the UN Charter was drafted only States had regular armed forces. Consequently, it can be assumed that the Charter's drafters envisaged States as the sole perpetrators of an armed attack.[56] The ICJ supported this view in several cases[57] such as the *Nicaragua Case*, the *Wall Advisory Opinion* (see Judges Buergenthal, Higgins, and Kooijmans) and the *Congo v. Uganda* (see Judges Simma and Kooijmans).[58] In its rulings, the ICJ's approach is to treat international law as inter-state law.[59]

Following the events of September 11, UNSC Resolutions 1368 and 1373 (see below) diverged from this view; in both resolutions, the UNSC referred to the right of self-defense against the perpetrators of the 9/11 attacks, thus seeming to implicitly recognize that a non-state actor (such as the terrorist organization Al Qaeda) can conduct an armed attack in the sense of Article 51.[60] In challenging this argument it can be argued that the two resolutions do not indicate whether an attack can be considered an armed attack even when not directly attributable to a State. Different legal opinions on the matter can be clustered into: the attacks against the World Trade Center and the Pentagon ought to be treated as crimes rather than armed attacks against the United States; or, the terrorist attacks amount to actual armed attacks as proven by their scale coupled with the overwhelming reaction of the international

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[55] Article 51, Ibid.

[56] Karl Zemanek, "Armed Attack," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: October 2013, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241?rskey=4gg951&result=1&prd=MPIL (accessed July 30, 2020), para. 5.

[57] Ibid., para. 11.

[58] In his Separate Opinion, Judge Simma stated: "Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favorably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the "Bush doctrine" justifying the pre-emptive use of force. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as "armed attacks" within the meaning of Article 51." International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Separate Opinion of Judge Simma*, December 19, 2015, I.C.J. Reports 2005, 334-350, https://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-05-EN.pdf (accessed March 5, 2020), para. 11, p. 337.

[59] Karl Zemanek, "Armed Attack," para. 16.

[60] Ibid., para. 15.

community.[61] The wording of Article 51 does not support either argument since the actual words "if an armed attack occurs" do not shed any light on the nature of the attacker.[62] Nevertheless, post-9/11 state practice tends to favor the view that non-state actors can perpetrate armed attacks and States can exercise their inherent right to self-defense against such actors.[63] The US' actions have been particularly relevant in supporting this view. Just to provide an example, on October 7, 2001, the day Operation Enduring Freedom was launched, John Negroponte, the US Representative to the UN, sent a letter to the Security Council justifying America's intervention in Afghanistan under the right to use force in self-defense against the perpetrators of the 9/11 attacks (and the Taliban regime supporting them).[64]

One comprehensive definition of an armed attack comes from the scholarly community. An armed attack therefore

> implies an act or the beginning of a series of acts of armed force of considerable magnitude and intensity (ie scale) which have as their consequence (ie effects) the infliction of substantial destruction upon important elements of the target State namely, upon its people, economic and security infrastructure, destruction of aspects of its governmental authority, ie its political independence, as well as damage to or deprivation of its physical element namely, its territory … [and] the 'use of force which is aimed at a State's main industrial and economic resource and which results in the substantial impairment of its economy…[65]

Therefore,

> regardless of the dispute over degrees in the use of force, or over the quantifiability of victims and damage, or over harmful intentions, an armed attack even when it consists of a single incident, which leads to a considerable loss of life and extensive destruction of property, is of sufficient gravity to be considered an 'armed attack' in the sense of Art. 51 UN Charter.[66]

The ICJ's jurisprudence in *Nicaragua v. United States*, the *Tadic Case*, the *Wall Advisory Opinion*, or the *Democratic Republic of the Congo v. Uganda* significantly contributed to defining the concept of an armed attack. According to the ICJ, an armed attack presupposes a certain scale of violence. In its judgment on the *Nicaragua Case* the ICJ differentiates

[61] See Christine Gray, *International Law and the Use of Force*, 2nd ed. (Oxford: Oxford University Press, 2004), pp. 164-165, cited in Ibid. (Karl Zemanek, "Armed Attack," para. 15).
[62] Ibid., para. 16.
[63] Ibid.
[64] "In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001." The Representative of the United States of America to the United Nations, "Letter of John Negroponte to the President of the Security Council, October 7, 2001," Yale Law School - The Avalon Project: Documents in Law, History and Diplomacy (September 11, 2001: Attack on America), https://avalon.law.yale.edu/sept11/un_006.asp#:~:text=In%20accordance%20with%20Article%2051,armed%20attacks%20that%20were%20carried (accessed August 20, 2020).
[65] Avra Constantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter* (Athènes: Sakkoulas, 2000), cited in Karl Zemanek, "Armed Attack," para. 10.
[66] Ibid. (Karl Zemanek, "Armed Attack," para. 10.).

between "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."[67] It must be underlined that in said judgment the Court relied on the customary nature of international law rather than on UN Charter provisions.[68] The different forms of violence are divided as follows: (1) intervention (does not necessarily include the use of force - e.g. financial support for non-state armed groups); (2) use of force (direct or indirect - e.g. delivering arms to non-state armed groups);[69] (3) aggression (direct or indirect - e.g. bombardment or blockade);[70] (4) armed attack (direct or indirect - e.g. sending armed bands).[71] The ICJ's decision in the *Nicaragua Case* is worth being cited at length:

> The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defense on the basis of its own assessment of the situation. Where collective self-defense is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.[72]

"Historically, self-defense had been a political justification for what, from a legal perspective, were ordinary acts of war."[73] The right to individual or collective self-defense is both enshrined in the UN Charter and a norm of customary international law. Article 51 of the UN Charter sets two preconditions for the lawful exercise of the right to self-defense: (1) an armed attack has taken place; (2) the State exercising its right to self-defense reports its actions to the UNSC. Customary international law sets three requirements - necessity, immediacy, and proportionality (also known as the Caroline criteria)[74] for the right to self-

[67] ICJ, *Nicaragua v. United States of America*, June 27, 1986, para. 191, p. 101.
[68] Karl Zemanek, "Armed Attack," para. 3.
[69] See (a) "The principle that States 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," and (b) "The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter." UNGA, *Declaration on Friendly Relations*, October 24, 1970.
[70] See UNGA, *Definition of Aggression*, December 14, 1974, Article 3(a-f).
[71] See Ibid., Article 3(g).
[72] ICJ, *Nicaragua v. United States of America*, June 27, 1986, para. 195, pp. 103-104.
[73] Michael Byers, *War Law*, p. 53.
[74] "[A] threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate." United Nations General Assembly, *Note [transmitting report of the High-level Panel on Threats, Challenges and Change, entitled "A more secure world: our shared responsibility"]*, December 2, 2004, A/59/565, https://www.refworld.org/docid/47fdfb22d.html (accessed August 20, 2020), para. 188. The Caroline criteria for

defense to be lawful. Two main schools of interpretation provide different views on Article 51: the restrictive school of interpretation is adamant that the language of Article 51 requires an actual armed attack to take place before a state can legitimately claim the use of force against the attacker; the "counter-restrictionists" argue that the UN Charter is not meant to impose restrictions on States' right to anticipatory self-defense as defined by customary international law; hence, Article 51's reference to an "inherent right" indicates that the Charter's framers did not mean to restrict the customary provisions on self-defense.[75]

Consequently, the broader view on self-defense allows for preemptive self-defense against an imminent armed attack.[76] Nevertheless, the international legal community is almost unanimously against the preventive use of force, i.e., "against a non-imminent or non-proximate"[77] threat. The temporal dimension differentiates between preemptive and preventive self-defense: traditionally, the Caroline criteria on pre-emptive self-defense require evidence of an imminent attack for the use of force to be lawfully employed to preempt such an attack. The preventive doctrine of self-defense requires only for evidence that a threat large enough to endanger a state's counteraction ability could materialize at some point in the future for a State to use force preventively.[78] The protection of nationals abroad,

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anticipatory self-defence were first mentioned in a letter the US Secretary of State sent to the British Government. In the letter it was mentioned that the right to preemptive self-defense was legit in the face of a threat that was "instant, overwhelming, leaving no choice of means and no moment for deliberation." For the origins of the principle of preemptive self-defense, see Hunter Miller (notes and annotations), "The Caroline Case," Yale Law School - The Avalon Project: Documents in Law, History and Diplomacy (British-American Diplomacy), http://avalon.law.yale.edu/19th_century/br-1842d.asp (accessed May 27, 2016).

[75] For the two views, see Anthony Clark Arend, "International Law and the Preemptive Use of Military Force," *The Washington Quarterly* 26, no. 2 (Spring 2003): 89-103, p. 92. For another overview on the restrictive and permissive interpretations of Article 51, see Monica Hakimi, "North Korea and the Law on Anticipatory Self-Defense," EJIL: Talk! - Blog of the European Journal of International Law, entry posted March 28, 2017, https://www.ejiltalk.org/north-korea-and-the-law-on-anticipatory-self-defense/ (accessed February 13, 2020). For instances when States cited self-defense to justify an anticipatory strike (the Cuban Missile Crisis, the Six-Day War, Operation Opera - Osirak Bombing, Operation Infinite Reach - Al Shifa Bombing, the 2003 Invasion of Iraq, or Operation Orchard - Al Kibar Bombing), see Alexander J. Potcovaru, "The International Law of Anticipatory Self-Defense and U.S. Options in North Korea," Lawfare, entry posted August 8, 2017, https://www.lawfareblog.com/international-law-anticipatory-self-defense-and-us-options-north-korea (accessed February 13, 2020).

[76] Nevertheless, it must be outlined that during the Cold War "[e]ven the most hawkish leaders baulked at a right of pre-emptive action …, at a time when both the world's principal disputants possessed armadas of nuclear missile submarines designed to survive first strikes and ensure 'mutually assured destruction.'" Michael Byers, *War Law*, p. 74.

[77] The Secretary General's *High Level Panel on Threats, Challenges and Change* writes in para. 191 that in "a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all." In para. 192, the Panel (literally) highlights that it does "**not favour the rewriting or reinterpretation of Article 51**."

[78] For further information on the temporal dimension differentiating preventive and pre-emptive self-defense, see Terry D. Gill, "The Temporal Dimension of Self-defence: Anticipation, Pre-emption, Prevention and Immediacy," *Journal of Conflict and Security Law* 11, no. 3 (Winter 2006): 361-369; and Thomas M. Franck,

the need to prevent future acts of terrorism[79] or the prevention of a potential devasting attack with nuclear weapons are just three of the justifications provided by decision-makers in favor of preventively using force to counter national security threats. Uncertainty (generated by new and multiple threats) is the word most often associated to preventive use of force.[80] It must also be outlined that the very concept of self-defense (as defined in Article 51 of the Charter) encompasses a temporal element: in theory, a State can exercise its inherent right to self-defense only until the Security Council decides on the matter.[81]

During the last two decades, following the events of September 11, the question of anticipatory use of self-defense has been at the heart of international law debates. The difference between preemptive and preventive action has been vividly debated since the US asserted its right to self-defense in the Global War on Terror. After the Bush Administration's 2002 National Security Strategy (NSS) advocated for a right to preventive self-defense (see below) and the US intervened in Iraq in March 2003 citing precisely this right to self-defense, several UN reports - *A More Secure World* (the 2004 report of the UN High-Level Panel on Threats, Challenges and Change), *In Larger Freedom* (the 2005 Report of the United Nations Secretary General - UNSG), and the *Outcome Document of the 2005 World Summit* - rebuked the Bush Administration's arguments:

> The consensus of all these instruments was that no change in the UN Charter provisions on the use of force was necessary. The fundamental prohibition on the use of force in Article 2(4), the right of self-defense in Article 51, and Chapter VII on collective action were all adequate to meet the new threats.[82]

This debate on the right to self-defense is part of a broader one on the use of force in international affairs. The multiple perspectives crystalized ranged from a positive view on the lack of constraints on US action, to the need for international law to evolve in meeting new threats, to the very death of Article 2(4) or of international law altogether.[83]

The issue of self-defense against non-state actors has also been fervently debated in the framework of the GWOT. Two questions arise regarding self-defense against terrorists: (1) is the use of self-defense against terrorism permissible under international law given that

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"Preemption, Prevention and Anticipatory Self-Defense: New Law regarding Recourse to Force," *Hastings International and Comparative Law Review* 27, no. 3 (Spring 2004): 425-435, pp. 425-426.

[79] Christine Gray, *International Law and the Use of Force*, p. 10.

[80] Noam Lubell, "The Problem of Imminence in an Uncertain World," in *The Oxford Handbook of the Use of Force in International Law*, eds. Marc Weller, Alexia Solomou, and Jake William Rylatt (Oxford: Oxford University Press, 2015), 697-719, p. 719.

[81] Theodora Christodoulidou and Kalliopi Chainoglou, "The Principle of Proportionality from a Jus ad Bellum Perspective," in *The Oxford Handbook of the Use of Force in International Law*, 1187-1208, p. 1198.

[82] Christine Gray, *International Law and the Use of Force*, p. 4.

[83] For an overview of these positions and accompanying state practice, see Ibid., pp. 4-8.

terrorists and the organizations they are part of are non-state actors; and (2) can a state unilaterally invoke such a right?[84] Following the 9/11 attacks, the UNSC recognized the "inherent right of individual or collective self-defense in accordance with the Charter"[85] in the preamble of Resolutions 1368 (2001) and 1373 (2001).[86] Notwithstanding, in its 2005 decision on the *Democratic Republic of Congo v. Uganda*, the ICJ did not answer the question of "whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces."[87] Moreover, in his separate opinion, Judge Simma wrote that following the 9/11 attacks "Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as "armed attacks" within the meaning of Article 51."[88] On the other hand, in a different separate opinion, Judge Kooijmans concluded that "it would be unreasonable to deny the attacked state the right to self-defense merely because there is no attacker state"[89] and that "nothing in the Charter prevents the victim state from exercising its inherent right of self-defense."[90]

Moving from jurisprudence to state practice, both the US and UK invoked the right to self-defense against terrorism and Al-Qaeda (a non-state actor) to justify many of their actions in the Global War on Terror (see, for instance, Operation Enduring Freedom in Afghanistan).[91] Whereas the practice of states such as the US or the UK was clearly in favor

[84] Ibid., p. 199.
[85] United Nations Security Council, *Security Council Resolution 1368 (2001) [Threats to international peace and security caused by terrorist acts]*, September 12, 2001, S/RES/1368 (2001), https://www.refworld.org/docid/3c4e94557.html (accessed August 20, 2020).
[86] "Reaffirming the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)." United Nations Security Council, *Security Council Resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts]*, September 28, 2001, S/RES/1373 (2001), https://www.refworld.org/docid/3c4e94552a.html (accessed August 20, 2020).
[87] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment*, December 19, 2005, I.C.J. Reports 2005, 168-283, https://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf (accessed September 11, 2019), para. 147, p. 223.
[88] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Separate Opinion of Judge Simma*, paras. 10-11, p. 337.
[89] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Separate Opinion of Judge Kooijmans*, December 19, 2015, I.C.J. Reports 2005, 306-326, https://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-03-EN.pdf (accessed September 11, 2019), para. 30, p. 314.
[90] Ibid., para. 29, p. 314.
[91] What is more, following September 11, NATO activated for the first time in its history Article 5 of the North Atlantic Charter providing for collective self-defense in the case of an outside attack on one of the Alliance's members. In the words of the then NATO Secretary General, Lord Robertson, "We know that the individuals who carried out these attacks were part of the world-wide terrorist network of Al-Qaida, headed by Osama bin Laden and his key lieutenants and protected by the Taleban. On the basis of this briefing, it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all."

of the right to self-defense against non-state actors, the scholarly community cautioned against this expansive approach to the right to self-defense, and, consequently, to the right to use force.[92] In the words of Daniel Bethlehem, former principal Legal Adviser of the UK Foreign and Commonwealth Office from May 2006 to May 2011,

> scholarship faces significant challenges, …, when it comes to shaping the operational thinking of those within governments and the military who are required to make decisions in the face of significant terrorist threats emanating from abroad" given the lack of "intersection between the academic debates and the operational realities.[93]

Nevertheless, as per another legal opinion:

> Those who argue that the law has changed or should be changed - that the requirements of the Definition of Aggression as applied by the International Court of Justice in the Nicaragua case should be modified in such a way that self-defense may be invoked against non-state actors operating from a state which has tolerated their activities or is unable to control them - have not been able to adduce state practice in support of their argument other than that of Operation Enduring Freedom. In so far as their arguments are based on policy considerations they bear the heavy burden of establishing that widening the permissible use of force would be effective in the 'war on terror.'[94]

To conclude, some legal experts consider that the definition and application of the concept of self-defense is dependent upon the circumstances of its invocation:

> self-defense is acknowledged to be an exception, but it is not at all clear what the content of that exception is. Given the need in practice to bring any resort to force which is not authorized by the Security Council within the scope of self-defense if it is to be considered lawful, the concept is being steadily distorted, so as to justify, or attempt to justify, a range of actions which no normal, traditional notion of self-defense would recognize as being comprised within it.[95]

Democracy promotion is another contentious aspect regarding the use of force. Although, especially after the Cold War, democracy promotion became part and parcel of the foreign

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NATO On-line Library: NATO Speeches, "Statement by NATO Secretary General, Lord Robertson," Updated: October 2, 2001, http://www.nato.int/docu/speech/2001/s011002a.htm (accessed May 28, 2016).

[92] For an interesting (scholarly debate) see the "Bethlehem Principles" Debate. In October 2012, Daniel Bethlehem, former principal Legal Adviser of the UK Foreign & Commonwealth Office from May 2006 to May 2011, wrote a piece in *The American Journal of International Law* advocating for states' right to use force in self-defense against non-state actors. Starting from the premise that legal developments should meet national security strategic imperatives and that following the 9/11 events those imperatives had changed to include serious threats from non-state actors, Bethlehem proposed a set of 16 principles to guide states' actions when using force in self-defense against non-state entities. For the original article, see Daniel Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors," *The American Journal of International Law* 106, no. 4 (October 2012): 770-777. For the ensuing debate, see *The American Journal of International Law* 106 (2013).

[93] Daniel Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors," p. 773.

[94] Christine Gray, *International Law and the Use of Force*, p. 201.

[95] Sir Arthur Watts, "The Importance of International Law," p. 11.

policy rhetoric (and actions) of states,[96] legally, it did not reach the status of an accepted exception to the prohibition to use force in international affairs. Despite the fact that democracy promotion as a norm has gained broad international acceptance,[97] disagreement remains as to how best to promote democracy in practice. Military intervention, i.e., use of force, is not precisely considered the most appropriate tool given that its track record of bringing a sustainable democratic system to countries that had lacked one prior to said military intervention is mixed, at best. The Bush Administration's failed democracy promotion agenda in Iraq greatly contributed to this view.[98] In general, the US has long been an advocate of a broad interpretation of the prohibition to use force in international affairs and it oftentimes employed democracy promotion as justification for the use of force.[99]

Given the lack of consistent state practice (and *opinio juris*) on the matter,[100] an authorization to use force under the Chapter VII system of collective security remains the legal basis for a military intervention to safeguard or promote democracy in a given country.[101] Supporters of intervention in the name of democracy promotion point to potential political gridlocks paralyzing the UNSC as justification for their actions (especially when political interests of one of the permanent members of the UNSC are at stake).[102] As former

[96] "… democracy promotion as a foreign policy goal has become increasingly acceptable throughout most of the international community." Michael McFaul, "Democracy Promotion as a World Value," *The Washington Quarterly* 28, no. 1 (Winter 2004-5): 147-163, p. 148.

[97] In the 1980s, international law scholar Michael Reisman wrote a piece in support of the intervention for democracy promotion. Reisman concluded that "the scenarios we have rehearsed are as destructive of the political independence of the community concerned as would be a massive invasion by the armed forces of another state. To characterize the second form of intervention as unlawful and the first as lawful or at least not cognizable by international law violates the basic policy that international law seeks to achieve and rapes common sense." W. Michael Reisman, "Coercion and Self-Determination: Construing Article 2(4)," *The American Journal of International Law* 78, no. 3 (July 1984): 642-645, p. 645. In the beginning of the 1990s, international law scholar Thomas M. Franck also supported an "emerging right to democratic governance." In Franck's view, the international community witnessed "the emergence of a normative entitlement to a participatory electoral process." Thomas M. Franck, "The Emerging Right to Democratic Governance," *The American Journal of International Law* 86, no. 1 (January 1992): 46-91, p. 90. For a rebuttal of the right to intervention for democracy promotion see Schachter's reply to Reisman: Oscar Schachter, "The Legality of Pro-Democratic Invasion," *The American Journal of International Law* 78, no. 3 (July 984): 645-650.

[98] Michael McFaul, "Democracy Promotion as a World Value," p. 157.

[99] Historically, national security imperatives and democracy promotion have been two justifications US decision-makers recurred to most often to legitimize military action against other countries. Democracy promotion was part of the justification in conflicts ranging from the Mexican-American war to the two World Wars. See James Meernik, "United States Military Intervention and the Promotion of Democracy," *Journal of Peace Research* 33, no. 4 (November 1996): 391-402, p. 391. For an overview on democracy promotion in US foreign policy following the end of the Cold War see Thomas Carothers, *Critical Mission: Essays on Democracy Promotion* (Washington, D.C.: Carnegie Endowment for International Peace, 2004).

[100] Michael Byers, *War Law*, p. 85.

[101] Claus Kreß and Benjamin Nußberger, "Pro-Democratic Intervention in Current International Law: The Case of The Gambia in January 2017," *Journal on the Use of Force and International Law* 4, no. 2 (2017): 239-252, p. 252.

[102] Michael Byers, *War Law*, p. 108.

British Prime Minister, Tony Blair, explained in his 2004 Sedgefield speech justifying the Iraq intervention:

> I understand the worry the international community has over Iraq. It worries that the US and its allies will, by sheer force of their military might, do whatever they want, unilaterally and without recourse to any rule-based code or doctrine. But our worry is that if the UN – because of a political disagreement in its Councils – is paralyzed, then a threat we believe is real will go unchallenged.[103]

Humanitarian (military) intervention[104] when a government is either "unable or unwilling"[105] to protect its own population is another (contested) claim of exception to the prohibition on the use of force. Broadly, humanitarian intervention is defined as "action by international actors across national boundaries including the use of military force, taken with the objective of relieving severe and widespread human suffering and violation of human rights within states where local authorities are unable or unwilling to do so."[106] The supporters of a right to humanitarian intervention start from the premise that governments, while enjoying sovereignty over their territory and citizens, also have an obligation to protect their population; when failing to uphold this obligation, they lose the right to claim absolute sovereignty and are no longer protected by the prohibition to use force.[107] What is more,

> The prohibition on the use of force has increasingly been challenged by scholars, politicians and commentators who believe that national governments that systematically murder, rape or expel their own citizens should not be shielded against military intervention. Convinced that the UN Security Council cannot be relied upon to address these problems, and that the United Nations – rather than its member states – is somehow to blame, they argue for a right of

[103] "Full Text: Tony Blair's Speech," *The Guardian*, March 5, 2004, https://www.theguardian.com/politics/2004/mar/05/iraq.iraq (accessed January 31, 2019).

[104] For a detailed overview on the concept of humanitarian military intervention, see Taylor B. Seybolt, *Humanitarian Military Intervention: The Conditions for Success and Failure* (New York: Oxford University Press, 2007).

[105] As its very name indicates, "unable or unwilling" refers to instances when the sovereign government of a state is either incapable of (e.g., failed states where the national government is no longer in partial or complete control of the country's territory) or does not wish to protect its citizens (in cases where most likely the very government is the perpetrator of human rights abuses against its own population). More recently, international law literature refers to the "unable and unwilling" test in situations when non-state actors (such as terrorist groups) convey regular attacks against the territory of another state. In deciding whether to respond or not to these attacks by way of use of force without the prior consent of the state harboring the attacker, the attacked state recurs to the "unable or unwilling" test to determine whether the state from whose territory the non-state actor launched its attack was unable or unwilling to prevent the attack. For an analysis of the legality of the "unable or unwilling" test as well as its implications for the concept of self-defense, see Ashley S. Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense," *Virginia Journal of International Law* 52, no. 3 (2012): 483-550. For a comprehensive list of states that employed force against non-state actors on the territory of the harboring state without the latter's prior consent, see Elena Chachko and Ashley Deeks, "Which States Support the 'Unwilling and Unable' Test?," Lawfare, entry posted October 10, 2016, https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test (accessed September 13, 2019).

[106] Jonathan Moore, "Deciding Humanitarian Intervention," *Social Research* 74, no. 1 (Spring 2007): 169-200, p. 169.

[107] Michael Byers, *War Law*, p. 8.

> 'universal humanitarian intervention,' that is, a right to intervene for humanitarian purposes without the authorization of the Security Council.[108]

Humanitarian intervention was invoked by India in East Pakistan in 1971; Vietnam in Cambodia in 1978; Tanzania in Uganda in 1979; the UK, France, Italy, the Netherlands, and the US in Iraq in 1991; or the UK and Belgium in Kosovo (in the last two cases to justify 'no fly zones').[109] The UK, in particular, has been a strong advocate of the right to intervene for humanitarian purposes.[110] Humanitarian intervention has been a particularly contentious issue in the 1990s following the North Atlantic Treaty Organization (NATO)-led intervention in Kosovo. The back then UN Secretary General, Kofi Annan, admitted that the intervention in Kosovo had raised legal questions:

> on the one hand, is it legitimate for a regional organization to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?[111]

In Annan's opinion, in circumstances as tragic as the ones that triggered the NATO intervention, the international community should reach consensus

> not only on the principle that massive and systematic violations of human rights must be checked, wherever they take place, but also on ways of deciding what action is necessary, and when, and by whom.[112]

Humanitarian intervention is nevertheless not accepted as an exception to the prohibition to use force. This argument is sustained by two previously-mentioned United Nations reports, *A More Secure World: Our Shared Responsibility* and *In Larger Freedom: Towards Development, Security and Human Rights for All*: both reports reinstated the key role of the UNSC in authorizing the use of force under Chapter VII of the UN Charter when States fail to fulfill their sovereign obligation to protect their citizens.[113] Both reports therefore were

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[108] Ibid., p. 92.

[109] For details, see Taylor B. Seybolt, *Humanitarian Military Intervention*. The US also referenced humanitarian intervention as a justification for the 2003 Iraq intervention. For an analysis of the arguments put forward by the Bush Administration, see Kenneth Roth, "Setting the Standard: Justifying Humanitarian Intervention," *Harvard International Review* 26, no. 1 (Spring 2004): 58-62. For a review of the argument put forward by the Obama Administration in the 2011 Libya intervention, see Robert Pape, "The New Standard for Humanitarian Intervention," *The Atlantic*, April 4, 2011, https://www.theatlantic.com/international/archive/2011/04/the-new-standard-for-humanitarian-intervention/73361/ (accessed April 27, 2020).

[110] For more information on humanitarian intervention, see Michael Byers, *War Law*, pp. 93-102.

[111] Kofi Annan, "Two Faces of Sovereignty," *The Economist*, September 16, 1999, http://www.economist.com/node/324795 (accessed May 28, 2016).

[112] Ibid.

[113] United Nations Office on Genocide Prevention and the Responsibility to Protect, "Responsibility to Protect," https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml (accessed February 13, 2020). The scholarly community though tends to be ambivalent in accepting humanitarian intervention as an exception to the prohibition to use force (given the lengthy debate this entails, this research shall not dive into the specifics). Ian Hurd, for instance, concluded that this lack of clear legal consensus on the subject matter was

adamant that, even for humanitarian purposes, absent the UNSC's approval, states cannot singlehandedly invoke a right to humanitarian intervention as an exception to the prohibition to use force. As stated, it is precisely skepticism as to the UNSC's ability to fulfill its role that motivates supporters of humanitarian intervention: the UNSC can fail to act,[114] oftentimes being paralyzed by diverging political interests of its permanent members (see, for instance, how Russia and China used their veto power to block UNSC resolutions on Syria).[115]

Another contentious aspect regarding the prohibition to use force, the Responsibility to Protect (R2P),[116] was cited as justification for a potential military intervention in Syria in 2013 and served as justification for the 2011 intervention in Libya.[117] There are both similarities and differences between humanitarian intervention and R2P.[118] The responsibility to protect involves "changing the language of humanitarian intervention (from sovereignty vs. human right to levels of responsibility)."[119] The difference between the two concepts is evident at the level of both state practice (empirical data) and *opinio juris* (conceptual basis). Whereas humanitarian intervention serves as a rationale for external intervention in other country's internal affairs, the responsibility to protect focuses on both governments' internal responsibility to protect their own citizens (just as in the case of humanitarian intervention)

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determined by the fact that law was a resource "in the hands of states and others, deployed to influence the political context of their actions." For an analysis outlining the lack of consensus regarding humanitarian intervention, see Ian Hurd, "Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World," *Ethics & International Affairs* 25, no. 3 (Fall 2011): 293-313, citation from p. 312.

[114] Michael Byers, *War Law*, p. 92.

[115] By December 2019, Russia and China had cast 14 vetoes on Security Council resolutions since the Syrian conflict erupted in 2011. Michelle Nichols, "Russia, Backed by China, Casts 14th U.N. Veto on Syria to Block Cross-border Aid," *Reuters*, December 20, 2019, https://www.reuters.com/article/us-syria-security-un/russia-backed-by-china-casts-14th-u-n-veto-on-syria-to-block-cross-border-aid-idUSKBN1YO23V (accessed February 13, 2020).

[116] For further information on the Responsibility to Protect, see The International Commission of Intervention and State Sovereignly (ICISS), *The Responsibility to Protect*, December 2001, http://responsibilitytoprotect.org/ICISS%20Report.pdf (accessed May 28, 2016); United Nations General Assembly, *Note [... "A more secure world: our shared responsibility"]*, December 2, 2004; United Nations General Assembly, *In Larger Freedom: Towards Development, Security, and Human Rights for All. Report of the Secretary General of the United Nations for Decision by Heads of State and Government in September 2005*, March 21, 2005, A/59/2005, https://www.refworld.org/docid/4a54bbfa0.html (accessed May 28, 2016) - especially paras. 138-139; United Nations General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, October 24, 2005, A/RES/60/1, https://www.refworld.org/docid/44168a910.html (accessed August 21, 2020).

[117] For an overview of the responsibility to protect in the context of the intervention on Libya, see Simon Chesterman, "'Leading from Behind': The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya," *Ethics & International Affairs* 25, no. 3 (Fall 2011): 279-285.

[118] "The evolution away from the discourse of humanitarian intervention, …, and toward the embrace of the new concept of the responsibility to protect has been a fascinating piece of intellectual history in its own right." For an overview of this history, see Gareth Evans, "From Humanitarian Intervention to the Responsibility to Protect," *Wisconsin International Law Journal* 24, no. 3 (2006): 703-722, citation from p. 703. See also S. Neil MacFarlane, Carolin J. Thielking, and Thomas G. Weiss, "The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?," *Third World Quarterly* 25, no. 5 (2004): 977-992.

[119] Alex J. Bellamy, "Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq," *Ethics & International Affairs* 19, no. 2 (2005): 31-54, p. 52.

and on the international community's responsibility to act when the former is either unable or unwilling to meet its obligations towards its citizens. R2P is a corollary of humanitarian intervention: it is for humanitarian reasons that breaching two fundamental principles of international law (the principle of sovereignty and the prohibition to use force) becomes acceptable. Moreover, humanitarian emergencies trigger R2P.[120]

R2P's defining elements, its so-called three pillars, were outlined in the Report of the UN Secretary General on the implementation of R2P:

> (a) Pillar one is the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. ... (b) Pillar two is the commitment of the international community to assist. ... (c) Pillar three is the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection in meeting those obligations.[121]

The one major reference to R2P in a UNSC resolution came in 2011 when the UNSC adopted Resolution 1973, recalling R2P and allowing for the enforcement of 'no fly zones' for the protection of civilians in Libya against the actions of its back-then President, Muammar al-Gaddafi. In the resolution's Preamble, the UNSC reiterates

> the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians[122]

and determines that "the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security;" thereby, "[a]cting under Chapter VII of the Charter of the United Nations"[123] the SC

> [a]uthorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory. [124]

The R2P is not an accepted exception to the prohibition on the use of force and a clear approval from the UNSC in the form of a resolution is necessary prior to any kind of military

[120] For an extended version of this argument, see Ibid.
[121] United Nations General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary General*, January 12, 2009, A/63/677, https://www.refworld.org/docid/4989924d2.html (accessed August 21, 2020), Pillar One - The Protection Responsibilities of the State, pp. 8-9.
[122] United Nations Security Council, *Security Council resolution 1973 (2011) [on the situation in the Libyan Arab Jamahiriya]*, March 17, 2011, S/RES/1973 (2011), https://www.refworld.org/docid/4d885fc42.html (accessed August 21, 2020).
[123] Ibid.
[124] Ibid.

action being undertaken in the name of the responsibility to protect. In 2013, in the case of Syria, Russia rejected the idea of an intervention following the Libyan model. Russia had been a steady supporter of the regime of Bashar Al-Assad considering it the sole legitimate and democratically elected government of Syria.[125] China reacted in a similar fashion.[126]

Just as with humanitarian intervention, R2P outlined the need for a "compromise between moral aspiration and political reality."[127] Political reality, i.e., national interests of the most powerful states, won over the moral aspiration of protecting innocent civilians. This comes to prove that even though (especially in the case of humanitarian intervention or R2P) legal action and morality are strongly intertwined both are more often than not surpassed by sheer state interest. National sovereignty remains a core such interest; therefore, some states remain reluctant towards the formulation of new rules supporting international intervention when governments seriously breach the human rights of their own citizens.

One last contentious aspect is intervention by invitation. Opinions are again divided as to whether intervention by invitation can constitute (or not) an acceptable exception to the prohibition to use force: some legal opinions consider that governments can allow foreign intervention, while other opinions consider that, in the case of a civil war, no intervention is acceptable on any side. The former argue that under customary international law intervention by invitation is acceptable given that Article 2(4)'s prohibition on the use of force refers exclusively to non-consensual interventions.[128] The prohibition to use force remains a norm of *jus cogens* and is therefore non-derogable. The main argument put forward by the latter addresses the issue of the recognition of different governments/groups in cases of non-international armed conflicts (NIACs). A similar line of legal reasoning was supported by the ICJ in *Nicaragua v. United States* when it concluded that the principle of non-intervention could

[125] Mr. Churkin, UN Ambassador, Russian Federation: "[…] the international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect. […] a significant number of Syrians do not agree with the demand for a quick regime change and would rather see gradual changes." United Nations Security Council, *United Nations Security Council 6627th Meeting*, October 4, 2011, S/PV.6627, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6627 (accessed May 28, 2016), p. 4.

[126] China "should not forget the lesson in Libya," since the military operation "resulted in the deaths of more than 20 000 civilians and the displacement of 900 000 people without bringing the country together or ending violence […] Such 'protection' … linked to a 'successful surgery that kills the patient' … is an irresponsible move that actually aims at intervening in other countries' affairs under the flag of 'protection'." Li Xiaokun, "Beijing's Policy on Syria 'Responsible'," *China Daily: Europe*, April 11, 2012, http://europe.chinadaily.com.cn/world/2012-04/11/content_15018253.htm (accessed May 28, 2016).

[127] Michael Byers, *War Law*, p. 106.

[128] Ibid., pp. 64-65.

> certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State… Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.[129]

As a matter of state practice, in 2015, the government of Iraq address such a request of intervention by invitation to the US.[130] The US government employed this request as ground for intervention in Iraq against the Islamic State in Syria and Iraq (ISIS).[131]

International Humanitarian Law (*jus in bello*): Overview

Jus in bello, the law of armed conflict or international humanitarian law, is a branch of international law applicable whenever there is an armed conflict regardless of whether that conflict is lawful from the viewpoint of the *jus ad bellum*. IHL's application is confined to the existence of an armed conflict.[132] This branch of law was borne to protect civilians, combatants, and prisoners of war. Severe breaches of IHL amount to war crimes to be judged by special tribunals.[133] IHL is largely divided into Hague law and Geneva law[134] (the four Geneva Conventions (GCs) and their three Additional Protocols).[135] Hague and Geneva law

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[129] ICJ, *Nicaragua v. United States of America*, June 27, 1986, para. 246, p. 126.

[130] "[…] we [Iraq], in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the Constitution, have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent. The aim of such strikes is to end the constant threat to Iraq, protect Iraq's citizens and, ultimately, arm Iraqi forces and enable them to regain control of Iraq's borders." United Nations Security Council, *Annex to the Letter Dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council*, September 22, 2014, S/2014/691, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_691.pdf (accessed May 28, 2016).

[131] For an overview of military interventions (by invitation or not) in Iraq, Syria, and Libya, see Karine Bannelier-Christakis, "Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent," *Leiden Journal of International Law* 29, no. 3 (September 2016): 743-775. For the US intervention in Iraq, see pp. 750-752.

[132] Besides IHL, other branches of domestic and international law are applicable during armed conflicts (e.g. domestic and international criminal law and international human rights law). For further information, see Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'," *Fletcher Forum of World Affairs* 27, no. 2 (Summer/Fall 2003): 55-74, p. 57.

[133] For detailed information on war crimes courts and tribunals (and especially on the US' approach to the ICC), see Michael Byers, *War Law*, pp. 136-145.

[134] For a comprehensive list of IHL treaties, see International Committee of the Red Cross, "Treaties, States Parties and Commentaries: By Topic," https://ihl-databases.icrc.org/ihl (accessed February 17, 2020).

[135] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention (III) relative to the Treatment of Prisoners of War, Convention (IV) relative to the Protection of Civilian Persons in Time of War (all signed on August 12, 1949) and their Additional Protocols: Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) – strengthening international standards for the protection of civilians, Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of

are complementary tools serving the same purpose: if possible, making war more humane and limiting human suffering, be it for civilians or soldiers. Whereas Hague law does so by spelling out rules for the conduct of hostilities and applying restrictions on the means and methods of war (i.e., the weapons employed by the parties to an armed conflict), Geneva law focuses primarily on limiting the consequences of war on its victims. Hague and Geneva law merge into the 1977 Protocol Additional on the Protection of Victims of International Armed Conflict whose provisions cover the wounded, sick, and shipwrecked, methods and means of warfare, combatant and prisoner of war status, and the protection of the civilian population and civilian objects.[136] IHL can be summarized as follows: "a license to kill enemy combatants, and to detain without charges or trials anyone who poses a security risk, is the price paid for rules designed to minimize human suffering."[137] International humanitarian law therefore rather focuses on protecting individuals than nation-states.[138] The drafters of the Geneva Conventions saw the conventions as being applicable to states or entities on states' territories.[139] Consequently, only States and national liberation movements (NLMs)[140] can become parties to the Geneva Conventions; non-state actors cannot do so.

Combatants and non-combatants alike enjoy a wide range of protections under IHL. While an armed conflict is unfolding, combatants are (at least in theory) protected against means of warfare and weaponry causing superfluous and unnecessary suffering. If captured, they receive prisoner of war status, ought to be treated with dignity, and be released at the

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Non-International Armed Conflicts (Protocol II) (both signed on June 8, 1977), and Protocol additional to the Geneva Conventions of August 12, 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (signed on December 8, 2005). See International Committee of the Red Cross, "Treaties, State Parties and Commentaries: Geneva Conventions of 1949 and Additional Protocols, and their Commentaries," https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp (accessed February 20, 2020).

[136] See International Committee of the Red Cross, "How Does Law Protect in War? - Law of the Hague," https://casebook.icrc.org/glossary/law-hague (accessed February 17, 2020) and "How Does Law Protect in War? - Law of Geneva," https://casebook.icrc.org/glossary/law-geneva (accessed February 17, 2020).

[137] Gabor Rona, "Interesting Times for International Humanitarian Law," p. 63.

[138] Michael Byers, *War Law*, p. 9.

[139] François Bugnion, "Terrorism and International Humanitarian Law," *Whitehall Papers* 61, no. 1 (2004): 47-55, p. 49.

[140] Article 1(4) of the 1977 Protocol I to the Geneva Conventions classifies as "armed conflicts" those conflicts "in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." The same Protocol, in its Article 96(3) stipulates that the "authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary." "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)," Geneva, June 8, 1977 (entered into force: December 7, 1978), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument (accessed February 17, 2020) - click on each article for the exact link.

end of hostilities.[141] As the protection of non-combatants, civilians not directly involved in hostilities, is of foremost importance in IHL, Part IV of Protocol Additional I of 1977 addresses the protection of civilian population in cases of armed conflict.[142] Combatants are to be differentiated from civilians when: (1) they answer to orders issued by a military part of a chain of command; (2) wear identifiable insignia; (3) carry their weaponry openly (so as to make their intentions clear); (4) act concordantly to the laws of war.[143] Non-compliance with any of these four criteria can lead to loss of POW status. As the protection of civilians is at the core of IHL, the distinction between civilians and combatants during an armed conflict is one of the core principles of international humanitarian law. The principle of distinction is both part of customary IHL and has been codified in the Geneva Conventions in Articles 48, 51(2), and 52(2) of Additional Protocol (AP) I.[144]

International humanitarian law places a series of constraints on the means and methods of warfare. According to IHL, military action must at all time strike a balance between military necessity and the protection of civilians. What is known as the principle of proportionality limits the scope and range of acceptable military action. Just as the principle of distinction, proportionality is both enshrined in customary IHL and codified by the GCs

[141] Article 43(2) of Protocol Additional I to the 1949 GCs defines the term "combatant:" "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities." https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=AF64638EB5530E58C12563CD0051DB93 (accessed August 21, 2020).

[142] The first article of Part IV, Article 48, stipulates that: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=8A9E7E14C63C7F30C12563CD0051DC5C (accessed August 21, 2020).

[143] See Article 4, "Convention (III) Relative to the Treatment of Prisoners of War," Geneva, August 12, 1949 (entered into force: October 21, 1950), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=2F681B08868538C2C12563CD0051AA8D (accessed August 21, 2020). For the overall Convention, see https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=77CB9983BE01D004C12563CD002D6B3E&action=openDocument (accessed August 21, 2020).

[144] Apart from Article 48 (cited in footnote 167), see also Article 52(1): "Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives …" & Article 51(2): "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F08A9BC78AE360B3C12563CD0051DCD4 (accessed August 21, 2020). For the principle of distinction as part of customary IHL, see International Committee of the Red Cross, "IHL Database - Customary IHL: Rule 1. The Principle of Distinction between Civilians and Combatants," https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 (accessed February 18, 2020).

(Articles 51.5(b) and 57.2(a)(iii)).[145] Military action should not harm civilians or civilian objectives in excess compared to the anticipated direct military advantage.[146]

One of the corollaries of the principle of distinction establishes that on the battlefield armies must employ high accuracy weaponry that distinguishes between combatants and civilians. Even when targeting combatants exclusively, IHL prohibits the usage of weapons that cause unnecessary suffering and superfluous injury given the disproportion between expected military benefits and the human suffering incurred. This principle is both enshrined in Article 35(2) of Additional Protocol I and is a rule of customary IHL.[147] Among others, the list of prohibited weaponry includes: expanding or explosive bullets, biological and chemical weapons, antipersonnel landmines, etc.[148] On this list, nuclear weapons are first among equals. In its Advisory Opinion in the *Nuclear Weapons Case*, the International Court of Justice reaffirmed the prohibition of means and methods of warfare causing superfluous injury and unnecessary suffering as one of the "cardinal principles … constituting the fabric of humanitarian law."[149] The Court concluded that although

> neither customary nor conventional international law [comprise] any comprehensive and universal prohibition of the threat or use of nuclear weapons as such[150] … the threat or use of

[145] See in Protocol Additional I to the GCs, Article 51.5(b): "Among others, the following types of attacks are to be considered as indiscriminate: … an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=4BEBD9920AE0AEAEC12563CD0051DC9E (accessed August 21, 2020). & Article 57.2(a)(iii): "With respect to attacks, the following precautions shall be taken: those who plan or decide upon an attack shall: … refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; …" https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=50FB5579FB098FAAC12563CD0051DD7C (accessed August 21, 2020). For the principle of proportionality as part of customary IHL, see International Committee of the Red Cross, "IHL Database - Customary IHL: Rule 14. Proportionality in Attack," https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14 (accessed February 18, 2020).

[146] For a legal analysis of the principles of distinction and proportionality as well as of the concept of military necessity, see Michael N. Schmitt, "Precision Attack and International Humanitarian Law," *International Review of the Red Cross* 87, no. 859 (September 2005): 445-466.

[147] Article 35(2): "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=0DF4B935977689E8C12563CD0051DAE4 (accessed August 21, 2020). For the principle of superfluous injury or unnecessary suffering, see International Committee of the Red Cross, "IHL Database - Customary IHL: Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering," https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70#Fn_3460CD3C_00054 (accessed February 18, 2020).

[148] For a more detailed list and relevant legal documents, see ICRC, "IHL Database - Customary IHL: Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering."

[149] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, July 8, 1996, I.C.J. Reports 1996, 226-267, https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf (accessed February 18, 2020), para. 78, p. 257.

[150] Ibid., para. 105(2).B, p. 266.

> nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.[151]

The Court nonetheless could not determine the legality of the threat or use of nuclear weapons in self-defense as a last resort to safeguard a State's survival.[152] Regarding the United States, the Bush Administration, in its December 2002 National Strategy to Combat Weapons of Mass Destruction, points out that the US "reserves the right to respond with overwhelming force - including to resort to all of our options - to the use of WMD against the United States, our forces abroad, and friends and allies."[153]

International and Non-International Armed Conflicts: Key Aspects

As stated, international humanitarian law is applicable whenever there is an armed conflict. One major distinction of key relevance to IHL is the one between an international armed conflict (IAC) and a non-international armed conflict (NIAC). The Geneva Conventions cover mainly international armed conflicts; only Common Article 3 and Protocol II cover aspects regarding non-international armed conflicts. IACs are defined in Common Article 2 (and Additional Protocol I) of the GCs:

> the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. … The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[154]

The ruling of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic Case* provides further clarifications on the definition of an international armed conflict:

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[155]

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[151] Ibid., para. 105(2).E, p. 266.
[152] Ibid.
[153] National Strategy to Combat Weapons of Mass Destruction, December 2002, https://2009-2017.state.gov/documents/organization/16092.pdf (accessed February 1, 2019), p. 3. Michael Byers, *War Law*, p. 126.
[154] Common Art, 2 continues: "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof." "Common Article 2 to the Geneva Conventions" cited from https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=41229BA1D6F7E573C12563CD00519E4A (accessed August 21, 2020).
[155] International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, October 2, 1995, https://www.refworld.org/cases,ICTY,47fdfb520.html (accessed August 21, 2020), para. 70.

The same definition of an armed conflict was adopted by the Trial Chamber in the *Delalic Case*.[156] In a 2008 Opinion Paper on the definition of an armed conflict, the International Committee of the Red Cross (ICRC) reviews the definitions of international and non-international armed conflicts as they are reflected in IHL treaties, jurisprudence, and doctrine. The ICRC concludes that international armed conflicts occur "whenever there is *resort to armed force between two or more States*."[157] The ICRC therefore decides on a restrictive, classical, state-centric definition of an IAC (similar to the definitions provided by the respective tribunals in the *Tadic* and the *Delalic* cases).

NIACs are defined in Common Article 3 of the GCs as "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties."[158] Protocol Additional II, in its Article 1(1), comes to complement the definition provided by Common Article 3.[159] Protocol II mentions the necessity of a higher threshold of violence for a situation to qualify as an armed conflict.[160] The range of application of the already limited set of legal rules covering NIACs is reduced by requirements regarding territorial control and the exclusion of conflicts in which governmental armed forces are not involved.[161]

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[156] International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Zdravko Mucic aka "Pavo," Hazim Delic, Esad Landzo aka "Zenga," Zejnil Delalic (Trial Judgement)*, IT-96-21-T, November 16, 1998, https://www.refworld.org/cases,ICTY,41482bde4.html (accessed August 21, 2020), paras. 182-183, p. 71.

[157] International Committee of the Red Cross, "How is the Term "Armed Conflict" Defined in International Humanitarian Law?," Opinion Paper, March 2008, https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf (accessed February 19, 2020), p. 5.

[158] "Common Article 3 to the Geneva Conventions," cited from https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=BAA341028EBFF1E8C12563CD00519E66 (accessed August 21, 2020).

[159] Article 1(1): "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of applications, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)," Geneva, June 8, 1977 (entered into force: December 7, 1978), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD002D6D09&action=openDocument (accessed August 21, 2020). For link to Article 1, see https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=93F022B3010AA404C12563CD0051E738 (accessed August 21, 2020).

[160] Article 1(2): "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." For link, see footnote 184.

[161] Thilo Marauhn and Zacharie F. Ntoubandi, "Armed Conflict, Non-International," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: July 2016, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e243?rskey=3LVULr&result=1&prd=MPIL (accessed July 30, 2020), para. 4.

The ICTY, in the *Tadic Case*, defines NIACs as taking place "whenever there is […] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[162] As per the definition provided by the ICRC, NIACs are

> *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show *a minimum of organisation*.[163]

At this point, a few words about national liberation movements are in order. NLMs are one of the reasons why countries such as the US, Israel, India, Iran, Indonesia or Myanmar are not parties to the two Additional Protocols.[164] Their main criticism regarded the definition of "armed conflict," which, in their view, encompasses wars of national liberation.[165] President Reagan's Message to the US Senate on Protocol Additional II is an example of such criticism. In referring to Protocol I, the President states

> Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called 'war of national liberation'. Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to 'wars of national liberation', an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.[166]

It must also be outlined that the US does not consider several provisions of the Additional Protocols to have reached the status of customary international humanitarian law.[167]

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[162] ICRC, "How is the Term "Armed Conflict" Defined in International Humanitarian Law?," p. 5.
[163] Ibid.
[164] International Committee of the Red Cross, "Treaties, States Parties and Commentaries: By State," https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesHistoricalByCountry.xsp (accessed February 20, 2020).
[165] Another concern regarded the relaxation of criteria on uniforms and weapons of irregular fighters. Emily Crawford, "Armed Conflict, International," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: June 2015, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e429?rskey=2lVtEm&result=4&prd=MPIL (accessed July 30, 2020), para. 32.
[166] Ronald Reagan, "Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions" (written message, Washington, D.C., January 29, 1987), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/253341 (accessed August 21, 2020).
[167] See John B. Bellinger, III and William J. Haynes II, "A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*," *International Review of the Red Cross* 89, no. 866 (June 2007): 443-471.

Even when specific legal provisions regarding IACs or NIACs are absent, the Martens Clause[168] applies. Outlined for the first time in the 1988 Hague Convention, the Martens Clause reflects the influence of "public conscience in the development of international law."[169] In situations not covered by the GCs, its Additional Protocols or other international agreements, the Martens Clause stipulates that

> civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[170]

IHL therefore recognizes only international and non-international armed conflicts. In the last decades, the nature of war changed significantly, especially following the 9/11 terrorist attacks perpetrated by a non-state actor (the terrorist organization Al Qaeda) against the United States. In the even more recent case of the Syrian civil war, for instance, the conflict morphed into an internationalized mixed conflict taking part both inside and outside Syrian borders. The actors were both states (Syria, the members of the US-led coalition, etc.) and non-state actors (the Syrian rebels, etc.). A particular actor in this setting was Hezbollah: a quasi-de facto regime in Southern Lebanon, Hezbollah is a terrorist organization heavily supported by Iran and invited by the Syrian government to help it fight the rebels and ISIS.[171]

Last but not least, a few words are in order about the interpretation of international humanitarian law. Apart from national interpretations and the scholarly community's legal opinions, the ICRC is the foremost international authority on IHL (see more below). The non-governmental organization (NGO) publishes both its commentaries to the Geneva Conventions[172] and the Handbook of International Rules Governing Military Operations.[173]

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[168] Initially adopted during the 1899 Hague Peace Conference as a solution to a dispute over the status of resistance fighters opposing the occupying authority, the clause bears the name of the Russian delegate, von Martens, in his efforts to put an end to differing opinions as to whether resisters fighting against an invading army are legitimate combatants (entitled to POWs and combatant status) or criminals. The Martens Clause is therefore part of the 1899 Convention with Respect to the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land (signed 29 July 1899, entered into force 4 September 1900). Emily Crawford, "Armed Conflict, International," para. 7.

[169] Dan Belz, "Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?," *Theoretical Inquiries in Law* 7, no. 1 (2006): 97-130, p. 120.

[170] Article 1, Protocol Additional I to the GCs. For further information on the Martens Clause see Thilo Marauhn and Zacharie F Ntoubandi, "Armed Conflict, Non-International," para. 29; Hans-Peter Gasser, "Acts of Terror, "Terrorism" and International Humanitarian Law," *International Review of the Red Cross* 84, no. 847 (September 2002): 547-570, p. 561.

[171] Information from Gudrun Harrer, "Keiner sagt: Uns ist das Völkerrecht egal," *derStandard.at*, May 22, 2016, http://derstandard.at/2000037322997/Keiner-sagt-Uns-ist-das-Voelkerrecht-egal (accessed May 26, 2016).

[172] For comments, see International Committee of the Red Cross, "Treaties, States Parties and Commentaries: Geneva Conventions of 1949 and Additional Protocols, and their Commentaries," https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp (accessed February 20, 2020). To access the comments click on each treaty and then on the comments pertaining to each part of each treaty.

The scholarly community presented its interpretation of IHL in, amongst others, the 1880 Oxford Manual on The Law of War on Land, the 1913 Oxford Manual on The Laws of Naval War or the 1995 San Remo Manual on International Law Applicable to Armed Conflicts at Sea.[174] Such manuals collect "evidence of international custom and practice accepted as law by the international community"[175] and *opinio juris* of different states. Their purpose is to flash out State practice when treaty and / or customary international law present gaps.[176]

Whereas international manuals focus on internationally agreed upon interpretations of IHL, national manuals[177] stress individual state practice (and interpretation).[178] Given their importance in understanding a particular state's view of the law, these national manuals require approval from the highest echelons of both military and political leadership.[179] The genesis of Law of Armed Conflict Manuals is the 1863 Lieber Code, considered "the first modern codification of the laws of war."[180] The Lieber Code is not a manual in the modern sense of a war manual (such as the 1956 US Army Field Manual on the Law of War on Land). It was authored by Francis Lieber, prominent German American jurist and political philosopher, signed for approval by President Abraham Lincoln, and published as US Army General Order. Since 1863 it has been replicated around the world and remains relevant to this day.[181] What came to be known as the Lieber Code represents a series of instructions for the US Armed Forces on the battlefield. These instructions influenced the subsequent

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[173] Frédéric de Mulinen of the Swiss Army compiled the first Handbook on the Law of War for Armed Forces in 1987. Another edition was compiled in 2012 and edited by Andrew J. Carswell. For the 2012 edition, see Andrew J. Carswell, ed., *Handbook on International Rules Governing Military Operations* (International Committee of the Red Cross, June 2012), https://www.icrc.org/sites/default/files/topic/file_plus_list/0431-handbook_on_international_rules_governing_military_operations.pdf (accessed February 20, 2020).

[174] See International Committee of the Red Cross, "Treaties, State Parties and Commentaries:" "The Laws of War on Land. Oxford, 9 September 1880," https://ihl-databases.icrc.org/ihl/INTRO/140?OpenDocument (accessed February 20, 2020); "Manual of the Laws of Naval War. Oxford, 9 August 1913," https://ihl-databases.icrc.org/ihl/INTRO/265?OpenDocument (accessed February 20, 2020); and "San Remo Manual on International Law Applicable to Armed Conflicts at Sea," *International Review of the Red Cross*, no. 309 (December 12, 1995), https://www.icrc.org/en/doc/resources/documents/article/other/57jmsu.htm (accessed February 20, 2020).

[175] Earle A. Partington, "Manuals on the Law of Armed Conflict," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: August 2016, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e326?rskey=upxLYJ&result=1&prd=MPIL (accessed July 30, 2020), para. 3.

[176] Ibid., para. 12.

[177] For a comprehensive alphabetical list of national military manuals, see International Committee of the Red Cross, "IHL Database - Customary IHL: III. Military Manuals," https://ihl-databases.icrc.org/customary-ihl/eng/docs/src_iimima#z (accessed February 20, 2020).

[178] Earle A. Partington, "Manuals on the Law of Armed Conflict," para. 4.

[179] There are other manuals as well, such as internal handbooks of states. Their purpose is not to outline any state practice (let alone *opinio juris*), but to educate lower level commanders on basic principles of IHL or set recommendations and provide guidelines. Ibid., paras. 4-5.

[180] Thilo Marauhn and Zacharie F Ntoubandi, "Armed Conflict, Non-International," para. 8.

[181] Earle A. Partington, "Manuals on the Law of Armed Conflict," paras. 8 & 13.

codification of the laws of war: nationally, states started adopting similar instructions in the form of manuals of war; internationally, the Lieber Code was at the basis of a project of an international convention regarding the laws of war and at the adoption of the Hague Conventions of 1899 and 1907.[182]

International Humanitarian Law: Enforcement Mechanisms[183]

According to the Geneva Conventions, "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."[184] Internal compliance is key to upholding the GCs: States must be willing to pass and implement legislation in accordance with the Conventions.[185] To willingly comply with the GCs, states must fulfill several criteria:

> … its provisions must be known by all those who participate in the war effort, in whatever capacity. Orders shall be given for strict observance of the law, its compliance must be supervised, and any serious violation must be investigated. Persons suspected of having committed such a serious violation of international humanitarian law, ie a war crime, shall be prosecuted and trialed by a regularly constituted court and, if found guilty, shall be punished.[186]

Furthermore,

> Delegates of the ICRC shall be granted all facilities required to carry out their humanitarian work in conflict areas. They shall be allowed access to all persons affected by armed conflict, in particular to detained persons—military personnel or civilians—and to occupied territories and their inhabitants.[187]

At international level

> several international institutions and procedures tend to assure compliance by the parties to an armed conflict with the rules of international humanitarian law. Traditionally, Protecting Powers (or their substitutes) were supposed to play an important role as a link between belligerents, yet practice shows that this institution has fallen into oblivion. In the event of a violation of the Geneva Conventions, an enquiry procedure may be instituted at the request of a belligerent party (see in particular Art. 52 Geneva Convention I, Art. 132 Geneva Convention III, and Art. 149 Geneva Convention IV). Moreover, States that are party to an international armed conflict are invited 'to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter' to find an end to serious

[182] For more information, see International Committee of the Red Cross, "Treaties, States Parties and Commentaries: Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863," https://ihl-databases.icrc.org/ihl/INTRO/110 (accessed February 20, 2020).
[183] For an extensive overview of IHL enforcement and implementation, see International Committee of the Red Cross, "How Does Law Protect in War? - Implementation Mechanisms," https://casebook.icrc.org/law/implementation-mechanisms (accessed February 20, 2020).
[184] Article 1, "Convention (III) relative to the Treatment of Prisoners of War."
[185] Hans-Peter Gasser, "Humanitarian Law, International," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: December 2015, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e488?rskey=ZGMorj&result=115&prd=MPIL (accessed July 30, 2020), para. 41.
[186] Ibid., para. 33.
[187] Ibid.

> violations (Art. 89 Additional Protocol I). Based on Art. 90 Protocol I, an → International (Humanitarian) Fact-Finding Commission has been established for those parties to that treaty that specifically accepted its jurisdiction. In recent times, however, the UN has increasingly taken a stand on violations of international humanitarian law and appealed to belligerents to respect their commitments, be it through the General Assembly, the Security Council, or the Human Rights Council. The same holds true for regional governmental organizations.[188]

The ICRC[189] plays a key role in monitoring compliance with the GCs:

> In practice it is the ICRC, a non-governmental organization with a special status within the international community, that has given itself a mandate to monitor compliance with the Geneva Conventions and with international humanitarian law in general. That mandate has been confirmed by the Geneva Conventions—and thus by the international community. Its main role is twofold. First, in an armed conflict, it has to monitor compliance with, in particular, Geneva Conventions III and IV (among others through visits to POW camps, civilian places of detention, and occupied territories at large); organize relief operations in favour of persons in need (→ Humanitarian Assistance in Cases of Emergency); search for missing persons (→ Missing and Dead Persons); reunite families; and, in case of breaches of humanitarian law, approach the responsible authorities with the intent of obtaining a change in behaviour. Second, the ICRC works for the development of international humanitarian law with a view to strengthening the protection of war victims. While the parties to an international armed conflict are under an obligation to accept the ICRC's presence at 'all places where protected persons are' (Art. 9 Geneva Conventions I–III, Art. 10 Geneva Convention IV, and Art. 81 Additional Protocol I), in a non-international armed conflict the ICRC 'may offer its services' to both sides, ie to government and insurgent groups alike (common Art. 3 (2) of the Geneva Conventions, Art. 18 Additional Protocol II). Practice has shown, at least since the end of the Cold War, that parties to armed conflicts, whether international or not, accept—even if not under an obligation to do so—and often also appreciate the role of the ICRC.[190]

Public opinion[191] can also help ensure compliance with the GCs: shaming and blaming, especially on behalf of such a prestigious, respected, and neutral organization as the ICRC, can induce compliance on behalf of certain States. Last but not least, the fear of reprisals from other belligerents on the battlefield can also induce IHL compliance. Nonetheless, according to the principle of proportionality, the reprisal "must be proportionate to the original violation and cannot be directed towards civilians or objects indispensable to the survival of civilians."[192]

Regarding punishments for violations of international humanitarian law, the perpetrators of serious violations of the laws of war can be trialed for war crimes. Such has been the case with the tribunals set up in Nuremberg and Tokyo to judge war criminals after WWII, or with the ones for Yugoslavia and Rwanda.[193]

To conclude, as one legal scholar remarked, at the end of the day, "[i]nternational humanitarian law is, in part, what you and I and the rest of the people on this planet

[188] Ibid., para. 43.
[189] Ibid., para. 44.
[190] Ibid., para. 45.
[191] Ibid., para. 46.
[192] Michael Byers, *War Law*, p. 125.
[193] Ibid., p. 10.

determine it to be."[194] As made evident by this brief overview on how IHL can be enforced, there is a rather limited array of available mechanisms to coerce states into IHL compliance. Consequently, one of the best compliance-inducing mechanisms is the belief IHL's intrinsic moral value.[195]

State Practice: United States

The US, *jus ad bellum*, and *jus in bello* in the Framework of the GWOT[196]

Legal experts critical of the Global War on Terror label it a justification for employing armed force against other countries.[197] The war on terrorism / terror, the argument goes, is primarily a political campaign with major implications for international law given that "the attack on a third country transforms such a campaign into an armed conflict in the sense of the laws of war."[198] Broadly, they argue that:

> The question arises how far this language is simply a rhetorical device, designed by the USA to legitimate domestic repression, the increase in military spending, the expansion of bases around the world, the imposition of pressure on certain states, and the pursuit of US foreign policy actually driven by other considerations.[199]

According to a number of scholars, the GWOT, defined by President Bush as a "global enterprise of uncertain duration"[200] and "a different kind of conflict against a different kind of enemy … a conflict without battlefields or beachheads"[201] does not amount to a fully-fledged war.[202] Given its definition, the GWOT can be labeled as "the sum of all forms of action taken to combat terrorists,"[203] action ranging from anti-terrorist rhetoric encompassing justifications for the right to use force in self-defense[204] against non-state actors such as the terrorist organization Al Qaeda and its supporters (see Operation Enduring Freedom in

[194] Ibid., p. 126.
[195] Ibid.
[196] For an overview, see Alyson J.K. Bailes and Anna Wetter, "Security Strategies."
[197] Hans-Peter Gasser, "Acts of Terror, "Terrorism" and International Humanitarian Law," p. 550.
[198] Ibid.
[199] Christine Gray, *International Law and the Use of Force*, p. 1.
[200] The National Security Strategy of the United States of America, September 2002, https://2009-2017.state.gov/documents/organization/63562.pdf (accessed August 25, 2020), page no.: N/A.
[201] George W. Bush, "The President's Radio Address" (speech, Maryland, September 15, 2001), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/216351 (accessed February 4, 2019).
[202] Christine Gray, *International Law and the Use of Force*, p. 1.
[203] Hans-Peter Gasser, "Acts of Terror, "Terrorism" and International Humanitarian Law," p. 554.
[204] For more information on September 11 and its implications for the law on the use of force, see Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy: Back to the Water's Edge*, 5th ed. (Lanham: Rowman & Littlefield, 2018), p. 154.

Afghanistan) and the preventive use of force against non-democratic states with potential ties to terrorism or a potential nuclear program (see the 2003 Iraq invasion).[205]

As previously outlined, the current international legal framework on the use of force is based on customary international law provisions and Articles 2(4) and 51 of the UN Charter. Following September 11, the United States acted both domestically (by providing law enforcement with new legal tools to combat terrorism)[206] and internationally (through military actions). America's actions in the War on Terror raised two major legal questions: (1) Can the 9/11 attacks be considered an actual act of war against the United States?[207] (2) Given the peculiarities of the War on Terror, is the pre-9/11 legal framework suitable for this conflict that is

> different from the interstate uses of force that constitute the implicit bases for the laws of war and the circumstances that animated the limitations on the use of force included in the United Nations Charter.[208]

After September 11, the US intervention in Afghanistan together with the 2003 Iraq invasion became "the frontlines in the war on terror."[209] Throughout history, the world mainly witnessed symmetrical warfare in the form of conventional wars between the armed forces of sovereign states. Conventional wars significantly decreased in number after the 1990-1991 Gulf War. The 21st century new type of warfare involves non-state actors oftentimes difficult to identify since, unlike regular armed forces, they do not wear uniforms or carry their weapons in plain sight, nor do they guide themselves by the same set of rules on the battlefield as regular armies do. The parties to the conflict therefore do not employ similar means in combat.[210] It is not only that terrorists, by the very nature of their actions, do not

[205] Christine Gray, *International Law and the Use of Force*, p. 1.
[206] Here the most widely known (and debated example) is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, most commonly known as the PATRIOT Act. Adopted by Congress immediately after the September 11 terrorist attacks and signed into law by President Bush on October 26, 2001, the PATRIOT Act provided US law enforcement and intelligence with broad surveillance and detention powers. Despite the many critiques coming especially from human rights advocates, US decision-makers and authorities credit the Act with having helped the government to prevent another 9/11 by having "substantially enhanced … [the] ability to prevent, investigate, and prosecute acts of terror." United States Department of Justice, "The USA PATRIOT Act: Preserving Life and Liberty," https://www.justice.gov/archive/ll/highlights.htm (accessed February 4, 2019).
[207] A more precise question would be whether the attacks of September 11 could be considered an act of war given the lack of direct involvement of a government in the attack. See Gabor Rona, "Interesting Times for International Humanitarian Law," p. 61.
[208] Jonathan I. Charney, "The Use of Force against Terrorism and International Law," *American Journal of International Law* 95, no. 4 (October 2001): 835-839, p. 838.
[209] Christine Gray, *International Law and the Use of Force*, p.1.
[210] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 48.

abide by the laws of war (or any other law for that matter), but traditional military means are oftentimes neither applicable nor effective to counter them.[211]

Following the September 11 attacks, through UNSC Resolutions 1368 and 1373 the international community reacted swiftly in support of the US thus providing an incipient international legal framework to the Bush Administration's War on Terror. This new type of war declared by President Bush on the very day of the attacks had several legal implications: international terrorists lack both international personality and territory; moreover, the international community has also been unable to agree upon a definition of terrorism and its actors. Therefore, treating them as perpetrators of an armed attack as per the meaning of Article 51 raised more than one eyebrow. The issue of attributability is particularly relevant,[212] especially since prior to 9/11, terrorism was not associated to Article 51 of the UN Charter. The magnitude, intensity, and scale of the attacks certainly reached the bar set by the ICJ in the *Nicaragua Case* for an attack to qualify as an armed attack under Article 51 of the UN Charter (see above). Nonetheless, the methods terrorists employ to carry out their attacks differentiate their actions from classical inter-State acts of violence:[213] generally, regular armies do not spread terror to influence public opinion and political decision-makers. Terrorists often die in the attacks they perpetrate making self-defense against them almost impossible given that the attacks oftentimes lead to the physical death of the attacker. From this perspective, according to some legal experts, self-defense against terrorists could rather be labeled self-help.[214]

Another legal conundrum is represented by whether hijacked civilian airlines could be considered weapons in the traditional sense of the word. In the case of the 9/11 attacks, civilian transportation means were employed by the hijackers with the same effect on human life and property as conventional weapons;[215] in this case, the perpetrators' intent and the effects of their actions became more relevant than the actual device being used; and so were the number of lives lost and the extent of property destruction (instrumental in equivaling the attack to an armed attack).[216]

The following day after 9/11, the UNSC unanimously passed Resolution 1368 labeling the attacks "like any act of international terrorism, as a threat to international peace and security," calling on "all States to work together urgently to bring to justice the

[211] Ibid.
[212] Karl Zemanek, "Armed Attack," para. 17.
[213] Ibid., para. 19.
[214] Ibid., para. 20.
[215] Ibid., para. 21.
[216] Ibid.

perpetrators, organizers and sponsors" of the attacks, and expressing "readiness to take all necessary steps to respond"[217] to the attacks. In the resolution's preamble, the UNSC recognized "the inherent right of individual or collective self-defense in accordance with the Charter."[218] Two weeks later, on September 28, 2001, the UNSC upheld the very same ideas and principles in Resolution 1373 and, "*Acting* under Chapter VII of the Charter of the United Nations"[219] urged States to refrain from any form of terrorism support. Consequently, as some legal experts argue, it can be said that UNSC Resolutions 1368 and 1373 provided an incipient international legal framework for counterterrorist measures against terrorists and the states supporting them. Both were "carefully worded to affirm the right of self-defence in customary international law, within the context of the terrorist attacks on New York and Washington, D.C."[220]

Moreover, in yet another show of support, on September 12, 2001, NATO invoked for the very first time in its history Article 5 according to which an attack against a member state is an attack against all.[221] NATO's invocation of collective defense (Article 5, NATO Treaty) differs from collective security (Chapter VII, United Nations Charter):

> The right of States (whether or not part of a standing alliance such as NATO) to use force by way of collective self-defence is derived from customary international law and is dependent upon the existence of a right to individual self-defence by a victim State which then requests their assistance. The legality of the use of force in a case of collective security is dependent not upon a request from a victim State but upon the authorization of the Security Council under Chapter VII or Chapter VIII UN Charter. Where a regional or other international organization employs force, its own constituent instrument may impose additional limitations upon its actions but it cannot empower the organization or its members to use force in circumstances where general international law does not permit such action or where no Security Council authorization exists.[222]

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[217] UNSC Res. 1368 (2001).
[218] Ibid.
[219] UNSC Res. 1373 (2001).
[220] Michael Byers, *War Law*, p. 67.
[221] Article 5: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security." "The North Atlantic Treaty," Washington, D.C., April 4, 1949 (entered into force: August 24, 1949), https://www.nato.int/cps/en/natolive/official_texts_17120.htm (accessed February 21, 2020). For information on the concept of collective defense and the invocation of Article 5, see North Atlantic Treaty Organization, "Collective Defense - Article 5," Last updated: November 25, 2019, https://www.nato.int/cps/en/natohq/topics_110496.htm (accessed February 21, 2020).
[222] Christopher Greenwood, "Self-Defence," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: April 2011,

On September 24, 2001, President Bush, accountable to his obligations under the War Powers Resolution and Senate Joint Resolution 23 (known as the Authorization for Use of Military Force - AUMF),[223] reported to Congress the "deployment of various combat-equipped and combat support forces to a number of foreign nations in the Central and Pacific Command areas of operations"[224] as a direct response to the attacks on the World Trade Center and the Pentagon. To "prevent and deter terrorism," Bush decided to add "additional forces into these and other areas of the world."[225] Referencing the same two legal documents, President Bush informed Congress that "at approximately 12:30 p.m. (EDT) on October 7, 2001, …, U.S. Armed Forces began combat action in Afghanistan against Al Qaida terrorists and their Taliban supporters."[226] Military actions were "designed to disrupt the use of Afghanistan as a terrorist base of operations" and were part of America's war on terror, a direct response to the September 11 attacks on US "territory, … citizens, and … way of life, and to the continuing threat of terrorist acts against the United States and … friends and allies."[227]

US officials justified the armed intervention in Afghanistan (and other US actions in the GWOT) as an act of self-defense.[228] This act of self-defense was directed against both a non-state actor (the terrorist organization Al Qaeda) and the Taliban regime (back then the *de facto* government of Afghanistan); the United States therefore attributed the 9/11 attacks to

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https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?rskey=LCyOoO&result=2&prd=MPIL (accessed July 30, 2020), para. 40.

[223] See below further information on these two legal documents. Also, see Chapters III and VI.

[224] George W. Bush, "Letter to Congress on American Campaign Against Terrorism" (letter, Washington, D.C., September 24, 2001), White House Office of the Press Secretary, https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010924-17.html (accessed February 5, 2019).

[225] Ibid.

[226] George W. Bush, "President's Letter to Congress on American Response to Terrorism" (letter, Washington, D.C., October 9, 2001), White House Office of the Press Secretary, https://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011009-6.html (accessed February 5, 2019).

[227] Ibid.

[228] See Ibid. In the beginning of November 2001, less than one month after the start of the Afghanistan mission, back then National Security Adviser Condoleezza Rice declared that: "… this is an action in self-defense. The United States was attacked on September 11th with incredible brutality. We continue to be concerned about further attacks. We have no choice but to try to go both to the source of this in Afghanistan…" Condoleezza Rice, "Press Briefing by National Security Advisor Condoleezza Rice" (press briefing, Washington, D.C., November 1, 2001), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/279450 (accessed February 21, 2020). Rice reiterated those remarks only one week later, when she declared during a press briefing: "Let me just remind everybody that the United States was attacked on September 11th. What we are engaged in now is an act of self-defense to try to root out al Qaeda, to try to deny them safe harbor." Condoleezza Rice, "Press Briefing By National Security Advisor Condoleezza Rice" (press briefing, Washington, D.C., November 8, 2001), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/271792 (accessed February 21, 2020). In a letter to Congress reporting on the GWOT, President Bush enumerates the Afghanistan war as just one of the actions taken in the war on terror. He concludes the report by stating that he "will direct additional measures as necessary to exercise our right to self-defense and to protect U.S. citizens and interests." George W. Bush, "Letter to Congressional Leaders Reporting on United States Efforts in the Global War on Terrorism" (letter, Washington, D.C., March 20, 2003), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/213558 (accessed February 21, 2020).

both Al Qaeda and the Taliban since the terrorist organization would not have been able to carry out the attacks had it not been for the support received from the Taliban. UNSC Resolutions 1368 and 1373, coupled with NATO's historic invocation of Article 5, evidenced the international community's willingness to rally behind the US and support the use of force in self-defense against terrorists (i.e. non-state actors).[229] Critiques consider that America's actions in Afghanistan cannot be justified as self-defense under the UN Charter or customary international law since there is "insufficient evidence of an armed attack by the state of Afghanistan" and America's reprisal has been "neither necessary nor proportional."[230]

President Bush was not shy in cautioning against too much legalism in the Global War on Terror. The 2005 National Defense Strategy (NDS) lists under vulnerabilities that America's "strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."[231] It is interesting to notice how the 2005 NDS enumerated international organizations and judicial processes together with terrorism as strategies to weaken US national security. Regarding international fora, the Bush Administration's actions dealt a serious blow to the UN system of collective security.[232] When UN Secretary General, Kofi Annan, outlined that the Iraq intervention absent UNSC approval was illegal under the UN Charter,[233] the US exercised pressure on Annan to leave office proving the "extent of the Bush Administration's intolerance of dissent about the wisdom and legality of its actions."[234] Despite the support provided by traditional US allies such as the UK or Australia (members of the Coalition of the Willing[235]), parts of the international community rebuked President Bush's expansive

[229] See UNSC Res 1368 (2001) and 1373 (2001) coupled with NATO's historical invocation of its Article 5 on collective defense.
[230] Leslie Rose, "U.S. Bombing of Afghanistan Not Justified as Self-Defense Under International Law," *Guild Practitioner* 59 (Spring 2002): 65-75, p. 71.
[231] National Defense Strategy of the United States of America, March 2005, https://archive.defense.gov/news/Mar2005/d20050318nds1.pdf (accessed February 24, 2020), p. 5.
[232] Christine Gray, *International Law and the Use of Force*, p. 5.
[233] In Annan's words: "Yes, if you wish. I have indicated it was not in conformity with the UN charter from our point of view, from the charter point of view, it was illegal." *BBC News*, "Iraq War Illegal, Says Annan," Last Updated: September 16, 2004, http://news.bbc.co.uk/2/hi/middle_east/3661134.stm (accessed February 5, 2019).
[234] Michael Byers, *War Law*, p. 50.
[235] The following countries were members of the Coalition of the Willing during the 2003 intervention: Afghanistan, Albania, Azerbaijan, Bulgaria, Colombia, Costa Rica, the Czech Republic, Denmark, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kuwait, Latvia, Lithuania, Macedonia, Marshall Islands, Micronesia, the Netherlands, Nicaragua, Palau, the Philippines, Poland, Portugal, Romania, Rwanda, Singapore, Slovakia, Solomon Islands, South Korea, Spain, Turkey, Uganda, and Uzbekistan. Israal was also considered to be part of the Coalition, while several Arab states (Saudi Arabia, Bahrain, Qatar, Jordan, Oman, the United Arab Emirates (UAE), and Egypt) provided bases or assistance to the war. For further information on the Coalition of the Willing, see *The New York Times*, "Q&A: What Is the 'Coalition of the Willing?'," From the *Council on Foreign Relations*, March 28, 2003,

views on the use of force and self-defense. For instance, at the UNGA in September 2003 (following the publication of the 2002 NSS and the March 2003 Iraq invasion), the Namibian Foreign Minister, Hidipo Hamutenya, summarized some of the views expressed by fellow world leaders:

> the central theme, that runs through nearly all the speeches at this Session, is the call for a return to multilateral dialogue, persuasion and collective action, as the only appropriate approach to resolving many conflicts facing the international community.[236]

French President, Jacques Chirac, was one of the international leaders most fervently opposing the Iraq war. While stating that "Iraq does not represent an immediate threat that would justify an immediate war," he appealed to "the responsibility of all to respect international law" and not put "power before law."[237] The report of the UNSG *High Level Panel on Threats, Challenges and Change* was another international rebuke of the Bush Doctrine. The report admitted to the customary nature of the right to use force when "the threatened attack is imminent, no other means would deflect it and the action is proportionate."[238] After analyzing legal provisions on collective security and the use of force and reviewing rules and guidelines for the use of force, the report clearly reinforced the SC's central role in addressing security threats and considered that states wanting to act in preventive self-defense should not do so absent Security Council authorization.[239] The Report therefore emphasized "demonstrable imminence"[240] and did not accept the use of force to prevent the threat from a potential future attack.[241]

The US Approach to Self-Defense in the Framework of the GWOT

The United States (together with the UK and Israel) has consistently supported an expansive view on the use of force and a broad interpretation of Article 2(4) of the UN Charter prohibiting the threat or use of force in international affairs. Over the years and in response to

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https://archive.nytimes.com/www.nytimes.com/cfr/international/slot1_032803.html?pagewanted=print&position=top (accessed February 24, 2020).

[236] Permanent Mission of the Republic of Namibia to the United Nations, "Statement by Hon. Mr. Hidipo Hamutenya, Mp Minister of Foreign Affairs at the 58th Session of the United Nations General Assembly," New York, September 30, 2003, http://www.un.org/webcast/ga/58/statements/namieng030930.htm (accessed February 5, 2019).

[237] *France24*, "When Chirac Opposed War in Iraq," September 26, 2019, https://www.france24.com/en/20190926-when-chirac-opposed-war-in-iraq (accessed February 24, 2020).

[238] See para. 188, UNSG *High Level Panel on Threats, Challenges and Change*.

[239] Ibid., paras. 188-192.

[240] Karl Zemanek, "Armed Attack," para. 4.

[241] To summarize, an armed attack "in the sense of Article 51 is an actual armed attack, which happens ('occurs'), not one which is only threatened. This conclusion is shared by the overwhelming majority of legal doctrine, which clearly holds 'anticipatory self-defense' to be unlawful." Michael Bothe, "Terrorism and the Legality of Pre-emptive Force," *European Journal of International Law* 14, no. 2 (April 2003): 227-240, pp. 229-230.

different international crises, the US justified the use of force for humanitarian purposes (in support of the 1999 NATO intervention in Kosovo), to promote democracy and oust dictators from power (Iraq 2003), or at the invitation of countries' governments (Iraq 2015).

As already stated, a narrower perspective on the use of force (characteristic to continental Europe)[242] provides three requirements for the lawful exercise of self-defense: (1) it must be exercised as a response to an armed attack; (2) necessity, immediacy, and proportionality are customary international law principles governing both the use of force and the degree of force employed; (3) the actions must be reported to the UNSC and cease once the latter took "measures necessary to maintain international peace and security."[243] These principles have been upheld by the ICJ in several landmark decisions such as the *Nicaragua* Case,[244] *Legality of the Threat or Use of Nuclear Weapons*,[245] and the *Armed Activities on the Territory of the Congo*.[246]

[242] Please note that withing Europe, the UK largely shares America's approach to the use of force.
[243] Article 51, UN Charter.
[244] "As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly al1 aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention." See ICJ, *Nicaragua v. United States of America*, June 27, 1986, para. 176, p. 94.
[245] "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*: there is a "specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law" (I. C. J. Reports 1986, p. 94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed." ICJ, *Legality of the Threat or Use of Nuclear Weapons*, July 8, 1996, para. 41, p. 245.
[246] "For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of selfdefence against large-scale attacks by irregular forces. Equally, since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate. The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometers from Uganda's border would not seem proportionate to the series of transborder attacks

As already stated, the UNSC, in its resolutions 1368 and 1373 (28 September 2001) labeled the 9/11 attacks on the World Trade Center and the Pentagon an armed attack.[247] Article 51 of the UN Charter does not stipulate that the attack must come from a state nor does it reference the customary international law Caroline criteria[248] which determine the manner in which states can use force in self-defense in terms of both the degree and intensity of the force employed and the weapons used. For instance, regarding the principle of proportionality, "[w]hether the victim State's use of force in self-defence meets the criterion of proportionality depends not upon its relation to the force initially used, but upon whether it is required in order to reverse the effects of the armed attack."[249]

The Bush Administration's legal views on the right to self-defense do not depart considerably from the ones of previous US Administrations. For some legal experts, by pushing for an extensive interpretation of the right to self-defense, the US "increases its own freedom to act," and "diminishes the role and authority of the United Nations."[250] This has important consequences especially for the functioning and relevance of the UNSC:

> Determining whether an action falls within the rubric of self-defence will usually turn on the facts of the specific situation. … Still, once an armed attack has come and gone and there is no continuing or immediate threat, there is nothing to stop the country that has been attacked from asking the UN Security Council to respond. … However, since the Security Council is a political body, the country that has been attacked cannot be certain that the Council will respond to its pleas. The extension of the right of self-defence to the period following an attack represents a pragmatic response, not just to the prohibition of reprisals in international affairs but also to the unreliability of the Security Council as a policing mechanism for the international rules on the use of military force. … By expanding the scope of situations where countries can use force without Security Council authorization, any extension to the right of self-defence necessarily decreases the frequency with which the Council is called upon to act.[251]

The US is a longtime advocate of the exercise of the right to self-defense as a response to terrorist attacks. Already in 1984, Secretary of State George P. Shultz asked for public support for "U.S. military actions to stop terrorists before they commit some hideous act or in retaliation for an attack on our people …."[252] Moreover, countries such as the US, Israel, or South Africa support the extension of the right to self-defense even when such right is

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it claimed had given rise to the right of self-defence, nor to be necessary to that end." [246] ICJ, *Armed Activities on the Territory of the Congo*, December 19, 2005, para. 147, p. 223.
[247] Christopher Greenwood, "Self-Defence," para. 11.
[248] Ibid., para. 17.
[249] Ibid., para. 28.
[250] Michael Byers, *War Law*, p. 60.
[251] Ibid.
[252] *The New York Times*, "Excerpt's from Shultz's Address on International Terrorism," October 26, 1984, https://www.nytimes.com/1984/10/26/world/excerpt-s-from-shultz-s-address-on-international-terrorism.html (accessed February 5, 2019).

exercised on the territory of states without direct implication in the terrorist act triggering the response.[253] What is more,

> The USA and the UK, which both support a wide right of self-defense against imminent attacks, claim that they may take measures proportionate to the threat of a future attack, rather than merely to a specific armed attack which has already taken place.[254]

The Clinton Administration had previously claimed the right to self-defense in its reprisal against the 1998 attacks on the US Embassies in Tanzania and Kenya and when launching cruise missiles against military objectives in Afghanistan and Sudan in its attempt to capture Osama bin Laden.[255] Following the August 7, 1998 terrorist attacks against the US Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania perpetrated by the terrorist organization al-Qaeda led by Osama bin Laden, training camps of this organization were discovered around Khowst, Afghanistan together with a pharmaceutical plant in Khartoum, Sudan.[256] In a joint press conference with Secretary of State, Madeleine Albright, Sandy Berger, President Clinton's National Security Adviser (NSA), declared: "I think it is appropriate, under Article 51 of the UN Charter, for protecting the self-defence of the United States … for us to try and disrupt and destroy those kinds of military terrorist targets."[257] Berger's choice of words referring to the need to destroy terrorist military targets without pointing to any specific country that might find itself as the target of an US attack, led some legal experts to conclude that while supporting America's right to destroy targets threating US security, the National Security Adviser implicitly admitted that the US had not been attacked by either Afghanistan or Sudan. Nevertheless, Berger was advocating for America's right to recur to force against countries harboring or aiding terrorist organizations.[258]

Following the 9/11 attacks, the US put forward several arguments[259] to justify its recourse to force in self-defense in Afghanistan. These arguments have been rebuffed by its critiques for whom the recourse to force was:

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[253] Michael Byers, *War Law*, p. 62.
[254] Christine Gray, *International Law and the Use of Force*, p. 203.
[255] Malcolm N. Shaw, *International Law*, p. 1134.
[256] Michael Byers, *War Law*, p. 63.
[257] Madeleine Albright and Sandy Berger, "Press Briefing by Secretary of State Madeleine Albright and National Security Advisor Sandy Berger" (press briefing, Washington, D.C., August 20, 1998), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/271184 (accessed August 26, 2020).
[258] Michael Byers, *War Law*, p. 63.
[259] For an overview of the six arguments (and the reply put forward by the US), see Thomas M. Franck, "Terrorism and the Right of Self-defense," *American Journal of International Law* 95, no. 4 (October 2001): 839-843.

(1) a violation of Article 2(4) of the UN Charter prohibiting the use of force in international affairs unless explicitly authorized by the UNSC under Chapter VII;[260]

(2) not allowed after the actual attack took place, i.e., after 9/11. The US claimed that self-defense was, indeed, allowed since neither the *travaux preparatoires* of the UN Charter, nor the actual text of the Charter mentioned anything about self-defense not being allowed after the actual attack. The argument followed, the immediacy requirement regarding the response was therefore the result of a misunderstanding of the criteria for preemptive self-defense following the Caroline incident whose principles were, in any way, applicable only to anticipatory self-defense. Last but not least, even after 9/11, anticipatory self-defense was applicable given that Osama bin Laden pledged to continue his attacks against the United States even after the September 11 attacks.[261]

(3) the right to self-defense can be exercised only against another state and Al Qaeda, the terrorist organization behind the 9/11 attacks, was neither a state nor the government of a state.[262] The US argued that the statehood requirement was not stipulated in the UN Charter[263] since the Charter only stipulated an armed attack as prerequisite for the exercise of the right to self-defense. Moreover, according to the US, UNSC Resolutions 1368 and 1373 stipulated America's right to self-defense after 9/11. What is more, in the words of John Yoo (Justice Department, Office of Legal Counsel (OLC), Bush Administration)

> Nations should decide whether war exists. It is their populations under threat, their armed forces that maintain peace and security, and their intelligence and security agencies that will defeat those who threaten them. Al Qaeda's defeat will certainly not come at the hands of the United Nations, nor at the hands of the many nations in the UN General Assembly and other UN institutions that have no assets or forces to contribute.[264]

Following this reasoning, it is up to the states to decide when, where, and how to use military force. The UNSC's role in maintaining international peace and security (a cornerstone of the post-World War II (WWII) international security architecture) becomes, at best, secondary to the will of individual states. The use of force depends on military capabilities and not on its lawfulness. War therefore belongs to those with the resources to wage it. To put it bluntly,

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[260] For the counterargument, see Ibid., pp. 839-40.
[261] Ibid., p. 840.
[262] For the role of government, see International Committee of the Red Cross, "How Does Law Protect in War? - ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory," https://casebook.icrc.org/case-study/icjisrael-separation-wallsecurity-fence-occupied-palestinian-territory (accessed March 2, 2020).
[263]For more information, see also Marko Milanovic, "Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum," EJIL: Talk! - Blog of the European Journal of International Law, entry posted February 21, 2010, https://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/ (accessed March 2, 2020).
[264] John Yoo, *War by Other Means*, p. 15.

war is what happens in real life, rather than a legal concept. In this case, war is what is necessary to prevent another attack on US soil following the 9/11 events. Again, John Yoo echoes the view of the Bush Administration: "What President would put America's image in the United Nations above the protection of thousands of innocent civilian lives?"[265]

A few words about the right to self-defense against non-state actors are in order. Even though terrorism was no new phenomenon prior to September 11, the 9/11 attacks made evident the ability of a non-State actor (which was neither a State's *de facto* regime nor an insurgency group) to transform civilian objectives into weapons capable of inflicting large scale violence and a significant number of casualties. The right of individual or collective self-defense against non-State actors was thus one of the main legal questions following September 11. Several other factors added to the already complicated legal setting: (1) Al Qaeda's network structure (making it a non-State actor with no territory of its own, but with strong ties with the Taliban regime in Afghanistan); (2) the time element (i.e. the attack was not ongoing in October 2001 when the US started its military reprisal against Al Qaeda); (3) the proportionality requirement regarding the magnitude of the force employed; (4) Resolution 1373 (2001) which to some legal experts might have superseded America's right to self-defense.[266] Political circumstances, the actors involved as well as the attacks' magnitude were the factors that contributed to the UNSC labeling the September 11 attacks "a threat to international peace."[267]

In a subsequent resolution (Resolution 1540 of 2004) the UNSC expressed its concern regarding the threat of terrorism and the risk posed by non-State actors that could "acquire, develop, traffic in or use nuclear, chemical and biological weapons."[268] The UNSC thus decided that any State "shall adopt and enforce appropriate effective laws which prohibit any non - State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons … as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them."[269] Terrorist groups conducting an attack with weapons of mass destruction (WMDs) is a perfect example to

[265] Ibid., p. 45.
[266] For an overview of these four factors, see Markus Wagner, "Non-State Actors," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: July 2013, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1445?rskey=yANLz2&result=1&prd=MPIL (accessed July 30, 2020), para. 26.
[267] See Resolution 1368 (2001).
[268] United Nations Security Council, *Security Council resolution 1540 (2004) [concerning weapons of massive destruction]*, April 28, 2004, S/RES/1540 (2004), https://www.refworld.org/docid/411366744.html (accessed August 26, 2020).
[269] Ibid., para. 2, pp. 2-3.

support the claim that the significance of non-State actors for international law is not to be underestimated and IL should be ready to provide a legal framework.[270] It must be outlined that, prior to 9/11, preemptive use of force against non-State actors had not been supported (even in instances such as the Israeli attack on the headquarters of the Palestinian Liberation Movement outside of Tunis, when the UNSC labeled the attack as a "threat to peace and security in the Mediterranean region."[271])

(4) The right to self-defense can be exercised only against the actual attacker. In this case, against Al Qaeda and not the Taliban. America's response was based on Dumbarton Oaks and China's definition of aggression, the definition of state responsibility as provided by the International Law Commission, and UNSC Resolution 1368.[272]

(5) According to the UN Charter, the right to self-defense can be exercised only "until the Security Council has taken measures necessary to maintain international peace and security;"[273] the UNSC had done so on September 28, 2001 via Resolution 1373. The US argued that the right to self-defense could be superseded only after the UNSC actually invoked collective self-defense / action and the UNSC had not done so in Resolution 1373 (covering only the responsibility for acts of terrorism).[274]

(6) The right to self-defense can be exercised upon providing proof that it was directed against the perpetrator of an armed attack and the US failed to provide such proof regarding the Taliban regime in Afghanistan.[275]

The American position can therefore be summarized as follows: a state can lawfully invoke the right to self-defense to respond to attacks prior to them taking place; if hostilities are ongoing and a state already lawfully resorted to self-defense then that state can continue to rely on this right; a state is bound to determine that a nonconsenting state fulfills the

[270] Markus Wagner, "Non-State Actors," para. 26.
[271] In that case, the UNSC decided the following: "*Considering* that the Israeli Government claimed responsibility for the attack as soon as it had been carried out, 1. *Condemns vigorously* the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct; 2. *Demands* that Israel refrain from perpetrating such acts of aggression or from the threat to do so; 3. *Urgently requests* the States Members of the United Nations to take measures to dissuade Israel from resorting to such acts against the sovereignty and territorial integrity of all States." United Nations Security Council, *Security Council resolution 573 (1985) [Israel-Tunisia]*, October 4, 1985, S/RES/573 (1985), https://www.refworld.org/docid/3b00f175c.html (accessed August 26, 2020). For further information, see Markus Wagner, "Non-State Actors," para. 26.
[272] Thomas M. Franck, "Terrorism and the Right of Self-defense," p. 841.
[273] Article 51, UN Charter.
[274] Thomas M. Franck, "Terrorism and the Right of Self-defense," p. 841.
[275] For the rebuttal, see Ibid., pp. 842-3.

criteria of "unable and unwilling"[276] to address a certain threat prior to being able to invoke self-defense and start an armed attack against the territory of the nonconsenting party.[277]

Terrorism, International Humanitarian Law, and US Practice in the Framework of the Global War on Terror

Regarding IHL and terrorism, it is important to outline that international humanitarian law prohibits acts of terrorism,[278] even in the absence of an international treaty prohibiting terrorism.[279] Article 51(2) of API prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population."[280] Moreover, as per the ICRC, the prohibition to spread terror is a norm of customary international law applicable to both IACs and NIACs.[281] Terrorists target civilians indiscriminately (such as in the case of the September 11 attacks), infiltrate civilian population to camouflage themselves or even use civilians as human shields, therefore exposing them to being wounded or even killed.[282] In every aspect of their *modus operandi*, terrorists disregard IHL.[283]

Therefore, IHL prohibits terrorism since it breaches one of the core premises of humanitarian law, namely the protection of civilians. As previously made evident, the

[276] "If the State, in whose territory a group which has perpetrated a terrorist attack against another State is located, is prepared to take effective action against that group, then military action in that territory by the victim of the terrorist attack cannot be regarded as necessary. Only if the former State has shown itself to be unwilling (or, perhaps, unable) to act effectively against the group it can be said that military action in its territory in the exercise of the right of self-defence meets the criterion of necessity." Christopher Greenwood, "Self-Defence," para. 18.
[277] Kristina Daugirdas and Julian Davis Mortenson, "US Drone Strike Kills Taliban Leader in Pakistan," *American Journal of International Law* 110, no. 4 (2016): 811-814, p. 813.
[278] For an overview on IHL and terrorism, see International Committee of the Red Cross, "Challenges for IHL - terrorism: overview," October 29, 2010, https://www.icrc.org/en/document/challenges-ihl-terrorism (accessed March 3, 2020).
[279] One attempt has been made at concluding such a treaty: the Convention for the Prevention and Punishment of Terrorism was drafted in 1937 by the League of Nations, but never entered into force. Differences about the actual definition of the term "terrorism" are currently blocking the negotiations on a Comprehensive Convention on International Terrorism. The 1937 Convention defined the term as "criminal acts directed against a State or intended to create a state of terror in the minds of particular persons, or a group of persons or the general public" without specifying which acts of terrorism are criminalized. This situation notwithstanding countries do criminalize terrorism via their internal criminal systems. For more information, see Hans-Peter Gasser, "Acts of Terror, "Terrorism" and International Humanitarian Law," p. 552 (citation from the same page). Another attempt at introducing the term terrorism in an international treaty took place during the drafting of the Rome Statute of the International Criminal Court. The United States considered that the term was not properly defined and therefore opposed its introduction into the ICC Statute. Gabor Rona, "Interesting Times for International Humanitarian Law," p. 62.
[280] Article 51(2), Protocol I to the GCs, June 8, 1977, https://ihl-databases.icrc.org/ihl/WebART/470-750065 (accessed February 5, 2019).
[281] International Committee of the Red Cross, "IHL Database - Customary IHL: Rule 2. Violence Aimed at Spreading Terror among the Civilian Population," https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule2 (accessed February 5, 2019).
[282] François Bugnion, "Terrorism and International Humanitarian Law," p. 48.
[283] Dan Belz, "Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?," pp. 97-98.

principle of distinction, one of the core principles of IHL, calls for the parties to an armed conflict to distinguish between civilian and military personnel and civilian property and military objectives.[284] Consequently, only "combatants, civilians who directly participate in hostilities for such time as they directly participate, possibly members of armed groups (according to the ICRC only if they have a continuous fighting function), and military objectives may be attacked."[285] Not distinguishing between the military and civilians renders the principle of distinction irrelevant. A particular case in point is the distinction between civilian and military objectives since an "object becomes a military objective by virtue of its use by the enemy or potential use by the attacker rather than by virtue of its intrinsic character, …."[286] The definition of a military objective is provided in Article 52(2) AP I. An object is a military object if it passes a two-pronged test. According to the first criterion the object must effectively contribute to the enemy's military actions.[287] The second criterion concerns "the object's destruction, capture, or neutralization."[288]

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[284] Dominik Steiger, "Civilian Objects," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: March 2011, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e267?rskey=aCPUWt&result=1&prd=MPIL (accessed July 30, 2020), para. 2.

[285] Marco Sassòli, "Military Objectives," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: September 2015, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e334?rskey=0MfaPP&result=1&prd=MPIL (accessed July 30, 2020), para. 1.

[286] Ibid., para. 3.

[287] "This turns on an object's '**nature, location, purpose or use**'. '**Nature**' refers to the intrinsic character of the object. '**Location**' admits that an object may be a military objective simply because it is situated in an area that is a legitimate target. When signing or ratifying AP I, the United Kingdom ('UK'), Canada, Germany, the Netherlands, and the United States of America ('US') clarified their understandings that a specific area of land may be a military objective if its total or partial destruction, capture, or neutralization in the circumstances ruling at the time offers a definite military advantage. However, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has found that a distinction between areas or zones as civilian or military in nature must be made on a case-by-case basis. Considering entire areas as military zones in which any objective can be lawfully targeted does not respect the principle of distinction (Prosecutor v Milošević paras 52–54). '**Purpose**' refers to the enemy's intended future use, based upon reasonable belief. A US interpretation goes further by including possible use in the future (US Law of War Manual 209 para. 5.7.6.1). '**Use**' refers to the current function of the object. For example, it is uncontroversial that weapons factories and even extraction industries furnishing raw materials for such industries are military objectives, because they serve the military, albeit indirectly." Ibid., para. 5.

[288] This "**must offer a definite military advantage for the attacking side** … . This may consist in the attacker gaining ground or weakening the fighting ability of enemy armed forces. According to declarations of understanding by the UK, Canada, Belgium, France, Germany, New Zealand, the Netherlands, Italy, Spain, and the US, the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack … . **A direct connection with specific combat operations is not considered to be necessary. An attack as a whole must, however, be a finite event, not to be confused with the entire war**. The Eritrea-Ethiopia Claims Commission therefore went too far when it held that the advantage anticipated from the attack 'must be considered in the context of its relation to the armed conflict as a whole' and includes the potential to end the conflict (Western Front, Aerial Bombardment and Related Claims: Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 between the State of Eritrea and the Federal Democratic Republic of Ethiopia [Partial Award] paras 113 and 121)." Ibid., para. 6.

The protection IHL extends to non-combatants makes all military decisions dependent upon a careful assessment of potential risks to civilians or civilian targets. Therefore, the principle of distinction is strongly intertwined with the principle of proportionality. As Judge Higgins of the ICJ explains, "even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack."[289] In this context, dual-use facilities raise multiple legal questions.[290]

Related to the principle of distinction is the issue of direct or indirect participation in hostilities. From the outset, it must be outlined that all human beings are protected by provisions of international law concerning humane treatment and are entitled to fundamental judicial guarantees.[291] Regarding participation or non-participation, the revolving door principle generally applies.[292]

It must be outlined that the principle of distinction refers strictly to the differentiation between military combatants (there is no combatant status in a non-international armed conflict) and civilians. Civilians can nevertheless find themselves willingly or unwillingly, directly or indirectly involved in conflicts. Whether they are considered civilians or combatants determines the law that is applicable to them. One category raising questions as to the body of law applicable to it is the one of enemy combatants. In the Global War on Terror, the United States employed the concept of enemy combatant to include not only

[289] Judge Higgins cited in Malcolm N. Shaw, *International Law*, p. 1184.
[290] Laurent Gisel, Legal Adviser, ICRC (Report prepared and edited by), "The Principle of Proportionality in the Rules Governing the Conduct of Hostilities Under International Humanitarian Law," International Expert Meeting, June 22-23, 2016, file:///C:/Users/Corina/Downloads/4358_002_expert_meeting_report_web_1.pdf (accessed March 3, 2020), pp. 37-40.
[291] Nils Melzer, "Civilian Participation in Armed Conflict," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: February 2010, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1674?rskey=SCRLX7&result=1&prd=MPIL (accessed July 30, 2020), para. 23.
[292] "The most important consequence of the direct participation of civilians in hostilities is the suspension of their protection against direct attack. The phrase '**unless and for such time**' used in treaty law clarifies that such loss of protection lasts exactly as long as, and cannot begin before, or extend beyond, the corresponding engagement in direct participation in hostilities. This necessarily entails that civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities (so-called 'revolving door' of civilian protection). Accordingly, in the period before or after an engagement in direct participation in hostilities, as well as in the period between such engagements, civilians may not be directly attacked and the use of force against them is governed by the standards of law enforcement. The legal mechanism of the 'revolving door' has been severely criticized. Most notably, it has been held to facilitate the systematic abuse of civilian protection by armed actors operating as 'farmers by day and fighters by night'. This would make it almost impossible to distinguish between peaceful civilians and persons subject to lawful attack and, thus, place uniformed armed forces in an unacceptable operational disadvantage. It should be emphasized, however, that only civilians benefit from the 'revolving door' of protection in the interval between specific combat operations, whereas members of organized armed groups remain legitimate military targets according to the same principles as members of the regular armed forces. The purpose of the 'revolving door' is not, of course, to protect armed actors involved in the conduct of hostilities, but to avoid erroneous and arbitrary attacks against peaceful civilians in situations where doubt, suspicion, and uncertainty are endemic." Ibid., para. 19.

combatants, but also civilians (either directly or indirectly involved in hostilities and captured on the battlefield). In March 2009, the US renounced the concept of enemy combatant, but continued to detain all those providing "substantial support" to the Taliban, Al Qaeda and its associated forces.[293] According to the ICRC Commentary on the GCs

> every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status*; nobody in enemy hands can fall outside the law.[294]

The US, on the other hand, differs in its assessment by claiming that civilians taking part in armed conflicts, apart from losing their civilian status, they also lose any legal protection since they are neither combatants nor civilians.[295]

Regarding international humanitarian law in general, the United States ratified the 1949 Geneva Conventions, but not the two Additional Protocols (the US only signed the two Additional Protocols in December 1977).[296] On February 2002, following the intervention in Afghanistan, the White House confirmed that it considered the Third Geneva Convention applicable to Taliban detainees, but not to Al Qaeda detainees; Taliban detainees, nevertheless, were not to be considered prisoners of war.[297] Moreover, as the Global War on Terror unfolded, in conducting military operations against terrorists, the US and its allies discovered "that 'excessive' endorsement of humanitarian law could hinder their own military efforts, and therefore oppose[d] it."[298] Despite that, as shall be seen in Chapter VI of this research, US decision-makers stated that America guided its actions in the Global War on Terror according to customary principles of IHL.

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[293] For further information, see Noëlle Quénivet, "The "War on Terror" and the Principle of Distinction in International Humanitarian Law," *ACDI* 3, Especial (February 2010): 155-186, pp. 172-3.

[294] International Committee of the Red Cross, "Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Commentary of 1958: Article 4 - Definition of Protected Persons," https://ihl-databases.icrc.org/ihl/COM/380-600007?OpenDocument (accessed February 5, 2019). For more information on the distinction between combatants and non-combatants, especially in the framework of the GWOT, see Noëlle Quénivet, "The "War on Terror" and the Principle of Distinction in International Humanitarian Law," 155-186.

[295] Ibid., p. 166.

[296] For a full review of the United States' participation to international humanitarian law treaties, see International Committee of the Red Cross, "Treaties, States Parties and Commentaries: United States of America," https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=US (accessed March 3, 2020).

[297] White House Office of the Press Secretary, "Fact Sheet: Status of Detainees at Guantanamo," February 7, 2002, The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/279349 (accessed March 3, 2020).

[298] Noëlle Quénivet, "The "War on Terror" and the Principle of Distinction in International Humanitarian Law," p. 157.

As already stated, IHL is applicable exclusively to armed conflicts. To determine IHL's exact applicability, the first step after establishing whether a conflict reached the threshold of an actual armed conflict was to identify whether it was an international armed conflict or a non-international armed conflict. Despite its name, the Global War on Terror was only partially an armed conflict.[299] Experts warned that if the GWOT was to be considered an international armed conflict it would

> serve as a global waiver of domestic and international criminal and human rights laws that regulate, if not prohibit, killing. Turning the whole world into a rhetorical battlefield cannot legally justify, though it may in practice set the stage for, a claimed license to kill people or detain them without recourse to judicial review anytime, anywhere.[300]

Given that Al Qaeda is a terrorist organization, and therefore, a non-state actor, for the war on terror as such to be considered an international armed conflict, military operations should be directed against a transnational group acting on behalf of a foreign state (e.g. the Taliban in Afghanistan).[301] If the GWOT were a NIAC, then this could pose questions as to the applicability of IHL to the conflict in terms of identification of parties (*ratione personae*), identification of territory (*ratione loci*), and the relationship between the armed conflict and certain events (*ratione materiae*).[302] Within the framework of the GWOT, in the particular case of the conflict in Afghanistan, in its early stages, the conflict was an international armed conflict between the US-led coalition and the Taliban government (from October 7, 2001 to June 18, 2002) followed by an internationalized non-international armed conflict between the new Afghan government (supported by the US-led international coalition) and the armed Afghani opposition (from June 19, 2002 onwards).[303]

Chapter Summary: The Law on the Use of Force and the Law of Armed Conflict - Legal Theory and US Practice

Sir Arthur Watts, international lawyer and diplomat, former Chief Legal Adviser to the Foreign Office points to the fact that as States feel obliged to provide legal justifications for their actions this can stand as proof of the relevance of international law. In his own words:

[299] Ibid., p. 156.
[300] Gabor Rona, "Interesting Times for International Humanitarian Law," p. 64.
[301] Thilo Marauhn and Zacharie F Ntoubandi, "Armed Conflict, Non-International," para. 7.
[302] Gabor Rona, "Interesting Times for International Humanitarian Law," pp. 60-62.
[303] Robin Geiß and Michael Siegrist, "Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?," in "Humanitarian Debate: Law, Policy, Action - Conflict in Afghanistan II: Part 2: Law and Humanitarian Action," ed. Vincent Bernard, *International Review of the Red Cross* 93, no. 881 (March 2011): 11-46, pp. 13-16.

> It is striking that virtually without exception States seek always to offer a legal justification for their actions, even in extreme circumstances where the action is manifestly contrary to international law - … However valid or invalid the attempted justification may be, it is the very fact of advancing it which demonstrates the value attached by States to compliance with international law.[304]

Great powers play a special role in shaping international law. Sir Watts draws the attention to the manner in which great powers influence international law:

> Those with real international power seldom pay much attention to the law: for them, rather than international law being the framework, which controls what they may do, it is their actions which shape the law. The constraints imposed by the law can be as unwelcome as they are sometimes unexpected.[305]

This chapter presented an overview of the legal theory and state practice (with a focus on the United States) regarding the two branches of international law part of this research: the law on the use of force and the law of armed conflict. America's practice towards these two branches of international law was analyzed in the framework of the GWOT.

From the very first instances of the Global War on Terror, the Bush Administration exhibited an extensive view on the use of force coupled with a particular interpretation of international humanitarian law which generated controversial policies (as shall be seen in Chapter VI, the Obama Administration followed a similar path). The Bush Administration's expansive interpretation of the use of force in international relations, in general, and the concept of self-defense, in particular, was made evident both in practice (by the October 2001 intervention in Afghanistan and the March 2003 invasion of Iraq), through official governmental documents (such as the 2002 and 2006 National Security Strategies) or through speeches[306] or interviews. In the words of President Bush:

> I believe it is essential - that when we see a threat, we deal with those threats before they became imminent. It's too late if they become imminent. It's too late in this new kind of war ….[307]

After 9/11 the US expanded the understanding of the concept of self-defense to beyond a "response to an attack that is reasonably and evidentially perceived to be imminent"[308] and beyond the Caroline criteria for preemptive self-defense. According to the 2002 NSS, threats

[304] Sir Arthur Watts, "The Importance of International Law," p. 7 (fragment also cited in the Introduction).
[305] Ibid., p. 6 (fragment also cited in the Introduction).
[306] "If we wait for threats to fully materialize, we will have waited too long." George W. Bush, "Commencement Address at the United States Military Academy in West Point, New York" (speech, New York, June 1, 2002), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/211409 (accessed February 5, 2019).
[307] George W. Bush and Tim Russert, "Interview With Tim Russert Broadcast on NBC's 'Meet the Press'," (interview, Washington, D.C., February 7, 2004), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/275960 (accessed August 26, 2020).
[308] Malcolm N. Shaw, *International Law*, p. 1140.

of the magnitude of global terrorism or weapons of mass destruction warrant states to use force preventively in self-defense against enemies such as terrorist organizations (non-state actors) and non-democratic States supporting them. To cope with such threats, the 2002 NSS emphasized America's need for freedom of action: pragmatic, ad-hoc coalitions thus become a key pillar of America's post-9/11 foreign and security policy (see Donald Rumsfeld's "the mission determines the coalition"[309]). A preventive right to self-defense exercised in the name of universal, democratic values thus legitimized America's actions even in the absence of an immediate threat.[310] The 2005 National Defense Strategy acknowledged the customary character of the preemptive right to self-defense, while also underlining that given the "time of unconventional challenges and strategic uncertainty,"[311] states were confronted with a whole new set of challenges (different, for instance, from the ones of the Cold War) and could not wait until those threats materialized and became imminent. As rogue states or terrorists conceal their actions and "the greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend …, even if uncertainty remains as to the time and place of the enemy's attack."[312] Such was the case with the 2003 Iraq invasion justified by the imperative of preventing Saddam Hussein from employing weapons of mass destruction against the US.[313]

The 2006 NSS focused heavily on democracy promotion which became both a value and a security guarantee. The NSS still zealously guarded the need to employ force in anticipatory self-defense.[314] Both Bush era National Security Strategies were particularly conclusive in providing arguments to support the reinterpretation of the right to self-defense

[309] "Let me reemphasize that the mission determines the coalition, and the coalition must not determine the mission. As President Bush has said, the mission is to take the battle to the terrorists, to their networks and to those states and organizations that harbor and assist terrorist networks." *The Washington Post*, "Text: Rumsfeld's Pentagon News Conference," October 18, 2001, https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/rumsfeld_text101801.html (accessed July 11, 2020).

[310] See The National Security Strategy of the United States of America, September 2002, and Alyson J.K. Bailes and Anna Wetter, "Security Strategies," paras. 8-9.

[311] National Defense Strategy of the United States of America, March 2005, p. iii.

[312] The National Security Strategy of the United States of America, September 2002, p.15.

[313] See, for instance, President Bush's warning during his 2003 State of the Union Address: "… let there be no misunderstanding: If Saddam Hussein does not fully disarm, for the safety of our people and for the peace of the world, we will lead a coalition to disarm him." George W. Bush, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 28, 2003), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/211931 (accessed February 24, 2020).

[314] The 2006 NSS establishes as some of America's essential tasks the expansion of "the circle of development by opening societies and building the infrastructure of democracy," the strengthening of "alliances to defeat global terrorism and work to prevent attacks" against the United States and its allies and preventing the country's enemies from threatening America and its allies with weapons of mass destruction. See The National Security Strategy of the United States of America, March 2006, https://history.defense.gov/Portals/70/Documents/nss/nss2006.pdf?ver=2014-06-25-121325-543 (accessed July 11, 2020), p. 1. Further information in Alyson J.K. Bailes and Anna Wetter, "Security Strategies," paras. 8-9.

as traditionally defined by Article 51 of the UN Charter and the customary Caroline criteria in the light of 21st century political developments and new strategic imperatives.[315] Central to this argumentation was the idea that the 9/11 attacks triggered a Global War on Terror of indefinite duration which required new institutional and legal practices.[316]

In his first NSS, President Obama outlined that 21st century challenges could not be met by force alone; too much of a focus on coercion and military force was thus a path to failure. National cohesion and the strengthening of international institutions and international law were, in Obama's view, better suited solutions to such challenges.[317] The "modernization of institutions, strengthening of international norms, and enforcement of international law"[318] were tools towards "promoting a just and sustainable international order."[319] Both Bush and Obama strategies nonetheless exhibited common features such as proactive and interventionist behavior on the international arena.[320]

It must be outlined that such national security strategies have both a political and legal relevance for they

> impose on those who are subject to its guidance, a certain attitude to the law, or an interpretation of the law, or an operational intent that relates to existing law either supportively or in some problematic way. It may also require or inspire the taking of subsequent acts that do have a legal form and/or carry legal consequences.[321]

To sum up, in what concerns the use of force, in general, and the right to self-defense (against non-state actors, in particular), following the 9/11 events

> As a result of the law-making strategies adopted by the United States and heightened concern about terrorism worldwide, the right of self-defence now includes military responses against countries that willingly harbour or support terrorist groups, provided that the terrorist have already struck the responding state. And in accordance with a longstanding consensus - and Article 51 of the UN charter - self-defence can be either individual or collective, so states that have been attacked by terrorists can call on other countries to assist them in their military response. Although previous attempts to establish a right of self-defence against terrorism had

[315] "For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means." The National Security Strategy of the United States of America, September 2002, p. 15.
[316] See both National Security Strategies and Alyson J.K. Bailes and Anna Wetter, "Security Strategies," para. 13.
[317] See National Security Strategy, May 2010, https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (accessed July 11, 2020) and Alyson J.K. Bailes and Anna Wetter, "Security Strategies," para. 9.
[318] National Security Strategy, May 2010, p. 3.
[319] Ibid., p. 12.
[320] Alyson J.K. Bailes and Anna Wetter, "Security Strategies," para. 9.
[321] Ibid., para. 12.

> failed to attract widespread international support, the situation in the aftermath of 11 September 2001 was considerably more conducive. Having now seized the opportunity to establish self-defence as a basis for military action against terrorism, the United States, and other countries, will be able to invoke it again in circumstances which are less grave, and where the responsibility of the targeted state is less clear. This raises the question: where, then, are the limits of this new extension to the right of self-defence?[322]

The US, with its unprecedented military might, is one of the countries best equipped to have an upper hand in an armed conflict. As some legal scholars notice, the consequences of its expansive view on the use of force also reverberate towards international humanitarian law:

> After decades of massive defense spending, the United States is today assured of victory in any war it chooses to fight. High-tech weaponry has reduced the dangers to US personnel, making it easier to sell war to domestic constituencies. As a result, some US politicians had begun - at least until the quagmire in Iraq - to view armed conflict as an attractive foreign policy option in times of domestic scandal or economic decline, rather than the high-risk recourse of last resort. This change in thinking has led to a more cavalier approach to the jus ad bellum, as exemplified by the Bush Doctrine …, and is beginning to have a similar effect on the jus in bello. When war is seen as a tool of foreign policy – Clausewitz's 'politics by other means'- political and financial considerations may distort the balance between military necessity and humanitarian concerns.[323]

Consequently, and especially regarding international humanitarian law, in the case of the US, "political and financial expediency have seemingly influenced the balance between humanitarianism and military necessity, …."[324]

America's actions therefore have longstanding consequences for international law as they contribute to establishing certain precedents. The next chapter, dedicated to reviewing literature relevant for this research and to outlining the theoretical framework and methodological underpinnings of this research, puts forward a theoretical explanation for the approach towards the use of force and international humanitarian law presented throughout this chapter.

[322] Michael Byers, *War Law*, pp. 67-8.
[323] Ibid., p. 120.
[324] Ibid., p. 124.

Chapter II: Literature Review, Theoretical Framework, and Methodological Considerations[1]

This chapter is dedicated to outlining the theoretical framework and the methodological considerations of this research. For this purpose, the chapter shall be organized as follows: (1) literature review of the concept of compliance from both the International Law and International Relations perspectives; (2) literature review on foreign policy analysis and foreign policy decision-making with a focus on the concept of operational code; (3) outline of this research's theoretical model; (4) outline of research methodology.

Compliance can be defined as "the degree to which state behavior conforms to what an agreement prescribes or proscribes."[2] There are multiple nuances to the concept of compliance. First and foremost, a difference must be made between "first-order compliance" or compliance with rules and "second-order compliance" or compliance with international judicial decisions[3] (e.g., rulings of the International Court of Justice). Compliance with international law differs from the implementation of international obligations or the effectiveness of such obligations. If compliance is defined in terms of conformity to agreements, implementation encompasses "state efforts to administer policy directives;"[4] on the other hand, effectiveness does not refer to state behavior but to "the extent to which a treaty solves efforts to administer policy directives."[5] Compliance is just one aspect of a state's support towards international law; the exercise of leadership in law-making and the consent to international agreements together with the internationalization or incorporation of those agreements into a country's domestic legal system[6] are also manifestations of states' support towards IL.

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[1] Some parts of this chapter are from the "PhD Thesis - Draft Prospectus" paper prepared for the International Relations Survey Course, August 2016, Vienna School of International Studies, Convenor: Prof. Markus Kornprobst. The paper was also the basis for the Research Proposal for the "Seminar in International Law (380034)" submitted in November 2016 at the Faculty of Law, University of Vienna; and also for the two proposals submitted to the Doctoral Fellowship Programme of the Austrian Academy of Sciences in September 2016 and September 2017. I want to thank the members of the committee who evaluated the research proposal for the "Seminar in International Law" as well as to the anonymous reviewers who provided feedback to the two proposals for the Doctoral Fellowship Programme of the Austrian Academy of Sciences for their feedback.

[2] Jana von Stein, "The Engines of Compliance," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 477-501, p. 478.

[3] Ibid.

[4] Mark A. Pollack, "Who Supports International Law, and Why?: The United States, the European Union, and the International Legal Order," *International Journal of Constitutional Law* 13, no. 4 (October 2015): 873-900, p. 880.

[5] Ibid.

[6] Internalization can be either social, political or legal. See Harold Hongju Koh, "1998 Frankel Lecture: Bringing International Law Home," *Houston Law Review* 35, no. 3 (Fall 1998): 623-681. For the rebuttal, see

The topic of states' compliance with international law merges the disciplines of International Relations and International Law. Compliance studies emerged at the crossroads of IR theory and international law during the 1970s as part of the literature on international regimes. The scope was to explain states' compliance with international law given the lack of central authority and enforcement mechanisms characteristic of this branch of law. Scholars from both disciplines employed either rationalist or normative models to explain the concept of compliance: in broad terms, states comply with their international obligations if it is in their national interest to do so (rational actor model) and / or if they perceive international norms as legitimate (normative). If rational actor model proponents identify material pressures as determinants of compliance, normative approaches advocates focus on ideas, identity, and persuasion. Nevertheless, both models locate sources of compliance at "interstate, transnational, and local levels."[7]

IR and IL theorists spent decades denying the concept's interdisciplinarity and analyzing compliance from their respective disciplines' perspectives. When reviewing existing literature it can be concluded that the two disciplines were speaking past each other rather than with each other while trying to answer the same question: what governs international affairs? Depending on the discipline, the answer was either international law (for (international) lawyers) or politics, interest or other IR-related variables (for IR scholars). Interestingly enough, in analyzing compliance, the two disciplines consciously or unconsciously borrowed terminology from one another; although not openly accounted for, interdisciplinarity defined the scholarly literature on compliance.

In both disciplines, the study of compliance followed a chronological pattern determined by historical developments. The 20th century witnessed major international law developments. In academia, the end of World War I (WWI) saw the first major debate between IL and the newly established discipline of IR following the 1919 inauguration of the first Chair of International Relations in Aberystwyth. During the 1920s and the 1930s the realists (led by E. H. Carr) labeled the proponents of a world order based on international organizations, international trade, and "domestic democratic governance"[8] as idealists. For the realists, international law was "the weapon of the stronger"[9] amounting to "nothing but a

Robert O. Keohane, "When Does International Law Come Home?," *Houston Law Review* 35, no. 3 (Fall 1998): 699-713.

[7] Beth A. Simmons, "International Law," pp. 353 & 366.

[8] For a more detailed description of the role of international law in the history of international affairs, see Ibid., p. 354.

[9] Edward Hallet Carr, *The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations* (London: MacMillan & Co. Ltd., 1946), p. 176.

function of the political community of nations."[10] Led by US President, Woodrow Wilson, the idealists considered IL a stabilizing, peace-ensuring force in international affairs, the forth pillar of an international order based on democracy, free trade, and international organizations.[11]

Following WWII, the spread of multilateral institutions,[12] "formal international organizations made by multilateral treaty, such as the United Nations, the World Trade Organization, …, and the European Union"[13] gave rise to the "legalization" of international relations.[14] In the post-WWII era IR scholarship focused, for the most part, on the balance of power between the two superpowers, therefore discarding international law. Consequently, IR and IL as scholarly disciplines distanced further apart once political realism established itself as the main International Relations Theory.[15] IR scholars such as Morgenthau[16] or Waltz[17] pointed out that the decentralized nature of international law impeded its enforcement and concluded that "nothing of real *importance* in international relations could be achieved through international law."[18] Interestingly enough, the post-World War II period also witnessed a major change in the character of international law which was no longer based overwhelmingly on state-centric, customary rules, but increasingly on multilateral treaties setting a positivistic legal order of "institutions and constitutions."[19] The end of the Cold War saw the revival of international law, with multiple scholars and decision-makers concurring

[10] Ibid., p. 178.
[11] For more information on the Wilsonian view on international affairs, see Chapters III and IV of this research.
[12] Kenneth W. Abbott and Duncan Snidal, "Why States Act through Formal International Organizations," *The Journal of Conflict Resolution* 42, no. 1 (February 1998): 3-32; Barbara Koremenos, Charles Lipson, and Duncan Snidal, "The Rational Design of International Institutions," *International Organization* 55, no. 4 (Autumn 2001): 761-799.
[13] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 21.
[14] Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, "Introduction: Legalization and World Politics," *International Organization* 54, no. 3 (Summer 2000): 385-399, p. 386.
[15] Harold Hongju Koh, "Why Do Nations Obey International Law?," *The Yale Law Journal* 106, no. 8 (June 1997): 2599-2659, p. 2614.
[16] "… the very structure of international relations – as reflected in political institutions, diplomatic procedures, and legal arrangements – has tended to become at variance with, and in large measure irrelevant to, the reality of international politics." Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 7th ed. (New York: McGraw Hill, 2006), p. 8.
[17] "With many sovereign states, with no system of law enforceable among them, with each state judging its grievances and ambitions according to the dictates of its own reason or desire - conflict, sometimes leading to war, is bound to occur." Kenneth N. Waltz, *Man, The State, and War: A Theoretical Analysis* (New York: Columbia University Press, 1959), p. 159.
[18] Beth A. Simmons, "International Law," p. 355. Their arguments against international law are best summarized by Goldsmith and Posner: international law "lacks a centralized or effective legislature, executive or judiciary; … it favors powerful over weak states; … it often simply mirrors extant international behavior; and … it is sometimes violated with impunity." Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 3.
[19] Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2614.

that IL was better suited than power politics to govern global affairs.[20] During the 1990s, this rediscovered trust in international law also revived the scholarly interest on states' compliance with IL[21] (with a focus on compliance with decisions of international courts).[22]

From the onset, International Relations Theory and International Law approached the concept of compliance from different methodological angles. The more prescriptive IL scholars lean towards normativity. They do not necessarily deny the influence of IR variables (such as state interests) on states' compliance with international law; they simply exhibit confidence in international law's salience over these variables.[23] Their premise is that legal rules do impact state behavior. In their research on the conditions that determine the making of international law, they tend to omit the environment in which international law develops. In their research on IL's application, they tend to omit that this branch of law is not self-executing, but largely dependent upon states' willingness to apply international law. In their overall research, IL scholars favor qualitative methods over quantitative ones;[24] they also borrow IR methodology to shed light on legal conundrum.[25]

The IR perspective, on the other hand, exhibits more explanatory power being more methodologically rigorous and more open towards interdisciplinarity; it also draws on other disciplines (sociology, psychology, economics, history, etc.) to explain compliance with international law as state behavior on the international arena. Initially informed by realist political thinking, IR scholars ignored their IL counterparts for decades. IR scholarship does not see a major difference between legal and non-legal rules (IL scholarship, on the other hand, heavily differentiates between compliance with treaties as legally binding commitments and other commitments of non-binding legal character).[26] Unlike their international law counterparts, IR theorists focus on the environment that conditions the emergence of international law, omitting how IL fits into this (international) environment.[27] Generally, IR

[20] Barbara Delcourt, "Compliance, Theory of," para. 7.
[21] Harold Hongju Koh, "Why Do Nations Obey International Law?," pp. 2600-2601.
[22] Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," in *Handbook of International Relations*, eds. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons (London, Thousand Oaks, New Delhi: Sage, 2002), 538-558, pp. 541-2.
[23] "Mainstream international law scholarship does not deny that states have interests and try to pursue them. But it claims that international law puts a significant brake on the pursuit of these interests." Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 15.
[24] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," *The Yale Law Journal* 111, no. 8 (June 2002): 1935-2042, pp. 1942-3.
[25] Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," p. 538.
[26] Ibid., p. 539.
[27] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," p. 1943.

compliance theorists analyze the factors that motivate state behavior.[28] An IR scholarship theory of compliance is therefore a "theory of the behavioral influence of legal rules."[29]

As mentioned, both IR and IL theoretical approaches to compliance can be divided into rational and normative. Although the rational vs. normative divide is more evident in IR theory than in IL, both disciplines try to explain compliance - or the lack thereof in the case of IR theory - by reference to states' rational actions or the normative salience of international legal rules or norms over state behavior. The rational approach to compliance differs in the two disciplines by the understanding of what rationality entails: if the IL literature constantly equates interest to law thus making compliance the natural behavior of states and law obedience rational state action, in the IR literature rational action presupposes states pursuing interests that differ from legal compliance. The normative approaches, on the other hand, bear striking similarities with each other given their focus on the salience of norms: in the IL literature internalization of norms transforms both domestic and international politics, whereas in the IR literature the presence of certain norms increases states' compliance with international law (e.g., the liberal view that democratic states adhering to liberal values are more inclined to obey international law). The rational actor and normative approaches can also be divided into: (1) instrumental, pertaining to the rational / self-interest approaches on compliance (explaining compliance as the result of fear of retaliation or elevated reputational costs, i.e. comply to avoid shaming and blaming); (2) noninstrumental, pertaining to scholars of international law and the "legalization" camp in IR, explaining compliance as the result of a logic of appropriateness (leaders' belief that a certain behavior is the appropriate one for someone in their position) or as reputation enhancer.[30]

Compliance: International Law Approaches

International law scholars approach compliance as a subfield of the discipline. The overwhelming majority of IL theories take compliance for granted: states either automatically comply with international law due to the salience of this body of law or they will comply once they have properly internalized its provisions.

Traditional legal theory approaches to compliance answer two core questions: why nations obey international law and what should the content of legal rules be?[31] Approaches to

[28] Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," p. 539.
[29] Ibid.
[30] For more information on these two views on compliance, see Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 100.
[31] Barbara Delcourt, "Compliance, Theory of," para. 1.

compliance are based on different legal traditions. The realist tradition stands apart from all other IL approaches as the only one accepting noncompliance as valid state behavior. Inspired by the philosopher John Austin, the realist tradition postulates that states do not comply with international law since it is not actual law (given its lack of enforcement mechanisms that limit its power to influence or constrain state behavior).[32]

Similar to the realist tradition, the Hobbesian utilitarian[33] one lays the basis for the rationalistic IL approach to compliance somehow represented by Louis Henkin, renowned international law and US foreign affairs scholar. Henkin is a *rara avis* - an international lawyer recognizing states' political interests as rational justification for noncompliance. Unlike the proponents of the realist approach, Henkin does recognize international law as law. Nevertheless, he acknowledges that in given instances national interests do prevail over law compliance (which, in legal parlance is labeled as the "cynic's formula"):[34]

> since there is no body to enforce the law, nations will comply with international law only if it is in their interest to do so; they will disregard law or obligation if the advantages of violation outweigh the advantages of observance.[35]

Moral considerations, together with the "habit and inertia of continued compliance,"[36] are variables that pull states towards international law observance. Henkin concludes that compliance with international law is rather the norm than the exception, hence his famous statement: "Almost all nations observe almost all principles of international law and almost all of their obligations almost all the time."[37]

Coming back to the concept of interest, the theory of compliance by coercion developed based on the notion of national interest. States comply with international law only when and if they face serious and credible consequences for non-compliance i.e. only if it is in their best national interest to comply. This makes compliance dependent on other states' ability to credibly "threaten" the non-complying state with retaliation.[38]

Abbott and Setear,[39] two of the few international law scholars interested in IR methodological tools,[40] also developed rationalistic / instrumentalist approaches to

[32] For further information, see Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2611.
[33] Ibid.
[34] Ibid., p. 2603.
[35] Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. (New York: Columbia University Press, 1979), p. 49.
[36] Ibid., pp. 49 & 58-63.
[37] Ibid., p. 47.
[38] For an overview of the role of coercion in states' compliance with international law, see Beth A. Simmons, "International Law," pp. 366-367.
[39] Kenneth W. Abbott, "Modem International Relations Theory: A Prospectus for International Lawyers," *Yale Journal of International Law* 14, no. 2 (1989): 335-411; Harold Hongju Koh, Kenneth W. Abbott, and Oran R.

compliance.[41] Other IL scholars basing their approach to compliance on the rational actor model are Jack Goldsmith, Eric Posner (see *The Limits of International Law*) or Andrew Guzman. In his reputational model theory, Andrew Guzman identifies reciprocity and reputation as sources of compliance. Unlike in the compliance-by-coercion theory, in Guzman's self-enforcing agreement theory, treaties are rather enforced by the threats of withdrawing from certain agreements or the risk of diminishing benefits than by sanctions from third parties.[42] Reciprocity-based self-enforcing agreements have been the object of research especially in relation to trade agreements and institutions (such as the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization - WTO), and the laws of war.[43] Guzman portrays state action as the result of legal power and interests: states consent to IL because of its legal power, i.e. binding character; consent is the only mechanism at their disposal to pursue their interest of avoiding the costs on noncompliance. Compliance is guaranteed for as long as the costs of noncompliance outweigh the costs of compliance.[44] Guzman premises that the elevated status of international law makes noncompliance costly in terms of reputational costs.[45] His argument presents states as self-interested actors that fear the reputational consequences they might face if they fail to comply with their obligations. He concludes that "[b]y developing and preserving a good reputation, states are able to extract greater concessions for future promises."[46]

The liberal, Kantian philosophical strand according to which nations obey international law because of ethical and moral considerations streaming from the natural law tradition and the concept of justice[47] situates itself in between rationalistic and constructivist approaches to compliance. This model explains compliance as a combination of

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Young, "Elements of a Joint Discipline," *Proceedings of the Annual Meeting (American Society of International Law)* 86 (April 1-4, 1992): 167-175; John K. Setear, "An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law," *Harvard International Law Journal* 37, no.1 (Winter 1996): 139-229.

[40] Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," *American Journal of International Law* 92, no. 3 (1998): 367-397; Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda," *The American Journal of International Law* 87, no. 2 (April 1993): 205-239.

[41] Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2632.

[42] Beth A. Simmons, "International Law," p. 367.

[43] Judith Goldstein, Douglas Rivers, and Michael Tomz, "Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade," *International Organization* 61, no. 1 (Winter 2007): 37-67; James D. Morrow, "When Do States Follow the Laws of War?," *The American Political Science Review* 101, no. 3 (August 2007): 559-572.

[44] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," pp. 1949-50.

[45] Beth A. Simmons, "International Law," p. 369.

[46] Andrew T. Guzman, "A Compliance-Based Theory of International Law," *California Law Review* 90, no. 6 (December 2002): 1823-1887, p. 1886.

[47] Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2611.

judicialization and legalization: states comply with the legal norms they themselves created because they were part of the framing process and consequently they perceive those rules as beneficial to their interests.[48] Brierly identifies the consent states give during the creation of new rules of international law as compliance generator.[49] States' behavior is also dependent upon its internal constitution - the regime type of a country directly influences compliance. Noncompliance arises once norms and states' interests no longer converge.

The Kantian, philosophical tradition, inspired Thomas Franck's theory of legitimacy. If states perceive that international law is the result of a legitimate process, the argument goes, then IL generates a greater pull towards compliance.[50] Thomas Franck's legitimacy model answers the question of "Why do powerful nations obey powerless rules?"[51] Why rules should be complied with as long as they lack "*an effective structure of coercion comparable to a national police force*?"[52] His answer is: "Because they perceive the rule and its institutional penumbra to have high degree of legitimacy."[53] Consequently, "compliance occurs when rules are legitimate and just."[54] The inherent characteristics of legal rules (such as fairness)[55] determine their legitimacy (which is defined as "that quality of a rule which *derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with the right process*").[56] Illegitimate rules lack "compliance pull."[57]

Legitimacy theory is at the crossroads of liberal and constructivist approaches to compliance focusing on the legitimacy of international law as a social institution, but also on identity, legitimacy, socialization, and persuasion as compliance generators.[58] The managerial model developed by Chayes and Chayes emphasizes that "compliance is due to a norm of

[48] On the other hand, Stanley Hoffmann draws the attention to the fact that powers seek to enshrine their interests into law. Hoffmann states that "[s]ince every Power wants to turn its interests, ideas and gains into law, a study of the "legal strategies" of the various units, i.e., of what kinds of norms they try to promote, and through what techniques, may be as fruitful for the political scientist as a study of more purely diplomatic, military or economic strategies." Stanley Hoffmann, "The Study of International Law and the Theory of International Relations," *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 57 (April 25-27, 1963): 26-35, p. 33.

[49] James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford: Clarendon Press, 1963), pp. 51-54, cited in Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 15.

[50] Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990), pp. 24-25.

[51] Ibid., p. 3, cited in Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2628.

[52] Thomas M. Franck, "Legitimacy in the International System," *The American Journal of International Law* 82, no. 4 (October 1988): 705-759, p. 707.

[53] Thomas M. Franck, *The Power of Legitimacy Among Nations*, p. 25, cited in Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2628.

[54] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," p. 1958.

[55] Barbara Delcourt, "Compliance, Theory of," para. 10.

[56] Thomas M. Franck, "Legitimacy in the International System," p. 706.

[57] Ibid., pp. 712-713 & 726.

[58] Beth A. Simmons, "International Law," p. 369.

compliance and fostered by persuasive discourse."[59] States obey their legal obligations because treaties ensure transparency, have dispute settlement mechanisms embedded in them and provide technical assistance, i.e., capacity building. These three elements are merged into an effort to persuade the non-compliant part to comply; persuasion thus becomes "the characteristic method by which international regimes seek to induce compliance."[60] This model therefore identifies "three sorts of considerations that lend plausibility to the assumption of a propensity to comply: efficiency, interests, and norms."[61] Treaty regimes, therefore, act as managers.[62] The managerial model of compliance, starting from the premise that states have a natural tendency to comply, sparked a debate about the sources of compliance with the proponents of enforcement theory (or the political economy theory of compliance). Downs, Rocke, and Barsoom focused on the strategic dimensions of cooperation regarding compliance.[63] The debate between managerialists versus enforcement theorists revolved around law as rule or law as process, law as an element to be embraced or enforced, and law as an instrument in the hands of its makers or as autonomous entity.[64]

Political philosopher Jeremy Bentham inspired the process-based approach to compliance: countries comply with international law because they engage in a discursive legal process which generates the internalization of international norms.[65] Koh therefore puts forward a distinct theory of obedience according to which compliance is dependent upon a three stage transitional legal process (interaction, interpretation, and internalization) that generates the incorporation of norms into countries' domestic legal systems.[66] In his transnational model, Harold Hongju Koh[67] departs from the managerial and legitimacy models. Even though he acknowledges the fairness of international norms as consequential in

[59] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," p. 1955.
[60] Abraham Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Law Regulatory Agreements* (Cambridge, Massachusetts: Harvard University Press, 1995), p. 25.
[61] Ibid., p. 4.
[62] Barbara Delcourt, "Compliance, Theory of," para. 9.
[63] George W. Downs, David M. Rocke, and Peter N. Barsoom, "Is The Good News About Compliance Good News About Cooperation?," *International Organization* 50, no. 3 (Summer 1996): 379-406.
[64] Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," p. 543.
[65] Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2611.
[66] Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," p. 544.
[67] Apart from an esteemed academic career at Yale (where he reached to the level of Law School Dean), Harold Hongju Koh worked for the State Department as Assistant Secretary of State for Democracy, Human Rights, and Labor (between November 1998 and January 2001) and as State Department Legal Adviser during the first Obama Administration. During his time as State Department Legal Adviser Harold Hongju Koh was a supporter of President Obama's targeted killings campaigns. For a full biography, see Yale Law School, "Harold Hongju Koh: Sterling Professor of International Law," https://law.yale.edu/harold-hongju-koh (accessed October 29, 2019).

ensuring compliance and outlines once more how legal regimes act as managers he premises that neither is the determinant factor ensuring compliance. Compliance, which Koh equates with obedience "occurs because norms are internalized."[68] It is ensured via a process of norm internalization, i.e., by states' "participation in transnational legal process" which "creates a normative and constitutive dynamic."[69] In a circular argument, Koh uses compliance to explain compliance: "repeated compliance"[70] helps countries internalize norms. Once the process of internalization makes norms penetrate countries' legal systems compliance becomes "habitual obedience."[71] The process of interpretation of global norms together with their internationalization into a country's domestic law determines the reconstruction of national interests and identities. Koh's model explains the "transformative influence of law on social activities and institutions within the domestic sphere, which affects traditional ways of doing politics."[72] This model is strikingly similar to the IR constructivist approach to compliance which encompasses cultural differences to "explain variations in the nature and reach of international law."[73]

The above international law approaches to compliance (with the exception of the rationalistic approach to international law) premise that international law influences states' behavior. IL does not even need to forcefully constrain state behavior: Franck's pull towards compliance is, to a certain extent, presupposed by all IL approaches. The causal link between any independent variable and compliance with international law as dependent variable is both straightforward and circular: at the end of the day, states comply with international law due to its salience. It is precisely this issue of causality that International Relations theory explores in depth and with a stronger methodological focus. The starting point for IR theory regarding compliance is the question of whether, indeed, a clear correlation can be identified between compliance as state behavior and international law.[74]

Compliance: International Relations Theory Approaches

International Relations theories on compliance can be divided into realist, institutionalist / liberal, and normative. Unlike international law approaches taking compliance for granted or chastising states' behavior not in accordance with international norms, IR approaches aim at

[68] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," p. 1960.
[69] Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2659.
[70] Ibid., p. 2603.
[71] Ibid.
[72] Barbara Delcourt, "Compliance, Theory of," para. 12.
[73] Ibid. Also see Asher Alkoby, "Theories of Compliance with International Law and the Challenge of Cultural Difference," *Journal of International Law and International Relations* 4, no. 1 (2008): 151-198.
[74] Barbara Delcourt, "Compliance, Theory of," para. 4.

explaining the reasons behind states' behavior of compliance or non-compliance with international law. IR Theory approaches provide different views as to "when, how, and why states comply with international agreements."[75] The reasons behind joining international treaties / regimes / etc. and the rationale for compliance with international norms are the two recurrent questions IR approaches to compliance try to answer.[76]

Just as with IL theories, realism places power and interest at the center of states' international behavior. State interest is the main determinant of compliance - if a national interest exists, states comply with international law even in the absence of a legally binding treaty. Variables such as a treaty's legal status or differences between and changes in the states' domestic political systems bear no weight on compliance. Unlike IL scholars, realists deny the autonomous influence of international institutions on state behavior: international institutions exist only to mirror the distribution of power between states on the international arena.[77] For liberals, states' interests are still central to state behavior meaning that they provide a reason for them to cooperate as part of international institutions. Effective institutions clarify legal obligations and help enforce agreements thereby overcoming "naked self-interest."[78] The domestic political system of states, i.e., regime type, influences compliance: democracies are more prone to comply given that domestic democratic institutions help (re)enforce IL.[79] For constructivists, norms constitute interests and states' compliance with international law is the direct result of norms' internalization. Again, the regime type impacts compliance: in democracies civil society has a stronger voice as well as the ability to legitimize certain values. The constructivist IR approach to compliance is the closest to the normative IL approach to the concept: constructivists tend to take compliance as a given; non-compliance is generated by external variables such as conflicts between norms, their incomplete internalization or states' inability to carry out legal obligations.[80]

Just as in the case of international law literature, International Relations Theory approaches to IL, its effectiveness, and compliance with its provisions can be divided into rational actor and normative.[81] IR's approach to compliance evolved chronologically. For the most part of the Cold War, when the imperatives of international affairs made realism the

[75] James D. Morrow, "When Do States Follow the Laws of War?," p. 560.
[76] Barbara Delcourt, "Compliance, Theory of," paras. 1-5.
[77] James D. Morrow, "When Do States Follow the Laws of War?," p. 560.
[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] Rational actor models (pp. 1944-1955) and normative models (pp. 1955-1962) in Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?."

dominant IR theory, key realist proponents such as John Mearsheimer or Kenneth Waltz did not consider international law to be a separate discipline from International Relations. IL was not perceived as a driving force in international affairs (or law at all!) and therefore not part of any research agenda.[82] International law was a mere tool in the hands of self-interested states pursuing their objectives rationally. Realists were the first proponents of the rational actor model. In the realist worldview, compliance equals coincidence with the national interest: it occurs when it coincides with a state interest rather than because international legal rules exert influence over states' behavior.[83]

In the 1970s, the English School explained international cooperation without specifically focusing on international law.[84] In the same vein as early constructivists (Ruggie or Kratochwill 1989), English School scholars such as Hedley Bull focused initially on norms and only subsequently on law. Two decades later, this normative approach on compliance complemented by Franck's legitimacy theory or Checkel's studies, dominated the post-Cold War IR studies on compliance.[85] The initial focus on international cooperation came in the 1970s from institutionalists employing the rational choice model[86] to explain the formation of international institutions and regimes. It was during this period that compliance studies became a focus of both IR and IL scholarly literature. For institutionalists compliance is a "winning long-term strategy to obtain self-interested goals."[87] This rationalistic (Hobbesian utilitarian)[88] approach conditions IL compliance by the existence of a state interest. International political economists and liberal institutionalists from Thomas Schelling to Robert Keohane, Duncan Snidal, Robert Axelrod, Oran Young or Kenneth A. Oye[89] developed institutionalist theories to explain cooperation within international institutions in the absence of a law maker or enforcer. In the framework of the Cold War, those scholars

[82] John Mearsheimer, *The Tragedy of Great Power Politics* (New York: Norton, 2001) and Kenneth Waltz, *Theory of International Politics* (Reading, Mass.: Addison-Wesley, 1979), cited in Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 16.
[83] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," pp. 1944-1947.
[84] See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1977), cited in Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 16.
[85] For more information on the authors mentioned, see Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," p. 544.
[86] For more information, see Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 16
[87] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," p. 1949.
[88] Information about the rationalistic (Hobbesian utilitarian) approach from Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2611.
[89] Thomas Schelling, *The Strategy of Conflict* (Cambridge, Massachusetts: Harvard University Press, 1963); Robert O. Keohane, *After Hegemony* (Princeton, New Jersey: Princeton University Press, 1984); Duncan Snidal, "Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes," *American Political Science Review* 79, no. 4 (December 1985): 923-942; Kenneth A. Oye, *Cooperation under Anarchy* (Princeton, New Jersey: Princeton University Press, 1986).

tried to explain the persistence of cooperation among states despite strategic imperatives. They studied primarily instances of international cooperation within international organizations (e.g., cooperation in peacekeeping missions). During the 1970s and 1980s, rationalists provided a "functionalist analysis of why nations obey international law."[90] Compliance with international regimes was the consequence of functional cooperation benefits: cooperation generating compliance was a rational outcome to be explained without hardly any reference to law.[91]

Regime theorists' goal is to explain the rationale behind the creation of international institutions / regimes and their influence on state behavior.[92] Regime theorists start from the liberal view that international institutions do influence state behavior. Stephen Krasner defines international regimes as "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international law."[93] States join international regimes as the result of a rational decision-making process. The broad definition given to international regimes reflects the growth in number and scope in international institutions characteristic of the second half of the Cold War, proliferation which implicitly led to the increase in number of new (legal) norms regulating international affairs.[94] The international regimes literature of the 1970s and 1980s Krasner pioneered observed that as anarchic as the international system may be, it is also highly organized in the form of international regimes. The question of conformity of states with these international regimes absent a central enforcing authority laid the ground for this strand of research.[95] In a similar rationalist / functionalist vein, Keohane explains states' demand for international regimes since they "facilitate the making of substantive agreements by providing a framework for rules, norms, principles, and procedures for negotiation."[96] Regimes allow states to cooperate in pursuit of their goals.[97] For Keohane, international regimes diminish transaction costs and reduce uncertainty by creating centers where states could coordinate policies together with their behavior on the international arena. Therefore,

[90] Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2625.
[91] Ibid.
[92] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," p. 1947.
[93] Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International Organization* 36, no. 2 (Spring 1982): 185-205, p. 186.
[94] Barbara Delcourt, "Compliance, Theory of," para. 6.
[95] Ibid.
[96] Robert O. Keohane, "The Demand for International Regimes," *International Organization* 36, no. 2 (Spring 1982): 325-355, p. 337.
[97] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," p. 1948.

"rational calculation under varying circumstances" accounts for "fluctuations over time in the number, extent, and strength of international regimes."[98]

International law gained a life of its own in IR Theory with the increased legalization of international affairs.[99] As Goldstein *et al*. point out in the introduction to the 2000 special issue of *International Organization* on legalization and international politics, "the world is witnessing a move to law"[100] with the increasing legalization of world politics. As it stands out from the regime theory literature, the beginnings of IR approaches to compliance hardly ever include references to law.[101] The literature on legalization challenges the classical dichotomy between realists and idealists in IR theory. This body of literature merging international relations and international law flourished in the 1980s and especially after the Cold Was because of the increasing cooperation between states in multiple domains, cooperation that yielded the need for legal norms that would regulate states' behavior. These legal obligations of states in international affairs acquired the status of autonomous international obligations that generated patterns of behavior on the international arena therefore influencing state behavior.[102] With legalization theory IR scholars reconceptualize international institutions by specifically including international law into their analyses. The questions posed by legalization and regime theorists are similar to the general questions IR scholars pose regarding states' compliance with international law: why join (international regimes) and why comply (with international law)?[103]

Kenneth Abbott *et al*. describe levels of legalization (from highly to weakly legalized and non-legalized) based on different elements of legalization (obligation, precision, and delegation). They conclude that there is "no bright line dividing legalized from nonlegalized institutions"[104] and that international institutions are "less highly legalized than institutions in domestic rule-of-law states."[105] In a different piece, Kenneth Abbott and Duncan Snidal differentiate between soft and hard legalization. Identifying hard law as precise legally binding obligations with the ability to "delegate authority for interpreting and implementing

[98] Robert O. Keohane, "The Demand for International Regimes," p. 326.
[99] Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, "Introduction: Legalization and World Politics," 385-399.
[100] Ibid., p. 385.
[101] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," p. 1949.
[102] Barbara Delcourt, "Compliance, Theory of," paras. 3-4.
[103] Ibid., paras. 1-6.
[104] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, "The Concept of Legalization," *International Organization* 54, no. 3 (Summer 2000): 401-419, p. 418.
[105] Ibid., p. 402.

law"[106] they conclude that international actors are rational actors when deciding to enter into these agreements. Their rationality is based on a calculation of costs (restrictions on their behavior and sovereignty) and benefits (reduced transaction costs, the expansion of their alternative political strategies and solutions to "problems of incomplete contracting)."[107]

Koremenos, Lipson, and Snidal, discuss the variation of institutional features such as "membership, scope, centralization, control, and flexibility."[108] Their research is part of the literature on regime design which seeks to answer Mitchell's very straight forward question: "Why do states design regimes the way they do?"[109] They define international institutions (i.e. international organizations or arrangements) as "*explicit arrangements, negotiated among international actors that prescribe, proscribe, and / or authorize behavior*."[110] They find that design differences can be accounted for as "the result of rational, purposive interactions among states … to solve specific problems"[111] and that "*states use international institutions to further their own goals, and they design institutions accordingly*."[112] In a different piece, Koremenos explains that states try to cope with uncertainty under anarchy when they negotiate and enter into international agreements that they themselves design with loopholes meant to help them elude obligations. "[B]ecause agreements matter, they are designed in rational ways"[113] by states trying to provide themselves with an "international insurance" when they "include the proper amount of flexibility"[114] in the agreements.

Inspired by a Kantian view on international affairs, for liberal IR theorists compliance is the "by-product of domestic politics."[115] Unlike for the realist and institutionalist strands identifying states as unitary and rational agents, liberal institutionalists focus on domestic political processes. They portray states as the sum of different parts (domestic institutions, interest groups, political leaders, etc.) whose international actions cannot be properly

[106] Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (Summer 2000): 421-456, p. 421.
[107] Ibid., p. 422.
[108] Barbara Koremenos, Charles Lipson, and Duncan Snidal, "The Rational Design of International Institutions," p. 769.
[109] Ronald B. Mitchell, "Situation Structure and Regime Implementation Mechanisms," Paper Presented at the American Political Science Association Conference, Atlanta, GA, 1999, cited in Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," p. 550.
[110] Barbara Koremenos, Charles Lipson, and Duncan Snidal, "The Rational Design of International Institutions," p. 762.
[111] Ibid.
[112] Ibid.
[113] Barbara Koremenos, "Contracting Around International Uncertainty," *The American Political Science Review* 99, no. 4 (November 2005): 549-565, p. 563.
[114] Ibid., p. 562.
[115] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," p. 1952.

explained without exploring their domestic political structure.[116] To sum up, for liberals "liberal democracies are more likely to "do law" with one another."[117] Still in the rationalist framework,[118] Moravcsik points to domestic constituencies as the source of international state preferences for international agreements. Moravcsik puts state-society relations, "the relationship of states to the domestic and transnational social context in which they are embedded"[119] at the core of states' behavior in international affairs. "Societal ideas, interests, and institutions influence state behavior by shaping state preferences"[120] laying at the basis of governments' strategic calculations. Compliance is also ensured by states' participation in the legal making process.[121] In her "liberal internationalist model of transnational legal relations"[122] Anne-Marie Slaughter identifies domestic institutions (e.g., domestic courts) as vectors of development and application of international rules. Her analysis brings together state, substate, and nonstate actors under the form of "transgovernmental regulatory organizations"[123] therefore offering a horizontal "model of global governance, an informal and frequently selective set of institutions in place of formal and highly scripted fora in which each State is accorded an equal voice."[124]

The constructivist / normative approach to international relations[125] emphasizes the importance of shared meanings for compliance with international law / institutions. According to the normative model, states' actions on the international arena cannot be fully comprehended without a proper explanation of the role of ideas on such actions.[126] From all IR approaches to compliance the constructivist one is the closest to international law given its focus on the internalization of norms, the normative power of rules, the role of identity, and appropriate behavior in international affairs.[127] John Ruggie is one international regime

[116] Ibid., p. 1953.
[117] Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2633.
[118] While institutionalists see compliance as a strategy of states acting as rational actors, liberalism sees compliance as the direct consequence of domestic politics. For more information, see Oona Hathaway, "Do Human Rights Treaties Make a Difference?," p. 1952.
[119] Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics," *International Organization* 51, no. 4 (Autumn 1997): 513-553, p. 513.
[120] Ibid.
[121] Barbara Delcourt, "Compliance, Theory of," paras. 9-10.
[122] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," p. 1953.
[123] Anne-Marie Slaughter, "Governing the Global Economy through Government Networks," in *The Role of Law in International Politics*, ed. Michael Byers, 181-204, p. 181.
[124] Ibid., p. 204.
[125] Apart from the authors and theories presented in this literature review, see also norms selection, norm compliance, and practices (Adler, Pouliot, Searle, Neumann, etc.) in Vincent Pouliot, "The Logic of Practicality: A Theory of Practice of Security Communities," *International Organization* 62, no. 2 (Spring 2008): 257-288.
[126] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," p. 1955.
[127] Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," pp. 539-540.

theorist explaining compliance as the result of reciprocity generating shared understandings. For Ruggie, international regimes have an intersubjective quality: the units constituting a regime are "speakers of a common language"[128] i.e., state action. Therefore, international regimes become defined by the "underlying principles of order and meaning that shape the manner of their formation and transformation."[129] Deviations from regimes are the result of intentions and acceptable behavior attributed to acts "in the context of an intersubjective framework of meaning."[130] For constructivists, ever changing identities determine the emergence and content of rules. Kathryn Sikkink together with Martha Finnemore explains the evolution of norms they define as "a standard of appropriate behavior for actors with a given identity."[131] Norm entrepreneurs help norms become entrenched. States adopt norms as a result of norm tipping (the number of states adopting a norm). Through the process of socialization norms are internalized to the point that they "achieve a "taken-for-granted" quality that makes conformance … almost automatic."[132] Constructivism therefore emphasizes norms' key role for national identity formation. The American constructivist school borrows the concept of international society from the English School.[133]

Last but not least, a few words about the measures states have at their disposal to induce compliance with international law. The importance of enforcing international law became part of the scholarly debate while analyzing enforcement procedures within the GATT and the WTO.[134] Assistance, deterrence, carrots and sticks, prevention, and *ex-ante* control are just some of the most frequent enforcement means cited by the literature.[135] National measures of implementation are crucial given that, oftentimes, international law is implemented at national level. Inducements can have an influence on states' compliance with international law. Negative inducements comprise reprisals / countermeasures, loses, loss of reputation, embargoes (affecting the entire population of the state), or, as in international criminal law, criminal responsibility, and the principle of universal jurisdiction. Examples of positive inducements are capacity building, transparency, and choice of measures.

[128] John Gerard Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in Postwar Economic Order," *International Organization* 36, no. 2 (Spring 1982): 379-415, p. 380.
[129] Ibid.
[130] Ibid.
[131] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (Autumn 1998): 887-917, p. 894.
[132] Ibid., p. 904.
[133] For more information on the Groatian roots of this concept, see Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2634.
[134] Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," p. 550.
[135] Ibid., p. 552.

Compliance procedures can be national and international, unilateral or multilateral. The actors in these procedures are as varied as state organs, civil society institutions, etc. The procedures can be initiated by certain actors or by competent institutions acting *ex oficio*.

Compliance with international law can therefore depend upon many factors such as the type of agreement, the branch of international law it covers, the dispute settlement mechanism it encompasses. Power asymmetry between countries is also a key factor in determining compliance. Countries can also decide not to comply with international law for reasons unrelated to law (e.g., financial incentives). Some authors refer to the phenomenon of descriptive inaccuracy, i.e., it is very difficult to prove that a country's compliance with international law is determined by only one factor: e.g., democratic regime type and compliance with international law (democracies can breach international law while more authoritarian regimes can comply with it as long as it is in their best interest).[136]

The reasons behind compliance can be clustered into several main groups:[137]

(1) Coincidence of interest: states comply with international law when / if it does not ask of them to perform any action they would not otherwise perform.[138] Since "most multilateral treaties are just a novel way of addressing concerns that date back centuries,"[139] they codify existing practice therefore not imposing any major new obligations on states.

(2) Enlightened self-interest: states comply with international law out of an enlightened selfishness to contribute to international law promotion. Originally coined by Alexis de Tocqueville, the principle encompasses the American belief that one must sacrifice for the common good in the hope that, in so doing, individual interests will be forwarded:

> The Americans, on the other hand, are fond of explaining almost all the actions of their lives by the principle of self-interest rightly understood; they show with complacency how an enlightened regard for themselves constantly prompts them to assist one another and inclines them willingly to sacrifice a portion of their time and property to the welfare of the state. In this respect I think they frequently fail to do themselves justice, for in the United States as well as elsewhere people are sometimes seen to give way to those disinterested and spontaneous impulses that are natural to man; but the Americans seldom admit that they yield

[136] Information on compliance inducing measures from Michael Bothe, "Compliance," paras. 100-152.
[137] I want to thank Professor Annette Seegers for pointing out four of these clusters to me: enlightened self-interest, burden sharing, democratic / moral leadership, and (internal) political legitimacy.
[138] Kenneth A. Oye, *Cooperation under Anarchy*; Lisa Martin, *Coercive Cooperation: Explaining Multilateral Economic Sanctions* (Princeton, New Jersey: Princeton University Press, 1992); George W. Downs, David Rocke, and Peter N. Barsoom, "Is the Good News about Compliance Good News for Cooperation?," cited in Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 28.
[139] Ibid., p. 108 (Goldsmith and Posner, *The Limits of International Law*).

> to emotions of this kind; they are more anxious to do honor to their philosophy than to themselves.[140]

In his monumental *Democracy in America*, Tocqueville compares the European understanding of the concept of interest to the American one concluding that

> I do not think, on the whole, that there is more selfishness among us [Europeans] than in America; the only difference is that there [in America] it is enlightened, here it is not. Each American knows when to sacrifice some of his private interests to save the rest; we [Europeans] want to save everything, and often we lose it all.[141]

(3) Burden sharing: compliance with international law is a legitimacy generator that leads to cost reduction. Compliance as a foreign policy behavior, coupled with its rhetorical invocation, increases legitimacy of action thus making it easier to rally coalition partners that help reduce costs by sharing the burden of military expenses and manpower.

(4) Cooperation: states adhere to treaties to clarify aspects that are unclear in customary international law.[142]

(5) (Multilateral) Coordination: related to cooperation, states coordinate their actions in a multilateral setting to overcome collective action problems.[143]

Merging the cooperation and coordination arguments, "processes and conventions associated with treaties provide information to treaty parties that can enhance cooperation."[144] Treaties act as collective action problem solvers between parties that can monitor each other's actions based on the information available within the treaty regime (e.g., the ICRC as guardian and interpreter of the Geneva Conventions).

(6) Moral obligation: to put it simply, states are morally bound to obey international law. The moral obligation argument is heavily contested by rational actor models proponents such as Goldsmith and Posner that argue that while states should indeed obey international law, they have no moral obligation to do so. International law imposes no moral constrains on state action if behind that state action there is a cost-benefit calculus making non-compliance the viable course of action.[145]

(7) Democratic / moral leadership: international law provides weight and legitimacy to international action. Democracies pride themselves of acting in accordance with

[140] Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve, A Penn State Electronic Classics Series Publication (The Pennsylvania State University, 2002), http://seas3.elte.hu/coursematerial/LojkoMiklos/Alexis-de-Tocqueville-Democracy-in-America.pdf (accessed August 14, 2019), p. 595.
[141] Ibid., p. 596.
[142] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 31.
[143] Ibid., p. 35.
[144] Ibid., p. 84.
[145] Ibid., p. 185.

international law and invoke its provisions to strengthen their claims for international action. Liberal democracies are also quick in pointing out the moral bankruptcy of non-democracies breaching fundamental norms of international law.

(8) (Internal) political legitimacy: internationally, compliance with international law increases legitimacy of foreign policy actions; internally, the public opinion is more prone to supporting a certain foreign action if convinced that it meets the high moral standard of international law.

From Literature Review to Theoretical Framework

To summarize, the numerous theories developed to explain states' compliance with international law can be broadly divided into rational actor and normative models. It must be underlined that the two models do not completely reject each other's premises. Proponents of the rational actor model do not exclude the influence of norm internationalization on compliance; they just consider that states' interests have a greater salience on compliance than norm internalization does. The same goes for the normative approach: normativist scholars agree that in certain instances states' interests can surpass other factors in determining compliance; nevertheless, they argue that norm internalization should be strengthened to increase the likelihood of compliance as preferred state behavior.[146]

Of all the branches of international law, the law on the use of force and the law of armed are particularly characterized by a lack of enforcement mechanisms (see previous chapter). In the case of *jus ad bellum* and *jus in bello* each model identifies different incentives for states' compliance with these two branches of IL.[147] The rational actor or utilitarian (military) approach identifies states' interests as compliance generators: states comply with *jus ad bellum* and *jus in bello* because they fear that non-compliance can generate reciprocal behavior from other states (states can retaliate in kind by employing force against an aggressor or soldiers can retaliate on the battlefield in breach of IHL norms); the norm internalization / humanitarian approach premises that compliance is conditioned and pre-dated by a process of norm internalization by countries.[148] Apart from retaliatory behavior, a cost states can incur in case of non-compliance with the law on the use of force and IHL is being publicly shamed and blamed for their actions. International NGOs active in the field of human rights are generally involved in shaming and blaming human rights

[146] Ibid., p. 9.
[147] These two approaches can lead to different interpretations of IHL. For further information, see Dan Belz, "Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?," p. 100.
[148] Ibid., pp. 97-98.

abuses.[149] As made evident by the previous chapter, in the particular case of IHL, *primus inter pares* among these organizations is the ICRC[150] (the "guardian" of the Geneva Conventions).[151]

Coming back to international law, in general, political imperatives are part and parcel of explaining international law compliance. In the words of international law and US foreign policy scholar, Louis Henkin:

> At bottom, all norms and obligations are "political;" their observance or deliberate violation are political acts, considered as part of a nation's foreign policy and registering cost and advantage within that policy.[152]

International law is therefore part of foreign policy. Given that "international law addresses itself to states and, for the most part, not to individuals or other entities such as governments,"[153] compliance, as previously cited, implies the behavioral influence of legal rules on states' actions since it shows the extent to which legal rules influence country's behavior. Given IL's relative lack of enforcement mechanisms, compliance is state behavior as countries can decide whether to comply or not with international law provisions. State behavior is defined by the policies governments enact; policies are the outcomes of decision-making processes.[154] Consequently,

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[149] For a comprehensive study on shaming and blaming and its effects on state behavior, see Amanda M. Murdie and David R. Davis. Their conclusion is that shaming and blaming by international non-governmental organizations does influence state behavior; nevertheless, it "does not have an unconditional effect on human rights; in other words, mere shaming is not enough." Shaming is the most impactful when "combined with a domestic presence of HROs or, perhaps more importantly, by shaming by intergovernmental organizations, third-party states, or individuals outside of the targeted regime. When there is a combination of third-party shaming and domestic HRO presence, the effect HRO shaming is enhanced." Amanda M. Murdie and David R. Davis, "Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs," *International Studies Quarterly* 56, no. 1 (March 2012): 1-16, citations from p. 13.

[150] For the ICRC's record of shaming and blaming, see David P. Forsythe, "Naming and Shaming: The Ethics of ICRC Discretion," *Millennium* 34, no. 2 (February 2006): 461-474; and Daniel Warner, "Naming and Shaming: The ICRC and the Public/Private Divide," *Millennium* 34, no. 2 (February 2006): 449-460. The two authors conclude that too much discretion and neutrality on behalf of the ICRC can be damaging for the institution's reputation. The two authors point to the ICRC's delayed criticism of the international humanitarian law breaches the US perpetrated in the framework of the Global War on Terror (e.g., the treatment of detainees at the Guantanamo detention center). The then president of the ICRC, Jakob Kellenberger, wrote an article in the ICRC's journal outlining the organization's difficult mission given that it "operates in the complex world of tension between political interests and humanitarian concerns." Jakob Kellenberger, "Speaking Out or Remaining Silent in Humanitarian Work," *International Review of the Red Cross* 86, no. 855 (September 2004): 593-609, p. 593.

[151] See Yves Sandoz, "The International Committee of the Red Cross as Guardian of International Humanitarian Law," *International Committee of the Red Cross*, December 31, 1998, https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm (accessed February 1, 2019).

[152] Louis Henkin, *How Nations Behave*, p. 47.

[153] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 5.

[154] Thus being said, Goldsmith and Posner warn that we "generally identify state interests in connection with particular legal regimes by looking, based on many types of evidence, to the preferences of the state's political leadership. This assumption is a simplification and is far from perfect." Ibid., p. 6.

> the state itself does not act except in a metaphorical sense. Individual leaders negotiate treaties and decide whether to comply with or breach them. Because the existence of a state and state action ultimately depend on individuals' beliefs and actions, one could reject the assumption that states have agency and insist that any theory about the behavior of states must have microfoundations in a theory of individual choice.[155]

The state is but a bureaucratic construct; state action is the sum of decisions made by individuals with decision-making authority. Compliance (or the lack thereof) thus flows from leaders' decisions. States' actions are not to be regarded as compact, but as the result of a decision-making process made by the individuals / leaders / decision-makers taking part in it. As Goldsmith and Posner put it:

> The strength of a state's commitment to an agreement is not a function of its legality, but of the strength and uniformity of public and elite preferences.[156]

Therefore, to answer the question of "Why do states comply with international law?" it is imperious to bring the analysis to the level of the individual decision-maker. The theoretical perspective enters the IR subfield of foreign policy analysis thus providing an International Relations Theory explanation to an international law concept, compliance.

Foreign Policy Analysis & Foreign Policy Decision-Making: An Overview

As outlined in the first part of this literature review, compliance theories can be divided either into rational actor theories explaining compliance as the result of strategic calculations of rational actors in the pursuit of their interests or normative / constructivist theories identifying norm internalization and legitimacy as compliance determinants. Regardless of the theoretical approach to the concept, compliance is state behavior. At state level, the decision to comply or not belongs to decision-makers, i.e., individuals; breaking down the decision-making process to the level of the individual thus explains state action. This research enters the IR subfield of foreign policy analysis by focusing on political leaders as decision-makers.

In 17th century Europe, the rise of the modern state led to the development of formal channels of communication between these main actors of international relations. For over two centuries, secret diplomacy in the name of the all-mighty concept of *raison d'état* was the key practice in conducting foreign relations between (European) states. After World War I, this

[155] Ibid., p. 4.

[156] Ibid., p. 95. Their approach to international law is a reply to the mainstream international law legal theory connecting compliance to legalization; legalization increases an agreement's normative strength generating a higher sense of obligation on behalf of a state party. If the normative strength increases, the argument goes, then the international legal system is strengthened as the sense of legal obligation counterbalances the weight of the national interest. The list of normativity conditions includes "<right process,> the participation of liberal democracies, domestic law penetration, management and deliberation." Treaty compliance can also be strengthened by increasing the precision of legal obligations incorporated into treaties or by providing third parties with the ability to monitor treaty compliance. Information and citation from Ibid., p. 83.

realist approach to foreign policy resting on the concepts of power and national interest was replaced by the liberal, Wilsonian view, calling for the democratization of foreign affairs by incorporating liberal values in their definition and execution and increasing transparency of the foreign policy decision-making process. Secret diplomacy, identified by President Wilson as one of the main causes of the calamitous World War I, would no longer be the rule in conducting foreign affairs. A few decades would pass before, the end of World War II, foreign policy analysis became an established sub-discipline of international relations. From the outset, the different academic approaches looked at either systemic factors (reminiscent of the traditional, realist view on foreign policy) or at domestic factors (closer to the liberal view on foreign affairs).[157] Nowadays, foreign policy analysis is at the crossroads of several disciplines such as psychology, sociology, or political science.[158]

Foreign policy decision-making is one of the main subfields of foreign policy analysis. Just as with compliance, the scholarly literature on decision-making employs two main models to explain policymaking. Originally developed in strategic studies and economics, the highly influential rational choice model portrays decision-makers as rational actors with a predetermined set of ranked preferences. Decision-making is reduced to a rational cost-benefit calculus meant to determine the most cost-effective course of action for reaching the desired preferences. Anatol Rapoport applies the model to explain decision-making in conflict situations, i.e., a strategic game entered into by different actors with the purpose of outwitting an opponent that is "a mirror image of self, whose interests may be diametrically opposed, but who nevertheless exists as a rational being."[159] Rapoport criticizes the rational actor model for its limited objectives since the players rather focus on outsmarting one another than on devising a mutually beneficial strategy. Focusing on strategic cooperation rather than on conflict, Charles Glaser proposes a strategic choice theory that "demonstrates that international anarchy does not create a general tendency for security-seeking states to pursue competitive strategies."[160] For Glaser, cooperation (rather than competition) is the rational course of action for security seeking states under anarchy. Motives, material capabilities, and information influence rational decisions. Graham Allison

[157] Information from Walter Carlsnaes, "Foreign Policy," *Handbook of International Relations*, eds. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, 2nd ed., 298-325, pp. 300-301. For the division between systemic and domestic factors, see also Beth A. Simmons, "International Law," pp. 361-363.
[158] Walter Carlsnaes divides FPA approaches into structural, agency-based, social-institutional, and interpretative actor perspectives. See Walter Carlsnaes, "Foreign Policy," Figure 12.1, p. 307; for details, see pp. 307-316.
[159] Anatol Rapoport, *Fights, Games, and Debates* (Ann Arbor: University of Michigan Press, 1960), p. 9.
[160] Charles L. Glaser, *Rational Theory of International Politics: The Logic of Competition and Cooperation* (Princeton, New Jersey: Princeton University Press, 2010), p. 269.

outlines the predominance of the rational actor model in foreign policy decision-making in his analysis of decision-making models during the 1962 Cuban Missile Crisis.[161]

Departing from the rational actor model, political psychologists[162] do not take agents' preferences for granted. For them, agents' preferences are neither predetermined nor stable; they are acquired and subject to change through human interactions. "Psychological explanations of international politics focus on the impact of cognition and emotion on choice."[163] Political psychologists analyze leaders' traits, personality type, political behavior or the influence of perceptions and misperceptions on decision-making.[164] Goldgeier and Tetlock explain that although all IR theories are grounded on psychological assumptions, the amount of IR scholarly research on human cognition and perception does not reflect this reality. Leaders' decisions are marred by misconceptions and misperceptions. In their view, constructivism is the best suited IR theory for a "cognitive psychological analysis"[165] given its focus on social identities and the normative context. For constructivists, a logic of appropriateness guides decision-making. "What does this situation call for actors of my type to do?"[166] is the key question leaders ask when having to decide on a course of action.

Psychological explanations of human choice are divided into cognitive explanations, the effects of framing and prospect theory, and the influence of emotions on decision-making. Cognitive psychology[167] explains why decision-makers are not rational actors and how, when faced with complex situations under uncertainty, leaders make use of cognitive "short-cuts." With its focus on "processes of attribution, estimation, judgment, and choice people frequently use,"[168] cognitive psychology emphasizes leaders' tendency for simplicity, their aversion to ambiguity, and their misunderstanding of probability as factors hampering

[161] Graham T. Allison, "Conceptual Models and the Cuban Missile Crisis," *The American Political Science Review* 63, no. 3 (September 1969): 689-718. For the rational policy model, see pp. 691-698. The other two models Allison puts forward are the organizational process (pp. 689-707), and the bureaucratic politics model (pp. 707-715).
[162] The literature review will not approach aspects related to group decision-making and collective emotions. For further information on these approaches on decision-making, see the literature review on emotions and collective behavior, group identity, and conflict in Janice Gross Stein, "Psychological Explanations of International Decision Making and Collective Behavior," in *Handbook of International Relations*, eds. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, 2nd ed., 195-219, pp. 205-212.
[163] Ibid., p. 195. For information on psychological explanations of decision-making in international politics, see pp. 195-219.
[164] For information on perceptions and misperceptions, see Robert Jervis's pioneer study in cognitive psychology, *Perception and Misperception in International Politics* (Princeton, New Jersey: Princeton University Press, 1976).
[165] James Goldgeier and Philip Tetlock, "Psychology and International Relations Theory," *Annual Review of Political Science* 4, no. 1 (2001): 67-92, p. 83.
[166] Ibid., p. 82.
[167] Janice Gross Stein, "Psychological Explanations of International Decision Making and Collective Behavior," pp. 196-198.
[168] Ibid., p. 196.

rational choice. The literature also focuses on the influence of people's beliefs on information processing as well as on leaders' attachment of such beliefs' (especially when presented with divergent arguments). Grayson and Schwartz analyze "the recalled behaviors and the subjective experience of ease of recall"[169] as information sources available to individuals looking to "review domain-relevant behaviors"[170] to assess their risk in a certain domain. Larson explains how cooperation between states is impaired by the decision-makers' wrong assumptions about the "opponent's motives and intentions."[171] Trust and distrust in international affairs, together with the decision-maker's prudency in assessing motivations, are also part of the explanation. Sanbonmatsu *et al*. conclude that the "subjective overestimation of the likelihood of a hypothetical event"[172] is due to biases in hypothesis testing. People tend to perceive events as being more plausible than they actually are because of "processes characterizing the selective testing of a hypothesis."[173] Wegener and Petty analyze the influence of naïve theories on behavior and perceptions.[174]

Heuristics, biases, discounting information and "cognitive processes of attribution"[175] (particularly the attribution of hostile intentions to one's opponent) are other factors influencing decision-making. Suedfeld and Tetlock look at instances of diplomatic communication in the midst of international crises. International crises are analyzed in accordance with their "integrative complexity … a dimension of information procession"[176] based on simple or complex responses, gross or fine distinctions, rigidity or flexibility, restricted or extensive information usage to prove the relevance of "information processing complexity"[177] for diplomatic events.

Kahneman and Tversky analyze the influence of heuristics and biases on judgment in uncertain situations. They identify three heuristics leading up to "systemic and predictable

[169] Carla E. Grayson and Norbert Schwarz, "Beliefs Influence Information Processing Strategies: Declarative and Experiential Information in Risk Assessment," *Social Cognition* 17, no. 1 (March 1999): 1-18, p. 1.
[170] Ibid.
[171] Deborah Welch Larson, "Trust and Missed Opportunities in International Relations," *Political Psychology* 18, no. 3 (September 1996): 701-734, p. 701.
[172] David M. Sanbonmatsu, Steven S. Posavac, and Randon Stasney, "The Subjective Beliefs Underlying Probability Overestimation," *Journal of Experimental Social Psychology* 33, no. 3 (May 1997): 276-295, p. 276.
[173] Ibid.
[174] Duane T. Wegener and Richard E. Petty, "The Naïve Scientist Revisited: Naïve Theories and Social Judgment," *Social Cognition* 16, no. 1 (March 1998): 1-7.
[175] Janice Gross Stein, "Psychological Explanations of International Decision Making and Collective Behavior," p. 197.
[176] Peter Suedfeld and Philip Tetlock, "Integrative Complexity of Communications in International Crises," *The Journal of Conflict Resolution* 21, no. 1 (March 1977): 169-184, p. 169.
[177] Ibid.

errors:"[178] representativeness, "availability of instances or scenarios,"[179] and "adjustment from an anchor."[180] In the late 1970s, Kahneman and Tversky developed the prospect theory model as an alternative to the utility theory of decision-making under risk. People's tendency to "underweight outcomes that are merely probable in comparison with outcomes that are obtained with certainty"[181] generates a certainty effect that makes decision-makers risk-adverse if their options lead to success and risk-prone if their options lead to loss. Moreover, individuals tend to isolate elements shared by "all prospects under consideration."[182] This isolation effect generates inconsistent preferences when the same problem is presented differently. Consequently, prospect theory[183] research finds that the way a problem is framed influences decision-makers' choices since framing provides a reference point to consider alternatives.[184] Framing, rather than individual predispositions, is therefore responsible for the levels of risk people are willing to take. Levy provides an overview of prospect theory; he analyzes both decisions' framing and prospects' evaluation in reference to a "value function and a probability weighting function."[185] Barbara Farnham uses prospect theory to analyze President Roosevelt's actions during the 1938 Munich Crisis. Looking at preference reversal and the framing of decisions, loss avoidance by accepting risks, and certainty effects, Farnham focuses on the role of affect in the change of decision frames.[186] McDermott analyzes risk in decision-making as a dynamic concept (influenced by the perception on threat) resulting from prospective losses (fears or costs) and gains (greed or opportunities).[187]

Neuroscience analyzes the connection between cognition, emotions,[188] and decisions. Rather than being the result of deliberative, rational processes, decisions are the consequence of "preconscious neurological processes."[189] Emotions play a primary and crucial role in the

[178] Amos Tversky and Daniel Kahneman, "Judgment under Uncertainty: Heuristics and Biases," *Science* 185, no. 4157 (September 27, 1974): 1124-1131, p. 1131.
[179] Ibid.
[180] Ibid.
[181] Daniel Kahneman and Amos Tversky, "Prospect Theory: An Analysis of Decision under Risk," *Econometrica* 47, no. 2 (March 1979): 263-292, p. 263.
[182] Ibid.
[183] Janice Gross Stein, "Psychological Explanations of International Decision Making and Collective Behavior," pp. 198-200.
[184] Ibid.
[185] Jack S. Levy, "An Introduction to Prospect Theory," *Political Psychology* 13, no. 2 (June 1992): 171-186, p. 171.
[186] Barbara Farnham, "Roosevelt and the Munich Crisis: Insights from Prospect Theory," *Political Psychology* 13, no. 2 (June 1992): 205-235, p. 205.
[187] Rose McDermott, *Risk-Taking in International Politics: Prospect Theory in American Foreign Policy* (Ann Arbor: The University of Michigan Press, 1998), p. 2.
[188] Janice Gross Stein, "Psychological Explanations of International Decision Making and Collective Behavior," pp. 200-204.
[189] Ibid., p. 200.

decision-making process. Research shows that humans with injuries to the part of the brain that is responsible for emotions cannot make rational decisions. Therefore, without emotions there is no rationality since for humans feelings precede action.[190] Camerer, Loewenstein, and Prelec analyze the relevance of neuroscience for economics in contrast to the already known rational actor model.[191] They conclude that correcting first emotional reactions is a lengthy process which requires a thorough cognitive mechanism. Gilbert and Gill look at the "correction models of human judgment"[192] to explain why people consider their subjective description of an object accurate and "only subsequently, occasionally, and effortfully consider the possibility that their experience was influenced by extraneous factors."[193]

Out of the five basic emotions (anger, disgust, fear, happiness, and sadness) fear has the most long-lasting influence on human behavior.[194] Threats with humiliating effects generate a strong response from decision-makers (e.g. the reaction of the Bush Administration after the 9/11 attacks).[195] Saurette analyzes the role played by the "dynamics of humiliation and counterhumiliation … in contemporary global politics"[196] to conclude that the post-9/11 global politics, in general, and the foreign policy of the United States, in particular, cannot be fully understood without considering such dynamics.

For Marcus Holmes, actors acquire preferences through negotiation. Mirror neurons allow us to understand people's intentions, actions, and whether they are being truthful since their "function is to replicate what occurs in the brain of another person during a social interaction."[197] He also combines rational beliefs with irrational behavior in his theory of aliefs, i.e. mental states that can make actors to "abandon their beliefs and desires."[198] Emotions constitute beliefs, but in some cases they cannot explain behavior which can only be explained by aliefs present when behaviors do not match beliefs.

Going back to the concept of judgment, political judgment is heavily dependent upon a leader's reasoning capabilities. Political judgment can be defined as the "*human faculty to*

[190] Ibid., p. 201.
[191] Colin Camerer, George Loewenstein, and Drazen Prelec, "Neuroeconomics: How Neuroscience Can Inform Economics," *Journal of Economic Literature* 43, no. 1 (March 2005): 9-64.
[192] Daniel T. Gilbert and Michael J. Gill, "The Momentary Realist," *Psychological Science* 11, no. 5 (September 2000): 394-398, p. 394.
[193] Janice Gross Stein, "Psychological Explanations of International Decision Making and Collective Behavior," p. 201.
[194] Ibid., p. 202.
[195] Ibid., p. 204.
[196] Paul Saurette, "You Dissin Me? Humiliation and Post 9/11 Global Politics," *Review of International Studies* 32, no. 3 (July 2006): 495-522, p. 495.
[197] Marcus Holmes, "The Force of Face-to-face Diplomacy: Mirror Neurons and the Problem of Intentions," *International Organization* 67, no. 4 (October 2013): 829-861, p. 830.
[198] Marcus Holmes, "Believing This and Alieving That: Theorizing Affect and Intuitions in International Politics," *International Studies Quarterly* 59, no. 4 (December 2015): 706-720, p. 706.

orientate oneself substantially and procedurally in an unfolding situation by subsuming – sometimes more intuitively, sometimes more reflexively – the particulars of this situation under selected universals of political life."[199] Although the rational actor model is the traditional model of decision-making, political psychology theories provide more insight into decision-making. Despite its high explanatory power, the rational actor model is an incomplete model of decision-making. Leaders' preferences are not predetermined nor should they be taken for granted; they are constructed (and changed) through social interactions. Out of the three lines of research in political psychology (cognitive, prospect theory and framing, and neuroscience), the first two are better suited to explain decision-making. The actual effects of emotions on leaders and their actions are very hard to grasp. As neuroscience borrows many elements from medicine, it is a challenge for IR scholars to pinpoint the exact influence of neurons and emotions on decisions. Cognitive psychology and prospect theory and framing, on the other hand, base their explanations on leaders' beliefs and personality as well as on their propensity to assume risks, which are easier to grasp and reconstruct.

Coming back to foreign policy decision-making, with its focus on "human decisional behavior,"[200] FPDM bridges international relations with domestic politics by explaining state actions as the result of individual decision-making. This agency-based perspective on decision-making processes is a direct result of the 1950s and 1960s shift towards behaviouralism in American social science. Behaviouralists[201] describe states' foreign policies as the result of the behavior of actors rather than the actions of states. Researchers have focused less on structural explanations of foreign policy and more on agency, social-institutional, and interpretative actor perspectives. Approaches based on social-institutional perspectives[202] such as social constructivism or discursive approaches have been heavily influenced by the constructivist Theory of International Relations. For social constructivists, the world is a collection of processes and structures. They focus on the emergence of (social) norms and on their ability to constrain states' behavior. Identity plays a considerable role in outlining "the socially constructed nature of the state and its interests."[203] Conceptions of national identity are oftentimes used by decision-makers as justification for their foreign

[199] Markus Kornprobst, *Co-managing International Crises: Judgments and Justifications* (Cambridge, New York, Port Melbourne, New Delhi, Singapore: Cambridge University Press, 2019), p. 23. Italics in original.
[200] Douglas T. Stuart, "Foreign Policy Decision-Making," in *The Oxford Handbook of International Relations*, eds. Christian Reus-Smit and Duncan Snidal (New York: Oxford University Press Inc., 2010), 576-593, p. 576; information on foreign policy decision-making from pp. 576-577.
[201] For information on behavioralism, see Walter Carlsnaes, "Foreign Policy," pp. 301-303.
[202] For information see Ibid., pp. 312-315.
[203] Ibid., p. 313.

policies. For the interpretative actor perspective,[204] foreign policy is heavily dependent upon the main decision-makers' perceptions on foreign policy situations. Elite thinking is the focus point of these approaches. Cognitive and psychological research,[205] dominated by role theory and groupthink, focuses on leaders' beliefs, their leadership styles (motives, decisions, and personal characteristics) and their influence on the decision-making process.

FPDM explanations can be divided into several theoretical clusters.[206] At individual level, explanations focus on decision-makers' / leaders' perception and cognition of their surrounding environment. The focus is on trying to uncover individuals' worldview (how they perceive the world and think about it). The literature on leaders' political belief system is at the heart of this explanatory cluster. The belief system is generally formed of memories or past experiences, values acquired throughout life or historical precedents of great influence. This belief system is known under the name of operational code, i.e. "a set of beliefs about the nature of the political world and about the effective strategies for dealing with that world."[207] The operational code is a mechanism for analyzing and understanding leaders' belief systems.[208] Operational code analysis literature is vast and complex: for decades, scholars have employed a variety of methods to construct the operational code of leaders ranging from John Foster Dulles or Henry Kissinger, to Saddam Hussein or George W. Bush.[209] Apart from operational codes, the literature on decision-making also focuses on cognitive shortcuts leaders employ to decide in an ever fast pacing and full of conflicting information environment. In this regard, how leaders make use of historical analogies to help them decide on a certain course of action is a key focus of the literature.[210] Another focus is on cognitive consistency, i.e., the "tendency to process information so as to keep one's view of reality consistent with one's underlying conceptions of reality."[211] The literature presents cognitive consistency as negatively affecting decision-making processes.

Apart from their system of beliefs, a significant part of the literature focuses on analyzing leaders' personalities; the accent falls on US Presidents and how their personality

[204] Ibid., pp. 315-316.
[205] Ibid., pp. 310-312.
[206] For detailed information on the different clusters, see Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, pp. 55-77.
[207] Ibid., p. 59.
[208] For more information, see Alexander George, "The "Operational Code:" A Neglected Approach to the Study of Political Leaders and Decision-Making," *International Studies Quarterly* 13, no. 2 (June 1969): 190-222.
[209] For more information, see the part of this chapter dedicated to an overview of the literature regarding operational code analysis.
[210] For a classic title on the role of historical analogies in decision-making, see Yuen Foong Khong, *Analogies at War: Korea, Munich, Dien Bien Phu, and the Vietnam Decisions of 1965* (Princeton, New Jersey: Princeton University Press, 1992).
[211] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 60.

influences their decision-making style. Richard T. Johnson, in his 1974 *Managing the White House*, argues that a president's personality traits predispose him to organize the foreign policy decision-making apparatus following either a competitive, formalistic or collegial model.[212] One of the main methods of studying the influence of leaders' personality traits on their decision-making processes is the psychobiography, a "clinical at-a-distance assessment,"[213] involving "the systematic application of psychological theory or concepts - usually (but not always) drawn from psychoanalysis or some other variant of personality theory and research—to the explanation of certain known biographical "facts.""[214] Alexander George, in his 1980 *Presidential Decisionmaking in Foreign Policy*, touches upon aspects as diverse as a leader's cognitive style, his tendency to orient towards political conflict or not, and his sense of confidence and efficacy.[215]

Since key political decisions are made by the most important political leaders, another major focus of the literature is on leadership studies. Leadership studies[216] have been developing increasingly in recent years in either management, psychology[217] or political science. Their focus is on the evolution of leaders' personalities, their career development, the relationship between leaders and their followers, as well as the importance of leadership at national and international levels (in both the private sector[218] and government).

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[212] See Richard T. Johnson, *Managing the White House: An Intimate Study of the Presidency* (New York: Harper & Row, 1974) and Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, pp. 92-105.
[213] David D. Ginger, "Assessing Leaders' Personalities: A Historical Survey of Academic Research Studies," in *The Psychological Assessment of Political Leaders: With Profiles of Saddam Hussein and Bill Clinton*, ed. Jerrold M. Post (Ann Arbor: University of Michigan Press, 2010), 11-38, p. 12.
[214] Ibid., pp. 12-13.
[215] See Alexander George, *Presidential Decisionmaking in Foreign Policy: The Effective Use of Information and Advice* (Boulder, CO: Westview Press, 1980) and Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 93.
[216] Information on leadership studies from Ronald E. Riggio and Masakatsu Ono, "Leadership," *Oxford Bibliographies*, September 30, 2013, http://www.oxfordbibliographies.com/view/document/obo-9780199828340/obo-9780199828340-0130.xml?rskey=7lPagE&result=9&q=leadership#obo-9780199828340-0130-div2-0001 (accessed November 28, 2016) - information from link modified.
[217] In the psychology literature, Daniel Goleman - see Daniel Goleman, Richard Boyatzis, and Annie McKee, *Primal Leadership: Realizing the Power of Emotional Intelligence* (Boston: Harvard Business School Press, 2002) - presides over the literature on emotional intelligence; he coins the concept of emotional intelligence and further focuses on leadership styles, personal leader development, and development within teams and organizations. Barbara Kellerman - in *Followership: How Followers Are Creating Change and Changing Leaders* (Boston: Harvard Business School Press, 2008) - outlines the lack of research on followers and provides a classification of followers (isolated, bystanders, participants, activists, and diehard). For further information, see Ronald E. Riggio and Masakatsu Ono, "Leadership."
[218] The business school approach is represented by John Kotter - *John P. Kotter on What Leaders Really Do* (Boston: Harvard Business School Press, 1999) - who analyzes change management. Kotter differentiates between leaders and managers by identifying different roles for them only to outline the many challenges facing transformational change. James M. Kouzes and Barry Z. Posner - *The Leadership Challenge*, 4th ed. (San Francisco: Jossey-Bass, 2007) - identify five best practices in leadership to be followed by all leaders: shape the path, enable and motivate other people, challenge already-existing processes, and inspire shared vision. Last but not least, Peter Northouse - *Leadership: Theory and Practice*, 5th ed. (Thousand Oaks, CA: Sage, 2010) -

The international affairs literature on leadership focuses on the leadership styles of the main political decision-makers as well as on their personal and interpersonal skills as leaders. There are three main lines of research in the literature on leadership in international affairs: (1) governance, the state, and world order; (2) the roles of public executive figures in public service; (3) leadership (with its personal, institutional, and organizational features) in the context of innovation and change.[219] Regarding public executive figures and their leadership, in his cornerstone book on diplomacy, Henry Kissinger[220] describes political leadership through the eyes of a former National Security Adviser and Secretary of State. Kissinger sketches the portraits of numerous political personalities from Metternich and Bismarck to Richard Nixon or the leaders of the Chinese Communist Party he was personally in contact with during his service in the US government. Joseph Nye[221] analyzes the leadership literature from both the scholarly viewpoint (as a former Dean of Harvard's Kennedy School of Government) and public official (Assistant Secretary of Defense for International Security Affairs and Chair of the National Intelligence Council). His analysis outlines some of the most relevant leadership skills for nowadays democratic leaders.[222]

A rich body of literature combines leaders' system of beliefs, their personality, and leadership styles to explain the influence of those variables on foreign policy decision-making. FPDM is thus the subfield of foreign policy analysis that explains states' external behavior as the result of decision-making processes influenced by decision-makers' personal characteristics. James Goldgeier mentions Alexander and Juliette George's seminal research on Woodrow Wilson and discusses George's operational code with a particular focus on his "image of the adversary."[223] Goldgeier mixes FPDM with leadership style analysis by looking at "the domestic roots of foreign policy,"[224] "the development of schemas,"[225] Soviet rhetoric and actions-based typologies of bargaining styles of Stalin (in the 1948-1949 Berlin Blockade Crisis), Khrushchev (in the 1962 Cuban Missile Crisis), Brezhnev (in the 1973

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scrutinizes theories and concepts of leadership. For further information, see Ronald E. Riggio and Masakatsu Ono, "Leadership."

[219] Information on leadership and leadership styles from Joseph Cerami, "Leadership in International Affairs," *Oxford Bibliographies*, March 2, 2011, http://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0059.xml (accessed November 28, 2016).

[220] Henry Kissinger, *Diplomacy* (New York: Simon & Schuster, 1994).

[221] Joseph S. Nye, Jr., *The Powers to Lead* (New York: Oxford University Press, 2008).

[222] For more information on these titles see Joseph Cerami, "Leadership in International Affairs."

[223] James Goldgeier, *Leadership Style and Soviet Foreign Policy: Stalin, Khrushchev, Brezhnev, Gorbachev* (Baltimore and London: The John Hopkins University Press, 1994), p. 15.

[224] Ibid., p. 1.

[225] Ibid., p. 2.

Middle East Crisis), and Gorbachev (in the 1990 German reunification). Goldgeier adds to his analysis factors such as relative power and interests or domestic politics.

Also drawing from Alexander George's operational code, Yael S. Aronoff analyzes leaders' ideologies.[226] In a psychological approach to leadership, Aronoff explains the evolution of leadership styles by analyzing the transformation of political hardliners into peace promoters. Aronoff combines leadership with political judgment; his model includes the influence of ideology,[227] cognitive style,[228] and advisors on enemy perception. Added to these are leaders' initial policy preferences and their reaction to events. Aronoff employs "congruence and process tracing to show the explanatory power of beliefs."[229]

Elizabeth Saunders[230] analyzes the causal power of beliefs on leadership in leaders' foreign intervention decisions and strategies. Her analysis of three American Presidents, Dwight D. Eisenhower, John F. Kennedy, and Lyndon B. Johnson (LBJ) focuses on pre-presidential beliefs of leaders about the nature of threats faced by the US, its alliances and America's sphere of influence, foreign aid, strategy, and policy investments. These are compared against the same leaders' beliefs as US Presidents on strategy and policy investments and their intervention strategies in different countries. Other factors part of the analysis are staffing decisions, strategy, defense posture, and the use of force, budgets and institutional creation and change. To further test her hypothesis, Saunders also analyzes George H.W. Bush and Bill Clinton's Somalia intervention and George W. Bush's 2003 decision to invade Iraq.

Alex Mintz and Karl DeRouen take a psychological approach to decision-making, leadership, and personality in reconstructing foreign policy decision-making processes.[231] Emphasizing biases in decision-making, they identify leaders' decision matrix and uncover their decision codes. By analyzing international, domestic, and cultural influences on decision-making they reconstruct the decision environment defined by time and information constraints, ambiguity, familiarity, dynamic setting, risk, stress, and accountability.

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[226] Yael S. Aronoff, *The Political Psychology of Israeli Prime-Ministers: When Hard-Liners Opt for Peace*, (New York: Cambridge University Press, 2014), p. 5.
[227] Ideological goals, their adaptability, specificity, and rigidity, time perceptions, perceptions about the enemy, peace, security, and the requirements for peace.
[228] Time orientation, risk propensity, cognitive flexibility, and emotional intelligence.
[229] Yael S. Aronoff, *The Political Psychology of Israeli Prime-Ministers*, p. 16.
[230] Elizabeth N. Saunders, *Leaders at War: How Presidents Shape Military Interventions* (Ithaca and London: Cornwell University Press, 2011).
[231] Alex Mintz and Karl DeRouen, *Understanding Foreign Policy Decision-Making* (New York: Cambridge University Press, 2010).

Blema Steinberg[232] profiles Indira Gandhi by analyzing the relationship between personality profile and leadership style. Creating an instrument for the assessment of personality profiles out of normal personality types and pathological variants, Steinberg analyzes Gandhi's personality profile before becoming Prime Minster and her leadership style while being Prime Minister. Steinberg divides leadership styles in several clusters depending on: (A) motives, task orientation, and performance; (B) decision-making and information management; (C) interpersonal relations (with personal staff and senior civil servants, Gandhi's party, opposition parties, and relations with the media and the public).

Another psychological approach is the one of Juliet Kaarbo. For Kaarbo leadership style "includes how the leaders relate to those around them, how they like to receive information, and how they make up their minds."[233] Kaarbo concludes that leadership styles influence foreign policy indirectly and foreign policy decision-making directly. She outlines that most of the literature on leadership styles focuses on presidents instead of prime ministers. Her prime ministerial leadership style model encompasses interest / experience, task orientation, managing conflict, information strategies, and strategy party relations.

As it can be seen, the literature is heavily imbued with the influence of leaders' beliefs on decision-making. The literature on decision-making is highly heterogeneous combining decision-making models, with psychological factors influencing the process of making decisions, leaders' characteristics, their perceptions of events, and the environment in which they make decisions. Moreover, it focuses on both process and polity since it does not only describe the decision-making process, but it also analyzes the ensuing policies.

Apart from focusing exclusively on individual leaders' influence on decision-making, the literature also analyzes small groups. The focus is traditionally on groupthink, the study of how small groups influence decision-making processes. The general tendency is to present groupthink as having a negative influence on decision-making: fear of being outcast from the group determines a possible dissenter to forcefully agree with the rest thereby limiting the range of policy options put forward for selection during a decision-making process.[234] Another study on groups, this time on the public opinion of masses and elites comes from Holsti. Holsti enquires into "the proper role of public opinion in the conduct of foreign

[232] Blema S. Steinberg, "Indira Gandhi: The Relationship between Personality Profile and Leadership Style," *Political Psychology* 26, no. 5 (October 2005): 755-789.
[233] Juliet Kaarbo, "Prime Minister Leadership Styles in Foreign Policy Decision-Making: A Framework for Research," *Political Psychology* 18, no. 3 (September 1997): 553-581, p. 553.
[234] For a classical study on the effects of groupthink on decision-making, see Robert Jervis, *Perception and Misperception in International Politics*. For small groups and decision-making, see also Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, pp. 63-65.

affairs."[235] Is public opinion an enhancer or an obstacle in framing national interests and implementing policies to tackle foreign policy challenges and national security threats? Is public opinion a legitimizer of vital state interests or is it a constraint to such interests?

The literature also focuses on larger groups such as bureaucracies. "The bureaucratic politics paradigm examines the impact of organizational structures on the behavior and choices of political leaders."[236] This model was coined by Graham Allison in his classical "Conceptual Models and the Cuban Missile Crisis"[237] (where Allison also analyzes the rational actor and the organizational process model).

Other approaches to FPDM include the policy type on the decision-making process and the constructivist approach to decision-making. The policy type "helps orient the analyst with respect to what and who is likely to matter in foreign policy making."[238] Just to give an example: decision-making is different in high-stakes situations as crises that require strategic policies such as policies of structural defense (e.g. defense programs) are at stake.[239] Last but not least, constructivism, with its focus on discourse and identity tries to uncover "where ideas come from and how they are put into action."[240] It has its main

> focus on the structures of power and meaning that identify some actors as "threats" and others not, some actions as acceptable and others not. … how actors use power and position to "construct" meaning out of a world where such meaning is not always obvious on the surface. Policy makers define their own world in terms they understand, and constructivism tries to understand how that process happens.[241]

To sum up all these approaches, foreign policy decision-making as a subfield of foreign policy analysis implies a distinction between process and policy. The process approach focuses on how political decisions are reached. FPDM deconstructs the decision-making process by looking at factors influencing decision-makers and their decisions. The policy-oriented analysis shifts the spotlight from the decision to the result of that decision, i.e., actual policies. The core task of FPDM[242] is to determine how certain agents part of the decision-making process (be it individuals, groups, or organizations) reached a particular

[235] Ole Holsti, *Public Opinion and American Foreign Policy* (Ann Arbor: The University of Michigan Press, 2004), p. 2.
[236] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 65. On bureaucracies and compliance: "even bureaucracies with delegated authority to comply with international law have competing preferences that sometimes win out, and when bureaucracies differ on compliance issues, the compliance view does not always prevail." Ibid., p. 106.
[237] Graham T. Allison, "Conceptual Models and the Cuban Missile Crisis."
[238] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 71.
[239] Ibid., pp. 70-1.
[240] Ibid., p. 72.
[241] Ibid.
[242] Information on agency in FPDM from Douglas T. Stuart, "Foreign Policy Decision-Making," pp. 576-578.

decision. For FPDM the actions of states are the actions of the agents acting on their behalf. As previously outlined, a wide array of internal and external factors, together with the decision-makers' perception of them, influence decision-makers and limit their scope of action.

Given its focus on decision-makers, a significant part of the literature analyzes the agency-related factors that influence foreign policy decision-making.[243] The literature outlining the central role leaders play in shaping international affairs was pioneered by Thomas Carlyle. According to Carlyle, "Universal History, the history of what man has accomplished in this world, is at bottom the History of the Great Men who have worked here."[244] Hermann identifies three situations that lead to the enhancement of a leader's role over policy: ambiguous decisional situations, circumstances that make authoritative action necessary and "when the political leader assumes office through dramatic means."[245] Combining decision-making with leadership, James Burns starts from the premise that "[o]ne of the most universal cravings of our time is a hunger for creative and compelling leadership"[246] to develop two models of leadership: transactional and transforming. Unlike leadership understood as a mechanism to hold power, these new models examine the leader – follower dynamic and how followers become leaders. Harold Laswell analyzes the relationship between power and personality. For Laswell, "[p]ower is an interpersonal situation; those who hold power are empowered."[247] Since his interest is to put "power in the service of a democratic society"[248] his analysis focuses on democratic elites and leadership. Besides providing a comprehensive review of the literature on leaders' personalities, David Winter analyzes personality traits which he defines as "the public, visible, stylistic (or adverbial) aspects of personality."[249]

To sum up, the analysis of decision-making processes[250] presupposes the identification of key decision-making agents and their influence on the said process based on

[243] Ibid., pp. 584-587.
[244] Thomas Carlyle, *On Heroes, Hero-Worship, and the Heroic in History (1840)*, http://history.furman.edu/benson/fywbio/carlyle_great_man.htm (accessed December 9, 2016).
[245] Margaret G. Hermann and Thomas W. Milburn, eds., *A Psychological Examination of Political Leaders* (New York: Free Press, 1977), pp. 20-21, cited in Douglas T. Stuart, "Foreign Policy Decision-Making," p. 584.
[246] James MacGregor Burns, *Leadership* (New York: Harper and Row, 1978), p. 4.
[247] Harold D. Laswell, *Power and Personality* (New York: W. W. Norton & Company, Inc., 1976), p. 10.
[248] Ibid., p. 9.
[249] David G. Winter, "Assessing Leaders' Personalities: A Historical Survey of Academic Research Studies," in *The Psychological Assessment of Political Leaders: With Profiles of Saddam Hussein and Bill Clinton*, ed. Jerrold M. Post (Ann Arbor: University of Michigan Press, 2010), 11-38.
[250] Information on decision-making from Douglas T. Stuart, "Foreign Policy Decision-Making," pp. 587-588.

a two-step dynamic:[251] (1) decision-makers use cognitive short-cuts to simplify the problem on which they have to decide; (2) they use analytical calculations to evaluate the different alternatives at their disposal. When making decisions, leaders face constrains that generate tradeoff dilemmas. Rationality can thus be a mitigating tool for mismanagement.

This overview of foreign policy analysis and foreign policy decision-making outlines FPA as an IR subdiscipline that merges structure and agency. To better understand this interaction, Robert Putnam's two-level games model provides one of the best examples. Although his model was developed to explain the relationship between diplomacy and domestic politics, his conclusion that "central decision-makers strive to reconcile domestic and international imperatives simultaneously"[252] is based on two levels of analysis: the national level characterized by the clash of interests between politicians and domestic groups and the international level where decision-makers want to "satisfy domestic pressures, while minimizing the adverse consequences of foreign developments."[253]

Operational Code Analysis: An Overview

As it can be seen from the previous section, one of the most influential models in explaining foreign policy decision-making is the operational code analysis. The operational code owes its influence on the FPDM literature to its high explanatory power: focusing on leaders' system of beliefs, the operational code unveils with great precision the relationship between leaders' personal characteristics, decision-making processes, and their outcome - actual policies. The operational code thus showcases leaders' relevance in coining policies as well as the link between leaders' individual traits and certain features of the policies they coin.

First employed by Leites, a pioneer researcher in elites' beliefs system, to refer to "the precepts or maxims of political tactics and strategy that characterized the classical Bolshevik approach to politics,"[254] the operational code has come to be largely associated with Alexander George and his analysis of President Woodrow Wilson.[255] In his 1951, *The*

[251] Some authors analyze groups drawing the attention to the fact that decision-making processes can transform group cohesion from an asset into a liability. Morton Halperin writing on the influence of bureaucratic politics on foreign policy is one case in point. Morton H. Halperin and Priscilla A. Clapp (with Arnold Kanter), *Bureaucratic Politics and Foreign Policy*, 2nd ed. (Washington, D.C.: Brookings Institution Press, 2006).
[252] Robert Putnam, "Diplomacy and Domestic Politics. The Logic of Two-Level Games," *International Organization* 42, no. 3 (Summer 1998): 427-460, p. 460.
[253] Ibid., p. 434.
[254] Alexander George, "The 'Operational Code'," p. 193.
[255] Other authors have analyzed leaders' decision-making employing the concept of operational code: Stuart and Starr analyze the information processing models of former US Secretaries of State, John Foster Dulles and Henry Kissinger, and US President John Fitzgerald Kennedy (Douglas Stuart and Harvey Starr, "The "Inherent Bad Faith Model" Reconsidered: Dulles, Kennedy, and Kissinger," *Political Psychology* 3, no. ¾ (Autumn 1981-Winter 1982): 1-33). Schafer and Walker gather a series of authors that use the operational code to analyze

Operational Code of the Politburo, Leites analyzes existing bibliography on Lenin and Stalin (memoirs, interviews, books on Soviet history and political propaganda) to construct the operational code of the Politburo of the Communist Party of the USSR. The main purpose of this study commissioned by the RAND Corporation[256] as part of a research program for the United States Air Force is to gain a better understanding of the "political strategy of Bolshevism"[257] and predict the behavior and policy calculations of Soviet leadership. It must be underlined that this initial approach to the operational code focused on recreating the system of beliefs of an entity (the Soviet Politburo) and not of an individual. Following this initial study, operational code analysis literature focuses on individuals and their beliefs.

Arguably one of the key contributors to the behavioral approach to political elites and decision-making processes, George distances himself from Leites by defining the operational code as a "set of premises and beliefs about politics and not as a set of rules and recipes to be applied mechanically to the choice of action."[258] Starting from psychoanalytic theory, the operational code as defined by George is based on political leaders' beliefs inferred from data and methods pertaining to the field of political science. George's model is based on content analysis of leaders' speeches and statements.[259] In his 1969 seminal article, Alexander George argues that "the way in which leaders of nation-states view each other and the nature of world political conflict is of fundamental importance in determining what happens in relations among states."[260] George outlines the importance of the "subjective perceptions and beliefs of leaders"[261] for the decision-making processes they are part of (particularly in conflict situations).[262]

George defined the operational code as "a political leader's beliefs about the nature of politics and political conflict, his views regarding the extent to which historical developments

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beliefs as causal mechanisms in international affairs; they look at content analysis, leader-advisor relations, and decision-making processes in international security and political economy. See Mark Schafer and Stephen G. Walker, eds., *Beliefs and Leadership in World Politics: Methods and Applications of Operational Code Analysis*, (New York: Palgrave MacMillan, 2006). For more information, see Douglas T. Stuart, "Foreign Policy Decision-Making," p. 585.

[256] The RAND Corporation is "a nonprofit research organization providing objective analysis and effective solutions that address the challenges facing the public and private sectors around the world." Nathan Leites, *The Operational Code of the Politburo*,1st ed., New York, Toronto, London: McGraw-Hill Book Company, Inc., 1951, https://www.rand.org/content/dam/rand/pubs/commercial_books/2007/RAND_CB104-1.pdf (accessed February 23, 2018), First page.

[257] Ibid., p. xi.

[258] Alexander George, "The 'Operational Code'," pp. 196-197.

[259] Douglas T. Stuart, "Foreign Policy Decision-Making," p. 585.

[260] Alexander George, "The 'Operational Code'," p. 191.

[261] Ibid.

[262] Ibid.

can be shaped, and his notions of correct strategy and tactics."[263] Employing elements of psychology, the operational code is a cognitive map that helps the leader simplify reality thereby acting as a prism influencing the leader's perception on events and the decision-making processes he or she is part of (a leader's system of beliefs generates "norms, standards, and guidelines"[264] influencing estimations on potential strategic choices).

Ole Holsti provides a clear description of the relationship between leaders' system of beliefs and decision-making processes:

> … our behavior is on large part shaped by the manner in which we perceive and interpret our physical and social environment. Our perceptions, in turn, are molded by clusters of beliefs about what has been, what is, what will be, and what ought to be. Thus our beliefs provide us with a more or less coherent code by which we organize and make sense out of what would be a conducing array of signals picked up from the environment by our senses. If there is a linkage between this code and behavior, beliefs about the nature of history and politics are likely to be especially relevant for understanding the behavior of political actors.[265]

He also asks some of the fundamental questions regarding operational codes:

> What are the sources of the political actor's beliefs? To what extent are they derived from and sustained by unique aspects of his background, experience, and personality? How are they shaped and constrained by role requirements? By the structural attributes of the governmental system? By the values and other characteristics of the wider social and cultural setting? By attributes of the international system? To what extent do these factors sustain, modify, or cause political beliefs to be discarded?[266]

Stephen Walker outlines that the operational code approach treats leaders' political beliefs as determining characteristics of decision-making.[267] Walker analyzes the relationship between motives, beliefs, and behavior to conclude that motives enhance "the impact of beliefs upon behavior rather than competing with beliefs for influence over behavior."[268] These elements are inherited or are part of an individual's family history and life experiences.[269]

Walker, Schafer, and Young, in their analysis of how presidential operational codes influence a country's involvement in international conflicts, focus on how beliefs shape the national interest starting from the premise that "the public operational code articulated by the

[263] Ibid., p. 199.
[264] Ibid., p. 191.
[265] Ole Holsti, "The "Operational Code" Approach to the Study of Political Leaders: John Foster Dulles' Philosophical and Instrumental Beliefs," *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 3, no. 1 (March 1970): 123-157, p. 123.
[266] Ibid., p. 155.
[267] Stephen G. Walker, "The Motivational Foundations of Political Belief Systems: A Re-analysis of the Operational Code Construct," *International Studies Quarterly* 27, no. 2 (June 1983): 179-202, p. 180.
[268] Ibid., p. 190.
[269] Ibid., p. 192.

chief executive is, in effect, the administration's operational code."[270] Presidential operational codes thus become key in determining a country's propensity to get involved in international conflicts. In coining operational codes, their methodological focus is on leaders' speeches as depository of beliefs and tools of social construction of reality.[271]

Regarding the constraints roles impose on individuals, Stassen recognizes the influence of both "roles and individual belief-sets … in shaping most foreign policy decisions."[272] Stassen analyzes the constraints roles impose on decision-makers' individual freedom and the potency of individual preferences in shaping policies. He concludes that roles' importance increases "for lower-level decision-makers and for routine decisions,"[273] while "individual cognitive belief-sets, preferences, and perceptual propensities"[274] increase in importance whenever high-stakes and disagreements between organizations propel the decision-making to higher levels or new issues are not covered by already existing routines. Leaders' cognitive beliefs increase in importance in novel situations such as when developing a new doctrine or being faced with a new situation.[275] Along the same lines, John Etheredge focuses on leader's personality, i.e., unique characteristics, to explain foreign policy outcomes[276] and identifies decision-makers' roles as determinants of behavior.

Jonathan Renshon analyzes stability and change in leaders' beliefs taking George W. Bush as case study and analyzing his beliefs prior and after becoming president.[277] His main finding is that "individuals' operational codes can change and that they can do so in a rather limited time frame (one or two years)."[278] Analyzing the crucial impact of the September 11 events on the belief system of President Bush (and outlining external events as a key factor in determining changes in beliefs), Renshon concludes that success reinforces beliefs whereas defeat contributes to changes in individuals' beliefs systems.[279]

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[270] Stephen G. Walker, Mark Schafer, and Michael D. Young, "Presidential Operational Codes and Foreign Policy Conflicts in the Post-Cold War World," *Journal of Conflict Resolution* 43, no. 5 (October 1999): 610-625, p. 613.
[271] Ibid.
[272] Glen H. Stassen, "Individual Preference versus Role-Constraint in Policy-Making: Senatorial Response to Secretaries Acheson and Dulles," *World Politics* 25, no. 1 (October 1972): 96-119, p.118.
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Lloyd S. Etheredge, "Personality Effects on American Foreign Policy, 1898-1968: A Test of Interpersonal Generalization Theory," *American Political Science Review* 72, no. 2 (June 1978): 434-451.
[277] He also divides President Bush's presidency into pre-September 1, post September 11, and end-of-term. For more information, see Jonathan Renshon, "Stability and Change in Belief Systems: The Operational Code of George W. Bush," *Journal of Conflict Resolution* 52, no. 6 (December 2008): 820-849.
[278] Ibid., p. 827.
[279] Ibid.

Regarding the relevance of events for leaders and their decision-making processes, an analysis of external influences on government decision-making comes from Hermann and Hermann. Their conclusion is that although government behavior is influenced by external and internal pressures "the precise character of its actions will be modified by properties of the ultimate decision unit"[280] i.e., key leaders, single groups, or different autonomous actors each with its own system of knowledge and beliefs.

Going back to Renshon, he analyzes how public statements reveal private beliefs. Given that speeches are "attempts at deception, persuasion, or impression management,"[281] Renshon recommends combining public speeches and private statements in operational code analysis and comparing the information gathered from employing these two methods for an accurate operational code. Regarding the relationship between public statements and private beliefs, Walker *et al*. conclude that "a leader's public behavior is constrained by his public image and that, over time, his public actions will consistently match his public beliefs."[282] On the same topic, Dyson and Raleigh conclude that public speeches of political leaders can be used to infer their private beliefs.[283] Schafer and Crichlow inquire into whether there are any substantive differences between leaders' personal characteristics as inferred from spontaneous comments versus as inferred from prepared comments. Following their analysis of President Bill Clinton's spontaneous and prepared interactions they conclude that there are indeed "differences between Clinton's public and private operational codes in terms of personality traits, but within each type of comments … substantive continuity."[284] Moreover, spontaneous comments are better at identifying "underlying cognitive predispositions, because they demonstrate learning trends."[285] Marfleet concludes that private and public rhetoric outlines similar general trends and points to the "context-sensitive nature of the … rhetoric and its sources when comparing individuals or even time."[286] Walker, Schafer, and Young analyze the operational code of former US President Jimmy Carter to point out its

[280] Margaret G. Hermann and Charles F. Hermann, "Who Makes Foreign Policy Decisions and How: An Empirical Inquiry," *International Studies Quarterly* 33, no. 4 (December 1989): 361-387, p. 384.
[281] Jonathan Renshon, "When Public Statements Reveal Private Beliefs: Assessing Operational Codes at a Distance," *Political Psychology* 30, no. 4 (August 2009): 649-661, p. 649.
[282] Stephen G. Walker, Mark Schafer, and Michael D. Young, "Profiling the Operational Codes of Political Leaders," in *The Psychological Assessment of Political Leaders: With Profiles of Saddam Hussein and Bill Clinton,* ed. Jerrold M. Post (Ann Arbor: University of Michigan Press, 2010), 215-245, p. 223.
[283] Stephen Benedict Dyson and Alexandra L. Raleigh, "Public and Private Beliefs of Political Leaders: Saddam Hussein in Front of a Crowd and Behind Closed Doors," *Research & Politics* 1, no. 1 (April-June 2014): 1-7, p.1.
[284] Mark Schafer and Scott Crichlow, "Bill Clinton's Operational Code: Assessing Source Material Bias," *Political Psychology* 21, no. 3 (September 2000): 559-571, p. 564.
[285] Ibid.
[286] B. Gregory Marfleet, "The Operational Code of John F. Kennedy During the Cuban Missile Crisis: A Comparison of Public and Private Rhetoric," *Political Psychology* 21, no. 3 (September 2000): 545-558, p. 557.

continuity despite significant variances over time and for different issue areas. Carter's view of others was more prone to change than his view of self.[287] Schafer and Walker, in analyzing the operational codes of Lyndon B. Johnson and his advisers, conclude that

> These differences suggest that there is merit in distinguishing between the private operational codes of individuals and the public operational code of the state. The elements of the state's operational code construct are also perhaps best conceptualized as variables subject to change over time and across domains, rather than as temporally stable, cross-situational characteristics. The social construction of the state's operational code is likely to be more prone to a greater variety of "impression management" pressures than those operating on the expression of individual beliefs in private settings.[288]

To conclude, it is worth mentioning that the operational code is only a fraction of a decision-maker's beliefs about politics. In his model, George does not consider leaders' ethical or normative beliefs. This is rather problematic since it is hardly possible to devoid a leader's operational code of any ethical or moral beliefs since they are the underlying factors that help decision-makers coin their views on political and historical developments and the strategy to follow. In cases of incomplete information, scarce knowledge about the end-means relationship and the ensuing consequences of actions, it is precisely these ethical and normative beliefs that kick in and help leaders decide.

Last but not least, Alexander George defines his version of the operational code as being a combination of instrumental (a political actor's beliefs about ends-means relationships in the context of political action) and philosophical beliefs ("assumptions and premises he makes regarding the fundamental nature of politics, the nature of political conflict, the role of the individual in history, etc.").[289] Operational codes are a simplification of reality. For a political actor to simplify reality, he can use a "cognitive map" of politics which encompasses his system of beliefs, i.e., operational code.

Theoretical Model

Why do states comply with international law? This research provides an International Relations Theory explanation to an international law concept, compliance. Compliance with international law is state behavior. As IL is characterized by a lack of enforcement mechanisms, compliance becomes a foreign policy decision. The decision to comply or not

[287] Stephen G. Walker, Mark Schafer, and Michael D. Young, "Systematic Procedures for Operational Code Analysis: Measuring and Modeling Jimmy Carter's Operational Code," *International Studies Quarterly* 42, no. 1 (March 1998): 175-189, p. 187.
[288] Stephen G. Walker and Mark Schafer, "The Political Universe of Lyndon B. Johnson and His Advisors: Diagnostic and Strategic Propensities in their Operational Codes," *Political Psychology* 21, no. 3 (September 2000): 529-543, p. 542.
[289] Alexander George, "The 'Operational Code'," p. 199.

with international law being the result of a decision-making process, the explanation to compliance pertains to foreign policy decision-making as a subfield of foreign policy analysis. From the multiple variables that influence foreign policy decision-making presented in this chapter's previous section, this research focuses on the concept of operational code.

The theoretical approach is based on Alexander George's concept of operational code, broadly defined as a leader's system of beliefs which influences the leader's perceptions of the surrounding environment and the desired course of action to respond to challenges emerging from that environment. This research broadens the definition of an operational code since it defines it not only in relation to an individual's system of beliefs, but also in relation to a set of institutional prerogatives; moreover, just as with Nathan Leites's 1951 operational code of the Soviet Politburo, the operational code does not only belong to an individual, but also to an institutional entity (for the purposes of this research, the President of the United States). Given this research's focus on international law, which, in the United States at least, is subsumed to foreign affairs, the research defines an institutional operational code on international law that contains constitutionally-mandated institutional prerogatives regarding foreign affairs and international law, in general, and the use of force (i.e. war powers), in particular. Moreover, part of this operational code are also executive practice, US Supreme Court jurisprudence, and the scholarly community's perspective on international law. Furthermore, this research differentiates between a public and a private operational code. This division between private and public operational codes already exists in the operational code analysis literature. Apart from the definition of an institutional operational code on international law, this research's contribution to existing literature emerges from a different definition of the public and private operational codes. While the literature generally defines the public operational code as the set of beliefs leaders expose in public, this research defines this code as pertaining to an institutional entity or a role leaders enter into once taking office (for the purposes of this research, the role of President of the United States). The private operational code consists of the system of beliefs, values, etc. leaders acquire prior to taking office (from their families during their childhood, through their education or the profession undertaken prior to holding office). The literature nevertheless generally defines the private operational code as the set of beliefs leaders expose in private. In this research, the public operational code refers to the US President's view on five concepts: foreign affairs, history, threat(s), enemy(ies), and ultimately, international law. The three codes mutually constrain and influence each other. Leaders "acquire" their private codes throughout their lives as a result of their life experiences. Once in office, and regardless of their previous beliefs,

assumptions or premises about history and political events, leaders must accommodate their private codes to the ones of the office they hold. Here the public and the institutional operational codes intervene: when making decisions, leaders act in the framework of the institutional operational code; they are also constrained by the public operational code and borrow elements of that code to justify their actions. Nevertheless, this accommodation is hardly ever a one-way street: while it is true that leaders are molded by their roles, it is equally true that they also leave an imprint on the roles they hold. Consequently, the codes exercise agency over one another.

As previously stated, the private operational code encompasses leaders' system of beliefs as acquired throughout their lives prior to coming into office. This code is shaped by leaders' education, family environment, life experiences, role models, religious beliefs, by the profession they choose, etc. Leaders acquire these codes throughout their lives and through their interactions with the surrounding environment. Once they take office, they are constrained by the public operational code of their new role and the institutional operational code on international law. This merger generates both individual and generic features. The generic features result from the merger between the leaders' private operational code and the role they acquire which generates a role permeated with the leader's personal characteristics. The generic operational code becomes the generic code of the office leaders hold. This generic operational code brings with it a certain view on foreign policy, history, enemy(ies), threats, and international law. But while a leader's personal operational code is shaped by his life experiences, the generic public operational code is shaped by the experiences of his predecessors and the public perceptions on the appropriate behavior of someone in that position. Once they come into office leaders find that there is a certain logic of appropriateness attached to their new role (which is also the result of the institutional operational code): they are expected to act in a way that is congruent with the existing perceptions and expectations of their role. As it is true that leaders (especially the ones with a strong personality) shape the public operational code, it is even more so the case that the public operational code shapes the private code of leaders. What is more, the institutional operational code also constrains both the private and the public codes as it encompasses the institutional framework that guides the actions of an institutional actor. The institutional operational code is also shaped by the private code of leaders: given their system of beliefs, personality or decision-making styles, leaders interpret more broadly or restrictively the constitutional prerogatives of their office. For the purposes of this research, and in the

particular case of the United States President, this translates into different perceptions on executive power, in general, and the Commander-in-Chief Clause, in particular.

The operational code acts as a cognitive short-cut in leaders' decision-making and it influences the way in which leaders frame reality. Since operational codes influence decision-making, they also shape political judgment. There are two types of such judgment:[290] *ex-ante* judgments are forward-looking in the sense that they are based on duty and obligation; *ex post-facto* judgments are backward-looking and are based on accountability and blame. The literature links these two types of judgments to the ethical imperatives of moral agents i.e. those agents with the ability to deliberate over courses of action and their respective consequences. Operational codes exercise influence on both types of judgments: a leader's beliefs determines the way he perceives his duties and obligations as well as the way in which he evaluates his actions and their results. As it was previously underlined, compliance with international law is a matter of political judgment: in the absence of enforcement mechanisms, political leaders have to decide whether they comply or not with the relevant norms of international law. Since political judgment is influenced by leaders' operational codes, it can be concluded that operational codes influence compliance with international law. Operational codes thus become a reservoir of clues: when making decisions, leaders automatically refer to these reservoirs; depending on the decision to be made, they select different elements of these three different reservoirs to help them decide. Decision-making therefore becomes sense-making.[291]

Although foreign policy decisions can be made by individuals, groups or coalitions, the aim of this research is to take the foreign policy decision-making processes to the level of the individual. Since leaders' decisions are determined by their operational codes with direct influence on their political judgment and decision-making styles, it is only logic that states' compliance with international law is influenced by the operational codes of their most important leaders, i.e., decision-makers with enough power to decisively influence a state's foreign policy actions (such as Ministers of Foreign Affairs, Prime-Ministers or Presidents). For the purposes of this research, the focus will be on the President of the United States (with a particular focus on George W. Bush and Barack Obama).

[290] Toni Erskine, "Locating Responsibility: The Problem of Moral Agency in International Relations," in *The Oxford Handbook of International Relations*, eds. Christian Reus-Smit and Duncan Snidal, eds. (New York: Oxford University Press Inc., 2010), 699-707, p. 701.

[291] I want to thank Prof. Markus Kornprobst for drawing my attention to the connection between reservoirs, decision-making, and sense-making.

Last but not least, it must be outlined that apart from broadening the scope of the operational code concept, this research further contributes to existing literature by merging two disciplines and three different approaches from these disciplines. The interdisciplinarity of this research is given by the merger between International Law and International Relations as this research provides an International Law concept, compliance, with an IR Theory explanation pertaining to the IR subfield of foreign policy analysis. By bringing down the analysis to the level of the individual and examining how leaders' system of beliefs influences decision-making behind policies with international law implications and how that system of beliefs is constrained by the role leaders enter into as well as by the constitutional prerogatives of that role, three different operational codes are constructed. Although it seems that the focus is on the individual, it must be outlined that this research rather focuses on a socially embedded individual. It must also be outlined that all three operational codes merge to explain international law compliance. The institutional operational code on international law borrows from Louis Henkin's approach to international law (an approach that merges IL with foreign affairs). The public operational code being created by analyzing speeches of several US Presidents to construct the view on five concepts (foreign affairs / policy, history, the enemy(ies), threat(s), and international law) borrows from the constructivist approach in IR Theory. The private operational codes coined by analyzing the personal and professional backgrounds of George W. Bush and Barack Obama borrow from political psychology to explain how individual traits influence leaders' decision-making and well as the outcomes of those decision-making processes (for the purposes of this research, policies with international law implications).

Methodology: Causal Mechanism & Qualitative Research

The purpose of the research is to answer the following question: Why do states comply with international law? To narrow down the scope of research, out of the many branches of international law, the research focuses exclusively on the law on the use of force (*jus ad bellum*) and, to a lesser extent, the law of armed conflict (*jus in bello*).

The research focuses on the United States' compliance with these two branches of international law. The American presidential system suits perfectly to the purposes of this research: the US President is not only the head of the executive, but also one of the key figures in US foreign policy; therefore, it is easy to identify the political leader this research focuses on and whose operational codes and decision-making processes are to be analyzed. Moreover, given this research's focus on foreign policy decision-making and states'

compliance with the law on the use of force and the law of armed conflict, the US President as both the key figure in American foreign policy and Commander-in-Chief of the United States Armed Forces offers the perfect case study.

This research will analyze several US post-9/11 foreign policy decision-making instances and the compliance with the law on the use of force and the law of armed conflict of the policies emerging from those instances. Given the focus of this research, the two American Presidents under analysis are George W. Bush and Barack Obama. The focus on foreign policy decision-making in the post-9/11 era is due to the myriad of legal questions raised by the military actions of the United States in wars such as the one in Afghanistan or Iraq. Moreover, focusing this research on former US Presidents George W. Bush and Barack Obama allows testing the theoretical model on two political leaders with different personal and professional backgrounds, coming from different political parties and having to make decisions in a similar framework, and in a similar role, the role of President of the United States. If the theoretical model stands after being tested on two political leaders with such different backgrounds and personalities, then there are reasons to believe that it is generalizable.

Given the centrality of the concept of operational code to this research, a significant part will be dedicated to constructing the three operational codes part of this research. For the institutional operational code on international law the main sources will be the US Constitution together with the US Supreme Court's decisions on the separation of powers and constitutional presidential prerogatives, as well as scholarly and policy articles on these topics. For the public operational code of the United States President, the research will employ speeches US Presidents gave in pre-determined moments of their presidencies: Inaugural, State of the Union, and Farewell Addresses. These speeches will be useful in coining the generic operational code, i.e., the one pertaining to the role of US President. For this purpose, the analysis will extend to all such speeches of US Presidents from Franklin Delano Roosevelt to Barack Obama focusing on both the content of those speeches and on the context in which the speeches were given. To construct the private operational codes of George W. Bush and Barack Obama, this research will use memoirs, biographies or other books they authored (with the noticeable exception of President Obama's still unpublished memoirs) together with the memoirs of members of their close group of advisers such as their respective Vice Presidents (VPs), Secretaries of State and Defense. This analysis of books authored by key US decision-makers will be complemented by literature on decision-making processes in US foreign and security policy during the Bush and Obama Administrations as

well as by scholarly and policy analysis literature on the two Presidents and their respective Administrations. For the literature review part, the IR Theory and international law literature on compliance with international law, and the legal literature on the law on the use of force and the law of armed conflict will complete the pool of resources.

To be able to generate structured and comparable data, the qualitative methodology of structured, focused comparison will be employed; this methodology entails analyzing similar aspects of the subject matter in order generate comparable data and it is generally employed when realizing in-depth case studies. The case study will therefore focus on similar aspects of the Bush and Obama Administrations such as the post-September 11 preemptive / preventive use of force in self-defense (against both state and non-state actors) or targeted killings looking primarily at the usage of drones. The analysis will also focus on the two wars in Afghanistan and Iraq or the decision-making processes behind other instances in which the US used force (e.g., Libya) or decided against the use of military force (e.g., Syria). The conflict in Afghanistan spans throughout the full time in office of Presidents Bush and Obama. What is more, the intervention in Afghanistan was one of the first major foreign policy decision of the Bush Administration after 9/11. As a method of war, targeted killings raise concerns regarding both the use of force in international relations and the laws applicable to armed conflicts. The usage of drones as a means of war started during the Bush Administration and increased exponentially during the Obama Administration. All in all, this research will be a chronological analysis of the decision-making mechanisms leading up to certain policies, analysis focused on whether compliance with international law is a relevant factor in decision-making. Moreover, those policies' compliance with international law will also be scrutinized.

Chapter III: US Institutional Operational Code on International Law

This chapter is dedicated to the institutional operational code of the United States regarding international law, code broadly defined as a set of institutional prerogatives and practices regarding IL. Out of the numerous factors that influence a country's approach towards international law, this code encompasses, among others, the institutional architecture the Constitution establishes in matters of foreign policy and use of force, executive practice, and Supreme Court jurisprudence. The focus on foreign policy and the use of force is in line with this research's analysis of America's compliance with international norms on the use of force and international humanitarian law. It is also in line with the fact that in the United States, just as in multiple other countries, international law is subsumed to foreign policy interests.

To be able to provide a clear overview of the US perspective towards international law, this institutional operational code encompasses several elements. With each sub-chapter focusing on a different element, this chapter shall be structured as follows: firstly, for a theoretical perspective, the scholarly community's approach towards international law shall be outlined; secondly, the relationship between the US Constitution and international law as well as the incorporation of international law into the US legal system will be analyzed; given that international law is subsumed to foreign policy, the next element (and sub-chapter) is represented by the institutional framework set by the American Constitution regarding foreign policy prerogatives, in general, and war powers, in particular; fourthly, the distribution of prerogatives between the executive and the legislative is analyzed against the institutional practice on matters of use of force (i.e. war-making prerogatives and their evolution throughout several presidencies). The fifth element is present throughout the research and therefore does not have a sub-chapter dedicated to it: the jurisprudence of the judicial branch (represented, for the purposes of this research, by the US Supreme Court) on three of the previous elements (the relationship between the Constitution and international law, foreign policy prerogatives, and executive practice on matters of use of force). At the onset, it must be underlined that this chapter does not provide a detailed account of the above-mentioned elements, but rather a synthesis.

The 17th and 18th centuries saw a growing belief that "international relations are based on a universal system of international law."[1] Inspired by European Enlightenment, the American

[1] Stephan Verosta, "History of International Law, 1648 to 1815," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: June 2007,

colonies' independence from the British Empire[2] strengthened a core international law principle, the principle of self-determination.[3] The new nation accepted international law norms which, at that time, had been single handedly designed by European powers. Even after its power and influence on the international arena increased, the US did not claim "the right to develop a North American international law,"[4] but further contributed to the development of existing international law norms.

American legal experts and decision-makers alike constantly point out the country's longstanding tradition of supporting international law. After all, liberty and equality, two core American values enshrined in the country's founding documents, the 1776 Declaration of Independence[5] and the 1787 Constitution,[6] are part and parcel of the development of international law (especially in the field of human rights).[7] At the end of WWII, America's leadership was instrumental in negotiating the founding agreements of the international organizations that are now the backbone of the world system:[8] the United Nations Charter and the North Atlantic Treaty[9] (at the basis of the current international security structure), or

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https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e707?rskey=hJ63jB&result=1&prd=MPIL (accessed July 30, 2020), para. 61.

[2] For more information on the birth of the US as a nation and the European influences on this process, see Ibid., paras. 16-17.

[3] Ibid., paras. 16 & 66.

[4] Ibid., para. 20.

[5] The second paragraph of the Declaration of Independence writes: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." National Archives: America's Founding Documents, "Declaration of Independence: A Transcription," https://www.archives.gov/founding-docs/declaration-transcript (accessed August 22, 2019).

[6] The Preamble to the American Constitution writes: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." National Archives: America's Founding Documents, "The Constitution of the United States: A Transcription," https://www.archives.gov/founding-docs/constitution-transcript (accessed August 22, 2019) - all citations from the United States Constitution are from this source (even if not explicitly mentioned). The word "equality" is nowhere to be found in the body of the Constitution. The 14th Amendment (Section 1) to the US Constitution stipulates that no person can be denied "the equal protection of the laws." National Archives: America's Founding Documents, "The Constitution: Amendments 11-27," https://www.archives.gov/founding-docs/amendments-11-27 (accessed August 22, 2019).

[7] John B. Bellinger, "The United States and International Law" (speech, The Hague, June 6, 2007), 2001-2009 Archive for the U.S. Department of State, https://2001-2009.state.gov/s/l/rls/86123.htm (accessed July 23, 2019).

[8] For a detailed analysis of the post-WWII world order and America's role in its making, see Robert Kagan, "Superpowers Don't Get to Retire," *The New Republic*, May 27, 2014, https://newrepublic.com/article/117859/superpowers-dont-get-retire?utm_medium=App.net&utm_source=PourOver (accessed April 28, 2020).

[9] For information on President's Truman support for NATO see Harry S. Truman Little White House, "Historical Guide to President Truman & NATO," https://www.trumanlittlewhitehouse.com/president-truman-nato-history.htm (accessed August 5, 2019). Regarding NATO, President Truman stated: "Events of this century have taught us that we cannot achieve peace independently. The world has grown too small. The oceans to our east and west no longer protect us from the reach of brutality and aggression." Harry S. Truman, "Special Message to the Senate Transmitting the North Atlantic Treaty" (written message, Washington, D.C., April 12,

the Bretton Woods Agreements[10] setting the International Monetary Fund (IMF) and the World Bank as pillars of the current international monetary system.[11] Nevertheless, in the post-Cold War era and especially following September 11 and America's actions in the Global War on Terror, the US seemed to be parting ways with international law.[12] In the 21st century, America repeatedly challenged international law rules on the use of force, international humanitarian law or environmental law[13] and, to some, displayed an empire type of behavior.[14] For instance, renowned international law scholar, Martti Koskenniemi, points to the Bush Administration's persistent efforts to "opt out from international rules and institutions and to proceed in norm-creation and enforcement through unilateral channels or in the context of 'coalitions of the willing'."[15]

Domestic ideology, political parties, interest groups, a country's regime type, its constitutional history, the public opinion's perception of the country's role and standing on the international arena are just some of the factors influencing a nation's perception on international law. Politics therefore becomes intertwined with IL; this is even more so the case when political leaders employ international law to justify and legitimize their policies or prevent internal challenges to a preferred course of action.[16] The distinction between IL and politics thus becomes blurred weakening international law which, marred by political considerations, is no longer "pure law."[17] IL, nonetheless, has never been completely

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1949), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/230126 (accessed August 5, 2019).

[10] For more information on the negotiation process during the 1944 Bretton Woods conference setting the World Bank and the International Monetary Fund as well as for the US involvement in the process, see Andreas F. Lowenfeld, "Bretton Woods Conference (1944)," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: March 2013, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e454?rskey=VpBJld&result=1&prd=MPIL (accessed July 30, 2020).

[11] For the overall structure of the current international monetary system, see Maurizio Ragazzi, "Financial Institutions, International," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: October 2017, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e460?rskey=yC3KOC&result=2&prd=MPIL (accessed July 30, 2020).

[12] Mark A. Pollack, "Who Supports International Law, and Why?," p. 874.

[13] Martti Koskenniemi, "History of International Law, since World War II," para. 58.

[14] G. John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (New Jersey: Princeton University Press, 2011), p. xii.

[15] Martti Koskenniemi, "History of International Law, since World War II," para. 62.

[16] Eyal Benvenisti, "Domestic Politics and International Resources: What Role for the International Law?" in *The Role of Law in International Politics*, ed. Michael Byers, 109-129, p. 109.

[17] Martti Koskenniemi, "Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations," pp. 28-34.

divorced from politics. For instance, as one international law scholar argues, "treaties are policy outcomes as well as legal agreements."[18]

The US View on International Law: The Scholarly Community's Perspective

The US attitude towards IL is "proof that power is, indeed, the constitution of international law."[19] The US approaches international law

> from the perspective of a powerful nation, indeed a world power, whose leaders have 'options' and routinely choose among alternative 'strategies' in an ultimately hostile world. From that perspective, any conception of law as fixed 'rules' seems irrelevant to the extent that it is not backed by sanction and counterproductive inasmuch as it limits the choices available to those who do have the means to enforce them. The language of 'governance' (in contrast to government), of the management 'regimes', of ensuring 'compliance', is the language of a powerful and a confident actor with an enviable amount of resources to back up its policies.[20]

Therefore, among other factors, the country's great power status in international affairs influenced the US view on international law. The salience of power over legal norms characterizes the realist approach towards IL. Realist scholars (such as E. H. Carr) considered the legalist or idealist school of thought to be "oblivious to the 'realities' of power in the international world."[21] The idealists, on the other hand, saw international law as a means towards peaceful coexistence in international affairs and outlined IL's relevance for the maintenance of post-WWI international peace and security. Following WWII, realist accounts of the failure of the inter-war system monopolized the scholarly community. With pragmatism as the law of the land, international law was deemed a mere tool subsumed to states' foreign policy interests.[22] Given the political imperatives, the Cold War era saw an ever-expanding drift between the US international law establishment and its foreign policy elites.[23] At the end of Cold War, the centrality of international law to the "new world order" proclaimed by President George H.W. Bush,[24] provided IL with a higher standing in US foreign policy.[25]

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[18] Rachel Brewster, "Reputation in International Relations and International Law Theory," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 524-543, p. 533.
[19] Gabor Rona, "Interesting Times for International Humanitarian Law," p. 56.
[20] Martti Koskenniemi, "Carl Schmitt, Hans Morgenthau, and the Image of Law in International relations," p. 29.
[21] Martti Koskenniemi, "History of International Law, World War I to World War II," para. 14.
[22] Ibid.
[23] Martti Koskenniemi, "History of International Law, since World War II," para. 37.
[24] For more information on the concept of "new world order," see Chapter IV - the section outlining the concept of international law.
[25] Martti Koskenniemi, "History of International Law, World War I to World War II," para. 14.

In the American scholarly community, two universities were home to the two main schools of thought on international law.[26] Yale scholars Myres McDougal, Harold Laswell, and W. Michael Reisman founded the New Haven School.[27] With a predominantly policy-oriented perception of international law, the New Haven School viewed IL as a "technique for pursuing American values and foreign policy goals."[28] This instrumentalization of international law was inspired by both European political realism (coined by scholars such as E.H. Carr or Raymond Aron) and American legal realism based on the interplay between social processes and rules in law enunciation.[29] The New Haven School saw the legitimacy of international institutions and the "likelihood that formal prescriptions encapsulate government interests"[30] as main determinants of states' compliance with IL.

The second approach originated at Harvard and was inspired by Henry Hart and Albert Sacks's unpublished materials on *The Legal Process*.[31] The International Legal Process School, represented, among others, by Abraham Chayes, Theodore Ehrlich, and Andreas Lowenfeld, shared with the New Haven School the assumption that international law compliance results from the interaction between transitional actors in different private and public fora.[32] This interaction translates … "claims of legal authority into national behavior."[33] Whereas the New Haven School views process as "policy justification," the International Legal Process School treats it as "policy constraint:"

> The New Haven School viewed international law as itself a decisionmaking process dedicated to a set of normative values, while the International Legal Process School saw international law as a set of rules promulgated by a pluralistic community of states, which creates the context that cabins a political decisionmaking process.[34]

[26] A short enumeration of 19th century American scholars of international law would include American J. Kent, *Commentaries on American Law: International Law* (vol, 1, 1826); Henry Wheaton, *Elements of International Law* (1836) and *Histoire des Progrès du Droit des Gens en Europe* (1941); T. D. Woolsey, *Introduction to the Studies of Political Science on Nationalism and Internationalism* (1886); Francis Wharton, *Digest of the International Law of the USA* (3 volumes, 1884-86); David Dudley Field, *Outlines on an International Code* (1872). For more information, see Hans-Ulrich Scupin, "History of International Law, 1815 to World War I," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: May 2011, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e708?rskey=Ic6Vmi&result=1&prd=MPIL (accessed July 30, 2020), para. 83. For an overview of European scholars, see para. 84.
[27] W. Michael Reisman, Siegfried Wiessner, and Andrew R. Willard, "The New Haven School: A Brief Introduction," *Yale Journal of International Law* 32, no. 2 (Summer 2007): 575-582.
[28] Martti Koskenniemi, "History of International Law, since World War II," para. 3.
[29] Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2618.
[30] Barbara Delcourt, "Compliance, Theory of," para. 6.
[31] William N. Eskridge, Jr., and Philip P. Frickey, "The Making of the Legal Process," *Harvard Law Review* 107, no. 8 (June 1994): 2031-2055, p. 2031.
[32] Harold Hongju Koh, "Why Do Nations Obey International Law?," p. 2618.
[33] Ibid.
[34] Ibid., p. 2623.

Both schools therefore view international law as part and parcel of foreign policy. The instrumentalization of IL in pursuit of foreign policy goals reflects the rational actor approach which tends to dominate the US view on international law. In summarizing this approach, renowned American international law professor, Eric Posner, raises the question of whether international law has a life of its own or is just "the sum of states' interest"[35] since IL is borne out of a cost-benefit analysis of what states consider to be good policy.[36] Following this analysis, states, reluctant as they are to admit to international law violations, put forward an interpretation of the law that overlaps with their national interests.[37] This cost-benefit calculation generates a more empirical liberal-conservative divide,[38] "a pattern of American international lawbreaking that long predates the years of the Bush administration:"[39] even though liberals consider that the long-term costs for US international law breaking are high they tend to agree to non-compliance when compliance with international trade agreements threaten the environment or the working conditions of US citizens; conservatives, on the other hand, tend to consider the long term costs of non-compliance low, even more so when international human rights[40] or criminal law interfere with national security.[41]

Moving away from the American scholarly community, Shirley V. Scott outlines the main elements of America's engagement with international law admitting to the contradictions between its legalistic rhetoric and its international actions. The US engages with international law by employing it as a policy dissemination tool, it uses it to shield its legal system and policies from external influences, and ultimately "takes legal obligations seriously" (albeit with some reservations).[42] Scott outlines America's skepticism towards international law and explains that such skepticism is rooted in the US Constitution.[43] America's foundational document begins with the words "We the People" therefore

[35] Eric A. Posner, *The Perils of Global Legalism* (Chicago: University of Chicago Press, 2009), p. ix.
[36] Ibid.
[37] Ibid.
[38] Ibid., p. 226.
[39] Ibid., p. xi.
[40] "If one is politically opposed to the provision of certain entitlements to groups of American citizens, then one will be wary of promoting the same rights internationally, especially if international agreements might pose standards that would have to be enforced within the United States, to which some Americans are opposed." Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 278.
[41] Eric A. Posner, *The Perils of Global Legalism*, p. xi.
[42] Shirley V. Scott, "The Nature of US Engagement with International Law: Making Sense of Apparent Inconsistencies," in *Handbook of International Law*, ed. David Armstrong (London: Routledge, 2009), 210-220, pp. 210-211.
[43] For further information, see this chapter's section on the Constitution and international law.

identifying the American people as the ultimate source of political legitimacy.[44] The people thus become the "source of all political authority as a matter of public discourse."[45]

From the foreign policy analysis arena and offering a critical rather than an explanatory perspective on international law, Krauthammer acknowledges the importance of legalism (i.e., policy "driven by legal formulas rather than by national purpose")[46] in international affairs. Nevertheless, as an IL skeptic, he considers that turning "foreign policy over to the lawyers is the laziest, the most brainless way to make policy."[47] For Krauthammer, even in international law-related matters, the decision to pursue a certain course of action is a (foreign) policy decision, not a legal one. International law therefore "has nothing to offer. Foreign policy is best made without it."[48]

European scholars, on the other hand, tend to reject this approach to international law; taking a more normative stance, they are staunch supporters of IL: compliance with international law is rather a legal imperative than a foreign policy choice. The difference between the two approaches to international law can be summarized as follows:

> What will happen next? The United States will continue to resist efforts to constrain itself in the snarls of international legal norms, believing that it needs freedom of action in order to protect its interests and advance liberty and democracy around the world. Europe will continue to argue that international law serves American as well as global interests in the promotion of human rights and international security.[49]

To a certain extent, the approach to international law among US (legal) scholars combines the European perspective with what Posner labels the "liberal popular-press view."[50] Most US scholars support the "conflation of America's interests and the world's interests"[51] (with the rationalists among them being skeptical of "global legalism," i.e. "an excessive faith in the efficacy of international law").[52] For global legalists international law compliance is an end in and of itself regardless of the national interest. Rationalists, on the other hand, consider that global legalists do not depict reality accurately since they emphasize universal rules over bilateralism, sovereign equality over heterogeneity, and human rights over power.[53] Legalism depends on agreement on norms and advanced institutions. For this reason, US legalism is

[44] Eric A. Posner, *The Perils of Global Legalism*, p. 227.
[45] Ibid.
[46] Charles Krauthammer, "The Curse of Legalism: International Law? It's Purely Advisory," *The New Republic* 201, no. 19 (November 6, 1989): 44-50, p. 50.
[47] Ibid.
[48] Ibid.
[49] Eric A. Posner, *The Perils of Global Legalism*, p. 228.
[50] Ibid., p. xi.
[51] Ibid.
[52] Ibid., p. xii.
[53] Ibid., pp. xiii-xvi.

confined to national borders where American courts with American judges are guided in their legal decisions by American values. International courts, staffed with judges unaccountable to the US raise skepticism from public opinion and decision-makers alike.[54]

In the US, isolationists or anti-internationalists roots go as far back as the days of the Senate' rejection of the Treaty of Versailles and, implicitly, the League of Nations as a post-WWI peace ensuring mechanism. Anti-internationalists are not 100% isolationists since they do not oppose all international treaties; they advocate for the US' right to simply "pick and choose the international conventions and laws that serve its purpose and reject those that do not."[55] Sovereignty is at the center of their arguments: the United States, as a fully sovereign nation, is governed by its Constitution which requires the safeguard of national sovereignty as a prerequisite for the safeguard of the Constitution itself. It is due to this "New Sovereigntist" current that, for instance, trade agreements perceived to be serving US interests have been ratified as long as they did not touch upon labor, human rights or environmental aspects.[56] The three main lines of attack put forward by the New Sovereigntists are similar to the ones of international law skeptics in the United States (be they Washington decision-makers, scholars or the public opinion): (1) international law is vague and intrudes on US domestic affairs; (2) the international lawmaking process is accountable to no one and generates unenforceable results; (3) "as a matter of power, legal right, and constitutional duty"[57] the US can simply withdraw from international agreements it does not consider favorable to its national interests. The US can do so easily, the New Sovereigntists argue, given its international standing heavily influenced by its military might and strong economy.[58]

Spiro refers in one of his articles to US international law scholars such as John Yoo or Jack Goldsmith (both working for the Department of Justice (DoJ) in the George W. Bush Administration). In his memoirs, *The Terror Presidency*, Goldsmith replies to Spiro's categorization outlining many of the elements part of the US view on international law. He admits that he was tagged as part of a number of

> conservative intellectuals – dubbed "new sovereigntists" in *Foreign Affairs* magazine – who were skeptical about the creeping influence of international law on American law. My [Goldsmith's] academic objections to this trend were based on the need for democratic control over the norms that governed American conduct. My [Goldsmith's] scholarship argued against the judicial activism that gave birth to international human rights lawsuits in

[54] Ibid., p. 228.
[55] Peter J. Spiro, "The New Sovereigntists: American Exceptionalism and its False Prophets," *Foreign Affairs* 79, no. 6 (November-December 2000): 9-15, p. 9.
[56] Ibid., pp. 9-10.
[57] Ibid., p. 10.
[58] See Jeremy Rabkin, Professor of Political Science at Cornell University, cited in Ibid., p. 12.

> U.S. courts. It decried developments in "customary international law" that purported to bind the United States to international rules to which the nation's political leaders had not consented. And it defended, on grounds of democratic legitimacy and national self-interest, the United States' refusal to enter into treaties like the Rome Statute establishing the International Criminal Court and the Kyoto Protocol regulating greenhouse gas emissions.[59]

Each country thus "develops a distinctive worldview that predisposes its members to look in their own special ways at world events and their influences on them."[60] This worldview takes the form of political culture, and in the particular case of foreign relations, foreign policy culture, i.e., "the distinct ways in which people in different countries view the world and their place in it."[61] Internal factors therefore heavily influence a country's approach towards international law. Its constitution, laws, institutions, history, traditions, values, and "style"[62] are just a few examples of such factors.

Let us now say a few words about the foreign policy cultural beliefs of the United States. Historically, the United States has perceived itself as the guardian of the international legal and political order. Throughout centuries, America has had a significant contribution to international law.[63] Instances of legal isolationism can nonetheless not be overlooked. The US Senate, constitutionally endowed with the prerogative of ratifying international agreements,[64] has a track record in this regard: in the pre-WWI period, the Senate did not ratify the Bryan Treaties providing a mechanism for the peaceful settlement of disputes between states although they incorporated "American national rules, functions and power positions."[65] Even more resounding was the Senate's post-WWI refusal to ratify the Peace Treaty of Versailles due to its opposition to the League of Nations. The first peace treaty to ever be rejected by the US Senate,[66] the Versailles Treaty was an attempt to constrain the use of force and safeguard states' right to self-determination as well as minority rights. Although

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[59] Jack L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton & Company, Inc., 2009), p. 21.
[60] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, pp. 19-20.
[61] Ibid., p. 19.
[62] Louis Henkin, *How Nations Behave*, p. 61.
[63] For an overview, see Hans-Ulrich Scupin, "History of International Law, 1815 to World War I."
[64] For further information, see the chapter's section on the US Constitution and international law.
[65] After WWI broke out, the treaties were eventually ratified between the Great Powers of Western and Eastern Europe. The treaty between the US and the German Reich remained unratified. Hans-Ulrich Scupin, "History of International Law, 1815 to World War I," para. 106 (information and citation from the same paragraph).
[66] The US never ratified the Versailles Treaty, nor did it join the League of Nations. In 1921, the US Congress approved separate resolutions to formally end the war between the US and Germany, Austria, and Hungary. United States Senate, "The Treaty of Versailles," https://www.senate.gov/artandhistory/history/common/generic/Feature_Homepage_TreatyVersailles.htm (accessed October 24, 2019). Also see Randall Lesaffer and Mieke van der Linden, "Peace Treaties after World War I," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: July 2015, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e368?rskey=kIAVbS&result=1&prd=MPIL (accessed July 30, 2020), para. 2.

it did not oblige the US to intervene to uphold the post-WWI peace settlement,[67] the treaty was rejected mainly because of the isolationist sentiment preponderant in the US at the end of WWI. Other contributing factors were the perception that the treaty's provisions were clashing with the US Constitution and the fear that Congress might lose control over foreign affairs and the president would see its power increased vis-à-vis Congress.[68]

Following WWII and its rise to superpower status, the US established what Robert Kagan calls an "institutionalized system of hegemony"[69] starting from the belief that it is America's duty and "manifest destiny"[70] to shape international norms based on American principles. The UN, NATO, IMF, and the World Bank are the pillars of this system. As a matter of both political beliefs and foreign policy behavior, promoting international institutions is a longstanding practice of US foreign policy: Theodore Roosevelt supported a consortium of powers, Woodrow Wilson was a staunch advocate for the League of Nations, Franklin Delano Roosevelt was one of the founders of the United Nations,[71] and George H.W. Bush believed in a New World Order based on international institutions.[72] One might argue whether this is a purely selfless liberal vision of international order or, on the contrary, a self-interested one.[73] What is more, the US became a member of these institutions fully aware that the structural power it would gain would help it "seek political and material support for its purposes."[74] These institutions preserved "U.S. leadership of an international order which has overwhelmingly served U.S. interests in a coherent system of rules and customs that has given … 70 years free of direct major power conflict and impressive economic prosperity."[75]

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[67] Ibid., para. 29.
[68] Ibid., para. 11.
[69] Yan Xuetong, *Meiguo Baquan yu Zhongguo Anquan* [American Hegemony and Chinese Security] (Tianjin, 2000), p. 23, cited in Robert Kagan, *The World America Made* (New York: Vintage, 2013), p. 58.
[70] See next chapters for more references to the "Manifest Destiny" Doctrine.
[71] For detailed information on the negotiation of the UN Charter during WWII (with a focus on the conferences held at Dumbarton Oaks, Yalta, or San Francisco), for President Roosevelt's direct and constant involvement in the negotiation process, and for the support provided by the American Society of International Law, see Jean-Pierre Cot, "United Nations Charter, History of," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: April 2011, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e539?rskey=5qFf1T&result=1&prd=MPIL (accessed July 30, 2020).
[72] Robert Kagan, *The World America Made*, p. 94.
[73] Ibid., pp. 93-94.
[74] Stewart M. Patrick, "John Bolton, Sovereignty Warrior," Council on Foreign Relations Blog - The Internationalist & International Institutions and Global Governance Program, entry posted March 23, 2018, https://www.cfr.org/blog/john-bolton-sovereignty-warrior (accessed March 27, 2018).
[75] Ted Piccone, "Why International Law Serves U.S. National Interests," *Brookings*, April 12, 2017, https://www.brookings.edu/research/why-international-law-serves-u-s-national-interests/ (accessed November 27, 2019).

America's relationship with the world as well as its vision of the world have been translated into different political doctrines[76] with major international law implications (especially for the principles of sovereignty and non-intervention in the internal affairs of another country). Rejecting European intervention in Latin America in support of what Europe could have considered legitimate claims on the continent, the Monroe Doctrine "contains the counter principle of non-intervention:"[77] the US would voluntarily restrain its engagement in European affairs as long as European states refrained from intervening in Latin America.[78] If after the First World War the US exhibited an isolationist international behavior and withdrew from Europe, the post-WWII era witnessed the opposite. In 1947, the Truman Doctrine pledged financial and military support to countries threatened to fall under Communist influence. Part of the Truman Doctrine, the 1948 Marshall Plan (or the European Recovery Plan) gave financial and political support to Western European countries to prevent them from falling under the Communist sphere of influence.[79] Another major doctrine of the Cold War era was the Reagan Doctrine whose aim was to reduce Soviet influence internationally by forcing reforms through (mostly covert) assistance to anti-Communist forces throughout the world.[80]

All the above-mentioned doctrines presupposed a particular worldview (and foreign policy cultural belief), labeled American exceptionalism,[81] which reflected how the US perceived itself and the rest of the world. American exceptionalism was coined by Alexis de Tocqueville in reference

> to the perception that the United States differs qualitatively from other developed nations, because of its unique origins, national credo, historical evolution, and distinctive political and religious institutions.[82]

In either politics or law, American exceptionalism is based on American values (such as freedom / liberty or equality of opportunity) and the primacy of the US Constitution. In the words of Thomas Jefferson, one of America's Founding Fathers and its third president, the ultimate purpose of the American government is to safeguard "Life, Liberty, and the Pursue

[76] For more information on different US doctrines, see next chapters and Chapter I.
[77] Hans-Ulrich Scupin, "History of International Law, 1815 to World War I," para. 14.
[78] Ibid.
[79] For more information on the Truman Doctrine and the Marshall Plan, see Ebrahim Afsah, "Cold War (1947-1991)," *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (online edition), Article last updated: June 2009, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e906?rskey=7a3WcH&result=1&prd=MPIL (accessed July 30, 2020), paras. 14-5.
[80] For more information, see Ibid., para. 30.
[81] See next chapters for further information on the concept of American exceptionalism.
[82] Harold Hongju Koh, "America's Jekyll-and-Hyde Exceptionalism," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (New Jersey: Princeton University Press, 2005), 111-144, p. 112.

of Happiness."[83] American exceptionalism encompasses a peculiar view on America's responsibilities (consequence of the US' unique democracy and unmatched (military) power) and its rights (especially the right to democracy promotion).

American exceptionalism can be identified as one of the factors generating reticence towards international norms.[84] American legal exceptionalism is best exemplified by the US practice of filling reservations to treaty provisions deemed as either conflicting with the US Constitution or departing significantly from standard US policy and therefore requiring a change in America's standard course of action.[85] On a more general level, research seems to indicate that states do not have "compliance policies"[86] regarding international law, but rather issue area policies. For instance, in the US, Republicans and Democrats differ in their approach towards international law. The overall perception is that Democrats tend to be more pro-IL whereas Republicans are deeply skeptical of international law. Research outlines that Democrats are pro-international agreements in areas such as human rights,[87] labor, criminal, and environmental law. Oftentimes, Democratic presidents signed such agreements only to see them blocked in Senate by a Republican majority. Republicans, on the other hand, have traditionally supported agreements in areas such as trade and investment.[88] Referring to specific Presidents, President Bush's interpretation of American exceptionalism focused more on America's rights (to behave as it saw fit). President Obama favored an American exceptionalism based on America's responsibilities. In relation to international law, both Presidents favored a flexible interpretation of IL: Bush withdrew the US from the Kyoto

[83] For more on American values, see James West Davidson, *A Little History of the United States* (New Haven & London: Yale University Press, 2015), p. 84.
[84] Mark A. Pollack, "Who Supports International Law, and Why?," p. 888.
[85] Michael Ignatieff, "Introduction: American Exceptionalism and Human Rights," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (New Jersey: Princeton University Press, 2005), 1-26 & Chapters: 4-7 (90-222).
[86] Lisa L. Martin, "Against Compliance," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 591-612, p. 606.
[87] For more information on the US constitutional protection of human rights (especially through the Bill of Rights) and its relationship to human rights treaty ratification, see Mark A. Pollack, "Who Supports International Law, and Why?," p. 891; and Andrew Moravcsik, "Why is U.S. Human Rights Policy So Unilateralist?," in *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement*, eds. Shepard Forman and Patrick Stewart (Boulder, CO: Lynne Rienner Publishers, 2001), 345-414, p. 345.
[88] Trade, environment, and human rights are just some of the areas where research shows that interest groups are most powerful and successful in influencing the preferences of decision-makers. Mark A. Pollack, "Who Supports International Law, and Why?," pp. 888-89. For more information on the differences in international law approach between Democrats and Republicans and their track record of treaty ratification, see Judith G. Kelley and Jon C. W. Pevehouse, "An Opportunity Cost Theory of US Treaty Behavior," *International Studies Quarterly* 59, no. 3 (September 2015): 531-543. For a historical overview of treaties and their ratification, as well as for a list of treaties rejected by the US Senate, see United States Senate, "Treaties: A Historical Overview," https://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm (accessed November 5, 2019).

Protocol and the ICC Rome Statute and overstretched the boundaries of the international norm against (preventive) use of force. Obama was a staunch supporter of international agreements such as the Paris Agreement or the Iran Nuclear Deal, but was also overstretching the boundaries of the prohibition on the use of force by significantly expanding the targeted killings program.[89]

To conclude, let us give the final word to an American practitioner of international law. In a 2007 speech given at the Hague, John B. Bellinger, then Legal Adviser of the State Department during the second Bush 43 Administration explains how the US acquires and implements international obligations, as well as the relationship between international obligations, the US Constitution, and US domestic law. Outlining the importance of international law for international cooperation and for solving common international problems, he rebukes critics that the United States rejects "international obligations when they prove constraining and inconvenient."[90] Instead, Bellinger makes a passionate support for America's commitment towards international law: the US believes in IL, helps develop it, relies on it, abides by it, and, most importantly, considers it relevant for both the US Constitution and its internal legislation.[91] Outlining America's historic involvement with international law and institutions, he identifies international law development as a "fundamental element" of US foreign policy with a key role in "shaping cooperation on international concerns, ensuring accountability and justice, and settling disputes peacefully."[92] Bellinger provides the following examples in support of his arguments. Firstly, treaty practice. Entering or not into a treaty is determined by its subject matter or the problem it addresses; whether it is a suitable instrument to address such problem, and, last but not least, whether the treaty can be implemented into US internal law.[93] Bellinger's conclusion is that treaties should not only "express good intentions," but "create clear and serious obligations."[94] Secondly, US practice is definitely guided by the belief that international law matters. In the words of then US Secretary of State, Condoleezza Rice:

[89] Peter Beinart, "The Iran Deal and the Dark Side of American Exceptionalism," *The Atlantic*, May 8, 2018, https://www.theatlantic.com/international/archive/2018/05/iran-deal-trump-american-exceptionalism/560063/ (accessed August 23, 2019).
[90] John B. Bellinger, "The United States and International Law."
[91] Ibid.
[92] Ibid.
[93] In his speech, to rebuke critics to US behavior towards international law, Bellinger details the country's approach to the Rome Statute of the International Criminal Court, the UNESCO Cultural Diversity Convention, the Kyoto Protocol, the Convention for the Elimination of Discrimination Against Women or the Law of the Sea Convention. Ibid.
[94] Ibid.

> America is a country of laws. When we observe our treaty and other international commitments, . . . other countries are more willing … to cooperate with us and we have a better chance of persuading them to live up to their own commitments. And so when we respect our international legal obligations and support an international system based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America.[95]

Thirdly, there is the influence of international law on US domestic law. Bellinger labels as a myth the supposition that international law is not binding on the US legal system. On the contrary, IL does generate legal consequences for international law non-compliance given the Constitution's Supremacy Clause.[96] The Constitution recognizes that treaties are the law of the land and allows Congress to punish offenses against international law, i.e. the Law of Nations. Instead of advocating for isolationism, the Constitution allows the US to actively participate in the "development and enforcement of international law."[97] IL is therefore "real law" and US courts have a key role in enforcing it.[98]

The US Constitution and International Law

The US view on international law is heavily influenced by the US Constitution. Just as it is by the views of America's Founding Fathers. Historically, America tended to feel suspicious of international law and institutions it feared could limit the country's freedom of action and threaten its sovereignty.[99] This distrust tends to be traced back to Thomas Jefferson's 1801 Inaugural Address in which he stated that in his foreign policy he shall aspire to "peace, commerce, and honest friendship with all nations—entangling alliances[100] with none."[101] The

[95] Condoleezza Rice, "Remarks at Annual Meeting of the American Society of International Law" (speech, Washington, D.C., April 1, 2005), https://2001-2009.state.gov/secretary/rm/2005/44159.htm (accessed August 23, 2019). To support his arguments, Bellinger provides the examples of legal disputes between the United States and international organizations such as the International Court of Justice or the World Trade Organization, and the Geneva Conventions. John B. Bellinger, "The United States and International Law."

[96] In his speech, to exemplify IL's influence on US law, Bellinger provides the examples of the Convention Against Torture or the Geneva Conventions. Ibid.

[97] Ibid.

[98] Ibid.

[99] This perspective is different from the European one. The literature labels Europe, in general, and the EU, in particular, as a "normative power." "Normative Power Europe" entails that the commitment to democracy, human rights or the rule of law is the very fabric of European identity. What can be labeled as European exceptionalism in this regard entails a strong commitment to a "rules-based, multilateral legal order." Mark A. Pollack, "Who Supports International Law, and Why?," p. 888.

[100] The syntagm "entangling alliances" is mistakenly attributed to George Washington's 1796 Farewell Address. In his final address to the American people, Washington had this to say about US foreign relations: "The great rule of conduct for us, in regard to foreign nations, is in extending our commercial relations, to have with them as little political connection as possible. Europe has a set of primary interests, which to us have none, or a very remote relation. Hence she must be engaged in frequent controversies the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities ... it is our true policy to steer clear of permanent alliances with any portion of the foreign world; so far, I mean, as we are now at liberty to do it; for let me not be understood as capable of patronizing infidelity to existing engagements." As it can be seen, Washington warned against "permanent alliances," not against "entangling

original intent of the Founding Fathers was to establish a "limited government … subject to the rule of law."[102] The US Constitution provides the architecture of this limited government. In force since 1789, it is "the world's longest surviving written charter of government."[103] The document opens with the phrase "We The People" establishing at the onset that the foremost purpose of the US government is to serve its citizens and bestowing all political legitimacy onto the American people. The three branches of government have separate powers and are at the same time intertwined through a system of checks and balances meant to protect both majority interests and minority rights, to safeguard both liberty and equality, and to bestow rights upon states' local governments while creating a strong central government with attributes in defense, foreign policy, trade or commerce.[104]

The US Constitution merges American culture, history, and institutions. "More a concise statement of national principles than a detailed plan of governmental operation,"[105] the Constitution provides an institutional framework for the US government: it designs a system of separation of powers meant to safeguard the values enumerated in the Declaration of Independence: freedom / liberty, justice, equality of opportunity. The US Constitution is also part and parcel of American identity. Its importance for the American people must not be underestimated. More so than in any other country, in the US, the Constitution's significance goes beyond the one of a legal document comprising the fundamental law of the land. Constitutional independence is thus a foremost value; international law is sometimes perceived as jeopardizing this independence. The dominant understanding in the US is that international (legal) obligations are an unwanted constraint on US freedom of action.[106]

This being said, the Constitution contains a clause famously known as the Supremacy Clause.[107] Article VI, Section 2 stipulates that

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alliances." George Washington, "Farewell Address" (written message, Pennsylvania, September 19, 1796), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/200675 (accessed July 16, 2019).

[101] Thomas Jefferson, "Inaugural Address" (speech, Washington, D.C., March 4, 1801), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/201948 (accessed July 16, 2019).

[102] Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York: Columbia University Press, 1990), p. 7.

[103] United States Senate, "The Constitution of the United States of America," S. PUB. 103-21, https://www.senate.gov/civics/resources/pdf/US_Constitution-Senate_Publication_103-21.pdf (accessed October 17, 2018), page no: N/A.

[104] Ibid.

[105] Ibid.

[106] Stewart M. Patrick, "John Bolton, Sovereignty Warrior."

[107] For further analysis on the Supremacy Clause, see Caleb Nelson and Kermit Roosevelt, "The Supremacy Clause," Interactive Constitution - Made by *National Constitution Center*,

> all Treaties made or which shall be made with the authority of the United States, shall be the supreme law of the land and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any state to the contrary notwithstanding.[108]

According to international law skeptics notwithstanding, this clause leads to the

> dilution of sovereignty; if the United States signs an international treaty, that document's provisions become part of U.S. law enforceable in U.S. courts. If a treaty's provisions contradict U.S. law, the treaty's dictates supersede the existing statute and take precedent over it. It is because of this feature that the opposition to … treaties based on diluting sovereignty is often argued; it is also why treaties require Senate action.[109]

Interestingly enough, in *Boos v. Barry*, the Supreme Court equated international law compliance with a national interest furthered by the Constitution itself:

> As a general proposition, it is of course correct that the United States has a vital national interest in complying with international law. The Constitution itself attempts to further this interest ….[110]

The US Constitution sets a rather high bar for treaty ratification.[111] The President is granted treaty-making prerogatives[112] with the advice and consent of the Senate.[113] Consequently, all treaties must be approved by the Senate Foreign Relations Committee before they are scheduled for a vote by the Senate's leadership. The Constitution requires a two thirds majority in the Senate making it almost impossible for a treaty to be ratified absent bipartisan agreement[114] (such a supermajority is extremely rare as most countries ratify international treaties via a simple or absolute majority).[115] Given the high threshold for treaty ratification, Article II treaties are being increasingly substituted by congressional-executive agreements requiring majority votes in both houses of Congress.[116]

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https://constitutioncenter.org/interactive-constitution/interpretation/article-vi/clauses/31 (accessed November 5, 2019).

[108] Article VI, Section 2, "The Constitution of the United States."

[109] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 278.

[110] JUSTIA - US Supreme Court, Boos v. Barry, 485 U.S. 312 (1988), Opinions: Case, https://supreme.justia.com/cases/federal/us/485/312/ (accessed November 21, 2019). For information on the case, see FindLaw - United States Supreme Court, Boos v. Barry (1988), No. 86-803, Argued: November 9, 1987, Decided: March 22, 1988, https://caselaw.findlaw.com/us-supreme-court/485/312.html (accessed February 6, 2019).

[111] Apart from considerations related to party allegiance, interest groups, and constitutional ratification requirements, one other extra factor influencing the US approach to international law is the US federal system. For further information, see Mark A. Pollack, "Who Supports International Law, and Why?," p. 891.

[112] For a detailed analysis of the President's treaty-making prerogatives, see Raoul Berger, "The Presidential Monopoly of Foreign Relations," *Michigan Law Review* 71, no. 1 (November 1972): 1-58, pp. 4-33.

[113] For further information, see next section on the constitutional framework of US foreign policy prerogatives.

[114] Mark A. Pollack, "Who Supports International Law, and Why?," p. 890.

[115] Oona Hathaway, "Treaties' End: The Past, Present, and Future of International Lawmaking in the United States," *The Yale Law Journal* 117, no. 7 (May 2008): 1236-1373, p. 1271.

[116] See Footnote 54 in Mark A. Pollack, "Who Supports International Law, and Why?," p. 890.

Regarding the incorporation of international law into the US legal system, the country (like some European states) has a dualist legal system oftentimes requiring the adoption of further national legislation for international law to become part of national law.[117] The difference between monism and dualism[118] boils down to where countries look to determine international law's status in relation to domestic law: "Monism looks outward to the structure and content of international law; dualism looks inward to domestic standards and processes."[119] Whereas monists consider international and domestic law to be part of the same legal order, dualists see them as different. Consequently, monist legal systems automatically incorporate treaty law into their domestic legal systems, whereas dualist systems consider that additional national measures are necessary to incorporate international law into domestic law. Last but not least, monists consider that international law rules supreme over domestic law, whereas dualists look at domestic legal provisions to determine the status of IL within their legal system. For dualists, each country can determine what international legal provisions to incorporate in its internal legal order.[120]

The US, as many other countries, differentiates between self-executing and non-self-executing treaties. Self-executing treaties automatically become part of the US legal system producing direct effects, whereas non-self-executing treaties require extra executive (presidential) or legislative (congressional) action to be incorporated into US law. In the US, the Supreme Court ruled that US domestic courts can enforce non-self-executing international treaties only after having been implemented by Congressional federal statute.[121] Most treaties are not considered self-executing; consequently, they are not directly

[117] For more information on the relationship between US law and international as well as for an overview of the jurisprudence on the topic, see Harold Hongju Koh, "International Law as Part of Our Law," *American Journal of International Law* 98, no. 1 (June 2004): 43-57.

[118] According to Bradley, the US scholarly community was supportive of what Breard labeled as an "internationalist conception" of the relation between international and domestic law. The scholarly community supported the incorporation of international law into US domestic law, advocated for the supremacy of international law over domestic law, and for the government's prerogative to join international agreements (coined as "foreign affairs exceptionalism"). For more information, see Curtis A. Bradley, "Breard, Our Dualist Constitution, and the Internationalist Conception," *Stanford Law Review* 51, no. 3 (February 1999): 529-566, p. 539 (for an overall description of the "internationalist conception," see pp. 539-556).

[119] Ibid., p. 530.

[120] For more information, see Lisa Conant, "Whose Agents? The Interpretation of International Law in National Courts," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 394-420, pp. 394 & 398; and Curtis A. Bradley, "Breard, Our Dualist Constitution, and the Internationalist Conception," p. 530.

[121] Bradley points out that the Supreme Court determined that the intent of the Parties to a treaty is the key factor in establishing whether a treaty is self-executing or non-self-executing: a treaty can thus be self-executing if the Parties intended for it to be self-executing. The Court's decision has been employed by lawmakers as a justification for attaching "non-self-execution" declarations to the ratification of certain international agreements, especially in the field of human rights. See Curtis A. Bradley, "Breard, Our Dualist Constitution, and the Internationalist Conception," p. 540.

enforceable by US courts. All in all, American courts have been reluctant in accepting international treaties or rulings of international courts[122] as directly enforceable into the country's legal system.[123]

Some US scholars are also reticent as to the inclusion of customary international law into the US legal system. They labeled customary international law as vague and "likely to muddy rather than clarify the law, while departing from American traditions of representative democracy, separation of powers, and federalism."[124] It must be outlined that the Supremacy Clause is silent in relation to international customary law. At the time when the Constitution was written, CIT was named "the Law of Nations."[125] The Constitution refers to customary international law solely in Article I, Section 8 which stipulates a Congressional prerogative to "define and punish … Offenses against the Law of Nations."[126] Within the US scholarly community, the dominant understanding[127] is that customary international law is part of US domestic law; the Supreme Court nonetheless has never supported this claim in one of its rulings. In practice, the US has been active in supporting the development of certain CIT norms such as humanitarian intervention or the responsibility to protect while concomitantly opposing the emergence of other norms such as the illegality of nuclear weapons.[128] Furthermore, the US sometimes relies on the application of norms of customary international law as a substitute for the ratification of certain treaties (e.g. the Vienna Convention on the Law of the Treaties, the UN Convention on the Law of the Sea, the Protocol Additional I to the Geneva Conventions).[129]

To conclude, international law rules are therefore subject to the Constitution.[130] The tendency in the US is to transfer to the executive branch the decision regarding compliance by deferring to the executive's view on customary international law and allowing it to decide the circumstances under which it applies in the United States together with its actual

[122] For more information on the relationship between US national tribunals and international courts, see Harold Hongju Koh, "Paying Decent Respect to International Tribunal Rulings," *American Society of International Law* 96 (2002): 45-53.
[123] Mark A. Pollack, "Who Supports International Law, and Why?," p. 882.
[124] For more information on the incorporation of international law into the US legal system, see Ibid. On the US view on customary international law, see Curtis A. Bradley and Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position," *Harvard Law Review* 110, no. 4 (February 1997): 815-876.
[125] Curtis A. Bradley, "Breard, Our Dualist Constitution, and the Internationalist Conception," p. 543.
[126] Article I, Section 8, "The Constitution of the United States."
[127] For consenting and dissenting opinions on the matter, see Curtis A. Bradley, "Breard, Our Dualist Constitution, and the Internationalist Conception," pp. 543-545.
[128] Mark A. Pollack, "Who Supports International Law, and Why?," p. 887.
[129] Ibid.
[130] Malcolm N. Shaw, *International Law*, p. 157.

application.[131] In the *Paquete Habana* case, in its decision regarding international law, in general, and customary international law, in particular, the Supreme Court decided that the courts are to apply customary international law "where there is no . . . controlling executive ... act."[132] Moreover, the Court added that

> … international law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.[133]

The Courts interpret international law.[134] Nevertheless, the President, as chief executive, is constitutionally mandated to ensure that laws (including international treaties) are "faithfully executed."[135] The Constitution also bestows upon the President the prerogative of treaty-maker (see below). Interestingly enough, the Constitution does not stipulate whether it bestows upon the President the ability to terminate or suspend treaties.[136] In *Goldwater v. Carter*, the Supreme Court ruled that presidential authority to terminate treaties was a "nonjusticiable political question."[137]

US Foreign Policy Prerogatives: Constitutional Framework

As previously stated, in the United States, as in other countries, the tendency is to consider international law as a foreign policy tool. Consequently, let us analyze in depth the institutional distribution of foreign policy prerogatives set by the United States Constitution.

America's Founding Fathers designed a constitutional architecture meant to divide political power and authority. Fearful that one of the three branches of government could

[131] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 77.
[132] "U.S. courts almost always defer to the executive's view about customary international law, and the political branches have the final say about whether and how it applies in the United States and whether or not the United States will comply with it. Indeed, although The Paquete Habana did not defer to the executive's views in Court, it did famously state that courts must apply customary international law "where there is no . . . controlling executive . . . act." Ibid.
[133] JUSTIA - US Supreme Court, The Paquete Habana, 175 U.S. 677 (1900), Opinions: Syllabus, https://supreme.justia.com/cases/federal/us/175/677/ (accessed November 21, 2019). For more information on the case, see FindLaw - United States Supreme Court, The Paquete Habana (1900), No. 395, Argued: Decided: January 8, 1900, https://caselaw.findlaw.com/us-supreme-court/175/677.html (February 6, 2019).
[134] Article III, Section 2(1) of "The Constitution of the United States" stipulates that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority…"
[135] Article II, Section 3 of "The Constitution of the United States" enumerates some of the President's powers including his duty to "take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."
[136] Louis Henkin is of the opinion that "the President, in his constitutional capacity to act in foreign affairs, has power under the Constitution to denounce a treaty, effectively terminating the status of that treaty as law in the United States, even if such denunciation is in violation of international law. Similarly, the President, at least by formal official act, can take measures within his constitutional authority that are contrary to a treaty or a principle of customary law." Louis Henkin, "International Law as Law in the United States," *Michigan Law Review* 82, no. 5/6 (April - May1984): 1555-1569, p. 1569.
[137] Curtis A. Bradley, "Breard, Our Dualist Constitution, and the Internationalist Conception," p. 551.

become too powerful and encroach upon the independence of the other two, the Founding Fathers set up a system of checks and balances that allows the executive, the legislative, and the judiciary to check one another while concomitantly limiting each other's power. The Constitution is the backbone of this system of "separate institutions" with "shared powers"[138] defined by the continuous competition between the executive and the legislative. This competition is best exemplified by the struggle between the President and Congress to define America's external action, i.e., foreign affairs or foreign policy. Foreign affairs[139] play a special role in the US constitutional architecture. Experts talk of "foreign affairs exceptionalism" to explain that "usual constitutional standards governing the federal government's exercise of power did not apply in the area of foreign affairs."[140]

As the late American international law and foreign affairs expert Louis Henkin explained: "Issues as to the respective constitutional authority of Congress and the President dominate the constitutional jurisprudence of foreign affairs."[141] Foreign affairs prerogatives form a so-called "twilight zone" defined by either "concurrent authority" (see also below) between the President and Congress, but most of all by the uncertain distribution of powers between the executive and the legislative.[142] In the words of both international law lawyer, Louis Henkin, and political scientist, Edward S. Corwin, the "twilight zone" is an "invitation to struggle for the privilege of directing American foreign policy."[143] In practice, the principle of codetermination sometimes applies: "each body determines its views on foreign issues, and by interactions between them, they codetermine what policy will be."[144]

The Supreme Court oftentimes contributed to sustaining this twilight zone.[145] In *Youngstown Sheet & Tube Co. v. Sawyer*, a key case on presidential authority, Justice Robert Jackson expertly summarized the relationship between the President and Congress in his concurrent opinion:

[138] Roger H. Davidson, "'Invitation to Struggle': An Overview of Legislative-Executive Relations," *The Annals of the American Academy of Political and Social Science* 499, no. 1 (September 1988): 9-21, p. 14.
[139] For a concise analysis of the Founding Fathers' intent in terms of the division of powers between the executive and the legislative, see Raoul Berger, "The Presidential Monopoly of Foreign Relations," pp. 7-12.
[140] Curtis A. Bradley, "Breard, Our Dualist Constitution, and the Internationalist Conception," p. 555.
[141] Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs*, p. 17.
[142] Edward S. Corwin, *The President: Office and Powers, 1787-1957*, 5th rev. ed. (New York: New York University Press, 1984), p. 201.
[143] Ibid.
[144] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 80.
[145] For further information on the courts and war powers see Ibid., pp. 158-160.

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum,[146] for it includes all that he possesses in his own right plus all that Congress can delegate.[147]

On the other hand,

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law.[148]

Adding to the complexity is the fact that the words "foreign affairs" are nowhere to be found in the Constitution.[149] Nevertheless, both the legislative and the executive are granted, either separately or concurrently, foreign affairs prerogatives regarding commerce, war, budget spending or diplomacy. The legislative attributes spending for the country's defense (as part of its budgetary prerogatives), regulates commerce with other countries, defines offenses against the law of nations, and declares war.[150]

Article I, Section 8 (which details the powers delegated to Congress by the federal government)[151] stipulates that Congress declares war[152] (nevertheless, as Commander-in-

[146] For a detailed analysis of this argument in the particular case of the President's Commander-in-Chief authority, see David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding," *Harvard Law Review* 121, no. 3 (January 2008): 689-804. For a rebuttal of the argument that Congress has willingly ceded preeminence to the executive in terms of war-making attributes, see David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: A Constitutional History," *Harvard Law Review* 121, no. 4 (February 2008): 941-1111.

[147] Justice Robert Jackson, JUSTIA - US Supreme Court, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), Opinions: Case, https://supreme.justia.com/cases/federal/us/343/579/ (accessed November 21, 2019). For further information on the case, see FindLaw - United States Supreme Court, Youngstown Sheet and Tube Co. v. Sawyer (1952), No. 744, Argued: Decided: May 3, 1952, https://caselaw.findlaw.com/us-supreme-court/343/937.html (accessed February 7, 2019).

[148] Justice Robert Jackson, JUSTIA - US Supreme Court, Youngstown Sheet & Tube Co. v. Sawyer. Apart from the constitutional text and Supreme Court jurisprudence, the Framers' perception on executive power is also of great relevance. Two views on executive power emerged from a debate between America's Founding Fathers. Whereas John Adams and Alexander Hamilton favored a broad and expansive interpretation of the executive powers the Constitution bestows upon the President, Thomas Jefferson and James Madison defended a restrictive view on executive prerogatives having advocated that the Constitution grants the President only those prerogatives expressly mentioned in the constitutional text. See John Yoo, "Jefferson and Executive Power," *Boston University Law Review* 88, no. 2 (April 2008): 421-457; Jeremy D. Bailey, "The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton," *The American Political Science Review* 102, no. 4 (November 2008): 453-465; Bruce Miroff, "John Adams' Classical Conception of the Executive," *Presidential Studies Quarterly* 17, no. 2 (Spring 1987): 365-382. In foreign policy the debate between these two views on presidential power is even more relevant given the "twilight zone" characterizing foreign affairs.

[149] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 14.

[150] For a comprehensive list, see Article I, Section 8, "The Constitution of the United States."

[151] As it can be seen, Article I of "The Constitution of the United States" is dedicated to Congress as the legislative branch and not to the President as chief executive. One of America's Founding Fathers, James Madison, wrote in Federalist 51 that "[i]n republican government, the legislative authority necessarily predominates. … As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified." James Madison (Hamilton or

Chief of the US Armed Forces, the President wages war). In practice, starting with the 1950s, US Presidents waged war absent congressional approval when dispatching US troops in conflicts such as the Korean War. Apart from the so-called "War Powers Clause," Congress's prerogative of controlling military funding also acts as a check on the President's Commander-in-Chief prerogative to deploy troops abroad.

Article II of the Constitution enumerates presidential prerogatives. In a clear example of concurrent authority, two major presidential prerogatives are subject to Senate approval. Consequently, the President[153] appoints Ambassadors (Article II, Section 2 stipulates that the President nominates "Ambassadors, Other Public Ministers and Counsels"[154] with the advice and consent of the Senate) and has treaty-making attributions (Article II, Section 2 writes that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.").[155] Last but not least, as per Article II, Section 3 of the Constitution, the President "shall receive Ambassadors and other public Ministers."[156] This provision can be interpreted as to bestow upon the chief executive the authority to recognize foreign governments together with the prerogative to commence or terminate relations with other countries by either appointing or refusing to appoint diplomatic personnel or refusing to recognize their representatives to the United States.[157] In a clear example of uncertain distribution of powers, Article II, Section 2 of the Constitution, makes the President the "Commander in Chief of the Army and Navy of the United States, and of

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Madison), "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments From the New York Packet. February 8, 1788," Yale Law School - The Avalon Project: Documents in Law, History and Diplomacy (The Federalist Papers: No. 51), https://avalon.law.yale.edu/18th_century/fed51.asp (accessed August 22, 2019).

[152] Article I, Section 8, "The Constitution of the United States."

[153] For further information on Presidential prerogatives, see Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, pp. 81-87.

[154] As per Article II, Section 2 of "The Constitution of the United States": "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[155] Article II, Section 2, "The Constitution of the United States."

[156] As per Article II, Section 3 of "The Constitution of the United States": "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."

[157] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 87.

the Militia of the several States, when called into the actual Service of the United States."[158] The Constitution clearly stipulates the President's role as Commander-in-Chief, but fails to detail the exact actions he can undertake in this capacity. Consequently, as Supreme Court Justice Robert Jackson put it, the so-called "Commander-in-Chief Clause" has been invoked as to vest upon the President "the power to do anything, anywhere, that can be done with an army or navy."[159] Last but not least, although under presidential command, US armed forces are at the disposal of Congress.[160]

The President therefore is Commander-in-Chief of the US armed forces, grants pardons, makes treaties and appoints executive officials, judges, and ambassadors (with the treaty making and appointment prerogatives being shared with the Senate).[161] These prerogatives make the President a central figure in US foreign and national security policy.[162] "The President's powers, as with those of Congress and the courts, have been limited by tradition, self-restraint, and the power of the other branches."[163] Although the President yields substantial constitutional authority especially in troops deployment, Congress does have the authority to "regulate presidential action"[164] as part of the checks and balances mechanism.

[158] As per Article II, Section 2 of "The Constitution of the United States": "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Treaty-making capacity together with the sending of troops / declaration of war are two examples where the Framers most probably envisaged that the two branches of government would stick to their respective constitutional obligations. This has not been the case: presidents sent troops on numerous occasions without a Congressional declaration of war and completed international agreements without the "advice and consent" of the Senate. The latter take the form of executive agreements the President concludes based on his constitutional authority: documents with similar status as treaties and that create similar legal obligations, but can be concluded without Senate approval. Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 85. The power to conclude such agreements is not explicitly stated in the Constitution, but has been implied from the President's executive authority and confirmed by subsequent practice. For an example, see the 1933 Litvinov Agreement (see e.g. United States v. Pink 315 US 203 (1942) in Malcolm N. Shaw, *International Law*, p. 48). For a legal analysis on presidential executive agreements, see Raoul Berger, "The Presidential Monopoly of Foreign Relations," pp. 33-48.

[159] Justice Robert Jackson, JUSTIA - US Supreme Court, Youngstown Sheet & Tube Co. v. Sawyer.

[160] As per Article I, Section 8 of "The Constitution of the United States," the Congress has the power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

[161] To which we can add Head of State, Head of the Executive or the state authority that can establish diplomatic relations with other countries. For the US President as Head of State and Head of Government, see Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, pp. 81-83.

[162] Ibid., p. 87.

[163] Andrew B. Arnold, *A Pocket Guide to the US Constitution: What Every American Needs to Know*, 2nd ed. (Washington, D.C.: Georgetown University Press, 2018), p. 54.

[164] Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs*, p. 18.

Therefore, "the presidency operates within a web of authority and limitations on that authority."[165] As Justice Robert Jackson put it in *Youngstown Sheet & Tube Co. v. Sawyer*, the distribution of constitutional authority in foreign affairs results in presidential power being at its highest when Congress approves presidential action.[166]

Through practice, the executive took a front seat in foreign policy making, especially in matters regarding the use of force.[167] Different presidential incumbents simply appropriated new powers in the absence of (Congressional) opposition.[168] Such was the case with strong Presidents such as George Washington, Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Theodore Roosevelt, Woodrow Wilson, Franklin Delano Roosevelt or George W. Bush.[169] The chief executive became the central foreign policy figure during the two terms in office of America's first President, George Washington. As made evident by this research, in more recent years, following 9/11, Georg W. Bush significantly expanded wartime presidential prerogatives. Historically, executive powers expanded during the Civil War, the Gilded Age,[170] the New Deal and World War II or during the Civil Rights era.[171]

The President is thus currently perceived as the prominent foreign policy actor (this is not entirely constitutionally inaccurate).[172] Moreover, in the beginning of the 20th century, the Supreme Court seemed to acquiesce this situation through a series of decisions with a similar conclusion:[173] for America's external action to be coherent, the country must speak with one voice; consequently, the executive, and in particular the President, must enjoy action

[165] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 81.
[166] For more information, see FindLaw - United States Supreme Court, United States v. Curtiss-Wright Export Corporation (1936), No. 98, Argued: Decided: December 21, 1936, https://caselaw.findlaw.com/us-supreme-court/299/304.html (accessed August 22, 2019).
[167] For a detailed description of Congressional foreign policy prerogatives, see Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, pp. 144-151.
[168] Andrew B. Arnold, *A Pocket Guide to the US Constitution*, p. 54. For information on the expansion of wartime prerogatives following 9/11, see Chapter VI on executive power during the Bush and Obama Administrations.
[169] "About America: The Constitution of The United States Of America with Explanatory Notes adapted from The World Book Encyclopedia," 2004 World Book, Inc., https://usa.usembassy.de/etexts/gov/constitution.pdf (accessed July 16, 2019), p. 17.
[170] A period of significant increase in industrial activity and corporate development during the 1870s, the Gilded Age is also associated to political corruption and the emergence of powerful entrepreneurs such as John Rockefeller, Andrew Carnegie or Cornelius Vanderbilt. For more information, see Jeff Wallenfeldt (most recent revision and update), "Gilded Age," *Encyclopedia Britannica*, https://www.britannica.com/event/Gilded-Age (accessed November 5, 2019).
[171] Andrew B. Arnold, *A Pocket Guide to the US Constitution*, p. 7.
[172] For a detailed discussion, see Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs*, pp. 18-44.
[173] FindLaw - United States Supreme Court, United States v. Belmont (1937), No. 532, Argued: March 4, 1937, Decided: May 3, 1937, https://caselaw.findlaw.com/us-supreme-court/301/324.html (accessed August 22, 2019); FindLaw - United States Supreme Court, United States v. Curtiss-Wright Export Corporation (1936); FindLaw - United States Supreme Court, State of Missouri v. Holland (1920), No. 609, Argued: March 2, 1920, Decided: April 19, 1920, https://caselaw.findlaw.com/us-supreme-court/252/416.html (accessed August 22, 2019).

leverage.[174] From the decision-making arena, President Woodrow Wilson was even more straightforward:

> One of the greatest of the President's powers . . . [is] his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely. The President . . . may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.[175]

Such a view hints towards what came to be known as the Sole Organ Doctrine: in foreign affairs and national security the President enjoys broad executive powers, "including assertations of an inherent executive power that is not subject to legislative or judicial constraints."[176] The doctrine is based on John Marshall's famous statement that "the President is the sole organ of the nation in its external relations."[177] This statement was cited by Justice Sutherland in the famous *Curtiss-Wright* Supreme Court decision[178] on presidential prerogatives.[179] In 1800, at the time when he made the statement, Marshall was a member of the House of Representatives; he went on to became Chief Justice of the United States Supreme Court. In this latter capacity, however, Marshall upheld that the executive and the legislative jointly exercise foreign policy, which is not "a unilateral or exclusive authority of the president."[180] Renowned political science expert, Edward Corwin, concluded in his book, *The President: Office and Powers*, that "[c]learly, what Marshall had foremost in mind was simply the President's role as *instrument of communication* with other governments."[181] Judicial and scholarly opinions aside, the dawn of the 21st century saw the revival of the Sole Organ Doctrine. Following the 9/11 attacks, the Bush Administration's Justice Department

[174] Curtis A. Bradley, "Breard, Our Dualist Constitution, and the Internationalist Conception," p. 555. For further literature on this topic, see Walter LaFeber, "The Constitution and United States Foreign Policy: An Interpretation," *The Journal of American History* 74, no. 3 (December 1987): 695-717; and G. Edward White, "The Transformation of the Constitutional Regime of Foreign Relations," *Virginia Law Review* 85, no. 1 (February 1999): 1-150.

[175] Woodrow Wilson, *Constitutional Government in the United States* (New York: The Columbia University Press, 1911), p. 77.

[176] Louis Fisher, "*The Law*: Presidential Inherent Power: The "Sole Organ" Doctrine," *Presidential Studies Quarterly* 37, no. 1 (March 2007): 139-152, p. 139.

[177] John Marshall, Annals of Congress (1800), cited in Raoul Berger, "The Presidential Monopoly of Foreign Relations," p. 15 (for citation, see footnote 78 of the article). For a detailed scholarly analysis of Marshall's intent not to identify the President as the "Sole Organ" in foreign relations, see Louis Fisher, "*The Law*: Presidential Inherent Power," pp. 140-143.

[178] For legal analysis, see Raoul Berger, "The Presidential Monopoly of Foreign Relations," pp. 26-33; and Louis Fisher, "*The Law*: Presidential Inherent Power," pp. 143-151.

[179] For further information on this decision, see this chapter's next section on foreign policy and the use of force.

[180] Louis Fisher, "*The Law*: Presidential Inherent Power," p. 142. For further information, see pp. 142-143.

[181] Edward Corwin, *The President: Office and Powers*, 3rd ed. (1948), p. 216, cited in Raoul Berger, "The Presidential Monopoly of Foreign Relations," p. 17 (for citation, see footnotes 6 and 85 of the article).

cited the Doctrine in several legal opinions justifying the President's authority to take broad action in the Global War on Terror[182] (from the use of force against non-state actors to approving broad surveillance, interrogation, and detention programs).

Historically, Congress increased its role in the foreign policy process when matters were less frequent and urgent, whereas the President, with his ability to act expediently,[183] tended to have the upper hand as the frequency and urgency of foreign policy problems increased. Oftentimes it is assumed to be a constitutive part of presidential prerogatives to determine, communicate, implement, and enforce foreign policy (as head of the executive and Commander-in-Chief):[184]

> From the beginning, the President, as "sole organ" of communication, as the representative to the world, was the eyes, ears, and voice of the United States. Slowly, it became its nerve center, too. He began to "make policy." He declared neutrality in the wars between England and France; he decided that he would purchase Louisiana and acquire Florida; he announced the Monroe Doctrine.[185]

Foreign Policy and the Use of Force: Constitutional Framework vs. Institutional Practice

National security is intrinsically linked to the use of force in foreign affairs. The impact of national security matters on the constitutional balance between the legislative and the executive concerned US policy makers since the early days of the Republic. James Madison, widely considered to be the father of the US Constitution and America's forth President, employed "security" in the 1788 *Federalist Papers* to argue for "the transfer of power to a federal authority on the ground of security against foreign danger."[186] The actual term of "national security" emerged in the US public discourse during the 1940s following the 1941 Japanese attack on Pearl Harbor. In 1947, President Harry Truman's National Security Act officialized national security as a core principle of US foreign policy.[187]

As per the American Constitution, the President, as Commander-in-Chief, can send troops, but it is Congress's prerogative to formally declare war.[188] Consequently, the US formally declared war only 11 times in five different conflicts to: Great Britain (1812), Mexico (1846), Spain (1898), Germany and Austria-Hungary during WWI (1917), Japan,

[182] Louis Fisher, "*The Law*: Presidential Inherent Power," p. 139. For further information, see Chapter VI.
[183] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 81.
[184] Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs*, p. 29.
[185] Ibid., p. 27.
[186] Avril McDonald and Hanna Brollowski, "Security," para. 6.
[187] Ibid., para. 5.
[188] For a detailed analysis of the separation of powers between the executive and the legislative in foreign affairs matters in the light of the War Powers Clause and its interpretation, see Michael D. Ramsey, "Textualism and War Powers," *The University of Chicago Law Review* 69, no. 4 (Autumn 2002): 1543-1638.

Germany, and Italy (1941) and Bulgaria, Hungary, and Romania (1942) during WWII.[189] Other instances of use of force in US history included "extended military engagements"[190] such as: the Korean War (1950-53), the Vietnam War (1964-1973) or the 1990-1991 Gulf War; "global actions against foreign terrorists"[191] in the post-9/11 era as part of the Global War on Terror; and the deployment of forces as part of NATO or UN-mandated operations (the 1999 Kosovo intervention or the 2011 Libya intervention). Except for the Korean War, Congress did provide some form of authorization to use force short of a war declaration.[192]

In the early days of the Republic, the Supreme Court[193] upheld Congress's right to declare war in two cases. In *Bas v. Tingy* (1800), Justice Samuel Chase wrote that

> Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in object, in time. If a general war is declared, its extent and operations are only restricted and regulated by the jus belli, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.[194]

In *Talbot v. Seeman* (1801) the Supreme Court concluded that

> Congress may authorize general hostilities, and in such case the general laws of war will apply, or partial hostilities, when the laws of war, so far, as they are applicable, will be in force.[195]

Last but not least, in *Little v. Barreme* (1804), the Court held that President John Adams's decision to size ships was illegal as it conflicted with an act of Congress.[196]

The President nevertheless enjoys the authority to use force to repel sudden attacks against US territory. In the *United States v. Smith* (1806), a Supreme Court decision on whether the President can initiate hostilities, Justice William Paterson (also a representative to the Constitutional Convention), outlined the rationale behind the need for the President to be able to repel sudden attacks:

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[189] Barbara Salazar Torreon and Sofia Plagakis, "Instances of Use of United States Armed Forces Abroad, 1798-2020," *Congressional Research Service Report R42738*, Last updated: July 20, 2020, https://fas.org/sgp/crs/natsec/R42738.pdf (accessed July 27, 2020), Summary.
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] For another review of the relevant Supreme Court decisions regarding presidential versus congressional war-making prerogatives, see David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest EBB: Framing the Problem, Doctrine, and Original Understanding," pp. 761-767.
[194] Justice Samuel Chase, JUSTIA - US Supreme Court, Bas v. Tingy, 4 U.S. 37 (1800), Opinions: Case, https://supreme.justia.com/cases/federal/us/4/37/ (accessed November 25, 2019). For more information on the case, see FindLaw - United States Supreme Court, Bas v. Tingy (1800), Argued: Decided: August 1, 1800, https://caselaw.findlaw.com/us-supreme-court/4/37.html (accessed November 15, 2019).
[195] JUSTIA - US Supreme Court, Talbot v. Seeman, 5 U.S. 1 (1801), Opinions: Syllabus, https://supreme.justia.com/cases/federal/us/5/1/ (accessed November 15, 2019).
[196] David Gray Adler, "The Constitution and Presidential Warmaking: The Enduring Debate," *Political Science Quarterly* 103, no. 1 (Spring 1988): 1-36, p. 28.

> If, indeed, a foreign nation should invade the territories of the United States, it would I apprehend, be not only lawful for the president to resist such invasion, but also to carry hostilities into the enemy's own country; and for this plain reason, that a state of complete and absolute war exists between the two nations. In the case of invasive hostilities, there cannot be war on the one side and peace on the other ....[197]

The Court was nonetheless adamant in differentiating between the action of going to war and the one of repelling an invasion:

> There is a manifest distinction between our going to war with a nation at peace, and a war made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of Congress to change a state of peace into a state of war.[198]

The first actual decision of the Court on the President's prerogative to repel sudden attacks came with the 1863 *Prize Cases*. In the words of Supreme Court Justice Robert Grier:

> By the Constitution, Congress alone has the power to declare a national or foreign war. … If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader or States organized in rebellion, it is nonetheless a war although the declaration of it be "unilateral."[199]

To sum up, the above-mentioned judicial decisions establish Congress as the initiator of hostilities, be it in a general or limited war, but grant the President the role of repelling sudden attacks.[200] In the 1895 *United States v. Sweeny* Case, Justice Henry Brown concluded that the so-called "Commander-in-Chief Clause" bestows upon the President "such supreme and undivided command as would be necessary to the prosecution of a successful war."[201] In the 20th century and following WWI, Senator George Sutherland, future Supreme Court Associate Justice stated:

> Generally speaking, the war powers of the President under the Constitution are simply those that belong to any commander-in-chief of the military forces of a nation at war. The Constitution confers no war powers upon the President as such.[202]

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[197] Justice William Paterson, *United States v. Smith*, cited in Ibid., p. 7 (for citation, see footnote 30). For more information on the United States v. Smith Case, see JUSTIA - US Supreme Court, United States v. Smith, 18 U.S. 153 (1820), https://supreme.justia.com/cases/federal/us/18/153/ (accessed November 25, 2019).

[198] Justice William Paterson, *United States v. Smith*, cited in David Gray Adler, "The Constitution and Presidential Warmaking," p. 28 (for citation, see footnote 112 of the article).

[199] Justice Robert Grier, JUSTIA - US Supreme Court, Prize Cases, 67 U.S. 635 (1862), Opinions: Case, https://supreme.justia.com/cases/federal/us/67/635/ (accessed November 15, 2019).

[200] David Gray Adler, "The Constitution and Presidential Warmaking," p. 29.

[201] Justice Henry Brown, JUSTIA - US Supreme Court, United States v. Sweeny, 157 U.S. 281 (1895), Opinion: Case, https://supreme.justia.com/cases/federal/us/157/281/ (accessed November 20, 2019). For more information on the case, see FindLaw - United States Supreme Court, U.S. v. Sweeny (1895), No. 889, Argued: Decided: March 25, 1895, https://caselaw.findlaw.com/us-supreme-court/157/281.html (accessed November 20, 2019).

[202] George Sutherland, *The Constitution and World Affairs* (New York: Columbia University Press, 1919), p. 73, cited in David Gray Adler, "The Constitution and Presidential Warmaking," p. 29.

In the midst of WWII, in the 1942 *Ex parte Quirin* Case, Supreme Court Chief Justice Harlan Stone, wrote the following on the Commander-in-Chief's prerogatives

> The Constitution thus invests the President with power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.[203]

Supreme Court jurisprudence therefore contradicts presidential practice developed since mid-20th century of invoking a presidential prerogative to initiate hostilities. This practice began in the 1950s[204] with President Truman's military actions in Korea. Three arguments have been put forward to justify this expansion of presidential prerogatives. Firstly, extra-constitutional sources bestow upon the President an "inherent power" to initiate hostilities. Secondly, the President is the "sole organ" of US foreign policy which provides him with war-making attributions. Thirdly, repetitive action makes executive war-making legally valid.[205] The "inherent power" argument is based on the 1936 *United States v. Curtiss-Wright Export Corporation* Case (probably the most cited US Supreme Court Case on the constitutional allocation of foreign affairs prerogatives) and Justice George Sutherland's argument on the conduct of foreign affairs as an executive privilege[206] based on

> … the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise, an act of Congress.[207]

Justice Sutherland's extra-constitutional executive power argument was rebuked by Justices Hugo L. Black and Robert Jackson in the 1952 *Youngstown Co. v. Sawyer* Case.[208] The same Justice Black favored a literal interpretation of the Constitution (and therefore of executive prerogatives) when he wrote in the 1956 *Reid v. Covert* Case that:

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[203] Justice Harlan Stone, JUSTIA - US Supreme Court, Ex Parte Quirin, 317 U.S. 1 (1942), Opinions: Cases, https://supreme.justia.com/cases/federal/us/317/1/ (accessed November 20, 2019). For more information on the case, see FindLaw - United States Supreme Court, Ex Parte Quirin (1942), No. 100, Argued: Decided: July 31, 1942, https://caselaw.findlaw.com/us-supreme-court/317/1.html (accessed November 20, 2019).
[204] David Gray Adler, "The Constitution and Presidential Warmaking," p. 29.
[205] Ibid., p. 30.
[206] Ibid.
[207] Justice George Sutherland, JUSTIA - US Supreme Court, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), Opinions: Case, https://supreme.justia.com/cases/federal/us/299/304/ (accessed November 20, 2019).
[208] David Gray Adler, "The Constitution and Presidential Warmaking," p. 32.

> The United States is entirely a creature of the Constitution. Its powers and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.[209]

Throughout history, the President became increasingly more effective in gaining the upper hand in foreign policy matters (e.g., WWII or the first half of the Cold War); following the Vietnam War and the Watergate scandal, Congress was more assertive in constraining presidential prerogatives. One crucial contentious point concerned the war-making powers. By mid-20th century, the war declaration mechanism became obsolete[210] (after all, last time the US Congress declared war on a country was in 1942). Ever since the 1964 Tonkin Gulf Resolution during the Vietnam war,[211] labeled by then Undersecretary of State, Nicholas deB. Katzenbach, the "functional equivalent" of a war declaration,[212] congressional authorizations to use force became standard operating procedure to provide a legal basis to America's military actions such as the 1990-1 Gulf War,[213] the 2001 Afghanistan war, and the 2003 Iraq invasion.[214] This practice revived a longstanding debate on how countries declare war:

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[209] Justice Hugo L. Black, JUSTIA - US Supreme Court, Reid v. Covert, 354 U.S. 1 (1956), Opinions: Case, https://supreme.justia.com/cases/federal/us/354/1/ (accessed November 20, 2019). For more information on the case, see FindLaw - United States Supreme Court, Reid v. Covert (1956), No. 701, Argued: May 3, 1956, Decided: June 11, 1956, https://caselaw.findlaw.com/us-supreme-court/351/487.html (accessed November 20, 2019).

[210] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 149.

[211] During the Vietnam War, President Lyndon B. Johnson requested Congress for permission to increase the US' military presence in Indochina. "To promote the maintenance of international peace and security in southeast Asia," Congress passed a resolution deciding that it "approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." www.ourdocuments.gov, "Transcript of Tonkin Gulf Resolution (1964)," https://www.ourdocuments.gov/doc.php?flash=false&doc=98&page=transcript (accessed February 7, 2019). Given the resolution's broad language it was employed by both the Johnson and Nixon Administrations as the legal basis for using military force during the Vietnam War. For a chronology of events leading up to the adoption of the resolution, see United States Department of State: Office of the Historian, Foreign Service Institute, "U.S. Involvement in the Vietnam War: the Gulf of Tonkin and Escalation, 1964," https://history.state.gov/milestones/1961-1968/gulf-of-tonkin (accessed November 6, 2019). For the relevance of the Gulf of Tonkin Resolution for the limits of presidential power, see Scott Bomboy, "The Gulf of Tonkin Resolution and the Limits of Presidential Power," *National Constitution Center*, August 7, 2019, https://constitutioncenter.org/blog/the-gulf-of-tonkin-and-the-limits-of-presidential-power (accessed November 6, 2019).

[212] A few years later, Katzenbach asked for the Resolution to be repealed and endorsed Congressional legislation aimed at restricting the President's authority to expand US military actions in Cambodia. John W. Finney, "Katzenbach, Who Termed Tonkin Resolution 'Equivalent' of Declaration of War, Now Backs Its Repeal," *The New York Times*, July 29, 1970, https://www.nytimes.com/1970/07/29/archives/katzenbach-who-termed-tonkin-resolution-equivalent-of-declaration.html (accessed November 7, 2019). For an analysis of the Gulf of Tonkin Resolution from the viewpoint of the division of powers between Congress and the President, see William W. Van Alstyne, "Congress, the President, and the Power to Declare War: A Requiem for Vietnam," *University of Pennsylvania Law Review* 121, no. 1 (November 1972): 1-28.

[213] For a detailed analysis of whether the 1991 US intervention into Iraq required a proper war declaration from the US Congress instead of just an authorization for Use of Military Force, see J. Gregory Sidak, "To Declare War," *Duke Law Journal* 41, no. 1 (September 1991): 27-121.

[214] The 1991 US intervention in Iraq was authorized via the Authorization for Use of Military Force Against Iraq Resolution. For detailed information, see Adam Clymer, "Confrontation In The Gulf; Congress Acts To Authorize War In Gulf; Margins Are 5 Votes In Senate, 67 In House," *The New York Times*, January 13, 1991,

whether via an actual war declaration (or any other legal instrument that can be equated to such a declaration) or simply via military action backed by declarations from political[215] or military decision-makers.[216] In the US the debate on war powers prerogatives revolved around the extent of the President's authority to send troops absent an actual Congressional war declaration, the need for Congress to declare war on a case-by-case basis when the President sends troops into battle, the constitutional role of a congressional resolution approving the use of force instead of an actual war declaration, the President's right to send troops in self-defense to an (imminent) attack to protect the homeland, as well as the need to preserve the constitutional checks and balances in war powers matters.[217]

In the 21st century, the emergence of the terrorist threat following the 9/11 attacks generated Congressional deference toward the President's war powers authority.[218] The debate on presidential versus congressional war powers continued given the prolonged war in Afghanistan, the fallout of the Iraq invasion, President Obama's decision to intervene in Libya absent Congressional approval,[219] and the debate surrounding US military actions in Syria.[220] Executive practice works in the executive's favor despite Congress's constitutional ability to impede executive preeminence.[221] A too high focus on historical practice therefore gives the executive an upper hand to the detriment of the legislative.[222] As already stated, US Presidents have a long history of using military power without congressional approval.[223]

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https://www.nytimes.com/1991/01/13/world/confrontation-gulf-congress-acts-authorize-war-gulf-margins-are-5-votes-senate.html (accessed November 6, 2019). The October 2001 Afghanistan intervention was made under the Authorization for Use of Military Force Against Terrorists known as the AUMF (for further information, see Chapters I and VI of this research), whereas the 2003 Iraq was approved by the US Congress via the Authorization for Use of Military Force Against Iraq Resolution of 2002. See 107th Congress, Authorization for Use of Military Force Against Iraq Resolution of 2002, Public Law 107-243, October 16, 2002, https://www.congress.gov/107/plaws/publ243/PLAW-107publ243.pdf (accessed November 6, 2019).

[215] For an analysis of presidential commitments and their influence on war-making, see Marvin Kalb, *The Road to War: Presidential Commitments Honored and Betrayed* (Washington, D.C.: The Brookings Institution, 2013).

[216] For an early article with a historical overview on the topic, see Clyde Eagleton, "The Form and Function of the Declaration of War," *The American Journal of International Law* 32, no. 1 (January 1938): 19-35.

[217] J. Gregory Sidak, "To Declare War," 27-121.

[218] For further information, see Chapter VI of this research.

[219] For analyses of President Obama's decision not to ask for Congressional authorization to use force in Libya, see Charles Krauthammer, "Who Takes Us to War?," *The Washington Post*, June 23, 2011, https://www.washingtonpost.com/opinions/who-takes-us-to-war/2011/06/23/AGwFS4hH_story.html (accessed November 7, 2019); and Scott Wilson, "Obama Administration: Libya Action Does Not Require Congressional Approval," *The Washington Post*, June 15, 2011, https://www.washingtonpost.com/politics/obama-administration-libya-action-does-not-require-congressional-approval/2011/06/15/AGLttOWH_story.html (accessed November 12, 2019).

[220] For further information on this and other decisions to use force taken by President Obama, see Chapter VI.

[221] Michael J. Glennon, "The Executive's Misplaced Reliance on War Powers "Custom"," *American Journal of International Law* 109, no. 3 (July 2015): 551-556, p. 552.

[222] Ibid.

[223] President Truman in Korea, President George H.W. Bush in Iraq or President Clinton in Haiti and Bosnia invoked UNSC authorizations to use force when dispatching troops into armed conflicts. This raised questions as to the constitutionality of invoking resolutions of a body of an international organization (such as the United

Risk and emergency are also factors favoring the President's war powers which are "broader when the nation confronts a direct and imminent national security threat that must be met before Congress has time to act."[224]

Following the US involvement in Vietnam,[225] Congress passed the 1973 War Powers Resolution as a major attempt to level the field between the executive and the legislative and to restore the codetermination relation between the two branches of government. Passed over the veto of President Nixon, the War Powers Act (WPA), as it is also known, aims to avoid the US being dragged into quagmire, endless wars such as Vietnam[226] or into secret wars such as Cambodia.[227] In broad terms, the resolution stipulates that when sending US armed forces abroad the President must report to Congress within 48 hours if the already-mentioned forces are sent: (a) "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;"[228] (b) "equipped for combat"[229] in a foreign territory; (c) "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."[230] From the moment the President reports to Congress, a 60 day period begins during which it is up to Congress to either: (a) declare war; (b) grant the President a specific authorization to use force; or (c) extend the period of deployment to up to 90 days for troop withdrawal.[231] Since absent Congressional action the President is bound to withdraw troops within 60 days, the resolution's constitutionality has been questioned by decision-makers and the scholarly community alike on the grounds of encroaching upon the President's Commander-in-Chief prerogatives.[232]

Nations Security Council) to justify the use of force absent congressional approval. For a legal analysis and relevant literature, see Louis Fisher, "*The Law*: Military Operations in Libya: No War? No Hostilities?," *Presidential Studies Quarterly* 42, no. 1 (March 2012): 176-189, p. 179.

[224] Michael J. Glennon, "The Executive's Misplaced Reliance on War Powers "Custom"," p. 554.

[225] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, pp. 160-1.

[226] For detailed information, see Ronald H. Spector, "Vietnam War: 1954-1975," *Encyclopedia Britannica*, Last Updated: November 1, 2019, https://www.britannica.com/event/Vietnam-War (accessed November 6, 2019).

[227] For more information on US military actions in Cambodia and their implications for presidential war powers, see Louis H. Pollak, "The Constitution as an Experiment," *University of Pennsylvania Law Review* 123, no. 6 (June 1975): 1318-1341, pp. 1329-1339.

[228] Sec. 4.(a)(1), Joint Resolution Concerning the War Powers of Congress and the President. For the full text, see Yale Law School - The Avalon Project: Documents in Law, History and Diplomacy, "Joint Resolution Concerning the War Powers of Congress and the President," November 7, 1973, http://avalon.law.yale.edu/20th_century/warpower.asp (accessed February 7, 2019). It is worth noticing that the resolution does not spell out the exact requirements for the consultation process.

[229] Ibid., Sec. 4.(a)(2) and (3).

[230] Ibid., Sec. 4.(a)(3).

[231] Ibid., Sec. 5.

[232] For a legal analysis preceding the actual adoption of the War Powers Resolution, see Eugene V. Rostow, "Great Cases Make Bad Law: The War Powers Act," *Texas Law Review* 50, no. 5 (May 1972): 833-900. For different views on the Resolution, see Stephen L. Carter, "The Constitutionality of the War Powers Resolution," *Virginia Law Review* 70, no. 1 (February 1984): 101-134; and Eugene V. Rostow, "Once More Unto the Breach: The War Powers Resolution Revisited," *Valparaiso University Law Review* 21, no. 1 (Fall 1986): 1-52.

The WPA's constitutionality nonetheless has never been questioned in front of the Supreme Court. Presidents either report after having sent forces, inform Congress rather than consult it or report "consistent with but not pursuant to"[233] the 1973 WPA (with the purpose of informing Congress without conceding to the Resolution's constitutionality). In the particular case of Kosovo, President Clinton sent troops despite Congress's refusal to authorize military action; the deployment duration exceeded, for the first time, the 60 day-deadline imposed by the 1973 War Powers Act.[234] In 2011, following the commencement of military operations in Libya,[235] President Obama sent a letter to the leaders of the two chambers of Congress informing them that, at his command,

> U.S. military forces commenced operations to assist an international effort authorized by the United Nations (U.N.) Security Council and undertaken with the support of European allies and Arab partners, to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya.[236]

President Obama stipulated that he was reporting to Congress as part of his "efforts to keep the Congress fully informed, consistent with the War Powers Resolution."[237] Moreover, a 32-page report submitted by the Obama Administration to Congress on US activities in Libya,[238] stipulated that

> The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because U.S. military operations are distinct from the kind of "hostilities"[239] contemplated by the Resolution's 60 day termination provision. U.S. forces are playing a

[233] Rich Lowry, "Obama Kills the War Powers Act," *National Review*, June 7, 2011, https://www.nationalreview.com/2011/06/obama-kills-war-powers-act-rich-lowry/ (accessed November 14, 2019).
[234] Jack Goldsmith, *The Terror Presidency*, p. 37.
[235] For an overview of the evolution of US military operations in Libya as well as the challenges they posed to the War Powers Act, see Scott Wilson, "Obama Administration: Libya Action Does Not Require Congressional Approval."
[236] Barack Obama, "Letter from the President Regarding the Commencement of Operations in Libya" (letter, Washington, D.C., March 21, 2011), White House Office of the Press Secretary, https://obamawhitehouse.archives.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya (accessed November 12, 2019).
[237] Ibid.
[238] This is one of the two legal opinions produced by the Obama Administration on the intervention in Libya. The first one was a memo of the Office of Legal Counsel arguing that US actions in Libya did not amount to a state of war. The second report was issued after military operations exceeded the 60 plus 30-day limit specified by the War Powers Resolution. The conclusion of this report, that US actions did not amount to "hostilities" as per the meaning of the War Powers Resolution, mirror the legal advice President Obama received from his White House Counsel, Robert Bauer, and State Department Legal Advisor, Harold Koh. Louis Fisher, "*The Law*: Military Operations in Libya: No War? No Hostilities?," p. 176.
[239] For a legal analysis of whether US military actions in Libya reached the state of war or remained at the level of hostilities, see Ibid., pp. 180-182. For both political and legal reasons, presidents have sometimes avoided admitting to waging war or participating in hostilities by employing linguistic metaphors. For instance, Harry Truman labeled the US war in Korea as "a police action." Louis Fisher, "The Korean War: On What Legal Basis Did Truman Act?," *The American Journal of International Law* 89, no. 1 (January 1995): 21-39, p. 34.

> constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.[240]

The necessity of a war declaration was also debated in relation to US military actions against the Islamic State in Syria (and Iraq). In this regard, some legal scholars considered such a declaration irrelevant given existing US constitutional practice.[241] In the words of Curtis Bradley: "Declaring war does not serve any real function under modern international law, and it is not required as a matter of U.S. constitutional practice in order to wage war."[242] John Bellinger, former Legal Adviser to the National Security Council (NSC) and the State Department during Bush 43, declared that such a declaration would make the US "look silly" since the country was already "using very robust military forces against ISIS. … It looks reckless to be declaring war against an amorphous group, and to a certain extent buys into their crusader narrative."[243] Moreover, Congress did not agree on an authorization to use military force against the Islamic State (IS) despite the Obama Administration's request in this regard.[244] Even absent such a congressional authorization, the Obama Administration argued that its military actions were covered by the 2001 AUMF passed following the 9/11 attacks.[245]

To sum up, the war powers balance between the President and the executive is a fragile architecture. An *ad literam* reading of the Constitution seems to indicate that the Founding Fathers "conferred virtually all of the war-making powers" upon Congress,

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[240] Department of State and Department of Defense, "United States Activities in Libya," June 15, 2011, https://fas.org/man/eprint/wh-libya.pdf (accessed November 12, 2019). This lengthy quote also evidentiates another legal argument put forward by the Obama Administration, namely that US military actions in Libya were authorized by UNSC Resolution 1973 authorizing the use of force in Libya to protect the civilian population (for further information on this resolution, see Chapter I of this research).

[241] For a counterargument on why should states declare war, see Maj. Gen. Charles J. Dunlap, Jr., USAF (Ret.), "Why Declarations of War Matter," *Harvard Law School: National Security Journal*, August 30, 2016, https://harvardnsj.org/2016/08/why-declarations-of-war-matter/ (accessed November 14, 2019).

[242] Curtis Bradley, Duke University Professor and Co-Director of the Center of International and Comparative Law, cited in Karen DeYoung, "Would Declaring 'War' On ISIS Make Victory More Certain — or Would It Even Matter?," *The Washington Post*, July 16, 2016, https://www.washingtonpost.com/world/national-security/would-declaring-war-on-isis-make-victory-more-certain--or-would-it-even-matter/2016/07/16/ed95f0aa-4b6c-11e6-acbc-4d4870a079da_story.html (accessed November 14, 2019).

[243] John Bellinger cited in Ibid.

[244] Russell Berman, "The War Against ISIS Will Go Undeclared," *The Atlantic*, April 15, 2015, https://www.theatlantic.com/politics/archive/2015/04/the-war-against-isis-will-go-undeclared/390618/ (accessed June 18, 2020).

[245] Karen DeYoung, "Would Declaring 'War' On ISIS Make Victory More Certain — or Would It Even Matter?." For further information, see also Chapter VI of this research.

bestowing upon the President solely the power "'to repel sudden attacks'."[246] This being said, "if the Constitution points to a congressionally centered reading of the war declaration clause, the two branches have long since settled into a presidentially centered mode."[247] Practice has given the President the upper hand in war-making with Congress's silent acquiescence.[248]

Chapter Summary: Institutional Operational Code on International Law

In the words of Eugene Rostow (former Dean of Yale Law School and Under Secretary of State for Political Affairs during the second Lyndon Johnson Administration), as the "system of order for the society of nations" international law reflects both interests and ideas and "has a political context, and exists in a political context."[249] A system of law does not substitute the use of force, but represents the totality of rules that sanction that use of force.[250] Force thus becomes "an indispensable element of law," but "not the whole of it."[251]

International law, indeed, exists in a political context. From the viewpoint of many states it is subsumed to foreign policy. This chapter was dedicated to the institutional operational code of the United States regarding international law. Goldsmith's and Posner's *Limits of International Law* provides an excellent summary of the US view on IL. Their interdisciplinary approach emanates from the "need to integrate the study of international law with the realities of international politics."[252] The rational actor model explains that states' compliance with international law depends on their preferences for other variables they evaluate as providing greater benefits than compliance with international norms.[253] Legal experts therefore should be cautious not to automatically assume states' compliance with IL, but to aim at identifying the factors that explain compliance or the lack thereof.

The national interest is one such factor. US decision-makers tend to consider that America's interests converged with the ones of the rest of the world.[254] This was an underlining assumption of American foreign policy since at least the presidency of Woodrow

[246] Raoul Berger, "War-Making by the President," *University of Pennsylvania Law Review* 121, no. 1 (November 1972): 29-86, p. 82. Berger concludes his analysis of the constitutional war-making prerogatives versus congressional and presidential practice stating that a balance should be kept between the legislative that is constitutionally endowed to make laws and the executive that is meant to be kept under the law to preserve free government. See Ibid., p. 86.
[247] Thomas Halper, "Declaration of War: A Dead Letter or An Invitation to Struggle?," *British Journal of American Legal Studies* 8, no. 1 (July 2019): 107-137, p. 135.
[248] For a review of Constitutional war-making prerogatives and ensuant practice, see Ibid., 107-137.
[249] Eugene V. Rostow, "American Foreign Policy and International Law," *Louisiana Law Review* 17 (1957): 552-571, p. 552.
[250] Ibid., p. 560.
[251] Ibid., p. 562.
[252] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 3.
[253] Ibid., p. 13.
[254] Robert Kagan, "Superpowers Don't Get to Retire."

Wilson. International law, as a foreign policy tool, was oftentimes viewed as a means towards the promotion of such interests (see, for instance, President Wilson's League of Nations project, a cornerstone of America's post-WWI liberal world order).[255] Just as in many other countries, in the US as well IL is therefore subsumed to foreign policy: international law thus does not rule supreme, it is rather a means to an end. Given its relative lack of enforcement mechanisms, international law compliance heavily depends upon countries' willingness to comply, which is determined by their national interests.[256] Great powers' actions can compensate international law's limitations.[257] By supporting (or not) the application of international law, great powers can instrumentalize it to fulfil their foreign policy goals.[258]

As presented throughout the chapter, in the US international law is largely subsumed to foreign policy as a means to achieving foreign policy goals. Given the focus of this research on the law on the use of force and the law of armed conflict, the chapter outlined the institutional framework provided by the American Constitution regarding foreign affairs, in general, and the use force and war powers prerogatives, in particular. Ultimately, this institutional framework explains the US approach towards international law, in general, and the use of force, in particular; the constitutional architecture outlined throughout this chapter and its application by relevant actors are part of the US view on international law together with the perspectives of the scholarly community (and, to a lesser extent, the policy analysis community), and the jurisprudence of the Supreme Court. The reasoning behind the factors selected is straight forward: it is the constitutional architecture that, to a large extent, constrains and guides the actions of the main actors with constitutional prerogatives regarding international law, in general, and foreign policy and the use of force, in particular; the scholarly and the policy analysis communities analyze both this constitutional architecture and the actions of the already-mentioned actors, while the judiciary interprets relevant constitutional provisions. The institutional framework dividing prerogatives between the executive and the legislative therefore provides the basis for the country's approach towards international law. The entire chapter was therefore sketched around the US Constitution: at the crossroads of law and politics, the US Constitution sets the institutional framework of the American government and its external action. Moreover, its importance for the US as a nation

[255] Ibid.
[256] Eugene V. Rostow, "American Foreign Policy and International Law," p. 565.
[257] For more information on international law, peaceful coexistence, and the relevance of power for international law, see Martti Koskenniemi, "History of International Law, since World War II," para. 2.
[258] Eugene V. Rostow, "American Foreign Policy and International Law," p. 571.

must not be underestimated: the Constitution is not only one of the country's founding documents, but also plays a significant role in defining the American national identity.

In the US, there is a tendency to distrust international law given the overall perception that it limits America's actions on the international arena and its constitutional sovereignty. This perception is all the more strengthened when national security is at stake. In those instances, the constitutional balance between the executive and the legislative is upended. Nowadays, the President's preeminence in foreign policy is undisputable. War is an instrument of foreign policy, fact strengthened by the Commander-in-Chief Clause.[259] Arguably, "history has legitimated the practice of presidential war-making:"[260] the last decades have seen a significant increase in presidential war-making powers, coupled with a continuous decline of Congressional war-making powers.[261] The letter of the Constitution therefore conflicts with executive practice developed since the 1950s.

To conclude, an agreement on the use of force is necessary between the executive and the legislative. This should steam from a consensus on the threats facing the nation and the necessary tools to tackle those threats: absent such an agreement, "the executive branch pursues its vision to the extent that it can without congressional assent, and Congress advocates its distinct vision and tries to block contrary policies whenever it can."[262] Merging politics with law, the use of force has implications for military activism: "in what situations and how should the United States be willing to use armed force to further its goals?"[263] The answer to this question can be a matter of political orientation of internal political actors (liberals vs. conservatives, with conservatives being more supportive than liberals of an expansive use of force) just as much as it is a matter of worldview and the tools employed to sustain that worldview.[264] Given the President's preeminence in foreign policy and use of force matters, his worldview is instrumental in shaping America's external action. The next chapter is therefore dedicated precisely to reconstructing the US President's worldview on several concepts with relevance for the use of force.

[259] "Whatever the intention of the framers, the military machine has become simply an instrument for the achievement of foreign policy goals, which, in turn, have become a central responsibility of the presidency." Henry Paul Monaghan, "Presidential War-Making," *Boston University Law Review* 50, no. 5 (Spring 1970): 19-33, p. 27.
[260] Ibid., p. 29.
[261] For a detailed analysis of executive and legislative foreign affairs constitutional prerogatives and their evolution in practice resulting in the syntagma "presidential war-making," see Ibid., information from p. 21.
[262] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 50.
[263] Ibid., p. 23.
[264] Ibid., p. 24.

Chapter IV: Public Operational Code of the United States President[1]

This chapter is dedicated to the public operational code of the President of the United States. The purpose is to outline the system of beliefs of an institutional entity, the US President, rather than the one of an individual. Therefore, individual incumbents are set aside to focus on the overall view of the President of the United States on five concepts: foreign affairs / policy, history (with a focus on the US' role in history), threat(s), enemy, and international law. The accent falls on the common aspects of presidents' views regarding the concepts under analysis, despite differences emerging from personal idiosyncrasies. Given his central role in foreign affairs, the President's worldview contributes to defining the country's foreign policy. This worldview is reflected in his speeches, especially in presidential speeches of major significance such as the Inaugural, Farewell or State of the Union Addresses (SOTUs). Following these introductory remarks, this chapter is structured as follows: the first part is dedicated to general remarks regarding the speeches under analysis (the purpose is to flesh out the speeches' significance and the reasons for selecting these speeches as material for analysis). The second and largest part of this chapter is dedicated to the analysis of each of the five concepts: foreign affairs / policy, history, threat(s), enemy, and international law. The third and last part contains the chapter's summary outlining the chapter's main findings.

This chapter performs content analysis of 116 speeches by all US Presidents from Franklin Delano Roosevelt to Barack Obama. The speeches (Inaugural, Farewell, and State of the Union Addresses) were selected since their chronological analysis allows to follow the evolution of each presidency and to trace the US President's general view on the five concepts. The material analyzed is sizeable (especially given the length of the speeches) and the time span is lengthy (from FDR's Inaugural in March 1933 to Barack Obama's Farewell in January 2017). The identification of commonalities in speeches given by 13 different presidents over eight decades provides a thorough understanding of the principles guiding

[1] All Inaugural, Farewell, and State of the Union Addresses cited in this chapter are from *The American Presidency Project* online database. A non-profit and non-partisan organization, *The American Presidency Project* has consolidated into a single online database: Messages and Papers of US Presidents (1789-1929); Public Papers of US Presidents (1929-present); Presidential Documents (compiled on a weekly basis: 1977-2009; and on a daily basis: 2002-present). For more information on the material made available, see https://www.presidency.ucsb.edu/ (accessed July 30, 2019). To see the exact database for each President, access the "Presidents" section on the website (https://www.presidency.ucsb.edu/presidents, accessed July 30, 2019), click on each President and then go to the "Search All Documents" section. All information from the speeches under analysis comes from Addresses downloaded from this database (even when not specifically cited).

America's foreign affairs. The President, as America's most representative foreign policy voice,[2] reflects in his speeches the country's role in world affairs.

As stated, this chapter is dedicated to the public operational code of the United States President, i.e., the US President's system of beliefs as it is reflected by analyzing 116 speeches given by 13 different presidents. The focus is on foreign affairs / politics, history, threat(s), the enemy, and international law. As outlined in the previous chapter, in the US international law is largely viewed as a foreign affairs tool. This makes it imperious for this research focused on US international law compliance to analyze the view on foreign affairs / policy of the United States President, the country's dominant actor and main voice regarding foreign affairs. The next concept under analysis is history. A country's history and the perception of its role in history (past, present or future) heavily influence its external action. Consequently, it is imperious to analyze how the President sees America's role in history. In the particular case of the US, American exceptionalism presupposes a peculiar view on US history as well as on its role in world history.[3] Enemy and threat(s) are part of this analysis due to this research's overall focus on compliance with the use of force and international humanitarian law. Countries employ force to respond to external threats to their national security, threats posed by an external enemy. This research's focus on the use of force (and, to a lesser extent, international humanitarian law) makes it all the more relevant to analyze the US President's perception of the enemy and national security threats.

This chapter's second part concludes with an outline of the US President's view on international law. Throughout the 116 speeches, international law is mentioned only 12 times. Therefore, for a comprehensive view on the concept, references to other concepts are imperious. Given the scarce number of references to international law, to be able to provide an overview of the concept as it appears in the speeches, the analysis will extend to other concepts part of the sentences where international law is mentioned, concepts that are generally associated to international law (e.g., treaty/treaties, international organizations, United Nations, world order, etc.).

Last but not least, this research employs a qualitative methodology to analyze the speeches. For a more thorough understanding, the concepts are analyzed in light of the historic context in which the different speeches were given. A proper communication of foreign policy actions is crucial in rallying public support for those actions. Fully aware of the need to target their message, leaders "are disciplined by the presence of multiple

[2] For more information, see previous chapter.
[3] For more information on American exceptionalism, see also previous chapter.

audiences"[4] and those audiences' characteristics influence their rhetoric. Apart from having a strong ceremonial role, rhetoric also signals behavior.[5] In the specific case of states' compliance with international law (the focus of this research), analyzing the main decision-makers' rhetoric is insufficient to measure states' compliance. State practice must also be considered[6] (which shall be done in the following chapters). Nevertheless, oftentimes states employ a legalistic rhetoric to camouflage their national interests.[7] "The appeal to law is simply the denial of self-interest."[8] In pursuing their interests, states can employ a legalistic rhetoric to accuse other states of breaching international law and thus diminish their credibility and international standing.[9] As shall become evident throughout the analysis of the concepts, hints to a legalistic rhetoric are part and parcel of the speeches.

The Speeches: General Remarks

For over two centuries, American presidential inaugurations celebrate the peaceful transition of power from one administration to another and help "validate the republic's democratic process."[10] The US Constitution provides only the date of the Inauguration[11] and the words of the oath of office;[12] the rest is ruled by tradition.[13] The Inaugural Address is one tradition that goes back to the very founding of the American Republic. Ever since George Washington was sworn in on April 30, 1789 in New York (America's initial capital), each new president addressed the nation on Inauguration Day in his first formal speech as the country's leader. As the very first speech of the new president, the Inaugural Address bears a significant ceremonial significance. The rhetoric is therefore all the more important. By tradition, the President sends a message of national unity.[14] "Usually bipartisan and unifying, the inaugural

[4] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 181.
[5] Ibid., pp. 174-182.
[6] For more information, see Mark A. Pollack, "Who Supports International Law, and Why?," p. 877.
[7] "When states cooperate in their self-interest, they naturally use the moralistic language of obligation rather than the strategic language of interest." Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 184.
[8] Ibid.
[9] Ibid., p. 169.
[10] The White House Historical Association, "Presidential Inaugurations," https://www.whitehousehistory.org/presidential-inaugurations (accessed August 2, 2018).
[11] The 20th Amendment to the US Constitution stipulates that: "The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin." National Archives: America's Founding Documents, "The Constitution: Amendments 11-27."
[12] Article 2, Section 1(8) of "The United States Constitution" stipulates the words of the presidential oath of office: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."
[13] For more information, see The White House Historical Association, "Presidential Inaugurations."
[14] Ibid.

address gives the President a first "center stage" opportunity to introduce his vision to the nation and the world."[15] Inaugural speeches therefore make for the perfect opportunity to outline the President's view on the five concepts analyzed in this chapter. Moreover, they "set a tone for the administration."[16]

This chapter analyzes 22 Inaugural Addresses: Franklin Delano Roosevelt (4), Harry Truman (1), Dwight D. Eisenhower (2), John F. Kennedy (1), Lyndon B. Johnson (1), Richard Nixon (2), Gerald Ford (1), Jimmy Carter (1), Ronald Reagan (2), George H. W. Bush (1), Bill Clinton (2), George W. Bush (2), and Barack Obama (2). Memorable quotes from such Inaugural Addresses[17] include FDR's 1933 warning in the midst of the Great Depression ("The only thing we have to fear is fear itself."[18]) or JFK's 1961 idealistic call ("Ask not what your country can do for you, ask what you can do for your country."[19])

Whereas 39 presidents have delivered Inaugural Addresses so far, only 10 presidents delivered a Farewell Address to the Nation.[20] Most US Presidents bed their farewell to the American people during their final State of the Union Addresses.[21] The tradition of a Farewell Address dates back to the early days of the American Republic. George Washington published on September 19, 1796 in Philadelphia's *American Daily Advertiser* an article outlining the reasons behind his decision not to run for a third presidential term (despite the lack of a constitutional prohibition in this regard).[22] Presidents Washington and (Andrew) Jackson (on March 4, 1837) delivered their Farewells in writing. More than a century later, President Truman reestablished the tradition of delivering a Farewell distinct from a State of the Union Address and opened the era of Farewells broadcast on radio and television. Lyndon B. Johnson and Gerald Ford nonetheless merged their Farewells with their final State of the Union Addresses. George H.W. Bush's West Point speech is widely considered to have been

[15] The White House Historical Association, "Presidential Inaugurations: The Inaugural Address," https://www.whitehousehistory.org/presidential-inaugurations-the-inaugural-address (accessed August 2, 2018).
[16] Ibid.
[17] For more on famous Inaugural Addresses, see James M. Lindsay, "Remembering the Best (and Worst) Inaugural Addresses," Council on Foreign Relations Blog – from The Water's Edge, entry posted January 17, 2017, https://www.cfr.org/blog/remembering-best-and-worst-inaugural-addresses (accessed August 2, 2018).
[18] Franklin D. Roosevelt, "Inaugural Address" (speech, Washington, D.C., March 4, 1933), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/208712 (accessed July 30, 2019).
[19] John F. Kennedy, "Inaugural Address" (speech, Washington, D.C., January 20, 1961), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/234470 (accessed November 29, 2019).
[20] For detailed information, see Gleaves Whitney, "Presidential Farewell Addresses," *The Imaginative Conservative*, January 10, 2017, http://www.theimaginativeconservative.org/2017/01/president-barack-obama-goodbye-presidential-farewell-addresses-gleaves-whitney.html (accessed May 15, 2018).
[21] Olivia B. Waxman, "Barack Obama's Farewell Address and 6 Other Memorable Presidential Goodbyes," *Time*, January 9, 2017, http://time.com/4624166/presidential-farewell-addresses/ (accessed August 2, 2018).
[22] Ibid.

his Farewell even though the President did not officially label it as such. Apart from these instances, most Farewells were delivered by presidents in the Oval Office, including Richard Nixon's resignation speech (considered his Farewell). Presidents George W. Bush and Barack Obama spoke from the White House East Room and Chicago, respectively.[23]

The Farewell Address is the last message a president directs to the nation and it represents a moment of reflection on four or eight years in office.[24] Presidents use this opportunity to summarize the main challenges the country faced during their presidency and showcase their key accomplishments while also providing their view on America's national purpose and standing in international affairs. Farewell Addresses are therefore useful in outlining how a president wants the world to remember him and his presidency and in providing one last glance at his worldview while still in office. Presidents also use Farewells to tackle some of the controversies surrounding their time in office.[25] George W. Bush, for instance, told the nation: "You may not agree with some of the tough decisions I have made. But I hope you can agree that I was willing to make the tough decisions."[26]

By far, the most famous Farewell was authored by George Washington. Apart from explaining the reasons behind his decision not to seek a third term in office (decision which set the tradition of a two-term presidency until 1951 when the 22nd Amendment[27] to the US Constitution was ratified), Washington also outlined principles that would guide the US for generations to come.[28] Respect for the presidency as an institution and the difficulties to be faced by the successor are leitmotifs of such speeches.[29] President Truman (1953) asked the American people to understand the perils of being president: "I want all of you to realize how

[23] Gerhard Peters, "Presidential Farewell Addresses," The American Presidency Project (online by John T. Woolley and Gerhard Peters), https://www.presidency.ucsb.edu/documents/presidential-documents-archive-guidebook/farewell-addresses-washington-1796-jackson-1837 (accessed August 2, 2018).
[24] Tamara Keith, "Obama's Farewell Address: How Presidents Use This Moment Of Reflection," *npr*, January 10, 2017, https://www.npr.org/2017/01/10/509052320/obamas-farewell-address-how-presidents-use-this-moment-of-reflection (accessed August 2, 2018).
[25] Information on Farewells from Olivia B. Waxman, "Barack Obama's Farewell Address and 6 Other Memorable Presidential Goodbyes."
[26] George W. Bush, "Farewell Address to the Nation" (speech, Washington, D.C., January 15, 2009), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/285776 (accessed November 29, 2019).
[27] Amendment 22, Section 1 stipulates the following: "No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term." National Archives: America's Founding Documents. "The Constitution: Amendments 11-27."
[28] Sarah Pruitt, "A History of the Presidential Farewell Address," *History*, January 10, 2017, https://www.history.com/news/a-history-of-the-presidential-farewell-address (accessed August 2, 2018).
[29] Tamara Keith, "Obama's Farewell Address: How Presidents Use This Moment Of Reflection."

big a job, how hard a job it is—not for my sake, because I am stepping out of it—but for the sake of my successor."[30] Warnings of future national challenges are also present in the Farewells.[31] Dwight D. Eisenhower famously warned of the danger the military-industrial complex would pose to US politics, following changes in America's military establishment through the National Security Act of 1947:[32] "In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex."[33] The need for US leadership has been another modern leitmotif of Farewell Addresses as pointed out by President George H. W. Bush: "We must engage ourselves if a new world order, one more compatible with our values and congenial to our interest, is to emerge. But even more, we must lead."[34] His son continued: "In the face of threats from abroad, it can be tempting to seek comfort by turning inward. But we must reject isolationism and its companion, protectionism."[35] US values are, of course, part and parcel of a Farewell. As Jimmy Carter famously put it: "Our American values are not luxuries, but necessities — not the salt in our bread, but the bread itself."[36] Bill Clinton underlined: "We must treat all our people with fairness and dignity, regardless of their race, religion, gender or sexual orientation, and regardless of when they arrived in our country — always moving toward the more perfect Union of our Founders' dreams."[37]

If tradition guides the Inaugural and Farewell speeches, the State of the Union Address is a constitutional obligation of the US President.[38] Apart from being an annual

[30] Harry S. Truman, "The President's Farewell Address to the American People" (speech, Washington, D.C., January 15, 1953), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/231372 (accessed November 29, 2019).
[31] Tamara Keith, "Obama's Farewell Address: How Presidents Use This Moment Of Reflection."
[32] The National Security Act of 1947 represented a major restructuring of the United States' foreign policy, military, and intelligence structures: it merged the Departments of War and Navy into the Department of Defense, created the Central Intelligence Agency, and established the National Security Council as an advisory body to the President in matters of foreign affairs and national security. For more information on this piece of legislation, see U.S. Department of State, "National Security Act of 1947," 2001-2009 Archive for the U.S. Department of State, https://2001-2009.state.gov/r/pa/ho/time/cwr/17603.htm (accessed July 30, 2019).
[33] Dwight D. Eisenhower, "Farewell Radio and Television Address to the American People" (speech, Washington, D.C., January 17, 1961), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/234856 (accessed November 29, 2019).
[34] George H.W. Bush, "Remarks at the United States Military Academy in West Point, New York" (speech, New York, January 5, 1993), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/266384 (accessed November 29, 2019).
[35] George W. Bush, "Farewell Address to the Nation."
[36] Jimmy Carter, "Farewell Address to the Nation" (speech, Washington, D.C., January 14, 1981), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/250691 (accessed November 29, 2019).
[37] William J. Clinton, "Farewell Address to the Nation" (speech, Washington, D.C., January 18, 2001), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/227701 (accessed November 29, 2019).
[38] As per Article II, Section 3(1) of "The Constitution of the United States," the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such

speech the President delivers to Congress, the State of the Union is part of the complex constitutional framework between the legislative and the executive. In the words of international lawyer and foreign affairs expert, Louis Henkin, the "President proposes and Congress disposes and legislates; then the President executes and Congress oversees and reexamines its legislation."[39] It is precisely the role of the President as agenda setter that the State of the Union outlines[40] by providing him with a yearly opportunity to showcase his agenda and ask Congress to pass legislation to fulfill that agenda. Certainly, one of the key presidential speeches of the year, the State of the Union allows the President to "showcase his entire arsenal of constitutional powers:" "chief of state, chief executive, chief diplomat, commander-in-chief, and chief legislator"[41] by directly addressing both the American public and Congress. Consequently, the State of the Union morphed from a constitutional obligation into a source of executive power.[42] The timing (beginning of the legislative session), the location (Capitol Hill, House Chamber) or the audience (members of Congress, Secretaries of different Departments, the House of Representatives Speaker presiding over the session, and the Vice President - in his capacity as Senate President), together with special guests selected to complement the President's message, accentuate the speech's significance.[43]

As a "unique genre of presidential speech,"[44] the SOTU contains three recurrent rhetorical arguments: public meditations on values, assessments of information and issues, and policy recommendations.[45] Each speech comprises two major parts: domestic policy and foreign policy. Among the recurring themes are: past and future (past accomplishments and future goals, lasting values, national identity), bipartisanship (the need for consensus building based on the President's national leadership), and optimism (the American people will fulfill

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Measures as he shall judge necessary and expedient; …" This constitutional provision (together with the provisions on treaty-making) provide the President with a role in lawmaking by allowing him to recommend to Congress measures he deems necessary for the functioning of the Union. In practice, the President outlines his political agenda and asks Congress to implement legislation and to appropriate funding to forward this agenda. Even tough lawmaking is ultimately a Congressional prerogative, given the public setting of the State of the Union, Presidents oftentimes use the SOTU to pressure Congress to pass legislation to help them fulfil their agenda. For the connection between the State of the Union Address and presidential lawmaking initiative, see Andrew B. Arnold, *A Pocket Guide to the US Constitution*, p. 65.

[39] Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs*, p. 37.

[40] "The State of the Union address is a communication between the President and Congress in which the chief executive reports on the current conditions of the United States and provides policy proposals for the upcoming legislative year." Colleen J. Shogan, "The President's State of the Union Address: Tradition, Function, and Policy Implications," *Congressional Research Service Report R40132*, January 16, 2015, https://fas.org/sgp/crs/misc/R40132.pdf (accessed August 2, 2018), Summary.

[41] Ibid., p.1.

[42] Ibid.

[43] Ibid., pp. 4-5.

[44] Ibid., p. 5.

[45] Ibid.

its destiny and build a more perfect Union overcoming any potential crisis).[46] A SOTU's content varies depending on the time of delivery during a presidential term: first year addresses tend to be forward looking; midterm addresses are meant to highlight policy achievements; election year addresses try to sketch an agenda for a second term; and second term addresses concentrate more on defense and foreign policy.[47]

The Constitution does not specify whether the State of the Union should be delivered in writing or as a speech. The first two US Presidents, George Washington and John Adams, delivered the SOTU as a speech. Starting in 1801, Thomas Jefferson established the tradition of delivering the Address in writing. It was President Woodrow Wilson who restarted the tradition of speeches. Some modern presidents delivered the SOTU as both a written message and a speech.[48] From the speeches part of this analysis, when both a written and an oral version were delivered, the written versions were not analyzed as they were only an extended version of the oral ones.[49] When there was only a written version of the speech, that version was analyzed.[50] A special case in point is Richard Nixon who in 1973 delivered six written messages to Congress. One message provided an overview of the other five (State of the Union Message to the Congress: Overview and Goals) and was delivered in writing. The other five were delivered both in writing and were preceded by five shorter radio addresses on the same topics (natural resources and the environment, economy, human resources, community development, law enforcement, and drug abuse prevention).[51] In this analysis, only the overview message was considered since it was a summary of the other five.

The Concepts[52]

Foreign Affairs / Foreign Policy

During the 20th century, following WWI and the rejection of the Treaty of Versailles by the US Senate,[53] but especially after WWII and America's rise to superpower status coupled with

[46] Ibid., pp. 6-8.
[47] Ibid., pp. 8-9.
[48] For an overview, see Gerhard Peters and John T. Woolley, "Annual Messages to Congress on the State of the Union (Washington 1790 - Trump 2019)," The American Presidency Project (online by John T. Woolley and Gerhard Peters), https://www.presidency.ucsb.edu/node/324107/ (accessed August 2, 2020).
[49] FDR (1945), Dwight D. Eisenhower (1956), Nixon (1972 and 1974), Jimmy Carter (1978, 1979, and 1980).
[50] Harry Truman in 1946 and 1953, Dwight D. Eisenhower in 1961, LBJ in 1969, and Jimmy Carter in 1981.
[51] For the complete list, see Gerhard Peters and John T. Woolley, "Annual Messages to Congress on the State of the Union (Washington 1790 - Trump 2019)."
[52] As shall become evident throughout the analysis of the five concepts, the concepts of foreign affairs / foreign policy and international law are reconstructed mostly through direct citations from different US Presidents. The concepts of history, enemy(ies), and threat(s) are reconstructed by combining information from different speeches of different Presidents without necessarily citing the exact speeches. This is due to the fact that the concepts of history, enemy(ies), and threat(s) enjoy a considerably larger number of entries in the speeches than the ones of foreign affairs / foreign policy and international law. As already stated, all information and citations are from the same source, The American Presidency Project database.

the magnitude of the Soviet (nuclear) threat at the height of the Cold War, US public opinion became interested increasingly in the country's foreign policy.[54] In the post-Cold War era events such as the September 11 terrorist attacks brought foreign policy to the forefront of American politics. Since the Cold War era, national security policy reigns supreme within foreign policy. As national interests and values together with national security threats are key to identifying viable foreign policy alternatives,[55] foreign policy is intrinsically linked to national politics. Nowadays, the distinction between foreign and national politics is blurred since many issues are "simultaneously, profoundly, and inseparably domestic and international."[56] They are *intermestic* as Bayless Manning (former Dean of Stanford University's Law School and former president of the *Council on Foreign Relations*) famously put it in his 1977 *Foreign Affairs* article.[57]

Traditionally, two main approaches defined the US perspective on foreign policy as well as the relationship between domestic politics and foreign policy. The bipartisan approach was promoted by Republican Senator Arthur Vandenberg who, in 1947, at the advent of the Cold War, encouraged Americans to "set aside partisan politics at the water's edge"[58] and join Democratic President Harry Truman in supporting the North Atlantic Treaty Organization. The overarching menace of communism provided a strong incentive for setting aside differences and uniting to combat the common enemy.

The opposite, partisan approach, pertains to the political scientist Edward S. Corwin. Corwin traced the origins of US foreign policy partisanship to the Founding Fathers who wrote a Constitution whose design contained an "invitation to struggle for the privilege of directing American foreign policy"[59] through the division and oftentimes overlap of foreign policy prerogatives between the executive (President) and the legislative (Congress).[60] Another cause of partisanship is the division of the political spectrum between only two parties: Democratic and Republican. Opposing views from both sides oftentimes degenerate

[53] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, pp. 5-6.
[54] Ibid., pp. 197-98. It must be outlined that, absent a major event directly affecting the national security of the US (e.g., the September 11 attacks) foreign policy does not rank the highest on the list of policy interests of the US public opinion. The state of the economy typically tops such a list. For proof see no further than the 1992 presidential campaign between the back then sitting President, George H.W. Bush, and the Governor of Arkansas, Bill Clinton. Despite Bush's resounding foreign policy success in the 1990-1991 Gulf War, it was Governor Clinton's famous "It's the economy, stupid!" that won the electorate and handed the presidency over to the Democratic contestant.
[55] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 216.
[56] Bayless Manning, "The Congress, the Executive, and Intermestic Affairs: Three Proposals," *Foreign Affairs* 55, no. 2 (January 1977): 306-324, p. 309.
[57] Ibid.
[58] Senator Arthur Vandenberg cited in Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 4.
[59] Edward S. Corwin, *The President: Office and Powers, 1787-1957*, p. 201.
[60] For detailed information, see previous chapter.

into hyperpartisanship in US politics (be it domestic or foreign) which leads to the polarization of political life and, ultimately, to political gridlock. The result is "a body politic that can agree on virtually nothing and "resolves" its differences by doing hardly anything."[61] Hyperpartisanship is especially present when the presidency and either one or both Houses of Congress are divided between the two parties.[62]

Foreign affairs are not mentioned often throughout the speeches[63] since US Presidents prefer to refer to America's external action as "foreign policy." Nevertheless, let us outline how "foreign affairs" are presented in the speeches. To begin with, foreign affairs mirror internal politics as America's "national policy in foreign affairs."[64] Secondly, foreign affairs are also a tool to forward America's domestic goals.[65] Along the lines of the "leaving politics at the water's edge" approach, President Truman outlines the unprecedented bipartisanship his Administration enjoyed in external relations matters.[66] Thirdly, during the Cold War, President Truman (just as many of his successors) states that American freedom is "threatened so long as the world Communist conspiracy exists in its present scope, power and hostility."[67] Such a statement sets the tone for the section President Eisenhower dedicates to foreign affairs in his 1954 SOTU, outlining the role of NATO and the UN in ensuring peace and keeping the free world safe. Fourthly, as President Eisenhower underlines in his 1955 SOTU, military and foreign affairs successes are insufficient to maintain US leadership; they must be complemented by internal factors such as a strong economy.[68] Fifthly, as Richard

[61] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 3.
[62] As presented in the previous chapter, presidential authority is at its highest when Congress legislates in support of the President's agenda.
[63] All in all, foreign affairs are mentioned 14 times throughout the speeches under analysis. Most Presidents refer to foreign affairs during the Cold War period. In the post-Cold War era, Barack Obama is the only US President to refer to America's external action as "foreign affairs."
[64] Franklin D. Roosevelt, "Annual Message to Congress on the State of the Union" (speech, Washington, D.C., January 6, 1941), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/209473 (accessed December 4, 2019).
[65] "Progress in reaching our domestic goals is closely related to our conduct of foreign affairs." Harry S. Truman, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 6, 1947), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/232364 (accessed December 4, 2019).
[66] "… I want to say that no one appreciates more than I the bipartisan cooperation in foreign affairs which has been enjoyed by this administration." Harry S. Truman, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 4, 1950), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/231027 (accessed December 4, 2019).
[67] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 7, 1954), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/232936 (accessed December 4, 2019).
[68] "Our efforts to defend our freedom and to secure a just peace are, of course, inseparable from the second great purpose of our government: to help maintain a strong, growing economy--an economy vigorous and free, in which there are ever-increasing opportunities, just rewards for effort, and a stable prosperity that is widely shared." Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union" (speech,

Nixon is keen to point out, the US can be proud of its international accomplishments such as "maintaining freedom, preserving peace, alleviating human suffering around the globe,"[69] and fighting wars to preserve and defend peace and freedom. President Ford also outlines America's proud record in foreign affairs in his final SOTU during which he specifies that foreign affairs are the result of "Congress, the President, and the people striving for a better world."[70] Last but not least, similar to other post-Cold War presidents, President Obama outlines that America's success "in this new and changing world will require" the country to "approach that world with a new level of engagement in … foreign affairs."[71]

As stated, US Presidents employ "foreign policy" more widely than "foreign affairs" to refer to America's external action. FDR mentions foreign policy during WWII to outline America's wartime policy based on alliances with other peace-loving nations.[72] President Truman points out that domestic policy is the foundation of foreign policy; consequently, the world seeks US leadership due to its exemplar democracy. Moreover, attaining peace is at the heart of US "foreign policy which is the outward expression of the democratic faith"[73] of the country. Most of Truman's references to foreign policy define the building and preservation of a just and permanent peace as the core US foreign policy objective. Truman concludes that "the preservation of peace between nations requires a United Nations Organization composed of all the peace-loving nations of the world who are willing jointly to use force, if necessary,

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Washington, D.C., January 6, 1955), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/233954 (accessed December 4, 2019).

[69] Richard Nixon, "Address on the State of the Union Delivered Before a Joint Session of the Congress" (speech, Washington, D.C., January 20, 1972), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/254749 (accessed December 4, 2019).

[70] Gerald R. Ford, "Address Before a Joint Session of the Congress Reporting on the State of the Union" (speech, Washington, D.C., January 12, 1977), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/257781 (accessed December 4, 2019).

[71] Barack Obama, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 25, 2011), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/289120 (accessed December 4, 2019).

[72] "In the field of foreign policy, we propose to stand together with the United Nations not for the war alone but for the victory for which the war is fought. It is not only a common danger which unites us but a common hope. Ours is an association not of Governments but of peoples—and the peoples' hope is peace. … wherever men love freedom, the hope and purpose of the people are for peace—a peace that is durable and secure." Franklin D. Roosevelt, "State of the Union Address" (written message, Washington, D.C., January 6, 1945), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/210062 (accessed December 5, 2019).

[73] Harry S. Truman, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 5, 1949), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/230007 (accessed December 5, 2019).

to insure peace."[74] US principles oblige the country to "never be tolerant of oppression or tyranny" and to always support "greater freedom and a better life for all people."[75]

President Eisenhower echoes his predecessor in his view on America's external action. US foreign policy is defined by clarity, consistency, confidence, or coherence and is "dedicated to making the free world secure"[76] and "to building a permanent and just peace."[77] The well-being of peoples together with peace and liberty are the goals of a "constructive foreign policy."[78] Cornerstones of US foreign policy are America's "great moral and material commitments to collective security, deterrence of force, international law, negotiations that lead to self-enforcing agreements, and the economic interdependence of free nations."[79] President Kennedy recurrently outlines that the main goal of US foreign policy is "a world of free and independent states."[80] President Johnson, just as several of his predecessors and successors, defines "support of national independence – the right of each people to govern themselves"[81] as one of the main principles of US foreign policy.

President Nixon refers to US foreign policy in the framework of the Vietnam War expressing his belief in winning "a just peace."[82] Just as other Presidents, Nixon defines his foreign policy goals as avoiding war and non-intervening in other countries as long as those countries are not a threat to US interests.[83] Another recurrent idea is that "a strong America

[74] Harry S. Truman, "Message to the Congress on the State of the Union and on the Budget for 1947" (written message, Washington, D.C., January 21, 1946), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/231926 (accessed December 5, 2019).
[75] Harry S. Truman, "Annual Message to the Congress on the State of the Union," January 4, 1950.
[76] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., February 2, 1953), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/231684 (accessed December 5, 2019).
[77] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 9, 1959), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/235339 (accessed December 5, 2019).
[78] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union" (written message, Washington, D.C., January 12, 1961), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/234806 (accessed December 5, 2019).
[79] Ibid.
[80] John F. Kennedy, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 11, 1962), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/236917 (accessed December 5, 2019).
[81] Lyndon B. Johnson, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 12, 1966), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/238437 (accessed December 5, 2019).
[82] Richard Nixon, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 22, 1970), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/241063 (accessed December 5, 2019).
[83] Richard Nixon, "Address on the State of the Union Delivered Before a Joint Session of the Congress," January 20, 1972.

… is essential to continued peace and understanding in the world."[84] President Gerald Ford focuses on the institutional aspects of America's external action. He admits that foreign policy requires cooperation between the President and Congress even though "by the Constitution and tradition, the execution of foreign policy is the responsibility of the President."[85] Ford decries the limitations on presidential foreign policy making imposed by Congress in the aftermath of the Vietnam War: for US foreign policy to be successful, Congress "cannot rigidly restrict in legislation the ability of the President to act."[86]

President Carter wants to restore "a moral basis"[87] for US foreign policy based on America's identity as a nation committed to human rights. In his final State of the Union he outlines that a "global foreign policy"[88] reflecting America's global interests is key to the maintenance of US leadership. President Reagan clearly states that America's foreign policy is one of "strength, fairness, and balance," a foreign policy which "must be rooted in realism, not naivete or self-delusion."[89] Bipartisanship, full partnership with allies, and negotiation with adversaries also define America's external action.

President Clinton too identifies "a bipartisan foreign policy"[90] as one of America's most significant sources of strength throughout the Cold War. Free people's choice of freedom and peace is, according to President George W. Bush, "a clear premise"[91] of US foreign policy. Just like his predecessors, President Obama states that to protect its national

[84] Richard Nixon, "State of the Union Message to the Congress: Overview and Goals" (written message, Washington, D.C., February 2, 1973), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/255358 (accessed December 5, 2019).
[85] Gerald R. Ford, "Address Before a Joint Session of the Congress Reporting on the State of the Union" (speech, Washington, D.C., January 15, 1975), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/256753 (accessed December 5, 2019).
[86] Ibid. President Ford expresses similar ideas in his final State of the Union Address (which also served as his Farewell).
[87] Jimmy Carter, "The State of the Union Address Delivered Before a Joint Session of the Congress" (speech, Washington, D.C., January 19, 1978), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/245063 (accessed December 5, 2019).
[88] Jimmy Carter, "The State of the Union Annual Message to the Congress" (written message, Washington, D.C., January 16, 1981), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/250760 (accessed December 5, 2019).
[89] Ronald Reagan, "Address Before a Joint Session of the Congress Reporting on the State of the Union" (speech, Washington, D.C., January 26, 1982), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/245636 (accessed December 5, 2019).
[90] William J. Clinton, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., February 4, 1997), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/223396 (accessed December 5, 2019).
[91] George W. Bush, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 28, 2008), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/277182 (accessed December 5, 2019).

security "America will always act, alone if necessary," following a "patient and disciplined strategy."[92] Nevertheless, on global issues it will try to mobilize an international coalition.

History

History is the most widely employed concept of the five under analysis. To a certain extent, all presidents fear history and share a constant preoccupation of how posterity will remember their presidency. History, in the view of US Presidents, has agency: it a ruthless judge casting a vote on political action. It is also a tool in the hands of presidents as they use it to justify their actions: they oftentimes employ historical precedents to justify or give more weight to certain actions. History is an atemporal entity: the US has a special and unique role in history, it can change its very course and by doing so it is the author of historic undertakings. Moreover, the US, as the leader of the free world, has the responsibility to shape world politics and, therefore, history. America is destined to continue on this path of historical achievements and its future actions are surely to make history. Regarding America's actions, a special mention goes to US military forces which all presidents hail as the best in history. History is portrayed as something to look forward to (e.g., every time a new Congress is inaugurated, the President outlines that it has the potential to become the most consequential in history). A positive view on history therefore predominates. History is also portrayed as a recurrent event: it keeps repeating itself because people have not learned from it.

Franklin Delano Roosevelt outlines in his speeches the crucial importance of WWII in the history of humankind. The relevance of historic events for the fate of the world is oftentimes employed by US Presidents to rally support for their actions. A similar message about WWII is sent by Roosevelt's successor, Harry Truman. President Truman outlines 1945 as a crucial year in history and adds to history's timeline a new event: the beginning of the Cold War. Already in the midst of the Cold War, Dwight Eisenhower employed the recurrent good versus evil rhetoric to portray the US in opposition to the Soviet Union. Just as presidents have done with other threats, the threat posed by the USSR was presented as being unique and, above all, unprecedented in the history of humankind. As always, America, as the harbinger of freedom and justice, has a moral obligation to fight this threat and bring prosperity to the world. Eisenhower's successor, President Kennedy, also points out his generation's unique role in history whose crucial task is to defend freedom. For JFK as well, history has agency and it can determine whether one is on the right or the wrong side of it.

[92] Barack Obama, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 12, 2016), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/313186 (accessed December 5, 2019).

History's agency is also President Johnson's leitmotif. His question to the American people, a question asked by other presidents as well, is whether they decide to act or history will decide in their place. History is therefore constantly portrayed as the judge of action or inaction. Each generation of Americans has the unique opportunity to make a singular contribution to the history of freedom. History is for sure on the side of freedom since only political constructions based on freedom can last; tyranny therefore is bound to be extinguished. The focus on internal prosperity is another recurrent theme for American Presidents: historic economic achievements are on the way for the United States.

Richard Nixon, in the midst of the Vietnam War, points out the turbulent nature of history. Despite the challenges, the US is in a better situation than at any time in history. The country's unique role in promoting freedom is once more outlined. Consequently, history humbles the US whose citizens should be thankful for all the blessings it bestowed upon them and for the country's unique historical development. Besides a tough judge on America's actions, history is also a teacher, a source of inspiration hose calling the US must answer. This benevolent teacher offers many points of reflection. Nixon's successor, President Ford, outlines the very same ideas. President Jimmy Carter identifies history as manifest destiny, a recurrent theme not only in presidential speeches, but also in US foreign policy.

A constant focus on America's history can also be identified in Ronald Reagan's speeches. Just like with other presidents before him, for Reagan, history has several characteristics. It is a continuous process of inescapable character. It provides both challenges and teachings. Only courageous people, like the American people, answer history's calling and make history. All people go through history, but only some leave their mark; the determination in leaving a mark will determine how one is remembered by history. Just like many other presidents, Reagan was reverential towards America's Founding Fathers whom he considered heroes. Living up to their heritage and honoring the country's history and past is every American's duty. All these ideas are wrapped up in a religious language based on the antagonism between freedom and totalitarianism.

At the end of the Cold War era, Reagan's successor, President George H.W. Bush, made few references to history. In his scant remarks on history he expressed his hope for the future of the United States and outlined the unique historical moment brought about by the demise of communism and the dismemberment of the USSR. President Clinton also outlined the historic moment for democracy, peace, justice, and freedom. Focusing on the US economy, the greatest in human history, Clinton pointed out that America is more than a place, it is the most powerful idea in history.

His successor focuses on history in the context of the Global War on Terror. Throughout all his speeches, George W. Bush outlines US' historic role in fighting terrorism and in promoting democracy. Bush 43 opens his Inaugural outlining the historical uniqueness of the peaceful transfer of power, one of the corner stones of American democracy and testament to America's historical achievements. America's historic engagement in the world is also part of the country's proud legacy. History calls upon the US to act and bestows upon it a unique role in the history of human freedom. Again, free people, not tyrants, make history. The US makes history, and it is also shaped by it. Similar ideas are put forward by the 44th President of the United States, Barack Obama. Apart from the usual historic challenges, Obama also outlines new ones such as climate change, clean water or energy.

Enemy(ies)

Former Canadian Prime Minister, Brian Mulroney, famously said: "In politics, …, you need two things: friends, but above all, an enemy."[93] Political rhetoric aside, all 13 presidents identified numerous enemies threating US national security. As it shall be made evident by the analysis, the description of the enemy follows a similar pattern to the description of threats. Each president identifies several enemies and threats. The definition of the enemy is dependent upon the historic period (WWII; Cold War; post-Cold War, prior-9/11; post-9/11).[94] For each historic period one enemy is identified as being more threatening than the others and America's foreign policy efforts are almost exclusively directed against it. Both the enemy and the threats are internal and external. The internal enemy, as shall be seen, is inaction (especially in the face of threats). The enemies (and the threats they pose) are both material and immaterial: for instance, while the USSR (with its nuclear arsenal and military contingents) posed a material threat to US national security, the communist ideology was a non-material threat, more difficult to identify and far more difficult to counter. Material enemies are recurrently described in immaterial terms throughout the speeches (e.g., labeling the Axis powers, the USSR or Al Qaeda as "evil"). Immaterial enemies are to be fought against with material means by employing America's unprecedented military might. Some

[93] Brian Mulroney, "Brian Mulroney Quotes," *BrainyQuote*, https://www.brainyquote.com/quotes/brian_mulroney_135610 (accessed August 13, 2018).

[94] One methodological aspect must be outlined regarding the historic periods. This chapter analyzes speeches given by US Presidents from FDR's 1933 Inaugural to Barack Obama's 2017 Farewell Address. Even though the beginning of Roosevelt's first term in office predates the outbreak of WWII by over six years, the analysis in this chapter focuses mainly on speeches given during WWII. The references to pre-WWII speeches are meant to outline the aspects regarding the five concepts under analysis which can also be identified in the speeches given since the outbreak of WWII (by either FDR or the rest of American Presidents under analysis). The analysis starts in 1933 for coherence purposes - to cover President Roosevelt's four mandates in their entirety.

enemies (such as the USSR) pose such a great threat that a coalition of like-minded (democratic) states was needed to face them. Of interest to the international law part of this research is the implied assumption throughout the speeches that the enemy is lawless. Outlaw regimes, i.e., non-democratic regimes, are constantly identified as a major threat to US national security. As tyranny is lawless so are America's enemies: lawless countries abide by no rules and therefore are a threat to law-abiding nations as the United States.

During WWII, Franklin Delano Roosevelt identifies the enemy with the Axis and the fascist ideology (the threat emerging from both the material military capabilities of different countries and the non-material fascist ideology). Recurrently, the warning is clear: a country can win the military fight but lose the overall battle if it surrenders to the enemy's philosophy. Overconfidence in its own military might and the appeal of one's own political philosophy determine complacency which is as dangerous of an enemy as the actual one. What is more, diminished faith in one's mission is playing by the enemy's will. The total defeat of the enemy is the utmost imperative. Besides military defeat, the question is how to defeat the enemy at home, i.e., defeat fascism at home and counter its propaganda. Subversion is another recurrent theme during WWII and during the Cold War as well: the enemy must never be underestimated, especially since it might try to sue internal division to achieve its purpose. To respond to the enemy and ultimately defeat it, the US must always be vigilant and armed. Just like the threat, the enemy is also portrayed in messianic, religious, and immaterial terms: therefore, the Axis powers are labeled as enemies of faith and humanity or enemies against the human race (President George W. Bush's rhetoric in the Global War on Terror will employ a similar language). The magnitude of the threat posed by this evil enemy makes it imperious to fight until it is completely destroyed. The US must be constantly on alert and respond to the challenge posed by the enemy. Nevertheless, just like many if his predecessors, President Roosevelt considers the US to always be up to the task. Given the threat to humanity itself, an international coalition must defeat this enemy, a coalition of United Nations, i.e., the Allied countries fighting the Axis.

Already in the Cold War era, many of President Harry Truman's speeches revolve around the war effort during WWII (which led to the final defeat of the enemy by the "United Nations") and the economic and political peace efforts necessary to rebuild following the conflagration. The economic effort is a tool to defeat the immaterial enemies of "hunger,

misery, and despair"[95] and to counter the devastating effects they have on the human race. In the case of yet another military confrontation the US must be ready to inflict immediate loses upon the enemy; the US has a responsibility not only to act, but also to help other nations that might find themselves threatened. One recurrent characteristic of the enemy is its identification as an enemy of democracy (see, for instance, President George W. Bush's speeches). As always, the enemy is not only external, but also internal: President Truman warns that what Americans must fear is the enemy within themselves.

Like many other presidents, President Dwight Eisenhower describes the (Soviet) enemy as an evil enemy. To counter this enemy, Eisenhower places great emphasis on the military, especially on the importance of the diversification of armament. Just like other presidents, Eisenhower believes that history shows the US can always defeat its enemies be them material (armies of enemy countries) or immaterial such as "ignorance, poverty, disease, and human degradation."[96]

A similar rhetoric, with multiple recurrent themes, is put forward by John F. Kennedy who refers to the "common enemies of man,"[97] namely "tyranny, poverty, disease and war itself"[98] against which the US must forge a "grand and global alliance."[99] Internal economic enemies, such as inflation, are also to be feared. Lyndon B. Johnson also identifies injustice to people and waste of resources as the main enemies of the nation. US enemies, in general, and the Communist (in capital letter) enemy, in particular, share several recurrent characteristics: cruelty, complexity (making it "not easy to perceive, or to isolate, or to destroy"),[100] and the tendency to make the mistake of underestimating the US. Just like Eisenhower, President Nixon also outlines the need for a good military acting as a deterrent and prerequisite for peace. Gerald Ford scarcely refers to the term "enemy;" he does so to outline his primary responsibility of protecting the lives and property of Americans from its enemies. Like several others before him, Carter identifies "poverty, ignorance, and

[95] Harry S. Truman, "Inaugural Address" (speech, Washington, D.C., January 20, 1949), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/229929 (accessed December 5, 2019).
[96] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union," January 9, 1959.
[97] John F. Kennedy, "Inaugural Address."
[98] Ibid.
[99] Ibid.
[100] Lyndon B. Johnson, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 10, 1967), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/238176 (accessed November 29, 2019).

injustice"[101] as enemies. In his habitual messianic language, Ronald Reagan refers to America's enemies as "enemies of freedom" (just as Bush 43 does several years later).[102]

President George H.W. Bush uses the term only once to outline the risks of having a superpower as your enemy. His successor, Bill Clinton, references both material and immaterial enemies, internal and external, old or new. The enemy therefore can be the government, change (which, if not handled properly, can become an enemy) or, in the words of the President, the "enemy of our time is inaction."[103] To counter the traditional, material enemies, the President recommends training the military.

Following the events of September 11, President George W. Bush identifies terrorism as the main enemy of the US. A religious, messianic language characterizes Bush's speeches. The terrorists that perpetrated the 9/11 attacks are, just as all other enemies of the United States, presented antithetically as "the enemies of liberty"[104] (or freedom, or justice). Driven by hatred, they are brutal, patient, determined, ambitious, with clear intends, and constantly willing to strike against the US. Evil enemies who would stop at nothing, their aim is to sue division and spread fear. Constantly seeking chaos, the enemy has made its intentions clear on September 11. The world is a battlefield and the US must pursue its enemies relentlessly to save civilization itself. Given the enormous task ahead, just as ever before, there is no alternative to defeating the enemy; "retreat … in the hope for an easier life"[105] is, therefore, not an option: the whole world is waiting for the US to take action; moreover, it is in America's nature not to shy away from threats and to face its enemies. Isolationism becomes a threat in and of itself since it helps the enemy reach its goal. To win the Global War on Terror, the US has no alternative but to confront the enemy and take the fight to its territory. To bring justice to the enemy (an idea similar to the post-WWII period), it is "not enough to

[101] Jimmy Carter, "Inaugural Address" (speech, Washington, D.C., January 20, 1977), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/241475 (accessed November 29, 2019).
[102] Ronald Reagan, "Inaugural Address" (speech, Washington, D.C., January 20, 1981), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/246336 (accessed November 29, 2019).
[103] William J. Clinton, "Address Before a Joint Session of the Congress on the State of the Union," February 4, 1997.
[104] George W. Bush, "Inaugural Address" (speech, Washington, D.C., January 20, 2001), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/211268 (accessed November 29, 2019).
[105] George W. Bush, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 31, 2006), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/214381 (accessed November 29, 2019).

serve the enemies with legal papers."[106]As always in its history, the US must be resolute and show unity in facing its enemies. Apart from terrorism, terrorists (such as Osama bin Laden), and terrorist organizations (such as Al Qaeda), dictators, in general, and Saddam Hussein, in particular, are identified as threats to United States.

Following a similar post-9/11 rhetoric in identifying America's enemies, Bush's successor, Barack Obama, shares the same sense of urgency in facing those enemies. For Obama, the enemy is also always determined and looking for new ways to attack. Therefore, the US must not fall into the trap of weakening itself while the enemy is getting stronger. In his speeches, Obama warns against the danger of winning the peace, but losing the war.

Threat(s)

The "basic function of a foreign policy is dealing with threats to the country's national interests."[107] The identification of national security threats is dependent upon the definition decision-makers give to the national interest. This definition exhibits both subjective and objective elements. Threats become objectively evident once they materialize (e.g., following the terrorist attacks of September 11, terrorism, in general, and Al Qaeda, in particular, were doubtlessly threats to US national security). The subjective element of threats is heavily dependent upon the interpretation decision-makers give to events with relevance for national security and on how they perceive the strategic surrounding environment.[108]

It must be outlined that the term security has a long tradition in the United States. As far back as 1788, James Madison, widely considered the father of the American Constitution, and the country's fourth President employed the term in the "Federalist Papers" in support of transfer of power towards federal authorities to provide security against foreign threats.[109] Over 150 years later, the term "national security" emerged in the American public sphere during the 1940s following the Japanese attacks on Pearl Harbor. National security as a concept raised to the core of US foreign policy on July 26, 1947 when President Harry Truman signed the National Security Act.[110] Especially following the tragic events of September 11, the United States exhibited a comprehensive view on security, especially through its National Security Strategies (2002, 2006, 2010).[111]

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[106] George W. Bush, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 20, 2004), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/211969 (accessed November 29, 2019).
[107] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 30.
[108] Ibid.
[109] Avril McDonald and Hanna Brollowski, "Security," para. 6.
[110] Ibid., para. 5.
[111] For further information, see Chapters I and VI as well as this research's Conclusion.

Several aspects ought to be underlined regarding national security threats. The first one concerns the exact nature of the threat: military, economic or political; internal or external to the nation state. Secondly, the entity posing the threat should be identified: state or non-state actor. The threat's duration (ephemeral or endurable) is another aspect to be analyzed. The extent and gravity of the threat are also on the list of relevant aspects which influence the manner in which decision-makers tackle threats. Summarizing, two questions are crucial: What is the threat? and How to counter it?[112] In coping with national security threats, the public opinion's support is fundamental. During the Cold War "the universal acceptance of [the Communist] threat and the need to counter it created virtual unanimity that allowed the paradigm to be accepted and implemented."[113] Some policy experts blame the post-Cold War era policy failures on the lack of a coherent vision on the threats facing America's national security. Last but not least, throughout centuries, external threats to US territory have been scarce which determined the emergence of a culture where Americans perceived themselves as "essentially independent of what they tended to view as a hostile, corrupt outside world."[114]

Threats change depending on the historic period and the events unfolding. As already stated, the analysis outlines four main historic periods (with their respective threats): (1) WWII (the ideological threat of fascism and the military threat posed by the Axis powers); (2) the Cold War (the threat of communism as an ideology and the more concrete threat posed by the USSR's military and nuclear arsenal); (3) the post-Cold War, but prior to 9/11: a period marked by the lack of an overarching threat, but also by the emergence of multiple non-state threats characteristic of the upcoming 21st century threat environment; (4) post-9/11 (the threat of terrorism). Regardless of the historic period, Presidents outline, threats to US national security constantly emerge and the US must act immediately and decisively to counter them. The US as the indispensable nation in solving world problems is another recurrent theme throughout the speeches together with the country's moral duty to help the world counter international threats.

As already stated, the identification of threats is dependent upon the historical period. For instance, if in FDR's speeches one can clearly identify Nazi Germany and Hitler as threats not only to the US, but to world peace in its entirety, by the late 1940s and early 1950s (in Harry Truman's speeches) it was clear that the newly identified threats were communism

[112] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 31.
[113] Ibid., p. 39.
[114] For a geopolitical explanation of America's political culture, see Ibid., p. 20.

and the Soviet Union. Historical periods aside, all presidents agree that the US will never pose a threat to any peace-loving nation. All presidents also distinguish between different types of threats: military, economic or political. Internal, economic threats are the focus of almost all American Presidents: e.g., a weak economy, unemployment, inflation, and income / social inequality. Some types of threats may remain constant, while their sources change: e.g., the nuclear threat - during the Cold War, the source of the threat was the Soviet nuclear arsenal; in the post-9/11 era, the threat emerges from the possibility of nuclear weapons potentially falling into the hands of terrorist organizations. Threats are both old (nuclear weapons) and new (cybercrime or climate change). The urgency of the response needed is, nonetheless, a common element: if not tackled immediately, presidents warn, the US (and potentially the entre humankind) will suffer the consequences. Following the Cold War era, the '90s were defined by strategic uncertainty: "in an environment where there was no concrete opponent, the real threat came from the unknown, unforeseen, and unforeseeable."[115]

Franklin Delano Roosevelt's first speeches focus on the Great Depression of the 1930s and America's domestic recovery. The threat is internal and economic. During WWII, the threat is external and comes from the Axis powers (Germany, Italy, Japan), especially from Hitler and the fascist ideology. The US shares this threat with all Western democracies which must all act as the "United Nations" to combat it. Non-democratic nations ruled by dictators which threaten democracies with aggression are recurrently identified as threats throughout most of FRD's and other presidents' speeches. The threat of aggression, identified as the most serious threat, will persist as long as dictators oppress nations (these very same ideas are to be identified in George W. Bush's speeches and political beliefs).

In Harry Truman's speeches, economic threats (the threat of inflation and depression) are recurrent. The external threat of communism materializes. From an ally during WWII, the Soviet Union becomes the main threat to US security. The communist threat is both material (the USSR and its military arsenal) and immaterial (the communist ideology). Seeking world conquest, the USSR is labeled as a threat against the very independence of the United States. The threat of aggression is omnipresent since the USSR is looking to create a Communist Empire (unlike the US, who will never seek an empire). This constant Soviet need for expansion is a threat that can lead to war. Just as before (e.g., Nazi Germany), the threat is total and the danger it poses is common to all peace-loving nations; it can only emerge from

[115] Ibid., p. 44.

the USSR as the US is never a threat to any peace-loving nation. Of relevance to the international law part of this research is the idea, recurrent through the speeches of several presidents, that free nations (i.e., democratic nations) must rally themselves against the Soviet (military and ideological) threat which can be countered by a world of law. (International) law therefore becomes a tool in fighting communism and assuring US national security.

Just as his predecessor, Dwight Eisenhower also outlines the economic threat. He also points out the confidence with which the US faces threats. Faced with a "strongly armed imperialistic dictatorship"[116] willing to use force to sustain its empire, the US must counter this threat without recurring to the use of force to avoid the devastating consequences of war. Apart from the oftentimes mentioned threat of aggression, the ideological threat posed by communism is just as significant and dangerous. To counter this lasting communist threat, the US needs to employ both military and non-military means.

The communist threat is therefore a recurrent theme in all speeches of Cold War US Presidents. Moreover, references to external and subversive threats during the Cold War reflect the era of espionage and secrecy between the two superpowers. John F. Kennedy refers to the communist threat in Europe and Latin America and to the need to sustain a nuclear arsenal able to counter the Soviet one. Nevertheless, the President cautions, the danger of massive retaliation is also a threat. Stressing the nuclear threat once more, LBJ outlines that the US can meet any threat and that its military is strong enough to deter any threat of aggression from the USSR. The very same ideas are also present in the speeches of Presidents Richard Nixon and Gerald Ford.

Jimmy Carter maintains the message of urgency and necessity in countering with the Soviet nuclear threat as well as the need for collective international efforts in this regard. As in previous presidential speeches, the USSR is the main threat to world peace and the US is the victim of its aggression. Internal, nonmaterial threats such as selfishness, cynicism, and apathy add to the list of previously outlined material threats. Economic and nuclear threats top the list in President Ronald Reagan's speeches as well. Reagan's language is heavily imbued with religious values and messianic terms - America's resolve will never falter since its mission is as unique as it is crucial to the faith of humankind: protecting freedom against threats and extending freedom's frontiers.

[116] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 10, 1957), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/233260 (accessed November 29, 2019).

At the end of the Cold War, President George H.W. Bush welcomes a period of peace. Although the threat of the use of force is still present (given the 1990 Iraqi invasion of Kuwait), the Soviet military threat in Europe is fading away with the demise of the Soviet Union. Just as other Presidents, Bush employs a predominantly non-military language to describe a military threat by labeling Iraq's act of aggression against Kuwait as "a threat to decency and humanity."[117] President Bill Clinton outlines the post-Cold War era threats (many of whom shall fully materialize with the down of the 21st century). Despite the decline of the nuclear threat in the post-Cold War era, chemical and biological weapons are still to be guarded against. Focusing on the economy, Clinton outlines once more the division between external and internal threats. With the fall of communism and the dismemberment of the Soviet Union, US security faces no immediate threats; for this reason, the President cautions, the US must guard against the internal threat of inaction. Just like his successors, Clinton points to the new strategic environment where threats know no borders. Therefore, it is all the more imperious to address them with urgency or the US will incur heavy consequences. In another example of messianic language employed to describe threats, President Clinton considers that potential threats such as terrorism, international organized crime, and drugs form an "unholy axis."[118] In this post-Cold War era threats come from the enemies of the nation state.

Following the rather calm years of the '90s, threats are constantly multiplying. Out of the multiple emerging threats of the 21st century (or the threats of a new era as they are recurrently called) terrorism emerges as the utmost threat to US national security after the terrorist attacks of September 11, 2001. Just as during the Cold War, this threat is imminent. Eradicating terrorism becomes national security priority number one and the Middle East becomes front and center in the US foreign policy.[119] "The emergence and evolution of international terrorism represents the first consensual threat to American vital interests since the dissolution of the Soviet threat."[120] Immediately after 9/11, terrorism becomes an existential threat, i.e. a threat that endangers the very national existence of the United States and its vital security interests (out of which, the most basic one is securing the lives of

[117] George H.W. Bush, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 29, 1991), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/265956 (accessed November 29, 2019).
[118] William J. Clinton, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 27, 1998), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/226032 (accessed November 29, 2019).
[119] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, pp. 46-47.
[120] Ibid., p. 47.

American citizens).[121] This is reflected in President George W. Bush's rhetoric; he clearly labels terrorism as the main external threat to US national security. Employing a language similar to the one of President Reagan's, Bush 43 states that terrorism threatens the civilized world and world peace. Given the likelihood of another terrorist attack, terrorism is an ongoing threat. Considering the magnitude of this threat, the US will rally the world to counter terrorism (just as it has done before with threats of this magnitude). Throughout President Bush's speeches, dictatorial regimes emerge as a threat. In particular, Saddam Hussein emerges as a threat especially since 2002 (in the run up to the 2003 Iraq invasion).

If President Bush heavily relied on military means to tackle the threat of terrorism, his successor, President Barack Obama, considered that the US must employ all elements of its power to counter threats to its national security and defeat its enemies. Diplomacy, for instance, is oftentimes considered better suited. Terrorism keeps its central position on the list of national security threats, especially after the emergence of the Islamic State (joined by cyber-terrorism and nuclear terrorism). Obama also worked relentlessly to tackle nonmilitary threats such as climate change (which he considered to be of a higher magnitude and more direct to US national security than some traditional threats). Just as many of his predecessors, President Obama outlined that the US needed allies to cope with the enormous threats of the 21st century (while, at the same time, as several of his predecessors, considering the US to be the indispensable nation in tackling international threats).

International Law

Throughout the speeches, international law is mentioned in only 12 instances (the last President to mention "international law" in one of the speeches under analysis is Jimmy Carter in his 1981 State of the Union Address in relation to the Iran hostage crisis, the Soviet intervention in Afghanistan, and the migration crisis in Cuba).[122] References to international law as such are positive. Before the outbreak of WWII, FDR sees the strengthening of international treaties and law as a means to "maintain peace and eliminate causes of war" part of a "general peace program."[123] As a recurrent theme throughout all the speeches, the respect towards international treaties and law is characteristic of "God-fearing democracies of the

[121] Ibid.
[122] Jimmy Carter, "The State of the Union Annual Message to the Congress," January 16, 1981.
[123] Franklin D. Roosevelt, "Annual Message to Congress" (speech, Washington, D.C., January 6, 1937), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/209043 (accessed November 29, 2019).

world."[124] Consequently, the respect for international law and norms is almost automatically part of the foreign policy behavior of democratic states; totalitarian regimes, i.e. outlaw regimes, represent a threat to democracies since they are prone to breaching international law and to committing acts of aggressions against peace-loving (democratic) nations. The mutual observance of international law is crucial; if it becomes "a new one-way international law, which lacks mutuality in its observance"[125] then IL transforms itself into an instrument of oppression.

President Harry Truman is one of the most passionate advocates of international law and institutions. In proclaiming his "wholehearted support to the United Nations," Truman describes it as the only organization that can "provide the framework of international law and morality without which mankind cannot survive."[126] IL therefore becomes a cornerstone of the post-WWII peace and security architecture. Strengthening the UN to preserve "international law and order"[127] is a prerequisite for ensuring world peace. Moreover, during the Cold War, the UN is oftentimes portrayed as a beacon of hope for international peace and security (especially when it comes to the control of weapons of mass destruction). President Eisenhower summarizes the importance of international law for international peace and security during his last State of the Union Address:

> New tactics will have to be developed, of course, to meet new situations, but the underlying principles should be constant. Our great moral and material commitments to collective security, deterrence of force, international law, negotiations that lead to self-enforcing agreements, and the economic interdependence of free nations should remain the cornerstone of a foreign policy that will ultimately bring permanent peace with justice in freedom to all mankind. The continuing need of all free nations today is for each to recognize clearly the essentiality of an unbreakable bond among themselves based upon a complete dedication to the principles of collective security, effective cooperation and peace with justice.[128]

In outlining another recurrent idea - that IL compliance is part of the community of civilized countries - Jimmy Carter outlines the great responsibility great powers bear to obey the rule of law and to "use its strength in a measured and judicious manner."[129] Again, international law appears as a pillar of the international system: IL and the UN Charter are "two fundamentals of international order" and international law non-compliance thus becomes a

[124] Franklin D. Roosevelt, "Annual Message to Congress" (speech, Washington, D.C., January 4, 1939), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/209128 (accessed November 29, 2019).
[125] Franklin D. Roosevelt, "Annual Message to Congress on the State of the Union," January 6, 1941.
[126] Harry S. Truman, "Annual Message to the Congress on the State of the Union," January 4, 1950.
[127] Ibid.
[128] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union," January 12, 1961.
[129] Jimmy Carter, "The State of the Union Annual Message to the Congress," January 16, 1981.

"threat to world peace."[130] President Carter also outlines that IL is equally defined by its norms and state practice.

Given that in numerous occasions international law and the United Nations are presented as complementary tools to ensure world peace, let us look at the way in which the UN is referred to in the speeches.[131] The UN's founding document is mentioned several times. The UN Charter is considered an instrument for the preservation of international justice.[132] According to its principles, states "must continue to share in the common defense of free nations against aggression."[133] Collective security as embodied in the Charter[134] must be strengthened to discourage war and therefore protect America's vital interests.[135]

President Roosevelt presents the UN as a pillar of post-WWII security architecture and a prerequisite for international peace. In his 1949 Inaugural Address, President Truman pledges America's "unfaltering support to the United Nations and related agencies," which he calls "a means of applying democratic principles to international relations," and promises to "search for ways to strengthen their authority and increase their effectiveness."[136] The UN "as the representative of the world as one society"[137] upholds international justice,[138] provides for "the common defense of free nations against aggression,"[139] is "the cornerstone of … a peaceful world"[140] and "the world's greatest hope for peace."[141] Through the "concept of international security embodied in the Charter" the "nations of the free world" placed their "reliance on the machinery of the United Nations to safeguard peace."[142]

Presidents Eisenhower and Kennedy echo the same ideas. Strengthening the system of collective security is particularly important throughout the Cold War. President Kennedy

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[130] Ibid.
[131] The syntagm "United Nations" is also employed by President Franklin Delano Roosevelt recurrently during WWII to refer to the alliance of countries fighting against the Axis Powers.
[132] Harry S. Truman, "Annual Message to the Congress on the State of the Union," January 6, 1947.
[133] Harry S. Truman, "Annual Message to the Congress on the State of the Union," January 4, 1950.
[134] Harry S. Truman, "Annual Message to the Congress on the State of the Union" (written message, Washington, D.C., January 7, 1953), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/231314 (accessed November 29, 2019).
[135] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union," January 6, 1955.
[136] Harry S. Truman, "Inaugural Address," January 20, 1949.
[137] Harry S. Truman, "Message to the Congress on the State of the Union and on the Budget for 1947," January 21, 1946.
[138] Harry S. Truman, "Annual Message to the Congress on the State of the Union," January 6, 1947.
[139] Harry S. Truman, "Annual Message to the Congress on the State of the Union," January 4, 1950.
[140] Harry S. Truman, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 8, 1951), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/231403 (accessed December 2, 2019).
[141] Harry S. Truman, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 9, 1952), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/231465 (accessed December 2, 2019).
[142] Harry S. Truman, "Annual Message to the Congress on the State of the Union," January 7, 1953.

refers to the UN as "our instrument and our hope" since "arms alone are not enough to keep the peace--it must be kept by men."[143] As a "world assembly of sovereign states" the UN is the "last best hope in an age where the instruments of war have far outpaced the instruments of peace,"[144] "the protector of the small and the weak, and a safety valve for the strong," and a potential "framework for a world of law."[145] LBJ calls it an "instrument for national independence and international order"[146] and the "supreme association."[147]

Following the end of the Cold War, the speeches reflect the declining enthusiasm towards the UN. President George H.W. Bush calls the UN "once only a hoped-for ideal, … now confirming its founders' vision."[148] President Clinton follows a similar pattern in calling for UN reform while at the same time recognizing the organization's crucial role in peace and security.[149] President George W. Bush mentions the organization solely in relation to the March 2003 US intervention in Iraq.[150]

When referring to international law, US Presidents also refer to international agreements. They view treaty obligations as tools that ensure world peace; as previously outlined, democracies have a greater tendency to observe international treaties than authoritarian regimes ("world peace through international agreements is most safe in the hands of democratic representative governments").[151] America's propensity to honor international agreements "historically considered … as sacred" [152] is another recurrent idea.

Going back to the concept of international law, as stated, it is mentioned only 12 times. "Law" and the "rule of law," on the other hand, receive far more attention. Just as

[143] John F. Kennedy, "Annual Message to the Congress on the State of the Union," January 11, 1962.
[144] John F. Kennedy, "Inaugural Address."
[145] John F. Kennedy, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 14, 1963), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/237129 (accessed December 2, 2019).
[146] Lyndon B. Johnson, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 8, 1964), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/242292 (accessed December 2, 2019).
[147] Lyndon B. Johnson, "Annual Message to the Congress on the State of the Union," January 12, 1966.
[148] George H.W. Bush, "Address Before a Joint Session of the Congress on the State of the Union," January 29, 1991.
[149] For the call for reform, see William J. Clinton, "Address Before a Joint Session of the Congress on the State of the Union," February 4, 1997. For the role of the United Nations in ensuring peace and security, see: "The new century demands new partnerships for peace and security. The United Nations plays a crucial role, with allies sharing burdens America might otherwise bear alone. America needs a strong and effective U.N." William J. Clinton, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 19, 1999), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/230240 (accessed August 2, 2020).
[150] For more information on the Bush 43 Administration's approach towards the UN, see Chapter I.
[151] Franklin D. Roosevelt, "Annual Message to Congress" (speech, Washington, D.C., January 3, 1938), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/209087 (accessed December 2, 2019).
[152] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union," January 9, 1959.

"international law," "law" is oftentimes implied throughout the speeches even when not explicitly mentioned. Again, democratic regimes are considered a precondition for (international) law compliance.[153] World peace itself is dependent upon the existence of "free and independent nations" that "band together into a world order based on law."[154] The cornerstone of such a peaceful world is the UN.[155] A "peaceful world of law and order" is in the self-interest of the US since it provides the perfect setting for its free institutions to "survive and flourish."[156] Law, in the US view, is based on values such as freedom and equality between all nations. Law must be "steadily invoked and respected by all nations" since without it "the world promises only such meager justice as the pity of the strong upon the weak."[157] Law compliance is an US tradition since America was founded as a country of men and law.[158]

Presidents Eisenhower,[159] JFK,[160] Jimmy Carter, and Reagan all refer to the rule of law as a peace-ensuring mechanism and the remedy against the use of force. President Carter outlines America's "deep respect … for the rule of law."[161] President Reagan places the "rule of law under God"[162] together with individual liberty and representative government as defining characteristics of a civilized world (in stark opposition to the USSR which, in the words of US Presidents, recognizes only strength).

The US as "a nation of laws"[163] is also a recurrent idea in President Clinton's speeches. Again, outlaw nations are a threat to US security.[164] The rule of law as basis for a

[153] "We have learned that God-fearing democracies of the world which observe the sanctity of treaties and good faith in their dealings with other nations cannot safely be indifferent to international lawlessness anywhere." Franklin D. Roosevelt, "Annual Message to Congress," January 4, 1939.
[154] Harry S. Truman, "Annual Message to the Congress on the State of the Union," January 8, 1951.
[155] "We believe that free and independent nations can band together into a world order based on law. We have laid the cornerstone of such a peaceful world in the United Nations." Ibid.
[156] Harry S. Truman, "Annual Message to the Congress on the State of the Union," January 7, 1953.
[157] Dwight D. Eisenhower, "Second Inaugural Address" (speech, Washington, D.C., January 21, 1957), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/233437 (accessed December 2, 2019).
[158] For more information on the birth of US democracy and law, see Chapter VI.
[159] "It is my purpose to intensify efforts during the coming two years in seeking ways to supplement the procedures of the United Nations and other bodies with similar objectives, to the end that the rule of law may replace the rule of force in the affairs of nations." Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union," January 9, 1959. The rule of law as a replacement for the rule of force is a recurrent idea in President Eisenhower's 1960 SOTU.
[160] "This Nation has the will and the faith to make a supreme effort to break the log jam on disarmament and nuclear tests--and we will persist until we prevail, until the rule of law has replaced the ever dangerous use of force." John F. Kennedy, "Annual Message to the Congress on the State of the Union," January 11, 1962.
[161] Jimmy Carter, "The State of the Union Annual Message to the Congress," January 16, 1981.
[162] Ronald Reagan, "Address Before a Joint Session of the Congress Reporting on the State of the Union," January 26, 1982.
[163] William J. Clinton, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 24, 1995), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/221902 (accessed December 2, 2019) & "Address Before a

country's development is a recurrent idea in the speeches of President George W. Bush when referring to Iraq. The rule of law is part of the "demands of human dignity"[165] and a prerequisite for any democracy.[166] President Barack Obama identifies "the rule of law, human rights, freedom of religion and speech and assembly, and an independent press"[167] as the main principles on which the post-WWII order was founded. Consequently, if the rule of law and freedom are to fade around the world, then the likelihood of war increases. Just as his predecessors, Obama outlines that America was founded on the rule of law and its commitment to it is part of its "unique strengths as a nation."[168] In the President's words:

> Our Founding Fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations.[169]

For Obama, the rule of law, coupled with the "strength of arms"[170] is a means to defend the US and uphold American values.

As previously stated, another recurrent idea is the antithesis between the rule of law and the rule by force. Throughout the Cold War, US Presidents constantly criticize Communist countries that want to replace the rule of law with the rule by force.[171] To counter the Soviet aggression, replacing "force with a rule of law among nations"[172] is a stated goal

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Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 23, 1996), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/223046 (accessed December 2, 2019).

[164] William J. Clinton, "Address Before a Joint Session of the Congress on the State of the Union," February 4, 1997.

[165] George W. Bush, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 29, 2002), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/211864 (accessed December 3, 2019).

[166] "Raising up a democracy requires the rule of law and protection of minorities and strong, accountable institutions that last longer than a single vote" said President Bush in his 2006 SOTU. George W. Bush, "Address Before a Joint Session of the Congress on the State of the Union," January 31, 2006.

[167] Barack Obama, "Farewell Address to the Nation From Chicago, Illinois" (speech, Illinois, January 10, 2017), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/321069 (accessed December 3, 2019).

[168] Barack Obama, "Address Before a Joint Session of the Congress on the State of the Union," January 12, 2016.

[169] Barack Obama, "Inaugural Address" (speech, Washington, D.C., January 20, 2009), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/217053 (accessed December 3, 2019).

[170] "We will defend our people and uphold our values through strength of arms and rule of law." Barack Obama, "Inaugural Address" (speech, Washington, D.C., January 21, 2013), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/303425 (accessed December 3, 2019).

[171] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union," January 9, 1959.

[172] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 7, 1960), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/234770 (accessed December 3, 2019).

of the US.[173] Law is therefore a peace-ensuring instrument. Moreover, a great power bears the responsibility to "use its strength in a measured and judicious manner."[174]

The rule of law must replace the unlawful use of force for the world to be at peace and war to be excluded as a threat to international security.[175] Throughout the Cold War years US Presidents have been outspoken in criticizing the use of force by the USSR and in outlining that such use of force is a threat to international order (see, for example, Jimmy Carter in his already-cited 1981 State of the Union Address). At the end of the Cold War, President George H.W. Bush is one of the presidents that provided the most detailed description of how the US should lawfully use force in international relations. The post-Cold War new world order is one of "governments that are democratic, tolerant, and economically free at home and committed abroad to settling inevitable differences peacefully, without the threat or use of force."[176] Nevertheless, the President continues, force can be employed lawfully and, most importantly, selectively, to achieve national security objectives.

The threat of aggression is based on the unlawful use of force. Aggression from Communism is a recurrent theme during the Cold War period. Democratic nations must be protected against this threat which can only come from the enemy since, in the words of President Truman, the US has no "plans for aggression against any other state, large or small."[177] A "world where all nations, large and small alike, may live free from the fear of aggression"[178] is the most desired outcome of the post-WWII world. The "common defense of free nations against aggression"[179] can be achieved under the UN umbrella. Again, the fact that only non-democracies threaten with aggression is a recurrent theme through multiple speeches: Presidents Truman, Eisenhower, JFK, LBJ, Carter, or Reagan all mention the threat of communist aggression in their respective speeches. In the post-Cold War era, President George H.W. Bush refers to the threat of aggression in relation to the Gulf War,[180] while

[173] John F. Kennedy, "Annual Message to the Congress on the State of the Union," January 11, 1962.
[174] Jimmy Carter, "The State of the Union Annual Message to the Congress," January 16, 1981.
[175] John F. Kennedy, "Annual Message to the Congress on the State of the Union," January 11, 1962.
[176] George H.W. Bush, "Remarks at the United States Military Academy in West Point, New York."
[177] Harry S. Truman, "Message to the Congress on the State of the Union and on the Budget for 1947," January 21, 1946.
[178] Harry S. Truman, "Annual Message to the Congress on the State of the Union" (speech, Washington, D.C., January 7, 1948), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/232897 (accessed December 3, 2019).
[179] Harry S. Truman, "Annual Message to the Congress on the State of the Union," January 4, 1950.
[180] "We will succeed in the Gulf. And when we do, the world community will have sent an enduring warning to any dictator or despot, present or future, who contemplates outlaw aggression." George H.W. Bush, "Address Before a Joint Session of the Congress on the State of the Union," January 29, 1991.

President Obama references the Russian aggression in Ukraine,[181] and warns US citizens in his Farewell to "remain vigilant against external aggression."[182]

International order is another concept strongly intertwined with international law. An "even stronger structure of international order and justice" is a clear indication of "new projects to strengthen a free world."[183] One of the purposes of communist aggression is to overthrow the post-WWII international order.[184] The UN is, once more, one of the instruments that help achieve international order.[185] The post-WWII international order "protected freedom from aggression,"[186] and the "prospect of Soviet use of force threatens the international order."[187]

International order is employed interchangeably with world order. As a recurrent theme, free countries seeking freedom, justice, and peace are the makers and pillars of this world order. These free countries work "together in a friendly, civilized society."[188] Law is the basis of this world order.[189] Such a world order provides widespread "opportunity for freedom and justice"[190] and is "based upon security, freedom and peace."[191] World order is "a new hope for lasting peace."[192] The role of the US in creating this post-WWII world order is again outlined by President Ford:

> America has had a unique role in the world since the day of our independence 200 years ago. And ever since the end of World War II, we have borne--successfully--a heavy responsibility for ensuring a stable world order and hope for human progress.[193]

[181] "We're upholding the principle that bigger nations can't bully the small, by opposing Russian aggression and supporting Ukraine's democracy and reassuring our NATO allies." Barack Obama, "Address Before a Joint Session of the Congress on the State of the Union" (speech, Washington, D.C., January 20, 2015), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/308225 (accessed December 3, 2019).
[182] Barack Obama, "Farewell Address to the Nation From Chicago, Illinois."
[183] Harry S. Truman, "Inaugural Address."
[184] Harry S. Truman, "Annual Message to the Congress on the State of the Union," January 7, 1953.
[185] "… we must strengthen our Atlantic and Pacific partnerships, maintain our alliances and make the United Nations a more effective instrument for national independence and international order." Lyndon B. Johnson, "Annual Message to the Congress on the State of the Union," January 8, 1964.
[186] Jimmy Carter, "The State of the Union Address Delivered Before a Joint Session of the Congress," January 19, 1978.
[187] Jimmy Carter, "The State of the Union Annual Message to the Congress," January 16, 1981.
[188] Franklin D. Roosevelt, "Annual Message to Congress on the State of the Union," January 6, 1941.
[189] "We believe that free and independent nations can band together into a world order based on law." Harry S. Truman, "Annual Message to the Congress on the State of the Union," January 8, 1951.
[190] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union," January 10, 1957.
[191] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union," January 7, 1960.
[192] Richard Nixon, "State of the Union Message to the Congress: Overview and Goals," February 2, 1973.
[193] Gerald R. Ford, "Address Before a Joint Session of the Congress Reporting on the State of the Union" (speech, Washington, D.C., January 19, 1976), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/257493 (accessed December 3, 2019).

In the post-Cold War era, President George H.W. Bush outlines a new world order which is "a big idea: a new world order, where diverse nations are drawn together in common cause to achieve the universal aspirations of mankind -- peace and security, freedom, and the rule of law."[194] This new world order ensures that brutality goes unrewarded and aggression is met with collective resistance. The United States must lead in this new world order, "one of governments that are democratic, tolerant, and economically free at home and committed abroad to settling inevitable differences peacefully, without the threat or use of force."[195] A "a new, enduring peace, based not on arms races and confrontation but on shared principles and the rule of law"[196] is the promise of this new world order. In the words of President Bush 43, the rule of law is also one of the "nonnegotiable demands of human dignity" together with "limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance."[197]

Chapter Summary: The Public Operational Code of the United States President

The purpose of this chapter was to analyze 116 speeches from 13 different American Presidents to outline the public operational code of the President of the United States regarding five concepts: foreign affairs / foreign policy, history (with a focus on the US role in history), enemy, threat(s), and international law. The chapter's aim was to showcase the common features of each concept as they were portrayed by 13 individual presidents in order to recreate the general view of the US President on these five concepts. The features outlined are therefore recurrent throughout the speeches and during all four historical periods identified: WWII, Cold War, post-Cold War - pre-9/11, and post-9/11. Following WWII and the threat posed by the fascist ideology and the Axis powers (especially Nazi Germany), for approximately 45 years, during the Cold War, the communist ideology together with the Soviet nuclear arsenal and military capabilities were the main threats to US national security. The USSR was America's archenemy. Prior to 9/11, the post-Cold War period is characterized by the multiplication of national security threats and by strategic confusion as to their exact definition and reach. In the immediate aftermath of the September 11 attacks, terrorism emerges as core threat to US national security.

[194] George H.W. Bush, "Address Before a Joint Session of the Congress on the State of the Union," January 29, 1991.
[195] George H.W. Bush, "Remarks at the United States Military Academy in West Point, New York."
[196] George H.W. Bush, "Address Before a Joint Session of the Congress on the State of the Union," January 29, 1991.
[197] Ibid.

Regarding international law as such, throughout the speeches, IL is presented rather implicitly than explicitly. For this reason, other international law related concepts were analyzed to provide an overview on IL. As outlined during the analysis of the concept of international law, law is part of the very fabric of the United States and of its foreign policy culture. As made evident in both the previous and current chapters, throughout its history, the US portrayed itself as the guardian of international law and institutions, the harbinger of freedom, justice, equality, and peace. Values such as freedom, justice, and equality are part and parcel of the American national identity. Throughout the speeches, US Presidents construct American identity in antithesis with the one of its enemies. America's enemies are portrayed as outlaw entities, breaching all legal norms and standards in their attempt to threaten both the international (legal) order and world peace, in general, and America's national security and its citizens' way of life, in particular. While adherence to legal norms (be them national or international) is part of American identity, lawlessness defines America's enemies. This Self versus the Other dichotomy[198] is constantly present throughout the speeches and it is not limited to the concept of international law – America's enemies, in general, are presented in antithesis to the US.

The nature of threats to US national security influences the view on international law, in general, and on the use of force, in particular: the use of force is part of a strategy designed to counter threats to national security; force is thus employed as a threats countering tool. Throughout the speeches, the use of force is presented as either in antithesis to the rule of law (when America's enemies recur to the use of force) or as a threats countering tool (when the US uses force to defend itself against its enemies or against external threats).

American exceptionalism is present throughout the speeches: America is both uniquely challenged and exceptional in its role in history. America's enemies and the threats to its national security represent exceptional challenges that only the US can meet. The use of force is sometimes indispensable to meeting those challenges. And, most importantly, it is almost always righteous when the US decides to employ force; when America's enemies do so, they perpetrate an act of aggression. The US is thus never the aggressor, nor in breach of international norms on the use of force.

Force is also presented as a viable tool to achieve more ideological foreign policy objectives such as democracy promotion, objectives which cannot necessarily be met by force. This tends to generate an imbalance between the objectives of America's external

[198] For more on the Self versus Other dichotomy, see Ted Hopf, *Social Construction of International Politics: Identities and Foreign Policies, Moscow, 1955 and 1999* (Ithaca and London: Cornell University Press, 2002).

actions and the means at its disposal. The relationship between foreign policy goals and means is crucial to a good foreign policy; so is "the need to link foreign-policy goals and power resources"[199] to achieve a country's foreign policy objectives.

At the level of rhetoric, the US approach to international law is a positive one. At this point, the pro-international law rhetoric revealed by the speeches counters the skepticism towards international law outlined in the previous chapter. It therefore becomes adamant to distinguish "between foreign policy as a set of statements (declaratory foreign policy) and foreign policy as implemented (action foreign policy)."[200] Speeches are nevertheless important since they help outline leaders' worldviews: how they perceive both the challenges facing the nation and the potential options available to tackle those challenges.[201] The principles and concepts guiding a leader's worldview are crucial in coining policies, either domestic or foreign. Critiques of US foreign policy are quick to identify the lack of such overarching and guiding principles and concepts, either at the level of leaders or at national level, as one of the main causes for the lack of coherence (and subsequent failures) in post-Cold War US foreign policy. In their view, the lack of an "organizational paradigm"[202] makes it difficult for US foreign policy to coalesce around responses to threats to US national security. This chapter's findings point out that there is an organizational worldview that can be identified by creating the public operational code of the US President. This chapter has traced this worldview from FDR to Barack Obama, from WWII to well into the 21st century. 13 different US Presidents, in different moments in history, exhibited similar beliefs on the five concepts under analysis. This stands to prove that at least at the level of foreign affairs / policy, history, enemy, threat(s), and international law there are commonalities across presidents. The five elements under analysis can definitely be constitutive of a worldview. Evidently, they are not the sole elements of such a worldview; nevertheless, if similarities were observed at the level of five concepts, then, if the research were to be extended to a larger number of concepts, there is ground to believe that similarities could emerge in the case of other concepts as well.

Given that different individuals, with their respective personal idiosyncrasies, have filled the role of President of the United States, the similarities identified throughout the speeches can be indicative of the influence the role of US President exercises over the

[199] Glenn P. Hastedt, *Readings in American Foreign Policy: Problems and Responses*, 2nd ed. (Lanham, Maryland: Rowman & Littlefield, 2018), p.1.
[200] Ibid., p. 2.
[201] Ibid., p. 3.
[202] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 29.

different individuals holding that role. Nevertheless, despite all the commonalities outlined throughout this chapter, the speeches do encompass differences from one president to another. Differences in language or political beliefs can be attributed to each individual holding the role of President. Given this research's focus, let us now turn our attention to two individuals that have held the role of US President during the last historic period identified and analyzed in this chapter, the post-9/11 period: George W. Bush and Barack Obama.

Chapter V: Private Operational Code - George W. Bush and Barack Obama

This chapter is dedicated to the private operational code of two former United States Presidents, George W. Bush and Barack Obama. For the purposes of this research, a leader's private operational code is defined as the system of beliefs acquired prior to taking office: during childhood, through education, and through the professional experience developed prior to becoming president. Unlike the previous chapter's broad focus on the role of President of the United States and the speeches given by 13 different individuals in their official capacity of US President, this chapter zooms in on two of the individuals behind that role. Whereas the previous chapter sets the individual aside to identify commonalities that define the worldview of an institutional entity, the President of the United States, this chapter takes a more personal approach via an in depth look at the system of beliefs of two individuals that held the office of US President. The purpose is to differentiate between a private and a public operational code, i.e., a leader's personal system of beliefs acquired throughout his life vs. the system of beliefs pertaining to the public office the leader holds.

The chapter is structured into two main parts: while the first part is dedicated to analyzing George W. Bush as an individual and decision-maker, the second one does the same for Barack Obama. While looking at the two leaders as individuals, the focus is on their personal and professional trajectories which are reconstructed following three main lines: childhood and family, education, and professional background prior to becoming president. The private operational code is constructed by following important events in the lives of George W. Bush and Barack Obama in chronological order to showcase how life experiences construct an individual's system of beliefs. The second part of each subchapter outlines the two leaders' decision-making styles and how they affect foreign policy and national security decisions with implications for the use of force and international humanitarian law. For a better understanding of the decision-making context the analysis will also encompass a short overview of the overall structure of the Bush and Obama Administrations. Last but not least, the chapter's summary outlines the main findings regarding the relationship between leaders' systems of beliefs and their foreign policy decision-making processes.

The concept of operational code was introduced in the foreign policy analysis literature by Alexander George in his 1969 seminal article.[1] George takes a cognitive approach to foreign policy decision-making by explaining how a leader's system of beliefs acts as a filter that

[1] Alexander George, "The 'Operational Code'," 190-222.

influences his perception on events and the surrounding environment and, therefore, the course of action the leader decides on. An individual's system of beliefs, a country's foreign policy, and compliance with international law are intertwined. As stated in the literature review on the concept of compliance, states are bureaucratic constructs: in and of themselves, they lack decision-making authority; decisions are made by individuals with decision-making power. One of the most defining features of international law is its relative lack of enforcement mechanisms. International law compliance is therefore a foreign policy decision. To understand foreign policy decision-making one must first and foremost look at the individuals behind foreign policy decisions and at the factors influencing their decision-making. Consequently, factors such as leaders' personality traits or decision-making styles leave a direct mark on a country's foreign policy. A leader's personality, decision-making, and a country's foreign policy are connected as personality influences "preferred ways of organizing decision-making in ways that are comfortable and effective for the individual …,"[2] thus influencing a leader's foreign policy style.[3]

Psychological research shows that an individual's personality is influenced by the system of beliefs because "beliefs lie at the heart of personality" and are "central to the way in which people package their experiences and carry them forward."[4] Defined as "mental representations"[5] of the world, beliefs encompass the view on the self and the others. An individual's beliefs and personality influence the environment perception as well as the reactions to the surrounding environment as well as the reactions to external events.

Beliefs are flexible; shaped by experience, they change throughout an individual's life span.[6] This chapter reconstructs two individuals' system of beliefs from their past life experiences. The chapter analyzes two strikingly different individuals with seemingly different personal and professional backgrounds: George W. Bush and Barack Obama. The common denominator in the two leaders' biographies is holding the office of President of the United States. After constructing their private operational codes, the analysis will continue from a more formal perspective to determine the decision-making styles of Bush and Obama as Presidents of the United States. The second part of each subchapter is therefore meant to showcase the connection between leaders' private operational codes, foreign policy decision-making, and foreign policy outcomes.

[2] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 92.
[3] Ibid., p. 80.
[4] Carol S. Dweck, "Can Personality Be Changed? The Role of Beliefs in Personality and Change," *Current Directions in Psychological Science* 17, no. 6 (2008): 391-394, p. 391.
[5] Ibid., p. 391.
[6] For more information, see Ibid., pp. 391-394.

A few words about the sources employed in this chapter are in order. For the parts dedicated to the private operational codes, the main sources are books authored by George W. Bush and Barack Obama (President Bush's memoir or autobiographies written by Bush and Obama). In the case of President Obama, he is yet to publish his presidential memoir, but a series of interviews will complement the information provided in the books he previously wrote. Although these are highly subjective sources, their selection is meant to partially eliminate a potential research bias: obviously, when writing these books, the two leaders were highly subjective (and weary of the need to influence certain audiences for electoral or other political purposes); nevertheless, selecting books they authored allows them to present their own lives instead of handpicking instances that the two leaders might not consider relevant. Memoirs of members of their respective administrations and secondary sources (such as scholarly articles) complement the list of sources in the parts of this chapter dedicated to the two leaders' decision-making styles.

To further understand the selection of sources, it is important to outline the interagency process in foreign policy and national security decision-making in the US. At the center of this interagency process lays the National Security Council. The 1947 National Security Act established the NSC as a White House structure meant to assist the President in foreign and national security policy making by integrating and coordinating actors with expertise and institutional prerogatives in these fields.[7] The NSC is not a decision-making body, but an interagency coordinating body. As per its founding document, only the President, the VP, and the Secretaries of Defense and State are constituent members of the NSC. Its composition and role varied throughout the years depending on each president's need for advice,[8] his view on presidential decision-making, and the manner in which he structured his Administration. Apart from the four initial members, it is now customary to have the Secretary of Homeland Security, the Directors of the main intelligence agencies, or the Secretary of Treasury present at NSC meetings. The NSC's activity is coordinated by the Assistant to the President for National Security Affairs, commonly known as the National Security Adviser. When present, the President presides over NSC meetings.[9] Consequently,

[7] Although President Harry Truman signed the National Security Act into law, he seldom relied on the Council. The NSC system was formalized by Truman's successor, President Eisenhower. For more information on the NSC's early days, see Peter W. Rodman, *Presidential Command: Power, Leadership, and the Making of Foreign Policy from Richard Nixon to George W. Bush* (New York: Vintage Books - A Division of Random House, Inc., 2009), pp. 3-35.

[8] The way in which the NSC "works and how important it is in any administration are a function of how the president chooses to exercise power. It is the modern setting for the continuing struggle of presidents to control their bureaucracy." Ibid., p. 15.

[9] For the NSC structure, see Ibid., pp. 3-35.

given the active participation in foreign policy and national security decision-making of the VP, Secretaries of Defense and State, National Security Advisors, or Directors of intelligence agencies, several of their memories or statements about the two Presidents were selected as sources for the part of the chapter that analyzes the two Presidents as decision-makers and presents their respective Administrations.

George W. Bush: Private Operational Code

Family and Childhood

Borne on July 6, 1946, George Walker Bush is the eldest son of George Herbert Walker Bush and his wife, Barbara. Bush Jr. was borne in New Haven, Connecticut, while his father was studying at Yale University. Tradition is a defining belief for the Bush family: both his grandfather, Prescott Bush, and his father, studied at the prestigious and rigorous Philips Academy in Andover prior to completing their studies at Yale. Both served in the military (Prescott Bush during WWI; George H.W. Bush during WWII), worked in the private sector (Prescott Bush as a Wall Street banker; George H.W. Bush in the oil industry), and pursued political careers (Prescott Bush as Connecticut Senator from 1952 to 1963; George H.W. Bush as Texas Representative in the House of Representatives, US Ambassador to the United Nations, Chair of the Republican National Convention, Chief of the US Liaison Office to China, CIA Director, two-term VP under Ronald Reagan, and one-term President).[10] Public service as a duty to society is another cornerstone belief for the Bush family.[11]

Bush Jr.'s relationship with his mother was one of the most consequential in his life. He referred to her mostly as "Mother" although he employed the more colloquial "Dad" to address his father. The reverential address to his mom is testament to his respect and admiration for her. As Bush Jr. recalls, Barbara Bush was charged with the discipline[12] in the Bush household. She was "the enforcer"[13] whenever the young Bush would cross the "boundaries for behavior"[14] his parents set. Bush Jr. owed his special relationship with his mother mostly to similar personality traits:[15] a sense of humor, an affectionate character, the

[10] Gary L. Gregg II, "George W. Bush: Family Life," *Miller Center* - U.S. Presidents: George W. Bush, https://millercenter.org/president/gwbush/family-life (November 13, 2017).
[11] "My grandfather Prescott Bush believed a person's most enduring and important contribution was hearing and responding to the call of public service. Money and material things were not the measure of life in the long run, he felt, and if you had them, they came with a price tag: the obligation to serve." George W. Bush, *A Charge to Keep: My Journey to the White House* (New York: Harper Collins, 1999), p. 167.
[12] Ibid., p. 183.
[13] George W. Bush, *Decision Points* (New York: Crown Publishing Group, 2010), p. 7.
[14] Ibid.
[15] George W. Bush, *A Charge to Keep*, p. 183.

need to make a point, two "tempers that can flare rapidly"[16] as well as bluntness, a trait that in Bush Jr.'s own words got them "in trouble from time to time."[17] The future President's first memories involve his mother: "sitting on the floor … looking through scrapbooks"[18] together or being taken by her to see his "first games as an infant when Dad [Bush 41] and his teammates at Yale made it to the NCAA national championships …"[19]

It is his father though the one that Bush Jr. would try to emulate throughout his life, especially in his political career and during his presidency. As the future President recalls about his family, his wife, Barbara

> … adored him, and so did I. As I got older, there would be others I looked up to. But the truth is that I never had to search for a role model. I was the son of George Bush.[20]

The influence Bush Father had on his son's personality and presidency must not be underestimated. George W. Bush strongly believed in the "values of duty, honor, and country"[21] as the values that defined his Father's generation. Bush Jr. commended his father's "vast reservoir of knowledge and experience"[22] and the fact that "he was a team player, willing to battle for the [Reagan] administration."[23] Especially in his relationship to the Republican Party and to President Reagan, Vice President Bush was a "loyal soldier"[24] that "helped make the administration's case, [and] worked hard to build the Republican party."[25] Bush Jr. would claim that the relationship between Vice President Bush and President Reagan would become a model for his relationship with Vice President Cheney, a collaboration based on respect, loyalty, and friendship.[26] Bush Jr. learnt some of his most important political lessons while he was working for his father's presidential campaign. This experience did not only teach him how to manage a national electoral campaign, but also made clear to him that "[p]roximity to power is empowerment,"[27] one lesson he will consider not only as presidential candidate, but also as President organizing his White House. In his own words,

[16] George W. Bush, *Decision Points*, p. 7.
[17] Ibid.
[18] Ibid., p. 4.
[19] George W. Bush, *A Charge to Keep*, p. 201.
[20] George W. Bush, *Decision Points*, p. 4. For a detailed portrait of George H.W. Bush made by his son and for more information on the relationship between the two, see George W. Bush, *41: A Portrait of My Father* (New York: Crown Publishing Group, 2014).
[21] George W. Bush, *A Charge to Keep*, p. 184.
[22] Ibid., p. 177.
[23] Ibid.
[24] Ibid.
[25] Ibid., p. 178.
[26] "My dad had great respect for President Reagan and served him well. He was always loyal, not only as the Vice President, but also as a friend." Ibid., p. 177.
[27] George W. Bush, *Decision Points*, p. 43.

Bush Jr. particularly admired his father for having left office with his values intact despite the enormous pressure exerted by the role of President of the United States.[28] Bush Jr. consulted with his father while putting together his White House team, nominated key figures from his father's Administration for key positions in his Administration, and structured his team based on lessons learned[29] from his father's presidency. Just like his father, he also kept a daily diary during his presidency. The "value of personal diplomacy…"[30] is another key lesson Bush Jr. took from his father.[31]

Although borne in New Haven, Connecticut, Bush Jr. spent most of his childhood in Midland, Texas. He would later on consider his Texan upbringing as one of his "greatest inheritances."[32] Texas would not only be the place where Bush Jr. would spend his idyllic childhood,[33] but would also be the place where he would start a family of his own, a business, and later on his political career. In the future President's own words:

> Midland was a small town, with small-town values. We learned to respect our elders, to do what they said, and to be good neighbors. We went to church. Families spent time together, outside, the grown-ups talking with neighbors while the kids played ball or with marbles and yo-yos. Our homework and schoolwork were important. The town's leading citizens worked hard to attract the best teachers to our schools. No one locked their doors, because you could trust your friends and neighbors. It was a happy childhood. I was surrounded by love and friends and sports.[34]

The "dusty ground beneath the boundless sky of Midland, Texas"[35] inspired his decision to run for President and was the place Bush Jr. had in mind when referring to the American dream.[36] Throughout his life, Bush would associate himself or be associated by others with Texas. While negotiating with international leaders the building of a coalition against the Taliban in Afghanistan, Bush would admit that to many of those leaders he was just the "the

[28] "For all the scrutiny and stress, Dad loved the job. He left office with his honor intact and values intact." Ibid., p. 36.
[29] For more information on the structure and membership of the two George W. Bush Administrations, see next section of this chapter.
[30] George W. Bush, *A Charge To Keep*, p. 185.
[31] Mark Mazzetti, *The Way of the Knife: The CIA, a Secret Army, and a War at the Ends of the Earth* (New York: Penguin Group USA, 2014), p. 171.
[32] George W. Bush, *Decision Points*, p. 5.
[33] One tragic event though marked Bush's childhood, the death of his little sister, Robin. "Mom and Dad had come to school to tell me Robin wasn't coming home, not then or ever. I was sad, and stunned. I knew Robin had been sick, but death was hard for me to imagine. Minutes before, I had had a little sister, and now, suddenly, I did not. Forty-six years later, those minutes remain the starkest memory of my childhood, a sharp pain in the midst of an otherwise happy blur. I was seven. Robin was almost four when she died of leukemia." George W. Bush, *A Charge To Keep*, p. 14.
[34] Ibid., p. 18.
[35] George W. Bush, *Decision Points*, p. 37.
[36] Ibid., p. 6.

toxic Texan guy."[37] Bob Woodward, in his analysis of the Bush Administration's decision-making on the intervention strategy in Afghanistan, characterized the President as the "Texas, Alamo macho."[38]

George W. Bush would oftentimes say: "I believe people's values and priorities are rooted in their upbringing."[39] The values passed on from his family were consequential for the future President and they became part of his conservative philosophy based on the importance of family, education, hard work, honesty, etc. Bush was of the belief that America had lost its traditional values[40] (and as President he would seek to reinstate them). As Bush himself admitted, similar values were at the basis of his relationship with his wife, Laura:

> We share the same basic values. We share a West Texas upbringing that thought us that each individual is equal and equally important, but also that each individual has a responsibility to be a good neighbor and a good citizen. We both love to read, we both love spending time with our friends, and we both, very quickly, fell in love with each other.[41]

Bush married into the United Methodist Church and later on became a borne again Christian. "Faith, family, and friends"[42] are, according to George W. Bush, the three pillars of an individual's life. Bush's faith is one of the foundations of his life since it is "a foundation that will not shift."[43] As a person and decision-maker, Bush was influenced by his faith: "My faith frees me. … I live in the moment, seize opportunities, and try to make the most of them."[44] "A Charge to Keep," a religious hymn written by Charles Wesley was the title Bush chose for his presidential campaign book: *A Charge to Keep: My Journey to the White House*. A painting with the same title hung in his office while he was Governor of Texas and later on President as a constant remainder of "the importance of serving a cause larger than oneself."[45] Trusting "a divine plan that supersedes all human beings,"[46] President Bush believed that he was called upon by a higher force to become President; this credo was reinforced on September 11: "our generation is being called. … I'm here for a reason, … and

[37] "In these people's minds, I am the new guy. They don't know who I am. The imagery must be just unbelievable." George W. Bush cited in Bob Woodward, *Bush at War* (New York: Simon and Schuster, 2002), p. 44.
[38] Ibid., p. 322.
[39] George W. Bush, *A Charge To Keep*, p. 28.
[40] "During the more than half century of my life, we have seen an unprecedented decay in our American culture, a decay that has eroded the foundations of our collective values and moral standards of conduct." Ibid., p. 229.
[41] Ibid., p. 80.
[42] Ibid., p. 6.
[43] Ibid.
[44] Ibid.
[45] George W. Bush, *Decision Points*, p. 107.
[46] George W. Bush, *A Charge To Keep*, p. 6.

this is going to be how we're going to be judged."[47] After September 11, when he was advised by his national security team to leave the White House for obvious security reasons, Bush's reply was: "I'm in the Lord's hands."[48]

The belief that he answered to a higher judge made President Bush a very confident (and messianic) decision-maker. His faith was instrumental in the way he defined and subsequently conducted the Global War on Terror. Drawing from both faith and history, he read the Bible just like Abraham Lincoln did. He also professed his admiration for Lincoln due to "his moral clarity and resolve,"[49] two values equally important for George W. Bush. Also drawing from both faith and history, Bush shared Lincoln's view that only a victorious war can decide the clash between freedom and tyranny; Bush 43 decided that the "war on terror would be the same."[50] Following the tragic events of September 11, Bush declared "[t]he deliberate murder of innocent people … an act of pure evil"[51] for which he demanded justice. America's fight against terrorism was thus a universal fight since freedom and justice, the values in whose name the US was spearheading the war against terrorism, were God-given values, not American values.[52] The Global War on Terror therefore became the fight of good (the US) vs. evil (Al Qaeda, terrorism) with the US having a duty and manifest destiny to end tyranny worldwide. Bush's dual, black and white approach defined the way he perceived America's enemies as well as the strategy employed to defeat those enemies: the US would make no distinction between terrorists and those harboring them; in the Global War on Terror, countries were either with the United States or against it.[53]

[47] Bob Woodward, *Bush at War*, p. 205.
[48] George W. Bush, *Decision Points*, p. 46.
[49] Ibid., p. 140.
[50] Ibid., p. 140.
[51] Ibid., p. 137.
[52] "There is a human condition that we must worry about in times of war. There is a value system that cannot be compromised - God-given values. These aren't United States created values. There are values of freedom and the human condition and mothers loving their children. What's very important as we articulate foreign policy through our diplomacy and military action, is that it never looked like we are creating - we are the author of these values. … It leads to a larger question of your view about God. … We're all God's children." George W. Bush cited in Bob Woodward, *Bush at War*, p. 131.
[53] "I did want to announce a major decision I had made: The United States would consider any nation that harbored terrorists to be responsible for the acts of those terrorists. This new doctrine overturned the approach of the past, which treated terrorist groups as different from their sponsors. We had to force nations to choose whether they would fight the terrorists or share in their faith. And we had to wage this war in the offense, by attacking the terrorists overseas before they could attack us again at home." George W. Bush, *Decision Points*, p. 137.

Education

Bush Jr.'s education was another example of the power of tradition in the Bush family. As a teenager, Bush was sent to Philips Academy in Andover, "a family tradition."[54] Bush's time in Andover had a significant formative influence on his life. Years later, the future President would recall: "Going to Andover was the hardest thing I did until I ran for president almost forty years later."[55] For the first time, the young Bush was away from his home and family; it was in Andover where he learnt how to make friends and relate to people, and, in his own words, learnt how to "bloom where he was planted."[56] For the first time he was submitted to a harsh system of discipline which taught him the "the power of high standards."[57] And it was in Andover where he developed an interest in history.

Following his time in Andover, Bush Jr. went to Yale University where he majored in history. His education in history and having witnessed the presidency up close during the Reagan and Bush 41 Administrations determined Bush's reverential attitude towards the presidency, an institution "more important than the person who holds it."[58] Bush's time in Yale coincided with the civil rights movement in the United States and the Vietnam War. These events left a mark on the young history student who would later call himself "a product of the Vietnam era."[59] The lack of a clear war strategy and a scope too broadly defined coupled with communication errors were in Bush's view the main elements impeding the public opinion to fully understand the government's actions[60] which eventually spiraled down to a lack of public opinion support, an unpopular war, and societal splits. Explain the mission, have an exit strategy, intervene only as a last resort employing the Nation's full military strength, fight to win, and never involve the military in a political war were the lessons Bush Jr. would presumably identify as the most important lessons of the Vietnam years.[61] While studying the Soviet Union and the communist system during his time in Yale, the young Bush

[54] George W. Bush, *A Charge To Keep*, p. 19.
[55] George W. Bush, *Decision Points*, p. 11.
[56] "I could make friends and make my way, no matter where I found myself in life." George W. Bush, *A Charge To Keep*, p. 22.
[57] Ibid., p. 21.
[58] George W. Bush, *Decision Points*, p. 109.
[59] George W. Bush cited in Bob Woodward, *Bush at War*, p. 95.
[60] "My feeling was that it was a war that was never properly explained, and that the government micromanaged the war." George W. Bush cited in Ibid., p. 168.
[61] "I also learned the lesson of Vietnam. Our nation should be slow to engage troops. But when we do so, we must do so with ferocity. We must not go into a conflict unless we go in committed to win. We can never again ask the military to fight a political war. If America's strategic interests are at stake, if diplomacy fails, if no other option will accomplish the objective, the Commander in Chief must define the mission and allow the military to achieve it." George W. Bush, *A Charge to Keep*, pp. 50-55.

became even more keenly aware of the blessings a democratic system provides its citizens.[62] Visiting his parents in China during his MBA studies at Harvard Business School reinforced Bush's belief in political and economic freedom.[63] His passion for history led President George W. Bush to thoroughly study his predecessors[64] only to conclude that presidents who had been criticized while in office or left office with low approval ratings were viewed more favorably by history once their legacy was reevaluated.[65] Throughout his presidency (and in particular when faced with daunting decisions in the Global War on Terror) Bush 43 considered that a President should not make decisions based on public opinion polls or media criticism; a President should decide with a view on history.[66] However, he believed, most presidents do not live long enough to see history passing a final judgment on their time in office.[67]

Among the historical figures Bush Jr. admired the most were the two US Presidents he had known best, his father and Ronald Reagan, followed by a string of wartime leaders: George Washington, Abraham Lincoln, Franklin Delano Roosevelt or Dwight Eisenhower. The selection of his favorite predecessor is indicative of Bush's view on the presidency: Abraham Lincoln "had the most trying job of any president, preserving the Union."[68] Holding together the nation in moments of crisis would be Bush's role after September 11. President Bush would oftentimes recur to historical analogies when making decisions or justifying them. He would refer to Franklin Delano Roosevelt's military tribunals to justify the set-up of military tribunals to trial captured terrorism suspects. He called 9/11 the "Pearl Harbor of the 21st century"[69] and vowed he would rally the nation after that tragedy just as President Roosevelt had done centuries prior. Two history lessons influenced Bush's decision-making. The first would be the Vietnam War and the quagmire the United States dragged itself into because of an unclear strategy that led to a highly unpopular war; hence, Bush's post-9/11 concern to explain to the public opinion that the new type of conflict the US was involved in (i.e., the Global War on Terror) would be a lengthy one. In doing do, Bush hoped to prevent the lack of public support in case of no immediate victory.[70] Secondly, Bush considered that

[62] George W. Bush, *Decision Points*, p. 15.
[63] Ibid., p. 23.
[64] Ibid., pp. 369 & 470.
[65] President Bush gives the example of President Harry Truman. See Ibid., p. 174.
[66] Ibid., p. 272.
[67] Such as Abraham Lincoln or Theodore Roosevelt. See Ibid., pp. 476 & 477.
[68] Ibid., p. 108.
[69] George W. Bush cited in Bob Woodward, *Bush at War*, p. 37.
[70] Public opinion support did decrease especially as the number of casualties began to raise. For an analysis of the public opinion's support for the wars in Iraq and Afghanistan, see Gary C. Jacobson, "A Tale of Two Wars:

weakness invites aggression and therefore the Clinton Administration's weak response to terrorism had been one of the main causes of the 9/11 attacks.[71]

Following his graduation from Yale in 1968, in the midst of the Vietnam War, Bush Jr., in another decision inspired by his father (the youngest pilot to get his wings in the history of US Air Forces) joined the Texas Air National Guard. His values also contributed to his decision to serve. In his own words: "I knew I would serve. … I was too conservative and too traditional."[72] As a consequence of the time spent in the Texas National Guard, Bush gained a strong "respect for the chain of command"[73] and realized the importance of a "well-trained and well-equipped military."[74] Later on, as President, Bush would show high respect and deference to the military (see next section for further details).

Following his military service, Bush Jr. went on to pursue a career in the oil business. After a few years in the oil business in Texas, Bush decided to study an MBA at Harvard Business School (Bush 43 is the only US President with an MBA degree thus far). His experience in the private sector, his time in Harvard, together with the visit he made to his parents in China while Bush Senior was US Liaison Officer there, reinforced his belief in democracy, capitalism, and the benefits of a free market system, unimpaired by government intervention.[75] Bush 43's faith in democracy was one of the cornerstones of his post-9/11 foreign policy (especially during his second term).[76]

Profession

In 1978, George W. Bush decided to run for Congress.[77] Despite his unsuccessful bid for a seat in the House of Representatives, the main lesson Bush took from this experience was that a politician should never allow his counterpart to define him and should always fight back when attacked.[78] Playing on the offensive was one of the main strategies President Bush would employ in the Global War on Terror.[79]

Public Opinion on the U.S. Military Interventions in Afghanistan and Iraq," *Presidential Studies Quarterly* 40, no. 4 (December 2010): 585-610.

[71] "It seems safe to say that weakness and doubt, from the perspective of the Bush team, were the main failings of the Clinton foreign policy, and that those characteristics played some role in inviting the calamities of September 11." Michael J. Mazarr, "George W. Bush, Idealist," *International Affairs* 79, no. 3 (May 2003): 503-522, p. 517.

[72] George W. Bush, *A Charge to Keep*, p. 50.

[73] Ibid., p. 55.

[74] Ibid.

[75] See Ibid., pp. 56-65 and George W. Bush, *Decision Points*, pp. 22-34.

[76] See Chapters I and VI for more information on the role of democracy promotion in Bush's foreign policy.

[77] George W. Bush, *A Charge to Keep*, pp. 26-27.

[78] George W. Bush, *Decision Points*, p. 41, and George W. Bush, *A Charge to Keep*, p. ix.

[79] See Chapters I and VI for more information on the offensive character of the Bush Doctrine.

Bush Jr. spent the next decade working in the oil industry. His next interaction with politics came in 1988 when he moved to Washington to become part of his father's presidential campaign, a formative experience for the future governor and presidential candidate. After his father's successful presidential bid, Bush returned to Texas and bought the Rangers baseball team following his childhood passion for baseball (a passion inspired by his father). Being part of the management team of the Texas Rangers sharpened the future President's management skills and helped him build networks that would later on become useful in his political career.[80]

In 1992, after his father lost his second presidential bid, Bush Jr. decided to run for the Governorship of Texas. In 1994 he became the first son of a President to hold the position of Governor.[81] In his Inaugural Address as Governor of Texas, Bush referred to his values noticing that the "strength of a society should be measured in the values its people share."[82] During his tenure as Governor, Bush portrayed himself as an ambitious leader with the skills to negotiate with people on both sides of the aisle (Democrats and Republicans alike).[83]

In 1999, Governor Bush decided to run for President. At the onset, and given his lack of foreign policy experience, Bush set to become an internal policy president who would focus on lowering taxes, children's education, health care, and social security. Bush ran as a compassionate conservative,[84] a platform combining limited government (belief Bush acquired during his time in the private sector) with a deep concern for the underprivileged (steaming from his religious beliefs), and personal responsibility (family credo). In Bush's own words, his faith was crucial in understanding his "frame of mind, and attitude and outlook,"[85] especially in terms of the self-proclaimed compassionate conservative approach to internal policy. In foreign policy his faith translated into a perspective on history as a contest of minds and ideas and became evident through his "utopian, transformative language."[86] Religious convictions permeated Bush 43's worldview thus providing him with a "very specific view of progress: good will prevail over evil, because most people want the

[80] George W. Bush, *A Charge to Keep*, pp. 197-208.
[81] George W. Bush, *Decision Points*, pp. 44-51.
[82] George W. Bush, *A Charge to Keep*, p. 10.
[83] For a detailed description of George W. Bush's time as Texas Governor, see George W. Bush, *A Charge to Keep* (especially from Chapter 8 onwards).
[84] For more information on Bush's compassionate conservative platform see Ibid., pp. 227-240; D. Jason Berggren and Nicol C. Rae, "Jimmy Carter and George W. Bush: Faith, Foreign Policy, and an Evangelical Presidential Style," *Presidential Studies Quarterly* 36, no. 4 (December 2006): 606-632.
[85] George W. Bush cited in D. Jason Berggren and Nicol C. Rae, "Jimmy Carter and George W. Bush," p. 614. The quote is from an interview candidate Bush gave in the fall of 2000 during his presidential campaign. The transcript can be found at George W. Bush, interview by Steve Waldman, "We Are All Sinners," *Beliefnet*, Fall 2000, https://www.beliefnet.com/news/politics/2000/10/we-are-all-sinners.aspx (accessed January 16, 2020).
[86] Michael J. Mazarr, "George W. Bush, Idealist," p. 513.

same things for themselves and their families."[87] Religion gave Bush a sense of "directional history, driven by human desires."[88] This messianic view on the world, in general, and on enemies and threats, in particular, translated into some overly ambitions strategies such as fighting tyranny or putting an end to terror. In his view of the world as a "contest between right and wrong,"[89] Bush was ideologically close to Ronald Reagan.

Bush's speechwriter, David Frum, explained that Bush's White House (where every Cabinet meeting would begin with a prayer and the President would start every day reading from the Bible) could not be properly understood without "its predominant creed … modern Evangelicalism."[90] Frum admitted that Bush once confided in him that if he was in the White House and not in a bar (allusion to his past drinking addiction) was because he had found God, faith, and the power of prayer.[91] In an interview with Bob Woodward, Bush declared that his prayers are directed to being as good of a messenger to God's will as possible and that "for personal strength he consults … his heavenly Father."[92] George W. Bush therefore "sees politics as a religious vocation, a calling, and a sacred duty to be performed for God and humankind."[93] His post-9/11 worldview was labeled by some as "democratic evangelicalism,"[94] a belief that values such as liberty, democracy, or compassionate conservatism are God's gifts to the world and thereby universal; since they are not US values, the US is not pursuing its own interests in promoting these values, it is fulfilling its messianic duty to make the world a better place.[95] Bush was a strong believer in America's leadership, a leadership based on "freedom and justice and equality," universal values the entire world aspires to; with the US being the embodiment of these values, Bush considered that the world sought US leadership.[96] Bush's strong belief in democracy, capitalism, and the power of free

[87] Ibid., p. 506.
[88] Ibid.
[89] Ibid., p. 514.
[90] David Frum, *The Right Man: An Inside Account of the Bush White House* (New York: Random House, 2003), p. 17, cited in D. Jason Berggren and Nicol C. Rae, "Jimmy Carter and George W. Bush," p. 614. For a detailed and comprehensive account of the influence of faith on George W. Bush's system of beliefs and decision-making style, see David Frum, *The Right Man: An Inside Account of the Bush White House* (New York: Random House Trade Paperbacks – A Division of Random House, Inc., 2003).
[91] David Frum, *The Right Man*, p. 283, cited in D. Jason Berggren and Nicol C. Rae, "Jimmy Carter and George W. Bush," p. 615.
[92] George W. Bush cited in Bob Woodward, *Plan of Attack: The Definitive Account of the Decision to Invade Iraq* (New York: Simon and Schuster, 2004), pp. 379 & 421, cited in D. Jason Berggren and Nicol C. Rae, "Jimmy Carter and George W. Bush," p. 615.
[93] D. Jason Berggren and Nicol C. Rae, "Jimmy Carter and George W. Bush," p. 615.
[94] Nancy Gibbs, "Celebration and Dissent," *CNNInternational.com*, January 24, 2005, https://edition.cnn.com/2005/ALLPOLITICS/01/24/inauguration.tm/ (accessed January 16, 2020).
[95] D. Jason Berggren and Nicol C. Rae, "Jimmy Carter and George W. Bush," p. 620.
[96] "America cannot keep peace alone. … The world seeks America's leadership, looks for leadership from a country whose values are freedom and justice and equality. Ours should not be the paternalistic leadership of an

markets influenced his worldview as one of "a globalizing world of trading democracies and international institutions, one in which the progress of democracy and free markets has been nothing short of astonishing."[97] Bush's idealist over-confidence in values such as good and justice that prevail over evil or tyranny was combined with his willingness to employ America's full military might to spread those values to countries under totalitarian regimes.

George W. Bush: Decision-Making and Administration

Following an embattled electoral campaign against outgoing Democratic VP Al Gore, George W. Bush was one of the few US Presidents who won the presidency without winning the popular vote.[98] He was also only the second US President in history whose father had also been President after John Quincy Adams, son of the second US President and one of America's Founding Fathers, John Adams (interestingly enough, John Quincy Adams also lost the popular vote).[99] Prior to becoming President, Bush 43 viewed the presidency up close while his father was Vice President and President which enabled him to understand the role's potential. Moreover, Bush 43, a historian by education, felt pressured by the fact that Presidents Reagan and Bush 41 "had used their time in office to accomplish historic objectives."[100] Watching his father as Commander-in-Chief during the 1990-1991 Iraqi invasion of Kuwait was a formative experience for the future President since it provided him with first-hand insight on the enormous responsibility that comes with sending soldiers to

arrogant big brother, but the inviting and welcoming leadership of a great and noble nation. … Our greatest export is freedom, and we have a moral obligation to champion it throughout the world." George W. Bush, *A Charge To Keep*, p. 240.

[97] Michael J. Mazarr, "George W. Bush, Idealist," p. 516.

[98] The 12th Amendment to the United States Constitution sets the election procedure for the President and the Vice President. The difference between the popular vote and the number of votes in the Electoral College emerges from the fact that the votes cast by the American people on Election Day for the presidential and vice presidential candidates of both parties determine which candidate wins a certain state and therefore obtains the votes from their States' respective representatives in the Electoral College. Each state's number of representatives in the Electoral College is equal to its total number of representatives in both Chambers of Congress. The Electoral College sums 538 electors each entitled to only one vote; the first presidential candidate that reached the threshold of 270 Electoral College votes becomes the next President of the United States. For a detailed explanation of the American election process, see usa.gov., "Presidential Election Process," https://www.usa.gov/election#item-36072 (accessed August 7, 2019). So far, there have been five Presidents who won the presidency, but lost the popular vote: John Quincy Adams (1824), Rutherford B. Hayes (1876), Benjamin Harrison (1888), George W. Bush (2000), and Donald J. Trump (1916). For detailed information, see Tara Law, "These Presidents Won the Electoral College – But Not the Popular Vote," *Time*, May 15, 2019, https://time.com/5579161/presidents-elected-electoral-college/ (accessed August 7, 2019).

[99] Gary L. Gregg II, "George W. Bush: Campaigns and Elections," *Miller Center* - U.S. Presidents: George W. Bush, https://millercenter.org/president/gwbush/campaigns-and-elections (November 13, 2017).

[100] "President Reagan had challenged the Soviet Union and helped win the Cold War. Dad had liberated Kuwait and guided Europe toward unity and peace." George W. Bush, *Decision Points*, p. 36.

war[101] and the importance of a correct military strategy. As he famously put it, "the vision thing matters"[102] as a president "likes to have a military plan that will be successful."[103]

A president's values are also reflected in the staff he chooses. Most presidents tend to select people with similar values and systems of beliefs, i.e., with a similar worldview. Therefore, just like with other leaders, Bush's worldview and past personal and professional experiences were influential in selecting his team.[104] Bush was well aware of the fact that "[t]he people you chose to surround you determine the quality of advice you receive and the way your goals are implemented."[105] In the President's own words, successful candidates had to meet several criteria:

> character and personality. I was looking for integrity, competence, selflessness, and an ability to handle pressure. I always liked people with a sense of humor, a sign of modesty and self-awareness.[106]

Given his professional background, Bush lacked both national security and foreign policy experience. For all intents and purpose, Bush 43 was going to be a domestic policy president with a strong national security and foreign policy team that would compensate for his lack of experience in these two fields. In assembling his team, Bush 43 gathered many of his father's former Administration members.[107] His Vice President, Dick Cheney, had extensive Congressional experience and was part of Operation Desert Storm as Secretary of Defense during Bush 41. Cheney came highly recommended by Bush 41 who knew that his son was looking for experience, candid advice, and loyalty.[108] Donald Rumsfeld came strongly recommended by Dick Cheney; the two had worked together in the Ford and Nixon Administrations. Rumsfeld was both the youngest (during the Ford Administration) and the oldest (during the Bush 43 Administration) Secretary of Defense in US history. Rumsfeld

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[101] After giving the green light to Operation Enduring Freedom in Iraq, Bush 43 wrote to his father a letter ending in "I know what you went through." Chris Whipple, *The Gatekeepers: How The White House Chiefs of Staff Define Every Presidency* (New York: Crown, 2017), p. 245. See also President Bush's impressions on his father's decision to send troops into Panama in 1989: "Sending Americans to war is the most profound decision a president can make. … But nothing prepared me for the feeling when I was the president who gave the order." George W. Bush, *Decision Points*, p. 185.

[102] George W. Bush cited in Bob Woodward, *Bush at War*, p. 341.

[103] Ibid., p. 344.

[104] For more information on how Bush 43 selected his team see George W. Bush, *Decision Points*, pp. 65-105. For more information on the profiles of some of his team members (information also available in this chapter), see *Miller Center* - U.S. Presidents: George W. Bush, "George W. Bush - Administration," https://millercenter.org/president/gwbush/george-w-bush-administration (November 13, 2017). For full information on each profile, click on each name.

[105] George W. Bush, *Decision Points*, p. 66.

[106] Ibid.

[107] For detailed information, see Ibid., pp. 65-105.

[108] Bush 41 told his son about picking Dick Cheney: "He would give you candid and solid advice. And you'd never have to worry about him going behind your back." Ibid., p. 68.

impressed Bush with his CV, knowledge, and focus on how to define [military] goals. His background, respect towards the military and the chain of command, ability to command "the military during a complex global war"[109] and the fact that he shared Bush's view on the "war on terror as a long-term ideological struggle"[110] were amongst the qualities Bush 43 appreciated the most in his first Defense Secretary (one of the main figures behind the 2003 Iraq invasion).[111] In 2006, Rumsfeld was replaced by Robert Gates, Deputy National Security Adviser during Ronald Reagan, CIA Director during Bush 41, and close friend of the former President. Colin Powell, Bush's first Secretary of State, had been Head of the Joint Chiefs of Staff during Bush 41 and Operation Desert Storm. As a former member of the military turned diplomat, Powell constantly advocated for the formation of broad coalitions to intervene in Afghanistan and Iraq and for the US to use military force only as a last resort (in stark contrast with the pro-use of force attitude of VP Cheney and Secretary of Defense Rumsfeld). After four embattled years against the pro-war Cheney-Rumsfeld duo, Colin Powell left the Bush Administration at the end of Bush's first term to be replaced by the President's first National Security Adviser, Condoleezza Rice. Working with him on the campaign and during his first term in office, Condoleezza Rice had gained Bush's trust and became a friend and confident. Being able to read his thoughts, sharing his worldview, and not being afraid to tell him when she disagreed with him were amongst Rice's qualities Bush valued the most.[112] Throughout her years in the White House as National Security Adviser and her tenure as Secretary of State, Rice displayed a high level of loyalty to the President.[113] Bush decided to keep George Tenet as CIA Director after asking his father to "sound out some of his CIA contacts."[114] Karl Rove, Senior Adviser to Bush 43, headed the College Republicans while his father was the Chairman of the Republican National Committee (and shared Bush's love for history), while Andy Card, Bush 43's first White House Chief of Staff,[115] was his father's Deputy Chief of Staff and Transportation Secretary.

[109] Ibid., p. 92.
[110] Ibid.
[111] David Margolick, "The Night of the Generals," *Vanity Fair*, September 16, 2013, https://www.vanityfair.com/news/2007/04/donald-rumsfeld-iraq-war (accessed January 21, 2020).
[112] George W. Bush, *Decision Points*, p. 90.
[113] During her years as Secretary of State, her loyalty to the White House was perceived by career officials in the State Department as detrimental to the Department's interests since Rice was rather more concerned with implementing the President's agenda instead of defending the Department's interests and stance within the US government in front of the President. Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 116.
[114] George W. Bush, *Decision Points*, p. 84.
[115] For a description of the institutional significance of the role of the White House Chief of Staff in any Administration, see Chris Whipple, *The Gatekeepers*, pp. 1-16. For Andy Card's role within the George W. Bush Administration, see pp. 220-256. Also see, David B. Cohen, Karen M. Hult, and Charles E. Walcott,

Members of Bush 43's Administration wrote extensively in their memoirs about the President, his decision-making style and his character. Former VP Dick Cheney called him "a man of his word"[116] who kept his promise of making him direct participant to all major decisions despite the lack of a constitutional obligation in this regard. A president who strengthened his Administration with the power of his convictions, "an outstanding leader, making tough decisions and inspiring others with the determination required for the war against a new kind of enemy,"[117] i.e., the Global War on Terror and a "visceral and forthright commander"[118] are other words VP Cheney used to describe Bush 43. Don Rumsfeld described him as a person who "asked serious questions, was self-confident, and had a command of the important issues."[119] Following their first meeting, Rumsfeld concluded that he had been wrong in trusting the media stereotypes of a uncurious Bush; he found the future President to be a "decidedly down-to-earth"[120] type of person, "with no inclination to formality,"[121] inquisitive, but "not much for small talk"[122] and able to keep "precisely to a fast-moving schedule."[123] Robert Gates, the only Secretary of Defense in US history who served under two consecutive different presidents was far more congratulant with President Bush than with his successor, President Obama. He described Bush 43 as "a man of character, a man of convictions, and a man of actions,"[124] a "mature leader who had walked a supremely difficult path for five years."[125] He would have an intimidating demeanor especially when asking tough questions before making decisions. He expected people to get to the point, "was not one for broad, philosophical, or hypothetical discussions,"[126] would get bored easily and show little patience with "with structured (or long) briefings."[127] A self-confident leader ("he knew what he knew")[128] Bush hardly ever "questioned his own thinking"[129] trusting his own judgment more than that of senior military advisers. Despite

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"White House Evolution and Institutionalization: The Office of Chief of Staff since Reagan," *Presidential Studies Quarterly* 46, no. 1 (March 2016): 4-29.

[116] Richard B. Cheney (and Liz Cheney), *In My Time: A Personal and Political Memoir* (New York: Simon and Schuster, 2011), p. 519.

[117] Ibid.

[118] Ibid.

[119] Donald Rumsfeld, *Known and Unknown: A Memoir* (New York: Penguin Group, 2011), p. 272.

[120] Ibid.

[121] Ibid.

[122] Ibid.

[123] Ibid.

[124] Robert Gates, *Duty: Memories of a Secretary at War* (New York: Penguin Random House, 2014), p. 96.

[125] Ibid., p. 94.

[126] Ibid.

[127] Ibid.

[128] Ibid.

[129] Ibid.

exhibiting great respect for military leaders, he did not like when he was publicly contradicted by them. In decision-making, Bush would oftentimes rely on his own instincts: once he had made a decision, he would never "look back or have second thoughts."[130] Unlike Secretary Gates, James Comey, Deputy Attorney General (AG) during the Bush Administrations and FBI Director under President Obama was far more congratulatory of Obama than of Bush 43. About Bush 43 Comey stated that he "could be impatient" with a "strong, and occasionally devilish, sense of humor,"[131] and would "occasionally display a temper."[132] Despite his "slight mean streak - … - he understood that humor was essential to the high-stress, high stake business…."[133] He was sometimes "talking with deadly seriousness about terrorism one minute and then filling the Oval Office with laughter the next."[134] In Comey words, Bush's sense of humor was rather belittling as if betraying a sense of insecurity and aiming at establishing a hierarchy with others.[135]

Despite an instinctive decision-making style, in his own view Bush 43 did have a structured decision-making process. For Bush 43, decision-making had several layers: (1) clarifying the guiding principles; (2) listening to experts on all sides; (3) reaching a conclusion; and (4) testing the conclusion with experts. Moving forward, the decision would be explained to the American people and a process would be set up for its implementation.[136] However, no decision-making process could be set in motion without first understanding the background of the issue; moreover, the historian in him would always prompt Bush to ask for clarifying information when matters were unclear. Not keen on "long preprogrammed meetings,"[137] Bush believed that his job was to "set the agenda and tone and framework, to lay out the principles by which we [the Administration] operate and make decisions, and then delegate much of the process to them [his team]"[138] (a delegative decision-making style similar to the one of a CEO).

Bush 43's foreign policy decision-making can only be understood in the framework of his perception of the September 11 attacks. For it is the morning of September 11 that redefined the focus of his presidency from domestic policy to foreign policy and war;

[130] Ibid., p. 49.
[131] James Comey, *A Higher Loyalty: Truth, Lies, and Leadership* (New York, London: Macmillan, 2018), p. 77.
[132] Ibid., p. 78.
[133] Ibid., p. 79.
[134] Ibid.
[135] Ibid., pp. 123-124.
[136] George W. Bush, *Decision Points*, pp. 110-111.
[137] George W. Bush, *A Charge to Keep*, p. 103.
[138] Ibid., pp. 103-104.

protecting US citizens and defending their freedom "that had come under attack"[139] would become the number one priority of an administration since then "at war against terror."[140] In the President's words:

> September 11 redefined sacrifice. It redefined duty. And it redefined my job. The story of that week is the key to understanding my presidency. There were so many decisions that followed, many of them controversial and complex. Yet after 9/11, I felt my responsibility was clear. For as long as I held office, I could never forget what happened to America that day. I would pour my heart and soul into protecting the country, whatever it took.[141]

Bush 43 viewed the President as "a decider"[142] and the "calcium in the backbone"[143] that has to show both leadership and determination and guide his team through difficult decisions.[144] Despite of making "sure that all risk is assessed"[145] prior to making a decision, Bush used the following words to describe himself: "I'm not a textbook player, I'm a gut player."[146] His "gut player" attitude surfaced best in the most consequential day of his presidency, September 11, 2001. It also featured prominently in his decision-making in the weeks following the attacks when the President had to decide on appropriate actions against Al Qaeda and the Taliban regime in Afghanistan.[147] The very decision of going to war against the perpetrators of the attacks was a spur of the moment decision. In the morning of the attack, President Bush was reading to children at the Booker Elementary School in Florida. Immediately after Andy Card, his Chief of Staff, told him "[a] second plane hit the second tower. … America is under attack.,"[148] Bush decided that whomever the perpetrators were they "had declared war on us, and I made up my mind at that moment that we were going to war."[149] Addressing the press shortly afterwards, Bush 43 said in his brief remarks that terrorism will not stand,[150] a reference to his father's words when Saddam Hussein invaded

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[139] George W. Bush, *Decision Points*, p. 129.
[140] Ibid., p. 134.
[141] Ibid., p. 151. For an overview of how 9/11 changed President Bush's leadership based on emotional intelligence, cognitive style, political skill, policy vision, organizational capacity, and effectiveness as a public communicator, see Fred I. Greenstein, "*The Contemporary Presidency*: The Changing Leadership of George W. Bush: A Pre- and Post-9/11 Comparison," *Presidential Studies Quarterly* 32, no. 2 (June 2002): 387-396.
[142] John Kreiser, "Bush: The Decider-in-Chief," *CBS*, April 20, 2006, https://www.cbsnews.com/news/bush-the-decider-in-chief/ (accessed November 13, 2017).
[143] George W. Bush cited in Bob Woodward, *Bush at War*, p. 259.
[144] "If I weaken, the whole team weakens. If I'm doubtful, I can assure you there will be a lot of doubt. If my confidence level in our ability declines, it will send ripples throughout the whole organization. I mean, it's essential that we be confident and determined and united." Ibid.
[145] Ibid., p. 136.
[146] Ibid., p. 137.
[147] For a detailed description of the decision-making processes, see Bob Woodward, *Bush at War* (entire book).
[148] George W. Bush, *Decision Points*, p. 127.
[149] George W. Bush cited in Bob Woodward, *Bush at War*, p.15.
[150] Following the 1990 Iraq invasion of Kuwait, George H.W. Bush declared on August 6, 1990: "This will not stand, this aggression against Kuwait." *The New York Times*, "This Aggression Will Not Stand," March 1, 1991, https://www.nytimes.com/1991/03/01/opinion/this-aggression-will-not-stand.html (accessed January 16, 2020).

Kuwait in August 1990.[151] He later declared that his remarks had been influenced by his gut feeling: "I don't know why … I'll tell you this, we didn't sit around massaging the words. I got up there and just spoke. What you saw was my gut reaction coming out."[152]

In his own words, Bush was a risk-prone decision-maker.[153] In major crises, he seized the opportunity and wanted quick decisions from his team (e.g., the post-9/11 intervention in Afghanistan). Sometimes he was prone to hasty decisions: immediately after the terrorist attacks he "made the decision in self-defense of America that 'Dead or Alive,' that it's legal,"[154] in reference to Osama bin Laden:

> Osama bin Laden is just one person. He is representative of networks of people who absolutely have made their cause to defeat the freedoms that we take -- that we understand, and we will not allow them to do so. … I want justice. And there's an old poster out west, that I recall, that said, "Wanted, Dead or Alive."[155]

This statement is characteristic not only of Bush's already mentioned Texan style, but it can also be interpreted as proof of his disregard for international law and broad view on executive powers (to be detailed in the following chapter). Following 9/11 and the President's direct encouragements in this regard, "Wanted, Dead or Alive" became the leitmotif behind many controversial executive actions in the Global War on Terror. As previously stated, decisiveness characterized Bush's decision-making. The President himself confessed not to ever doubt his decisions. Bush's instinctual decision to go to war and his faith in his instincts, "his natural and spontaneous conclusions and judgments,"[156] defined his decision-making style. His hasty decision-making style was therefore the result of Bush's self-confidence and of his reliance on his instincts. Bush could also identify opportunities in any positive or negative situation and set ambitious goals for his Administration.

His instinctual decision-making style explains his preference for "short memos, oral briefings, and crisp meetings."[157] Another feature of Bush 43's decision-making style was delegation, a direct consequence of both the lessons learnt during his MBA studies and the President's perception of himself as a tough minded leader who after listening to his advisers

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[151] "Dad's words must have been buried in my subconscious, waiting to surface during another moment of crisis." George W. Bush, *Decision Points*, p. 128.
[152] George W. Bush cited in Bob Woodward, *Bush at War*, p.16.
[153] "Somebody has got to be risk averse in this process, and it better be you, because I'm sure not." George Bush cited in Robert Gates, *Duty*, p. 73.
[154] George W. Bush cited in Bob Woodward, *Bush at War*, pp. 101-102.
[155] *CNN*, "Bush/Dead or Alive," https://www.youtube.com/watch?v=CGwLKqll4ZM (accessed January 16, 2020).
[156] Woodward about Bush in Bob Woodward, *Bush at War*, p. 342.
[157] James P. Pfiffner, "The First MBA President: George W. Bush as Public Administrator," *Public Administration Review* 67, no. 1 (January-February 2007): 6-20, p. 7.

made the tough decisions and then delegated the implementation to his team.[158] Bush 43's preference for delegating decisions to a small group of close advisers influenced decision-making processes in the White House: Bush would set the direction and delegate administrative details to his executive "led by his chief operating officer, Vice-President Richard Cheney."[159] Cheney, who worked in the White House in the 1970s when Congress was set on limiting presidential powers following the Nixon presidency and the Watergate scandal, was a staunch supporter of executive supremacy.[160] Cheney's opinion on executive supremacy was shared not only by Defense Secretary Donald Rumsfeld or President Bush himself, but also by White House Counsel and subsequent US Attorney General, Alberto Gonzales, who believed that an expansion of executive powers in national security matters should not be confined only to President Bush, but to future presidents as well.[161] Cheney's heavy influence inside the administration and on the President himself generated frustrations not only within his close team of advisers, but also from career professionals within the public administration and the military whose expert opinion was oftentimes ignored. Cheney, together with his lifelong friend, Don Rumsfeld, would make decisions the rest of the administration was oblivious of.[162] The Cabinet was thus relegated to the role of providing support and technical expertise for the implementation of policies previously adopted by the White House with limited or no input from the Cabinet. With a limited number of people in the room when crucial decisions were being made, alternatives were not always considered in this "tightly managed decision-making process."[163] Therefore, Bush tended to neglect the administrative dimensions of policy-making and his management style was "marked by secrecy, speed, and top-down control."[164] This lack of deliberation and tendency to consider a limited number of alternatives were the direct result of his "unwillingness to admit the complexity of many policy issues"[165] (despite his declarations to the contrary). Lawrence Wilkerson, retired Army colonel who served as Secretary of State Colin L. Powell's Chief of

[158] Ibid.
[159] Ibid., p. 6.
[160] *Miller Center* - U.S. Presidents: George W. Bush, "Richard B. Cheney," https://millercenter.org/president/bush/essays/cheney-2001-vicepresident (November 13, 2017).
[161] Charlie Savage, *Power Wars: Inside Obama's Post-9/11 Presidency* (New York: Little, Brown and Company, 2015), p. 43.
[162] James P. Pfiffner, "The First MBA President," p. 8.
[163] "It's a too tightly managed decision-making process. When they make decisions, a very small number of people are in the room, and it has a certain effect of constricting the range of alternatives being offered." Christopher DeMuth, former president of the conservative think-tank American Enterprise Institute cited in Ron Suskind, "Faith, Certainty and the Presidency of George W. Bush," *The New York Times Magazine*, October 17, 2004, http://www.sscnet.ucla.edu/polisci/faculty/chwe/austen/suskind2004.pdf (accessed January 16, 2020).
[164] James P. Pfiffner, "The First MBA President," p. 6.
[165] Ibid., p. 7.

Staff characterized the Bush-Cheney decision-making style as "cowboy-like, typical Texas, typical Wyoming, and extremely secretive."[166] This was particularly relevant in matters of national security where VP Dick Cheney would dominate the advice the President received and imposed his own agenda. Bush 43 put VP Cheney in charge of managing the relationship with Congress, energy policy, creating the plan for the newly established Office of Homeland Security, the warrantless wiretapping program, or Al Qaeda detainees.[167] VP Cheney would see his influence diminished toward the end of Bush 43's second term.[168]

Given his passion for history, President Bush would oftentimes base his decisions on historical analogies or make use of such analogies[169] in his decision-making. When referring to his decision to suspend the writ of *habeas corpus* for Guantanamo detainees, Bush 43 recalled Abraham Lincoln's suspension of the writ of *habeas corpus* during the Civil War. To support his decision of giving the law enforcement community more wiretapping prerogatives, Bush 43 referred to both Abraham Lincoln's decision to wiretap telegraphed machines during the Civil War and to Woodrow Wilson's decision to intercept telephone and telegraph communication during World War I. There is also a precedent for reforming the government: in 1947, in the early days of the Cold War, President Truman merged the Navy and War Departments into the nowadays Department of Defense (DoD). In a similar vein, after September 11, 2001, Bush 43 restructured the intelligence community by founding the Department of Homeland Security to coordinate the work of several agencies with national security attributions and by establishing the position of Director of National Intelligence (DNI).[170]

Last but not least, religion played a crucial part in shaping George W. Bush as decision-maker: Bush's conviction that he was acting according to God's will would make him overconfident and gave him a tendency to "stubbornly stick with failing courses of action."[171] His religious beliefs also influenced his wartime decision-making: close advisers reported that the President did not struggle with his decision to intervene in Iraq despite him understanding the severe consequences such a decision entailed. To some of his critics, in

[166] Joel Achenbach, "Analysis: Obama Makes Decisions Slowly, and with Head, not Gut," *The Washington Post*, November 25, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/11/24/AR2009112404225.html (accessed November 13, 2017).
[167] James P. Pfiffner, "The First MBA President," p. 8.
[168] Robert Gates, *Duty*, p. 584.
[169] For more information on President Bush's historical analogies see George W. Bush, *Decision Points*, p. 155.
[170] For further information, see Ibid., p. 156, and James P. Pfiffner, "The First MBA President," p. 6.
[171] D. Jason Berggren and Nicol C. Rae, "Jimmy Carter and George W. Bush," p. 625. Such was the case for the Iraq war. For an analysis, see Joe Klein, "Staying - and Overstaying - the Course," *Time*, June 11, 2005, http://content.time.com/time/magazine/article/0,9171,1071256,00.html (accessed January 16, 2020).

times of national crises, Bush's deep faith impeded him to explore alternatives or question the consequences of his actions.[172] Bush himself admitted to finding decision-making easy since

> his faith provides a lens through which to see the world as it is and what it could be, inspires his political style, and is the source of his willingness to take bold risks, even in face of severe criticism, calls for caution, and ebbing popularity at home and abroad.[173]

In the words of David Frum, one of President Bush's former speech writers, "that was why Bush was so confident: not because he was arrogant, but because he believed that the future was held in stronger hands than his own."[174]

His good versus evil / black and white / civilized versus uncivilized worldview was criticized as being too simplistic and departing with the complexities of international affairs. Bush himself was branded as rather arrogant, single-minded, or reluctant to admit to his own mistakes.[175] His overconfidence coupled with his messianic view of the world would make his foreign policy goals overtly ambitious (e.g., ending tyranny in the world and achieving world peace).

Barack Obama: **Private Operational Code**

Family and Childhood

Barack Obama was born in a mixed family in Hawaii on August 4, 1961 (from a white American mother and a black Kenyan father on a scholarship in the US). The relationship with his parents (and with his extended family) was crucial in defining the future President's personality. Shortly after Obama's birth his father left Hawaii to continue his studies at Harvard only to return to Kenya afterwards. His parents eventually got divorced when he was just two years old. Apart from a brief visit his father made to the US when Obama was a teenager,[176] they communicated mostly through letters until Barack Obama Senior died in a car crash in Kenya when his son was 21. Obama mostly knew his father from the stories told by his mother and maternal grandparents.[177] His father's absence marked Obama's childhood and subsequent development as an individual: the sense of abandonment he felt as the result

[172] Joe Klein, "The Blinding Glare of His Certainty," *Time*, February 18, 2003, http://content.time.com/time/nation/article/0,8599,423745,00.html (accessed January 16, 2020).
[173] D. Jason Berggren and Nicol C. Rae, "Jimmy Carter and George W. Bush," p. 626.
[174] David Frum, *The Right Man*, p. 30.
[175] Ron Suskind, "Faith, Certainty and the Presidency of George W. Bush."
[176] "After a week of my father in the flesh, I had decided that I preferred his more distant image, an image I could alter on a whim - or ignore when convenient. If my father hadn't exactly disappointed me, he remained something unknown, something volatile and vaguely threatening." Barack Obama, *Dreams from My Father: A Story of Race and Inheritance* (Edinburgh, London, New York, Melbourne: Canongate Books, 2007), p. 63.
[177] "At the time of his death, my father remained a myth to me, both more and less than a man. He had left Hawaii back in 1963, when I was only two years old, so that as a child I knew him only through the stories that my mother and grandparents told." Ibid., p. 5.

of his father's early departure from his life and the need of belonging to a community would stay with Obama for years to come.[178]

Obama's mother was one of the most influential figures in his life. Ann Dunham played a crucial part in creating a connection between father and son despite of the little time they spent together. His mother always made Obama aware of the similarities between the future President and his father, constantly telling him: "your brains, your character, you got from him."[179] Obama also inherited his father's ambition; it was his mother nevertheless who helped him channel that ambition through the values she brought him up with. The support for the civil rights movement, "tolerance, equality, [and] standing up for the disadvantaged"[180] are just some of the values Obama strongly believed in and fought for both as a private citizen and as President. Obama remembers his mother as a person of great "kindness, charity, and love"[181] who, without recurring to religious texts, instilled in him Sunday church-like values such as "honesty, empathy, discipline, delayed gratification, and hard work,"[182] a deep sense of revolt against injustice and poverty, and a great love for nature. Obama was not raised to be a fervent believer since his mother viewed religion as "a phenomenon to be treated with a suitable respect, but with a suitable detachment as well."[183] Despite going to both Catholic and Muslim churches while living in Indonesia, his mother was more concerned about him "properly learning … multiplication tables."[184] It was not until later in life that he discovered faith while working as a community organizer in Chicago. Obama's religious views encompassed "the need to battle cruelty in all its forms, the value of love and charity, humility and grace,"[185] the very same values inculcated by his mother.

After divorcing Obama Sr., Ann Dunham remarried Lolo Soetoro, an Indonesian national, and followed her husband to his country. While in Indonesia, Obama's mother was very keen on providing him with an American upbringing and the differences between himself as a foreigner and the local population soon became evident to Obama.[186] The future President defined the relationship with his stepfather as good although not close.[187] He did acknowledge the fact that Lolo Soetoro treated him like his son and taught him valuable life

[178] For a detailed description of the role Obama's father had in his life, see Ibid., pp. xv, xvi, 5, 10, 25, 50, 63-71, 76, 93, 106, 125-129, 2050-206.
[179] Ibid., p. 50.
[180] Ibid., p. 29.
[181] Ibid., p. 205.
[182] Ibid.
[183] Ibid., p. 204.
[184] Ibid.
[185] Ibid., p. 224.
[186] Ibid., pp. 46-47.
[187] "I appreciated this distance; it implied a manly trust." Ibid., p. 38.

lessons.[188] One such lesson involved power, be it physical or societal, a constant of Indonesian life. When one day Obama came home injured from a street fight his stepfather taught him that the rule of the fittest is the mechanism that rules societies and resilience is what makes the difference between strong and weak. "The first thing to remember is how to protect yourself.,"[189] Lolo Soetoro said. And he continued:

> Men take advantage of other men's weakness. They are just like countries in that way. Better to be strong and if you can't be strong, be clever and make peace with someone who's strong. But always better to be strong yourself. Always.[190]

It was also during his time in Indonesia that Obama witnessed firsthand the effects of poverty on people's lives. Years later, this would influence Obama's perception of the terrorist phenomenon as well as his policy choices. The future President realized that poverty turns people into desperate, powerless, and infuriated beings more prone to embracing fundamentalism. Lifting people out of poverty is not a mere charitable deed, but a national security imperative. In this regard, international cooperation (and not isolationism) is just as important as the ability to project military power in ensuring long-term security since "the battle against international terrorism is at once an armed struggle and a contest of ideas."[191]

After several years in Indonesia, Obama returned to the US to live with his grandparents, while his mother stayed in Indonesia with her husband and their daughter. Going to school, in Hawaii where he was part of a small black community, Obama became aware of the racial differences in the US. For many years, race defined the future President's life. As part of the black community, Obama constantly felt "trapped between two worlds"[192] having to fight an acute feeling of dissatisfaction regarding his life and a constant need to prove himself while having a poignant understanding of the fact that being a black American gave him a limited number of options compared to the rest of the society.[193] Years later, these very same feelings would influence Obama's political career: the urge to constantly prove himself and not disappoint people's expectations.[194] When living in the US while his mother

[188] Ibid., pp. 30-52.
[189] Ibid., p. 35.
[190] Ibid., pp. 40-41.
[191] Ibid., p. 23.
[192] Ibid., p. xv.
[193] Ibid., pp. 79 & 226; and Doris Kearns Goodwin, "Barack Obama And Doris Kearns Goodwin: The Ultimate Exit Interview," *Vanity Fair*, September 21, 2016, https://www.vanityfair.com/news/2016/09/barack-obama-doris-kearns-goodwin-interview (accessed November 13, 2017).
[194] "I've had 10 days off in the last three years, and that includes weekends. My workdays are often 16 hours." … "My instinct is to do everything. I don't want to disappoint anyone." Oprah Winfrey, "Oprah Talks to Barack Obama," *Oprah.com*, http://www.oprah.com/omagazine/oprah-winfrey-interviews-barack-obama (accessed November 13, 2017).

remained in Indonesia, Obama was raised by his grandparents. Despite their tolerance towards race[195] and deep love for their grandson, one episode deeply marked Obama's childhood when one night his grandmother was almost attacked by a black person on her way home from work. His grandfather then told Obama that his grandmother understood "that black people have a reason to hate. That's just how it is."[196] It was then when Obama really understood how fearful white Americans were of the black community. Years later, the future President described the mark this event left on him:

> The earth shook under my feet, ready to crack open at any moment. I stopped, trying to steady myself, and knew for the first time that I was utterly alone.[197]

Years later, Obama described himself as an optimist who despite life's hardships still believed in the genuine goodness of people and in the progress of society.[198] One of the descriptions Obama provided of himself is worth citing at length for it combines both personal and political beliefs:

> I am a Democrat; my view on most topics correspond more closely to the editorial pages of the *New York Times* than those of the *Wall Street Journal*. I am angry about policies that consistently favor the wealthy and powerful over average Americans, and insist that government has an important role in opening up opportunity to all. I believe in evolution, scientific enquiry, and global warming; I believe in free speech whether politically correct of politically incorrect, and I am suspicious of using government to impose anybody's religious beliefs - including my own - on nonbelievers. … But that is not all that I am. I also think my party can be smug, detached, and dogmatic at times. I believe in the free market, competition, and entrepreneurship, and think no small number of government programs don't work as advertised. I wish the country had fewer lawyers and more engineers. I think America has more often been a force for good than for ill in the world; I carry few illusions about our enemies, and revere the courage and competence of our military. I reject a policy that is based solely on racial identity, gender identity, sexual orientation, or victimhood generally. I think much of what ails the inner city involves a breakdown in culture that will not be cured by money alone, and that our values and spiritual life matter at least as much as our GDP.[199]

Self-deprecation and humor are two other character traits defining Obama.[200] Once in office, despite his belief that the President plays a public role, Obama stated that there was not much of a difference between his public and private personas, except for him cursing more and being more sarcastic in private than in public.[201] His innate ability to connect with people,

[195] Barack Obama, *Dreams from My Father*, p. 25.
[196] Ibid., p. 91.
[197] Ibid.
[198] Doris Kearns Goodwin, "Barack Obama And Doris Kearns Goodwin."
[199] Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (New York: Crown Publ., 2006), p. 11.
[200] Doris Kearns Goodwin, "Barack Obama And Doris Kearns Goodwin."
[201] Ibid.

especially via modern communication channels such as social media,[202] also helped narrow the difference between Obama the individual and Obama the public figure. In private or in public, Obama exhibited confidence. His self-esteem resulted from his life path from Indonesia, to Hawaii, to the South Side of Chicago, the Illinois State Senate, the US Senate and, eventually, to the White House. In his own words:

> I'm named Barack Hussein Obama. I'm African-¬American. And I've been elected twice to this office [the office of President of the United States] with the majorities of the American people. So something is working.[203]

Education

Education is a fundamental pillar of Obama's life. In his adult life (and during his years as President) Obama exhibited a strong interest in education and science. The value of education is something Obama inherited from both his parents. Obama's father came from Kenya to the US on a scholarship and left his young wife and son to continue his studies in Harvard. One of Obama's memories of his father's short visit to the US when the future President was already a teenager was Obama Sr.'s constant concern about the attention his son paid to his studies.[204] His mother cultivated her son's love for education while they were in Indonesia by waking him up every morning to study before she would go to work.[205] Once back in the US, Obama graduated with academic honors from the prestigious Punahou Academy in Hawaii, studied at Occidental College in Los Angeles, and majored in Political Science and International Relations from the Ivy League Columbia University.[206]

Following graduation, Obama worked as a community organizer in Chicago prior to joining the prestigious Harvard Law School. From this point on his career skyrocketed. In his second year of studies, he became the first African American President of the renowned Harvard Law Review which propelled him to national popularity.[207] He also developed an interest for constitutional law and worked as an assistant for constitutional law professor Laurence Tribe.[208] Particularly impressed by his student's skills, Tribe praised Obama's

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[202] "I think part of the reason that I have been successful, though, despite maybe not always fitting my message into the pre-packaged formulas, is there is this whole other media ecology out there of the Internet and Instagram and memes and talk shows and comedy, and I'm pretty good at that." Ibid.
[203] Ibid.
[204] For a description of the time Obama and his father spent together during that visit, see Barack Obama, *Dreams from My Father*, pp. 63-71.
[205] Ibid., p. 50.
[206] Ibid., pp. 58, 96 & 120.
[207] Fox Butterfield, "First Black Elected to Head Harvard's Law Review," *The New York Times*, February 6, 1990, https://www.nytimes.com/1990/02/06/us/first-black-elected-to-head-harvard-s-law-review.html (accessed June 26, 2020).
[208] A renowned Harvard Law School professor, Laurence Tribe would become judicial adviser to Obama's 2008 presidential campaign and Senior Counselor for Access to Justice in the Department of Justice during Obama's

ambition towards achieving his goals,[209] a defining character trait of the future President. Obama went on to teach US constitutional law at Chicago Law School for over a decade. His law education (and career as a constitutional law professor and civil rights lawyer) influenced Obama's view on the US Constitution and political system set by the republic's Founding Fathers.[210] But for the "original sin of slavery"[211] Obama praises the Constitution and its makers for their vision of setting up a system of "equal citizenship under the law."[212] Obama views the Constitution as the founding document of "the American experiment,"[213] a document that sketches a framework for individual rights and that is a source of universal values[214] presupposing "the equal worth of every individual."[215] Constitutional values are a "codification of liberty's meaning"[216] constraining both the government and the people. Individual freedom lies at the center of this system of values. According to Obama, finding the right balance between collective security and civil liberties is one of the main challenges facing the US government in the post-9/11 era when the US "played fast and loose with constitutional principles in the fight against terrorism."[217]

Apart from law and politics, Obama developed a strong passion for history. His former Harvard constitutional law professor, Laurence Tribe, would outline student Obama's "deep appreciation for history and for the impossibility of fully appreciating its unfolding while it is in the process of being made."[218] His race and education heavily influenced his

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first presidential term. His tenure in the DoJ would be short lived with Tribe resigning after several months citing health issues. For more information, see Harvard Law Today, "Tribe named Senior Counselor for Access to Justice," February 26, 2010, https://today.law.harvard.edu/tribe-named-senior-counselor-for-access-to-justice/ (accessed August 7, 2019); Harvard Law Today, "Laurence Tribe to return to Harvard Law School in January," November 18, 2010, https://today.law.harvard.edu/laurence-tribe-to-return-to-harvard-law-school-in-january/?redirect=1 (accessed August 7, 2019).

[209] See Laurence Tribe, "The Steadiness And Grace Of President Obama," *Harvard Law and Policy Review*, November 14, 2016, http://harvardlpr.com/2016/11/14/laurence-tribe-the-steadiness-and-grace-of-president-obama/ (accessed November 13, 2017); and Ari Shapiro, "Obama Made A Strong First Impression At Harvard," *npr*, May 22, 2012, https://www.npr.org/2012/05/22/153214284/obamas-harvard-days-began-with-exclamation-point (accessed November 13, 2017).

[210] For one of the many instances when Obama mentions the American political experiment, see, for instance, Barack Obama, *The Audacity of Hope*, p. 9.

[211] Ibid., p. 231.

[212] Ibid.

[213] Doris Kearns Goodwin, "Barack Obama And Doris Kearns Goodwin."

[214] "… the basic set of individual liberties identified by the Founders and enshrined in our Constitution and our common law: the right to speak our minds; the right to worship how and if we wish; the right to peacefully assemble to petition our government; the right to own, buy, and sell property and not have it taken without fair compensation; the right to be free from unreasonable searches and seizures; the right not to be detained by the state without due process; the right to a fair and speedy trial; and the right to make our own determinations, with minimal restriction, regarding family life and the way we raise our children." Barack Obama, *The Audacity of Hope*, p. 86.

[215] Ibid.

[216] Ibid.

[217] Ibid.

[218] Laurence Tribe, "The Steadiness And Grace Of President Obama."

view on history. Among the political personalities he admired the most were President Abraham Lincoln[219] and Dr. Martin Luther King Jr., two leaders he would always refer to regarding race issues in the United States. Obama did not only admire Lincoln's political determination in passing the 13th Amendment; he also identified himself with Lincoln as "somebody who genuinely rose from nothing, self-taught,"[220] who believed in humanity, was sympathetic to the human condition and remained hopeful, humorous, and forgiving throughout his presidency. Another political leader Obama revers is America's first President, George Washington. Obama's appreciation of Washington's political genius showcases his view on the presidency:

> But there is a reason why George Washington is always one of the top three presidents, and it's not because of his prowess as a military leader; it's not because of the incredible innovations in policy that he introduced. It's because he knew when it was time to go. And he understood that part of the experiment we were setting up was this idea that you serve the nation and then it's over, and then you're a citizen again. And that "office of citizen" remains important, but your ability to let go is part of the duty that you have. … As important as taking hold of the office is letting go of the office. And they're of a piece—it is an expression of our fidelity to the ideals upon which this nation was founded.[221]

Profession

After completing his studies, Obama worked as a community organizer on the South Side of Chicago. The future President decided to become a community organizer given his distrust in government, particularly in its ability to help small communities and the underprivileged.[222] His time as community organizer was consequential for both his personal and professional lives. Personally, the work in these communities helped him "grow into … manhood"[223] by strengthening his racial identity and his belief in the capacity of ordinary citizens to accomplish extraordinary things. While working with church-based initiatives he joined the Trinity United Church of Chicago as a Protestant Christian.[224]

Professionally, it convinced the future President to pursue a life of public service. In 1996, Obama successfully ran for the Illinois State Senate.[225] In 2000, he unsuccessfully ran for a seat in the House of Representatives. Obama's political career skyrocketed in October 2002 while Congress was debating passing a resolution in favor of the subsequent Iraq

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[219] "...there's no one who I believe has ever captured the soul of America more profoundly than Abraham Lincoln has." Doris Kearns Goodwin, "Barack Obama And Doris Kearns Goodwin."
[220] Ibid.
[221] Ibid.
[222] Barack Obama, *The Audacity of Hope*, pp. 133-135.
[223] Ibid., p. 206.
[224] For more information on Obama's view on religion, see Ibid., pp. 196-224.
[225] Michael Nelson, "Barack Obama: Life In Brief," *Miller Center* - U.S. Presidents: Barack Obama, https://millercenter.org/president/obama/life-in-brief (November 14, 2017).

intervention Obama was a stark opponent of. His blunt statement "I'm not against wars, just against dumb wars"[226] earned him the spotlight: the Democratic Party selected him to give the keynote speech during the national convention for John Kerry's nomination as the party's presidential candidate.[227] These are all instances in which Obama proved his rhetorical skills: the future President himself admitted that despite the informal environment in which he grew up, he could always express himself and "win some arguments."[228] In 2004, Obama became the US Senator from Illinois, winning the Senate seat with the widest electoral margin in the history of the State of Illinois.[229] Only four years later, in November 2008, he was elected President of the United States.

Obama came into office with a very down to earth perception of the person holding the presidency as just an ordinary person with the same "virtues and vices, insecurities and long-buried injuries"[230] as the rest of the people. Nevertheless, for Obama, the President embodies the presidency and therefore has a role to play.[231] Given his importance, the President must be an optimist with a long-term view. Obama shared with his predecessor the view that a president's worth was determined by his ability to build a long-lasting legacy. If for President Bush such a legacy was the one history would remember, for President Obama, it was a "culture and a way of living together"[232] that was good, inclusive, kind, innovative, and "able to fulfill the dreams of as many people as possible."[233] The "hopes and dreams the American people invested"[234] in their president was the prism through which Obama measured his actions. For Obama, the presidency provided a first-row seat from which to

[226] Michael Nelson (Consulting Editor), "Barack Obama: Life Before The Presidency," *Miller Center* - U.S. Presidents: Barack Obama, https://millercenter.org/president/obama/life-before-the-presidency (November 14, 2017). During his time in the Senate, future President Obama issued further criticism of the Iraq war by stating that "by refusing to end the war in Iraq President Bush is giving the terrorists what they really want … a US occupation of undetermined length, at undetermined cost, with undetermined consequences." Barack Obama, "The War We Need To Win" (speech, Washington, D.C., August 1, 2007), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/277525 (accessed May 5, 2020). Despite his opposition to the war itself, Obama warned of the consequences of a full withdrawal of troops: "… too precipitous a withdrawal would lead to all-out civil war in the country and the potential for widening conflict throughout the Middle East." Barack Obama, *The Audacity of Hope*, p. 135.

[227] For Obama's full speech, see Barack Obama, "Keynote Address at the 2004 Democratic National Convention" (speech, Massachusetts, July 27, 2004), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/277378 (accessed June 26, 2020).

[228] Oprah Winfrey, "Oprah Talks to Barack Obama."

[229] Michael Nelson (Consulting Editor), "Barack Obama: Life Before The Presidency."

[230] Barack Obama, *The Audacity of Hope*, p. 48.

[231] "One of the things you realize fairly quickly in this job is that there is a character people see out there called Barack Obama. That's not you." Michael Lewis, "Obama's Way," *Vanity Fair*, September 11, 2012, http://www.vanityfair.com/news/2012/10/michael-lewis-profile-barack-obama (accessed November 13, 2017).

[232] Doris Kearns Goodwin, "Barack Obama And Doris Kearns Goodwin."

[233] Ibid.

[234] Michael Lewis, "Obama's Way."

view the mechanisms that make the world work.[235] The office of US President is both a "humbling privilege"[236] and the depository of unique power counterweighted by a "whole host of institutional constraints"[237] limiting the President's scope of action. Despite the immense power that comes with the job, Obama was keenly aware of the accompanying limitations (e.g., the need to fulfill the pledges made to the American people[238] or the very scope of executive power which, in his words, in "national-security issues is very broad, but not limitless").[239]

One fundamental value defined Obama as both President and defines him as individual and that is (social) justice. "The arc of the moral universe is long, but it bends towards justice." That is one of Obama's favorite quotes from Dr. Martin Luther King Jr., a quote written on the Oval Office floor carpet during his presidency. The significance of race and social justice[240] for the President was made evident by other items he chose to decorate the Oval Office (and the White House) with: a bust of Dr. Martin Luther King Jr., a copy of the Emancipation Proclamation,[241] the announcement of the March on Washington[242] on August 28, 1963, or a photo of him with Nelson Mandela (one of his political idols).[243]

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[235] Doris Kearns Goodwin, "Barack Obama And Doris Kearns Goodwin."
[236] Ibid.
[237] Ibid.
[238] "The president believes that Churchillian rhetoric and, more to the point, Churchillian habits of thought, helped bring his predecessor, George W. Bush, to ruinous war in Iraq. Obama entered the White House bent on getting out of Iraq and Afghanistan; he was not seeking new dragons to slay. And he was particularly mindful of promising victory in conflicts he believed to be unwinnable." Jeffrey Goldberg, "The Obama Doctrine," *The Atlantic*, April 2016, https://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/ (accessed November 13, 2017).
[239] Ibid.
[240] In the words of Susan Rice, one of Obama closest advisers (see next section of this chapter): "Barack Obama's fervent belief in our fundamental equality as people and in the goodness of our nation is what I think led him to community organizing, teaching, and ultimately to public service." Susan Rice, "'Tough Love: My Story of the Things Worth Fighting For,' by Susan Rice: An Excerpt," *The New York Times*, October 24, 2019, https://www.nytimes.com/2019/10/24/books/review/tough-love-my-story-of-the-things-worth-fighting-for-by-susan-rice-an-excerpt.html (accessed May 25, 2020).
[241] The Emancipation Proclamation was issued by President Abraham Lincoln on January 1, 1863 and it proclaimed that "all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom." National Archives: Online Exhibits, "Transcript of the Proclamation," https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html (accessed August 7, 2019). The Proclamation applied only to secessionist States, it exempted the secessionist States from the South that had fallen under Northern control, and the application of its provisions depended upon the Union's victory in the Civil War. For more information on the content and significance of the Emancipation Proclamation, see National Archives: Online Exhibits, "The Emancipation Proclamation," https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation (accessed August 7, 2019).
[242] The March on Washington for Jobs and Freedom is a key moment in the history of the civil rights movement in the United States. Dr. Martin Luther King delivered his consequential "I have a Dream" speech in front of

Barack Obama: Decision-Making and Administration

Barack Obama became the first African American President of the United States in the midst of one of the greatest economic recessions in the country's history and with two wars unfolding in Iraq and Afghanistan. Just like his predecessor, President Obama came into office with almost no foreign policy experience.[244] Hence his selection for a running mate: Delaware Senator from 1973 to 2009, Joe Biden was a long-term ranking member and former Chair of the Foreign Relations Committee. Throughout the two terms they served in the White House, Biden was one of the President's closest advisers. Their relationship was one of collaboration and support based on Biden's request to always be the last person in the room to advise the President. In the words of former VP Biden:

> I have a rule that I've kept and it's one of the reasons why the president and I get along as well as [we do].…I said "I want to be the last guy in the room to give you my advice. You're president. Whatever you do, unless I morally disagree with you, I'm going to support.[245]

VP Biden therefore influenced the President's decision-making: for instance, during the 2009 deliberations on the Administration's Afghanistan strategy, the VP was a strong supporter of sending fewer military troops with a limited mission. In the end, Obama sided with the military and decided for a substantial increase in the number of troops; nevertheless, his final decision of setting a timeline for the withdrawal of troops was influenced by the VP.[246] Differences between President Obama and VP Biden included the VP's skepticism towards the viability of the raid that took down Osama Bin Laden.[247] In the end, Biden commended

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more than 200, 000 demonstrators. Following the march, the Kennedy Administration decided to pressure Congress for a civil rights bill. For more information, see *Stanford - The Martin Luther King, Jr. Research and Education Institute*, "March on Washington for Jobs and Freedom," Event on: August 28, 1963, https://kinginstitute.stanford.edu/encyclopedia/march-washington-jobs-and-freedom (accessed August 7, 2019).

[243] Doris Kearns Goodwin, "Barack Obama And Doris Kearns Goodwin."

[244] During his first term in the US Senate (2005-2007) Obama was a member of the Foreign Relations Committee. After winning reelection, Obama served as Chairman of the Subcommittee on European Affairs of the Foreign Relations Committee from January 2007 to November 2008 (when he resigned from the Senate following his election as President of the United States on November 4, 2008). One of Obama's main focuses while in the US Senate was nuclear nonproliferation (with a focus on nuclear security). United States House of Representatives: History, Art & Archives, "Obama, Barack," https://history.house.gov/People/Detail/19276?ret=True (accessed August 8, 2019).

[245] *History* - The Obama Years, "Bin Laden: Priority Number One," http://www.history.com/the-obama-years/bin-laden.html (accessed November 16, 2017) - link currently unavailable.

[246] Michael Nelson, "Joseph Biden," *Miller Center* - U.S. Presidents: Barack Obama, https://millercenter.org/president/obama/essays/biden-2009-vicepresident (accessed August 8, 2019).

[247] For detailed information on Biden's advice to Obama regarding the bin Laden raid, see Glenn Kessler, "Fact Checker: Biden's Claim That He Didn't Tell Obama Not To Launch bin Laden Raid," *The Washington Post*, January 8, 2020, https://www.washingtonpost.com/politics/2020/01/08/bidens-claim-that-he-didnt-tell-obama-not-launch-bin-laden-raid/ (accessed January 17, 2020). The back-then Secretary of State, Hillary Clinton, also recalls in her memoirs that Vice President Biden had expressed concerns regarding the risk the raid would pose for the relationship between the US and Pakistan given that the intelligence was not 100% conclusive on whether it was actually bin Laden in the Abbottabad compound where he was eventually captured. The same

the President for his leadership and courage to approve the Bin Laden raid as "an example of the man's character. He knew he was putting his presidency on the line. If [the raid] had failed…it would have been the end of the administration."[248]

As Secretary of Defense,[249] Obama kept Robert Gates, a Republican and close friend of Bush 41. A low profile, but nonetheless influential figure in decision-making, Gates shared Obama's belief that the Administration's focus should be on Afghanistan, a war neglected by the Bush Administration. Following their first meeting, Gates described Obama as strait forward and flexible.[250] Even before starting to work together, Obama was described to Gates as "oriented toward diverse views"[251] and a good listener who "placed great emphasis on accountability."[252] As President, Gates found Obama to be very presidential and a man of "first-rate temperament and intellect."[253] As Commander-in-Chief, Gates considered Obama to be fond of the military (but, just like VP Biden, distrustful of its leadership),[254] but unfamiliar with the military structure. Secretary Gates considered that unlike his predecessor, President Obama lacked passion regarding the wars in Iraq and Afghanistan.[255] Gates outlined Obama's willingness to decide against the preferences of his political advisors, fellow Democrats or interest groups. The Secretary of Defense was left frustrated though by political considerations that, in his view, "were far more a part of national security debates under Obama"[256] than under President Bush.

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account is provided by then CIA Director, Leon Panetta, and then Defense Secretary, Robert Gates (who initially shared Biden's skepticism, but eventually changed his mind). Subsequent information gathered from former Obama Administration officials, as well as statements made by former VP Biden himself, seem to indicate that while the VP did express his skepticism during a formal Principals Meeting in the Situation Room, he did tell President Obama to "follow his instincts" during a private conversation following that very meeting (see Glenn Kessler, "Fact Checker.")

[248] *History* - The Obama Years, "Bin Laden: Priority Number One."

[249] Four Secretaries of Defense served under President Barack Obama: Robert Gates (2006-2011); Leon Panetta (2011-2013); Chuck Hagel (2013-2015); and Ash Carter (2015-2017). For an overview of Obama's relationship with his Defense Secretaries, see, for instance, Michael Wilner, "Obama's Third Defense Secretary Steps Down Under Pressure," *The Jerusalem Post*, November 24, 2014, https://www.jpost.com/International/Amid-ISIS-threat-US-Secretary-of-Defense-Hagel-resigning-official-says-382697 (accessed January 17, 2020); Greg Jaffe, "Obama On The Defense Again As Another Defense Secretary Speaks," *The Washington Post*, May 26, 2015, https://www.washingtonpost.com/politics/obama-on-the-defense-again-as-another-defense-secretary-speaks/2015/05/26/49a5a20a-03d9-11e5-8bda-c7b4e9a8f7ac_story.html (accessed January 17, 2020); and Rowan Scarborough, "Ex-defense Secretaries Among Toughest Critics of Obama's Military Strategy," *The Washington Times*, January 3, 2016, https://www.washingtontimes.com/news/2016/jan/3/obama-military-strategy-blasted-by-robert-gates-le/ (accessed January 17, 2020).

[250] Robert Gates, *Duty*, pp. 271-272.

[251] Ibid., p. 279.

[252] Ibid.

[253] Ibid., p. 300.

[254] Ibid., p. 383.

[255] Ibid., p. 288.

[256] Ibid., p. 588.

From the very beginning, Gates felt like an outsider in an administration where he was approximately 20 years older than the President and therefore had different (if not divergent) "frames of reference"[257] from the rest of the Administration: while Gates was part of the Vietnam and Cold War generation (characterized by bipartisanship in national security), most of the rest of a rather young Obama Administration viewed the world through the post-September 11 lenses. Gates bluntly characterized Obama's team as one of "congressional staffers, … all smart, endlessly hardworking, and passionately loyal to the president. What they lacked was firsthand knowledge of real-world governing.,"[258] and "an awareness of the world they had just entered."[259] Obama's most trusted team members were long-time collaborators from when he was working as community organizer in Chicago, from his time in the Senate or had been jealously working for him during the presidential campaign.[260] The one member of the Administration Gates held in high regard was CIA Director Leon Panetta, a man with years of experience in Washington and whose "insight into the political realities in Washington"[261] Gates considered superior to the ones of both the President and the VP.

Obama's first CIA Director and second Defense Secretary, Leon Panetta, had extensive Washington experience as former US Representative from California (1977-1993), Director of Office Management, and Bill Clinton's Chief of Staff. Panetta characterized Obama as "ever gracious"[262] during their first encounter when the future President was just an incoming junior Senator from Illinois. Shortly afterwards, Obama asked Panetta to come to Washington to discuss budgetary issues; at this second meeting, Panetta was struck by the new Senator's "quick grasp of the budget and its broader implications for the economy."[263] Later on, as a member of his Administration, Panetta would reiterate his characterization of Obama as "supremely intelligent, capable of absorbing and synthetizing complex information, and committed to a well-reasoned vision for the country."[264] As leader, Panetta

[257] Ibid, p. 288.
[258] Ibid.
[259] Ibid.
[260] Gautam Raghavan talks about "those "day one" folks who started at the White House on January 20, 2009, … the storied band of brothers and sisters who traced their service back to the Iowa caucuses or - even more rare and special in Obamaland - the early days in Chicago." Gautam Raghavan, "Preface," in *West Wingers: Stories from the Dream Chasers, Change Makers, and Hope Creators Inside the Obama White House*, ed. Gautam Raghavan (New York: Penguin Books, 2018), ix-xiii, p. ix.
[261] Robert Gates, *Duty*, p. 293.
[262] Leon Panetta (with Jim Newton), *Worthy Fights: A Memoir of Leadership in War and Peace* (New York: Penguin, 2014), p. 191.
[263] Ibid.
[264] Ibid., p. 442.

described Obama as "sincere, strong, and genuine"[265] in his interactions. Nevertheless, just like Gates, Panetta would characterize the President as lacking fire and relying on the "logic of a law professor rather than the passion of a leader."[266] This would leave room for what Panetta labeled as "his most conspicuous weakness, a frustrating reticence to engage his opponents and rally support for his cause."[267] Panetta did admit that, as the first black US President, Obama faced more personal attacks and political challenges than his predecessors which made the President cautious and defensive while emboldening his detractors.[268] Panetta characterized Obama as a realist and a pragmatist (not an ideologue) playing it cool instead of battling his detractors which made it for missed opportunities he later on regretted.[269] For all his faults, Panetta commended Obama for his accomplishments in fighting terrorism and setting the economy back on track.[270]

As President, Obama also appointed two seasoned Secretaries of State signaling his interest in America's return to multilateral diplomacy. His bitter enemy from the primaries, Hillary Clinton, spoke graciously of Obama. Clinton described him as a man who would not take no for an answer, fact proven by Obama's persistence when he asked her to become his Secretary of State.[271] She also commended him for living up to his promises of giving her a strong voice within his national security team[272] and for his decision to order the bin Laden raid, a "crisp and courageous … display of leadership."[273] At the end of Obama's first mandate, Clinton was replaced by John Kerry, former US Senator who served in the Senate Foreign Relations Committee throughout his entire tenure in Congress and even chaired the

[265] Ibid., p. 358.
[266] Ibid., p. 442.
[267] Ibid.
[268] Ibid., p. 443.
[269] Ibid.
[270] Ibid.
[271] In her memoirs, Clinton recalls how she initially declined Obama's offer to become his Secretary of State: "Yet my answer was still no. The President-elect again refused to accept that. "I want to get to yes," he told me. "You're the best person for the job." He would not take no for an answer. That impressed me." Hillary Rodham Clinton, *Hard Choices* (New York: Simon & Schuster Paperbacks, 2014), p. 18.
[272] "The President fully lived up to his promises. He gave me free rein to choose my team, relied on my advice as his chief foreign policy advisor on the major decisions on his desk, and insisted on meeting often so we could speak candidly. He and I generally set down together at least once a week when we weren't traveling." Ibid., p. 19. Robert Gates stated in his memoirs that when asked to be join Obama's team, Hillary Clinton had been promised leverage in choosing her Department of State subordinates, promise which was not kept. Moreover, Gates defines Clinton's relationship with the Obama White House as one of "constant tension." Robert Gates, *Duty*, p. 289. Gates also wrote that just as himself, Secretary Clinton together with CIA Director Panetta, were keenly aware of Obama's White House tight control over national security policy and operations. Ibid., p. 585. For more on the differences between the President and Secretary Clinton, especially regarding Obama's reluctance to intervene in Syria in 2014, see Jeffrey Goldberg, "The Obama Doctrine."
[273] Hillary Clinton, *Hard Choices*, p. xii.

Committee from 2009 until 2013 (when he became Secretary of State).[274] During his tenure in the State Department, Kerry disagreed with Obama's decision not to intervene in Syria. In explaining his position, he provided a glimpse into the President's view on the use of force:

> The president came to office with the Iraq experience fresh in America's memory. He grew up in the wake of the Vietnam experience, which is fresh for a whole generation. Both of those have had a profound impact on President Obama in a way that made him want to think very carefully about where and how you commit American forces. There's been maybe on occasion or two an excessive level of caution, some would argue. But all in all, I think he has felt that there are better ways…to have an influence.[275]

As outlined, the more senior members of Obama's Administrations were occasionally critical of his approach towards policy and decision-making. For the younger members of his Administration, Obama was undoubtedly an inspiration. James Comey, Deputy Attorney General during the Bush Administration and FBI Director under President Obama, characterized the 44th US President as a "compelling leader" with "a sense of humor, insight, and an ability to connect with an audience."[276] Unlike Bush's, Obama's sense of humor was not belittling, but proof of his self-confidence.[277] Comey also saw Obama as "an extraordinary listener" with a willingness to discuss topics "people weren't sure he wanted to hear."[278] His willingness to listen though made his meetings rather chaotic[279] with "extensive, thoughtful, and very slow" deliberations.[280] Comey commended Obama's "breathtaking confidence,"[281] confidence that did not imply sarcasm. In Comey's view, his confidence determined the President to believe that "he, Barack Obama, could always figure out the hardest stuff."[282] Such confidence was balanced only by Obama's "humility to learn from others"[283] and his ability to "get people relax and tell him what he needed to know."[284] Last but not least, Comey commended Obama for his very good understanding of the law.[285]

Susan Rice, one of President Obama's closest advisers (who served in his Administrations first as UN Ambassador and then as National Security Adviser) has this to say about Barack Obama:

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[274] *Miller Center* - U.S. Presidents: Barack Obama, "John F. Kerry (2013-2017)," https://millercenter.org/president/obama/essays/kerry-2013-secretary-of-state (November 15, 2017).
[275] *History* - The Obama Years, "Foreign Policy," http://www.history.com/the-obama-years/foreign-policy.html (November 16, 2017) - link currently unavailable.
[276] James Comey, *A Higher Loyalty*, p. 123.
[277] Ibid., p. 124.
[278] Ibid., p. 148.
[279] Ibid.
[280] Ibid., p. 190.
[281] Ibid., p. 155.
[282] Ibid.
[283] Ibid.
[284] Ibid., p. 156.
[285] "President Obama is a very smart man who understands the law very well." Ibid., p. 173.

> I saw an African American political leader of my generation who was passionate, intelligent, principled, and credible. He was neither an icon of the civil rights era nor a "race-man" (as my father used to call those who viewed the world primarily through the prism of race). He was a new American leader—for all. Young and visionary, he spoke movingly of one America. … For the first time in my life, I had found a political leader to whom I could completely relate and who excited me. … He was wicked smart, confident, and well-versed on foreign policy, but also funny and personable.[286]

As a young and visionary leader, prior to becoming President, Obama campaigned for a "new kind of politics,"[287] based on shared understandings between Americans, one that would narrow the gap between the challenges facing the country and the "smallness"[288] of US politics. Although a strong supporter of bipartisanship in the beginning of his presidency, his

> first three years as President are the story of his realization of the limits of his office, his frustration with those constraints, and, ultimately, his education in how to successfully operate within them.[289]

Obama would thus become a "facilitator of change:"[290] a decision-maker equally aware of the constraints the Congress and public opinion exercise on the President and of the opportunities the presidency offers each president to devise tactics and strategies to "work the system."[291] Learning just that made Obama "canny and tough,"[292] not quite "the President his most idealistic supporters thought they had elected."[293] Realizing that to get legislation passed through Congress in support of his agenda defeating the Republican opposition was just as good of a strategy for success as consensus building and national unification made Obama the perfect accommodator.[294] What remained unchanged though was Obama's driving force in politics: his belief in the decency of the American people.[295]

Just as with other leaders, Obama's worldview was crucial in influencing his policy decisions. Just as President Bush, President Obama was a staunch believer in the liberal international order the United States helped forge after World War II and in America's leading role in sustaining that order. Saving the core by sacrificing the periphery was one of Obama's guiding foreign policy principles: the US should thus sustain the core of the liberal

[286] Susan Rice, "'Tough Love: My Story of the Things Worth Fighting For,' by Susan Rice: An Excerpt."
[287] Barack Obama, *The Audacity of Hope*, p. 22.
[288] Ibid.
[289] Ryan Lizza, "The Obama Memos, The Making of a Post-post-Partisan Presidency," *The New Yorker*, January 23, 2012, http://www.newyorker.com/magazine/2012/01/30/the-obama-memos (accessed November 13, 2017).
[290] Ibid.
[291] Ibid.
[292] Ibid.
[293] Ibid.
[294] Ibid.
[295] Barack Obama, *The Audacity of Hope*, p. 8.

order and avoid "misguided adventures and feuds in the global periphery,"[296] i.e., the Middle East. The September 11 events left their mark on Obama: a moment of chaos that would determine Americans "act differently, understand the world differently"[297] and "answer the call of a nation"[298] is how he portrayed the terrorist attacks. To counter terrorism, Obama's national security tools combined "drones, sanctions, and negotiations"[299] coupled with security assistance and surveillance, all with the purpose of reducing the number of US boots on the ground. Just as for many of his predecessors, precedent and context were crucial for Obama's decision-making style. "A president does not make decisions in a vacuum,"[300] he would say.

Just like Bush 43, Obama was a very decisive decision-maker. As the President himself admitted, although there were instances when he wished he had done better, there were hardly any instances when he considered his decision was wrong. His decision-making style was based on his capacity to think at all possible options for a certain problem:

> Was there something that we hadn't thought of? Was there some move that is beyond what was being presented to me that maybe a Churchill could have seen, or an Eisenhower might have figured out?[301]

Obama premised that no easy problems end up on the desk of the President of the United States. To solve those though problems, he perceived himself as being "pretty good"[302] at sorting through options and making the best decisions based on the information available at that point. Obama admitted that openness to new ideas was key to his work. He once told his first Secretary of Defense, Robert Gates, that besides what he knew and what he did not know, what people did not tell him was what concerned him the most, determining the veteran Washington politician to commend Obama's perspicacity: "It takes many officials in Washington years to figure that out; some never do."[303] In Obama's view, certainty is unattainable since decisions are a matter of probability: any decision has a 30% to 40% chance of failure; the role of the decision-maker is therefore to choose that option whose

[296] Gideon Rose, "What Obama Gets Right: Keep Calm and Carry the Liberal Order On," *Foreign Affairs* 94, no. 5 (September-October 2015): 2-12, p. 2.
[297] Barack Obama, *The Audacity of Hope*, p. 292.
[298] Ibid.
[299] Gideon Rose, "What Obama Gets Right," p. 7.
[300] And it is what informed his decision not to intervene in Syria: "…any thoughtful president would hesitate about making a renewed commitment in the exact same region of the world with some of the exact same dynamics and the same probability of an unsatisfactory outcome." Jeffrey Goldberg, "The Obama Doctrine."
[301] Doris Kearns Goodwin, "Barack Obama And Doris Kearns Goodwin."
[302] Ibid.
[303] Robert Gates, *Duty*, p. 300.

probability "of it working is higher than the other options available"[304] while at the same time feeling comfortable with the decision-making process and not being paralyzed by fear. Lastly, the decision-maker has to feign absolute certainty about his decisions, because people "being led do not want to think probabilistically."[305] Just like Bush 43, Obama was particularly cautious when it came to explaining his decisions to the American people, something he considered even more important than the decision-making process itself.[306] Just as his predecessor, Obama ranked sending troops into combat among the toughest decisions he had to make as President. In those instances, the "feeling of the weight of the decision"[307] surpassed even the fear of making a wrong decision. Despite his controversial record regarding targeted killings, Obama stated that he weighted his decisions thoroughly before launching strikes because he did not want to turn himself into a President comfortable with killing people.[308] On targeted killings, Obama was characterized as "resolute and bold when a quick executive action"[309] was needed.

As made evident by his rather statistical approach to decision-making and as a consequence of his professional background as constitutional law professor, President Obama was a very rational, methodical, and measured decision-maker, who would base his decisions on information rather than emotions. Whereas President Bush preferred short, oral briefings, President Obama preferred detailed, written memos. Every night, after 10 pm, Obama would go to the Treaty Room on the second floor of the White House to work and study the memos received from his advisers. He would make hand-written notes and write down questions on the memos and tick one of the "Agree," "Disagree," or "Let's Discuss"[310] boxes on the policy documents awaiting his decision.

Obama's meetings were structured as a collection of mini speeches, not as debates;[311] he was interested in hearing from people even after having made up his mind about a certain course of action. While making decisions, Obama encouraged disagreements among his team

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[304] Joel Achenbach, "Analysis: Obama Makes Decisions Slowly, and with Head, not Gut."
[305] Michael Lewis, "Obama's Way."
[306] Joel Achenbach, "Analysis: Obama Makes Decisions Slowly, and with Head, not Gut."
[307] Doris Kearns Goodwin, "Barack Obama And Doris Kearns Goodwin."
[308] "I don't want ever to be a president who is comfortable and at ease with killing people. I don't want my generals or my defense secretary or my national-security team to ever feel deploying weapons to kill people as routine or abstract, even if the targets are bad people. And that weighs on me." Ibid.
[309] Karen DeYoung, "How the White House Runs Foreign Policy," *The Washington Post*, August 4, 2015, https://www.washingtonpost.com/world/national-security/how-the-obama-white-house-runs-foreign-policy/2015/08/04/2befb960-2fd7-11e5-8353-1215475949f4_story.html?utm_term=.189ad7f33a22 (accessed November 13, 2017).
[310] Ryan Lizza, "The Obama Memos, The Making of a Post-post-Partisan Presidency," *The New Yorker*, January 23, 2012, http://www.newyorker.com/magazine/2012/01/30/the-obama-memos (accessed November 13, 2017).
[311] Michael Lewis, "Obama's Way."

members just as much as he valued consensus after the final decision was made.[312] After making a decision, Obama tended to "cherry-pick the best arguments to justify"[313] his actions by asking different people questions. In the President's own words: "Me asking the question changes the answer. And it also protects my decision-making."[314] Robert Gates, after having worked for several administrations (including for Obama's predecessor), ranked Obama as "the most deliberative president"[315] he had worked for. He characterized his decision-making style, very similar to the one of Lincoln's, as "refreshing and reassuring."[316] Although when time allowed, Obama would never rush through a decision and would always ask for more information before deciding, he was also able to make fast decisions.[317] Obama's political science background influenced his decision-making style which was as lengthy, meticulous, and based on consistent information as the one advocated by political scientists. "I can't defend it unless I understand it.,"[318] was Obama's central principle for decision-making. Critics occasionally blamed his decision-making style for a foreign policy they label as "ineffective and risk-averse"[319] with a hint of indecisiveness. One former White House official would complain: "Someone's got to be the decision-maker, who's just going to say, 'We're going to do this' and 'We're not going to do that."[320]

High centralization of the decision-making power in the White House characterized the Obama years. This generated a situation similar to the one of the Bush Administration when the President's close advisers dominated the decision-making process, whereas Cabinet members were relinquished to a secondary role with limited capacity to lobby for their own initiatives or priorities. Former CIA Director and Secretary of Defense, Leon Panetta, bluntly admitted in his memoirs to having been chastised by the Obama White House when he tried to reach out to Congress or the press without prior White House approval.[321]

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[312] "I welcome debate among my team, but I won't tolerate division." Barack Obama cited in Bob Woodward, *Obama's Wars* (New York: Simon and Schuster, 2011), p. 374.
[313] Michael Lewis, "Obama's Way."
[314] Ibid.
[315] Robert Gates, *Duty*, p. 300.
[316] Ibid.
[317] Former CIA Director and Secretary of Defense, Leon Panetta, describes the White House meeting President Obama called for prior to deciding whether to release the CIA memos on the Bush-era enhanced interrogation techniques. Panetta outlines that Obama's willingness to patiently listen to CIA experts and consider their objections "impressed my colleagues immensely." Leon Panetta, *Worthy Fights*, p. 218.
[318] "He once told me that one reason he ran for president was because he was so bored in the Senate. I never saw anyone who had not previously been an executive - and especially someone who had been a legislator - take so quickly and easily to making decisions and so relish exercising authority." Robert Gates, *Duty*, p. 300.
[319] Karen DeYoung, "How the White House Runs Foreign Policy."
[320] Ibid.
[321] Leon Panetta, *Worthy Fights*, p. 376.

President Obama would get personally involved in decision-making. One example was his direct involvement in his Administration's new defense strategy: the President participated throughout, hosted meetings in the Oval Office, the Situation Room or the East Room with military and civilian leaders alike. "His engagement shaped the outcome, and his support made it possible."[322] On a different occasion, when deciding on the increase in the number of troops in Afghanistan, Obama had to choose between the "sharp escalation"[323] advocated for by the military and the "more modest approach"[324] promoted by civilian officials. Ultimately, after lengthy and intense deliberations,[325] Obama went with the option supported by military leaders although he decided for a smaller number of troops than the military had requested and a strict timeline for withdrawal.

The decision-making process regarding the increase in the number of troops in Afghanistan,[326] frustrated many in the top echelons of the national security apparatus. Former Secretary of Defense, Robert Gates, declared himself "disgusted"[327] with the process and "tired of politics overriding the national interest, the White House staff outweighing the national security team"[328] even if he did admit that the national interest eventually trumped politics with the President deciding on the least popular course of action for the public opinion and contrary to the recommendations of his political advisers.[329] What, in Gates's view, made the process more cumbersome was the "aggressive, suspicious, and sometimes condescending and insulting questioning"[330] of the military leaders, especially by White

[322] Ibid., p. 385.
[323] Ibid., p. 260.
[324] Ibid.
[325] "Obama's handling of the Afghanistan conundrum has been a spectacle of deliberation unlike anything seen in the White House in recent memory. The strategic review began in September. Again and again, the war council convened in the Situation Room. The president mulled an array of unappealing options." Joel Achenbach, "Analysis: Obama Makes Decisions Slowly, and with Head, not Gut."
[326] For Obama's direct involvement in the Afghanistan Review Strategy and his actions as his own honest broker, see Kevin Marsh, "The Administrator as Outsider: James Jones as National Security Advisor," *Presidential Studies Quarterly* 42, no. 4 (December 2012): 827-842, pp. 837-839. For Obama's direct involvement in policy-making and his centralization of control in the White House as well as his tendency to rely on campaign advisers, see Ibid., p. 840.
[327] Robert Gates, *Duty*, p. 384.
[328] Ibid.
[329] Former CIA Director, Leon Panetta, summarizes the positions of the main decision-makers regarding the surge: "The generals consistently maintained that anything less than a surge of forty thousand troops would doom the mission. Vice President Joe Biden challenged that presumption again and again. More than anyone else in those conversations, Biden raised the specter of Vietnam, of incremental increases in commitment without a clear plan or exit strategy. Hillary Clinton, by contrast, was an enthusiastic champion of the military's proposed increase. She conceded that stepping up America's military commitment in Afghanistan was no guarantee of victory, but she also forcefully argued that failing to do so virtually guaranteed failure. Gates argued for the surge but, late in the debates, proposed that it could be carried out with between thirty thousand and forty thousand troops, a modest scaling back that helped calm the conversation." Leon Panetta, *Worthy Fights*, pp. 254-255.
[330] Robert Gates, *Duty*, p. 385.

House staff. Back then CIA Director, Leon Panetta, admits that the decision took too long, especially since Obama as a new, Democrat President lacking military experience would have had no other choice but to follow the recommendations of the military. Obama ended up accepting his Secretary of Defense's recommendation for 30,000 new troops.[331]

Obama's White House staff mistrusted the military therefore creating a "chasm"[332] between it and senior defense leaders and leaving the impression that only "politically convenient"[333] agreements were acceptable for the Obama White House. Robert Gates, by far the Obama Administration member with the most national security experience commented that during Obama's presidency the role of the White House staff in national security decision-making was largely outsized compared to previous Administrations.[334] Gates considered that Obama's control over "every aspect of national security policy and even operations"[335] led to a White House that was "by far the most centralized and controlling in national security of any … since Richard Nixon."[336] This control over policy making frustrated civil servants in different departments.[337]

Chapter Summary: Private Operational Codes of George W. Bush and Barack Obama

"George W. Bush was … a gambler, not a bluffer. He will be remembered harshly for the things he did. … Barack Obama is gambling that he will be judged well for the things he didn't do."[338] George W. Bush relied heavily on intuition and was a risk-prone decision-maker; Barack Obama was highly rational which made him a rather cautious decision-maker. Two different individuals, two different backgrounds, two different decision-making styles. One common denominator: holding the office of President of the United States.

The purpose of this chapter was to recreate the private operational codes of former US Presidents George W. Bush and Barack Obama. The chapter focused on the personal and professional trajectories of the two individuals prior to becoming Presidents as well as on their system of beliefs and values and their influence on their decision-making processes and the manner in which they structured their respective administrations. George W. Bush and Barack Obama could not have been more different in terms of personal and professional backgrounds: the son of a veteran of the American political establishment, George W. Bush

[331] Leon Panetta, *Worthy Fights*, p. 255.
[332] Robert Gates, *Duty*, p. 475.
[333] Ibid., p. 464.
[334] Ibid., p. 584.
[335] Ibid., p. 585.
[336] Ibid.
[337] Ibid., p. 587.
[338] Jeffrey Goldberg, "The Obama Doctrine."

seemed to be destined for the presidency. Barack Obama, on the other hand, was an unlikely candidate for the role: borne during the '60s in a biracial family with no political background, Obama's interest in politics sparkled later in his life while working as a community organizer in Chicago. These distinct individuals both held the office of President of the United States and their distinct personalities were molded by the institution of the presidency with all its constraints from the executive branch, the public opinion, or national security imperatives.

Alexander George, in his 1980 *Presidential Decisionmaking in Foreign Policy*, defined presidential personality based on cognitive style, sense of efficacy and confidence, and orientation towards political conflict.[339] The cognitive style represents the way in which a president prefers to receive information prior to making a decision: whereas information minimalists prefer oral briefings, information maximalists would rather receive the information through (lengthy) written briefings. In the case of the two Presidents under analysis, President Bush was an information minimalist, while President Obama was an information maximalist. The sense of efficacy and confidence is associated to a President's mastery of foreign affairs and communication skills translated in the ability to communicate foreign policy decisions. In this regard, the analysis made evident that neither George W. Bush, nor Barack Obama were foreign policy hawks when they arrived at the White House; they both grew into the role of main US foreign policy maker. On the communication side, President Obama was more charismatic and a better communicator than President Bush. Last but not least, regarding the proclivity towards political conflict, it is safe to say that President Bush was more conflict-prone given his gut player, Texas style attitude. On the other hand, President Obama's rational and calculated attitude made him less conflict-prone.

Richard T. Johnson, in his 1974 *Managing The White House*,[340] outlines how personality influences the presidential management style and foreign policy making by predisposing presidents to a certain organization of the foreign policy apparatus. This chapter outlined similarities in organizing the White House and conducting foreign policy between two Presidents with different personalities. Given their lack of foreign policy expertise prior to the presidency, both Bush and Obama chose seasoned experts to be part of their foreign policy and national security teams. Even though President Obama had a more hands-on approach towards the policy-making process, whereas President Bush preferred to delegate responsibilities, both Presidents concentrated decision-making power in the White House

[339] For detailed information, see Alexander George, *Presidential Decisionmaking in Foreign Policy*, cited in Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, pp. 92-94.
[340] For detailed information, see Richard T. Johnson, *Managing the White House*, cited in Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, pp. 94-105; for a table on Presidential Decision Styles, see p. 96.

during their presidencies. This oftentimes led to bypassing relevant foreign policy and national security governmental agencies. Here the influence of their educational and professional backgrounds becomes evident: a Harvard Business School MBA graduate and former businessman with an executive political background (as Texas Governor), President Bush preferred to delegate; a lawyer and former constitutional law professor with experience as community organizer, President Obama was more analytical and hands-on in his decision-making. Both Presidents nevertheless confided in their respective Vice Presidents and relied on their advice (this is even more so the case for President Bush than for President Obama). Moreover, as shall be made evident in the following chapter, both Presidents showcased extensive views on the extent of presidential prerogatives, especially in relation to the use of force.

To conclude, individuals and their personalities influence the roles they enter. Their backgrounds influence their personality traits, both influence their decision-making styles and processes as well as the way in which they organize their work; they therefore influence how individuals perceive the roles they enter. President Bush's view on the presidency was informed by his view on history and his father's service as Vice President and President. President Obama's view on the presidency was informed by his time as constitutional law professor.

The next chapter aims at binding all three operational codes (institutional, public, and private) into one coherent analysis on the influence of the three operational codes on President Bush and Obama's decision-making behind policies with direct implications for the law on the use of force, and, to a lesser extent, on international humanitarian law. By analyzing the influence of the three operational codes on specific decision-making instances, the purpose is to outline the connection between the three operational codes coined in previous chapters and US compliance with *jus ad bellum* and, to a lesser extent, *jus in bello*. As already stated, as a foreign policy behavior compliance with international law is part of a country's foreign policy. To grasp the influence of law on (foreign) policy, one must understand that the "principal effect of law – how it shapes policy in the daily operations of government – can be best illustrated by reference to the process of making decisions."[341] For this reason, the next chapter will focus on concrete decision-making instances during key moments of the Bush and Obama Administrations (instances with implications for the two branches of international law under analysis).

[341] Louis Henkin *How Nations Behave*, p. 243.

Chapter VI: Operational Codes, Executive Power, and Foreign Policy Decision-Making in the Bush and Obama Administrations

This chapter analyzes the connection between the concept of operational code and states' compliance with international law. To do so, the chapter focuses on several decision-making instances from the Bush and Obama Administrations, instances that present implications for the law on the use of force and, to a lesser extent, international humanitarian law. To better showcase the causal influence of operational codes on international law compliance, the chapter analyzes the impact of the three operational codes (institutional, public, and private) on the view on executive power of Presidents George W. Bush and Barack Obama with an accent on the two Presidents' perception of wartime Commander-in-Chief constitutional prerogatives and the use of force in international affairs.

For this purpose, the chapter shall be divided as follows: first, an overview of legal interpretation and of the relevant actors involved in legal interpretation in the US government shall be provided. This part is followed by a description of the Authorization to Use Military Force, key piece of legislation in the Global War on Terror, and the interpretation Presidents Bush and Obama provided to this authorization. Moving forward, subsequent parts of the chapter are dedicated to the two Presidents' approach towards international law, in general, and the use of force, in particular (with a focus on the consequences their respective approaches entail for international humanitarian law). For a better understanding of how the operational codes influenced decision-making with international law implications during the Bush and Obama Administrations, the chapter will focus on the following concrete decision-making instances: during the Bush Administration, the declaration of the fight against terrorism as a war on terror and the decision to invade Iraq; during the Obama Administration, on the one hand, the decision to intervene in Libya and, on the other hand, the decision not to intervene in Syria. A section of this chapter is also dedicated to the use of force in the form of targeted killings as a practice with implications for both the use of force and IHL, practice started by President Bush and developed extensively by President Obama. Last but not least, the chapter's summary draws conclusions on how the three operational codes influence America's approach towards the use of force, and, to a lesser extent, international humanitarian law.

As outlined in previous chapters, in the US the tendency is to subsume international law to foreign policy. Throughout the years, executive practice has largely made the President the dominant foreign policy figure. Presidents draw on their constitutionally-mandated executive

prerogatives to act in foreign policy matters; given that international law is subsumed to foreign policy, analyzing presidents' interpretation of executive power allows to outline a causal link with international law compliance. Previous chapters have outlined some of the factors influencing presidential decision-making: the constitutionally-mandated institutional framework establishing the President's prerogatives (institutional operational code); a set of beliefs regarding certain concepts pertaining to the role of President of the United States (public operational code); a set of beliefs (and values) resulting from the personal and professional backgrounds of individuals holding the office of President of the United States (private operational code). The missing link that has not been analyzed thus far is the President's interpretation of executive power, in general, and the Commander-in-Chief prerogatives, in particular.

The final remarks of the previous chapter were dedicated to outlining the differences and similarities between the decision-making styles and foreign policy approaches of Presidents George W. Bush and Barack Obama. The fight against terrorism influences significantly the foreign policies of the two Presidents: whereas it dominated President Bush's foreign policy,[1] for President Obama combating terrorism was *primus inter pares* among other foreign policy initiatives such as the Paris Climate Accord or the Iran Nuclear Deal. Given the national security imperatives, Bush 43 focused extensively on terrorism prevention and relied heavily on the military thus militarizing America's foreign policy.[2] A great believer in the power of democracy, President Bush made democracy promotion a major component of his foreign policy. The combination between the militarization of US foreign policy and democracy promotion led to military interventions followed by regime change in countries such as Afghanistan or Iraq.[3] Given his already-mentioned Texas style

[1] Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 102.

[2] For how the militarization of America's foreign policy reached its peak with the 2003 US invasion of Iraq, see Jeremi Suri, "The Long Rise and Sudden Fall of American Diplomacy," *Foreign Policy*, April 17, 2019, https://foreignpolicy.com/2019/04/17/the-long-rise-and-sudden-fall-of-american-diplomacy/ (accessed February 4, 2020). For a detailed understanding of the phenomenon of militarization of American foreign policy (with a focus on the civilian / military institutional balance and the post-9/11 era), see Gordon Adams and Shoon Murray, eds., *Mission Creep: The Militarization of U.S. Foreign Policy?* (Washington, D.C.: Georgetown University Press, 2014). In the words of former Secretary of Defense, Robert Gates: "Overall, even outside Iraq and Afghanistan, the United States military has become more involved in a range of activities that in the past were perceived to be the exclusive province of civilian agencies and organizations. This has led to concern among many organizations - … - about what's seen as a creeping "militarization" of some aspects of America's foreign policy. This is not an entirely unreasonable sentiment." Robert Gates, "Secretary of Defense Speech: U.S. Global Leadership Campaign" (speech, Washington, D.C., July 15, 2008), U.S. Department of Defense, https://archive.defense.gov/Speeches/Speech.aspx?SpeechID=1262 (accessed February 4, 2020).

[3] Stephen Walt criticizes this type of democracy promotion: "What doesn't work is military intervention (aka "foreign-imposed regime change"). The idea that the United States could march in, depose the despot-in-chief and his henchmen, write a new constitution, hold a few elections, and produce a stable democracy — presto! — was always delusional …" Stephen Walt, "Why Is America So Bad at Promoting Democracy in Other

attitude, President Bush tended towards unilateralism in his foreign policy. In particular, the Bush Administration exhibited skepticism and even antagonism towards international legal commitments or international organizations it perceived as infringing upon America's sovereignty and, to a certain extent, even upon the country's national security. In a clear example of legal unilateralism, President Bush rallied a Coalition of the Willing to intervene in Iraq in 2003 after the UNSC failed to pass a resolution formally approving the use of force against Saddam Hussein's regime.

At least at the level of rhetoric, President Obama took a different stance towards international commitments. Referring to multilateralism in general, the rather calculated and collegial President Obama considered that "multilateralism regulates hubris"[4] (which did not prevent him from employing force unilaterally when ordering targeted killings even against American citizens). During his presidential campaign Obama pledged to end America's wars, especially the one in Iraq. He criticized both the militarization of national security policy and what he later called the weaponization of national security rhetoric: "rhetoric should be weaponized sparingly, if at all, in today's more ambiguous and complicated international arena."[5] He was particularly weary of "the Washington playbook," i.e., America's automatic urge to recur to military force as a solution to almost any foreign policy challenge. In his words, it is "not smart … the idea that every time there is a problem, we send in our military to impose order. We just can't do that."[6] Two main views defined Obama's foreign policy: throughout its history (and especially in the Middle East), the US had been too quick in pursuing "military solutions to problems that neither represented core U.S. national security

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Countries?," *Foreign Policy*, April 25, 2016, https://foreignpolicy.com/2016/04/25/why-is-america-so-bad-at-promoting-democracy-in-other-countries/ (accessed February 4, 2020). Democracy promotion, associated with regime change and nation building in Afghanistan and Iraq, was part of President Bush's "Freedom Agenda." Integral to the Bush Administration's second term foreign policy, the "Freedom Agenda" linked US national security to the spread of democracy (especially in the Middle East). As President Bush stated in his second Inaugural Address: "The survival of liberty in our land increasingly depends on the success of liberty in other lands. The best hope for peace in our world is the expansion of freedom in all the world." George W. Bush, "Inaugural Address" (speech, Washington, D.C., January 20, 2005), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/214048 (accessed February 4, 2020). For an evaluation of President Bush's "Freedom Agenda," see Sarah E. Yerkes and Tamara Cofman Wittes, "What Price Freedom? Assessing the Bush Administration's Freedom Agenda," *Brookings*, September 1, 2006, https://www.brookings.edu/research/what-price-freedom-assessing-the-bush-administrations-freedom-agenda/ (accessed February 4, 2020). A strong belief in democracy as a prerequisite to international peace and security and America's exceptional duty to promote democracy's benefits throughout the world have long been part and parcel of the country's foreign policy. For an overview, see James Traub, "Freedom Agenda," *The New York Times*, October 11, 2008, https://www.nytimes.com/2008/10/11/books/chapters/chap-freedom-agenda.html (accessed February 4, 2020).

[4] Barack Obama cited in Jeffrey Goldberg, "The Obama Doctrine."

[5] Jeffrey Goldberg, "The Obama Doctrine."

[6] Barack Obama cited in Ibid.

interests, nor were susceptible to amelioration by missile strike."[7] Secondly, America had traditionally focused too much on the Middle East, a region whose overall situation could not be improved by US interference (on the contrary, such interference tended to make matters worse).[8] Unlike his predecessor, Obama exhibited a calculated approach towards the use of force. In his view, an entity with real power was able to obtain a desired outcome "without having to exert violence."[9] For Obama, for the use of force to be justified, it had to be exercised rationally and for a clear reason since only the rational and measured use of force can increase US power. When employed irrationally, force "leads to warfare, to the deaths of U.S. soldiers, and to the eventual hemorrhaging of U.S. power and credibility."[10]

Law and Politics in Government: The Role of the US President in Legal Interpretation

In the United States, the President benefits from legal advice from the White House Counsel,[11] the Justice Department's Office of Legal Counsel, the State Department's Office of the Legal Adviser, or the Defense Department's General Counsel. In foreign policy matters these legal experts are meant to advise the President and other key decision-makers on the legality of America's international actions, issue legal justifications for such actions (especially regarding the use of force), help interpret international treaties or advise on whether the US should adhere to new international obligations.[12] These justifications allow the US to claim international law compliance even when it stretches legal arguments to support its actions.[13]

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[7] Jeffrey Goldberg, "The Obama Doctrine, R.I.P.," *The Atlantic*, April 7, 2017, https://www.theatlantic.com/international/archive/2017/04/the-obama-doctrine-rip/522276/ (accessed January 17, 2020).

[8] Ibid.

[9] Barack Obama cited in Jeffrey Goldberg, "The Obama Doctrine."

[10] Jeffrey Goldberg, "The Obama Doctrine.".

[11] It is important to mention that White House political appointees work at the behest of the President, are appointed by the President, and their confirmation does not require Congressional approval (unlike in the case of high level executive branch appointees). Oftentimes labeled as "the President's lawyer," the White House Counsel is appointed by the President and accountable solely to him. Assisted by a handful of White House aides, the Legal Counsel is "a rival source of legal advice for the president, but one who necessarily operates in the shadows." His main advantage is his literal proximity to the chief executive. The Attorney General, on the other hand, is a member of the President's Cabinet since the beginning of the Republic, is confirmed by the Senate, and heads an entire executive Department, the Department of Justice. For more information on the role of the While House Counsel, see Jeremy Rabkin, "At the President's Side: The Role of the White House Counsel in Constitutional Policy," *Law and Contemporary Problems* 56, no. 4 (Autumn 1993): 63-98, citations from pp. 63-4.

[12] For detailed information on legal advice within the US government, see Jeremy Rabkin, "At the President's Side," 63-98; Richard B. Bilder, "The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs," *The American Journal of International Law* 56, no. 3 (July 1962): 633-684; and Jack Goldsmith, *The Terror Presidency*, pp. 17-70.

[13] Barbara Delcourt, "Compliance, Theory of," para. 25.

John Adams, one of America's Founding Fathers, its first Vice President and second President, strived to design "a government of laws, not of men."[14] For this purpose, the separation of powers between the three branches of government is enshrined in the US Constitution. All three branches of government are bestowed with prerogatives for the maintenance of the rule of law: laws are made by the legislative, enforced by the executive, and interpreted by the judiciary. The role of the US government is to guarantee the rule of law for the benefit of all its citizens. Should one of the branches become too powerful, it could jeopardize this constitutional balance. The executive, for instance, could easily interpret the law so as to increase its power and therefore act outside judicial limitations.[15]

Throughout centuries, the relationship between the three branches of the US government changed. The evolving nature of national security imperatives made it so that legal questions on executive actions reach the courts after such actions have been taken, if they ever do so. This opens the door for the executive to singlehandedly determine the necessary legal actions to respond to a given national security situation.[16] As chief executive, the President plays a crucial role. He "himself must construe the law as part of his constitutional duty to "faithfully execute"[17] the law, for he must know what the law requires before he can enforce it."[18] In the United States, the President determines what the law is for the executive branch; nonetheless, it is the prerogative of the Justice Department to certify the President's interpretation as lawful.[19] Moreover, the DoJ is responsible with enforcing the law. The Department of Justice is nevertheless accountable to enforcing the law as it was written, not as a certain Administration might want it to be.[20]

Within the Justice Department, the President traditionally relied on the Attorney General for legal advice. The AG is the nation's top legal officer and its legal opinions are binding on the executive branch.[21] Starting in the middle of the 20th century, the AG relied on the Office of Legal Counsel to provide legal advice to the President thus increasing its influence within the executive branch.[22] Although part of the Department of Justice and,

[14] Hon. Tassaduq Hussain Jillani, "Judicial Review and Democracy," *American Bar Association*, January 01, 2018, https://www.americanbar.org/groups/litigation/publications/litigation_journal/2017-18/winter/judicial-review-and-democracy/ (accessed August 16, 2019).
[15] Jack Goldsmith, *The Terror Presidency*, p. 33.
[16] Ibid.
[17] See Chapter III for further information.
[18] Jack Goldsmith, *The Terror Presidency*, p. 32.
[19] James Comey, *A Higher Loyalty*, p. 96.
[20] Ibid., p. 110.
[21] Charlie Savage, *Power Wars*, p. 45.
[22] Nevertheless, the President and the AG can overrun the legal opinion of the OLC's legal adviser. Ibid.

therefore, of the executive branch, the OLC "is subject to few real rules to guide its actions, and has little or no oversight or public accountability."[23]

Just as in the case of the White House Counsel, government officials working for the OLC are politically appointed to serve the President. As the part of the executive branch and in charge with providing legal advice to the President, the OLC is inevitably at the crossroads of law and politics. This makes it impossible for the OLC to be politically neutral despite its subordination to the Department of Justice whose political neutrality is crucial to the proper functioning of the executive branch.[24] That being said, legal interpretation in the OLC does not equal judicial interpretation. In government, legal interpretation almost always entails a merger between legal questions and their political implications.[25] This is even more so the case for foreign affairs and national security issues with implications for international law. In the words of Richard Bilder, former official at the State Department's Office of the Assistant Legal Adviser for Economic Affairs:

> The task of finding ways to work out international disputes tends also to develop in the Office attorney what might be called a pragmatic or functional approach to international law - a tendency to view that law less as a body of fixed and unchangeable rules than as a flexible tool for use in forging real solutions to practical problems of international order. Perhaps as an outgrowth of common-law training, there is a working habit of viewing new and unique areas of problems on a case-by-case basis at first, and letting the law work itself out, rather than jumping immediately into the enunciation of broad principles. In general, precedent and authority, while important, do not preclude analysis in terms of sensible result and workable rule.[26]

The President, with unparalleled access to (classified) information and unique executive responsibilities in foreign affairs and national security matters, asks politically appointed personnel for legal advice on how to reach a desired course of action. Jack Goldsmith, former Head of the OLC under Attorney General John Ashcroft, describes from personal experience what such a situation entails for the law:

> Especially on national security matters, I would work hard to find a way for the President to achieve his ends. Whenever I advised the White House that a proposed action was legally problematic, I would try to suggest ways to achieve its goals through alternative and legally available means.[27]

The OLC is thus at the crossroads between a moral imperative to provide neutral legal advice based on its sworn allegiance to the supremacy of the law and its accountability to the chief executive. Such accountability makes it necessary to identify legal solutions to the actions the

[23] Jack Goldsmith, *The Terror Presidency*, p. 33.
[24] Ibid., pp. 33-35.
[25] Ibid., pp. 34-35.
[26] Richard B. Bilder, "The Office of the Legal Adviser," p. 680.
[27] Jack Goldsmith, *The Terror Presidency*, p. 35.

President deems necessary to safeguard national security. As Goldsmith himself admits, it is difficult to say 'no' to someone who is not accustomed to hearing 'no' as an answer.[28]

To a certain extent, presidents tend to be wary of "legalisms," i.e., legal constraints on their actions. To a large extent, as elected officials, presidents consider that their primary allegiance is to their electorate; their actions are therefore determined by a logic of appropriateness urging them to place the security of the American people at the center of their actions, even at the expense of sidelining the law.[29] For instance, a former Wall Street lawyer, President Franklin Delano Roosevelt was characterized by Supreme Court Justice Robert Jackson as a "strong skeptic of legal reasoning."[30] As all presidents distrustful of legalisms, Roosevelt supported a flexible interpretation of the laws and the Constitution, one rather subjected to political imperatives than to strict legal reasoning. Refined legal interpretations were too technical for his pragmatic mind. A wartime President, he rejected legalism as an impediment to his wartime responsibilities. To Roosevelt, the President could be sanctioned by Congress, the media, and public opinion at large, but not necessarily by the law.[31] As President, Roosevelt authored wartime measures that served as precedent for the Bush Administration's war on terror (e.g., the set-up of military commissions to judge prisoners of war captured by the US in the Global War on Terror).[32]

During the first half of the Cold War, the executive power in the US was largely unconstrained due to the permissiveness of the legal culture. The magnitude of the communist threat generated a bipartisan consensus among Washington decision-makers and lawmakers alike: all actions were acceptable as long as they contributed to countering the communist threat. Following the Vietnam War years, the Pentagon Papers revelations,[33] and the Watergate scandal,[34] this legal culture changed dramatically. The Church Committee

[28] Ibid., pp. 38-39.
[29] See Roosevelt's example in Ibid., pp. 48-9.
[30] "Roosevelt was a strong skeptic of legal reasoning and criticized many attitudes of lawyers and members of Congress for being legalistic." Robert H. Jackson, *That Man: An Insider's Portrait of Franklin Delano Roosevelt*, edited and introduced by John Q. Barrett (New York: Oxford University Press, Inc., 2003), page not available.
[31] For more information on Roosevelt, see Jack Goldsmith, *The Terror Presidency*, pp. 48-9.
[32] George W. Bush, *Decision Points*, p. 167.
[33] Commissioned in 1967 by Secretary of Defense, Robert McNamara, *The Pentagon Papers* amount to approximately 7,000 pages divided into 47 volumes. The investigation, conducted by experts from the Washington Institute for Defense Analysis and RAND Corporation, covers the US military involvement in Vietnam from 1945 to 1967. The documents outline how US Presidents from Harry Truman to Lyndon B. Johnson had misrepresented to the public opinion the country's involvement in Vietnam. For more information, see Jordan Moran, "Nixon and The Pentagon Papers," *Miller Center* - The Presidency: In-Depth Exhibits, https://millercenter.org/the-presidency/educational-resources/first-domino-nixon-and-the-pentagon-papers (accessed August 16, 2019).
[34] The Watergate scandal concerns the June 1972 break in at the headquarters of the Democratic National Committee at the Watergate hotel in Washington, D.C. Following revelations from *Washington Post* journalists

investigation[35] and the civil rights revolution transformed the relationship between Congress and the executive with the legislative becoming more assertive of its oversight prerogatives over executive actions. If "the press, Congress, and intellectuals had a higher regard for the executive branch,"[36] the '70s saw the demise of this culture of acquiescence.

Bush, Obama, and War Powers

Prior to 9/11,[37] legal standards imposed during the 1970s paralyzed "risk aversion … pervaded the White House and the intelligence community. The 9/11 attacks, …, made playing it safe no longer feasible."[38] 9/11 took (legal) gloves off and erased (legal) barriers. For the United States, September 11 provided a new context for the use of force in international affairs. The US President's approach to wartime prerogatives would be crucial in this new context.

Bob Woodward and Carl Bernstein the break in was linked to Republican President Richard Nixon and his reelection campaign. Revelations regarding Watergate eventually led to President Nixon's resignation. See United States Senate, "Select Committee on Presidential Campaign Activities: The Watergate Committee," https://www.senate.gov/artandhistory/history/common/investigations/Watergate.htm (accessed August 16, 2019); David F. Schmitz and Vanessa Walker, "Jimmy Carter and the Foreign Policy of Human Rights: The Development of a Post-Cold War Foreign Policy," *Diplomatic History* 28, no. 1 (January 2004): 113-143; and Friedbert Pflüger, "Human Rights Unbound: Carter's Human Rights Policy Reassessed," *Presidential Studies Quarterly* 19, no. 4 (Fall 1989): 705-716.

[35] Active in the second half of the 1970s, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (known as the Church Committee after its Chairman, Democratic Senator Frank Church) is just one of the fallouts of the Watergate scandal. In 1973, the Senate Watergate Committee "revealed that the executive branch had directed national intelligence agencies to carry out constitutionally questionable domestic security operations". The Committee's final report concluded that "[i]ntelligence agencies have undermined the constitutional rights of citizens," and committed "intelligence excesses" as a result of the erosion by nonapplication of constitutional checks and balances on their activities. Concluding that "there is no inherent constitutional authority for the President or any intelligence agency to violate the law," the report recommended "expanded legislative, executive, and judicial involvement in intelligence policy and practices" by placing "intelligence activities within the constitutional scheme for controlling government power." Following the Committee's work, the US Congress passed a series of legislative proposals that strengthened the checks and balances on the US intelligence community. For more information, see United States Senate, "Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee)," https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm (accessed August 16, 2019) (for citations, follow the link).

[36] Jack Goldsmith, *The Terror Presidency*, p. 49. For more information on the culture of legal permissiveness, see p. 49.

[37] Other factors contributed to the legal changes promoted by the Bush Administration. In the words of former FBI Director, James Comey: "I would discover in the coming months that the pressures to bend the rules and to make convenient exceptions to laws when they got in the way of the president's agenda were tempting. And it was a temptation fed by the urgency of the topic and the nature of the people around the president, people who couldn't take the long view or understand the importance to the country of doing things the right way, no matter the inconvenience. … the importance of institutional loyalty over expediency and politics." James Comey, *A Higher Loyalty*, p. 73.

[38] Jack Goldsmith, *The Terror Presidency*, p. 70.

A week after 9/11, Congress provided President Bush with the legal basis to defend the nation against future attacks and wage the Global War on Terror.[39] The Authorization for Use of Military Force Against Terrorists or simply, Authorization for Use of Military Force is a bill passed by Congress on September 18, 2001. The AUMF, indeed, took all gloves off allowing the US President to broadly use power for counterterrorism purposes.[40] The authorization stipulates

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[41]

It acknowledges as "both necessary and appropriate" for the US to "exercise its right to self-defense"[42] to protect US citizens from terrorist acts as well as the President's constitutional authority to "deter and prevent acts of international terrorism against the United States."[43] By encharging the President with the prevention of future terrorist attacks, the AUMF allows him to use force preventively to safeguard US national security. Part of this "Authorization for Use of United States Armed Forces,"[44] is also a reference to the 1973 War Powers Act allowing Congress to restrict the President's constitutional prerogative of deploying troops abroad as Commander-in-Chief of US Armed Forces.[45]

Ever since 2001, the AUMF has been broadly discussed by policy analysts and the scholarly community alike and even more broadly cited by Washington decision-makers to justify actions in the post-9/11 era. Both Presidents Bush and Obama made extensive use of the authorization to use force provided by the AUMF. The document nevertheless contains

[39] For more information on war powers after 9/11, see Nancy Kassop, "The War Power and Its Limits," *Presidential Studies Quarterly* 33, no. 3 (September 2003): 509-529.
[40] Each President approaches war powers differently. The changes are the result of each President's view on his executive prerogatives, i.e., the constitutional and institutional limitations to employing war powers. Apart from the President's personality, several factors contribute to shaping that view. For a review of those factors influencing legal decision-making within an administration, see Rebecca Ingber, "The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power," *American Journal of International Law* 110, no. 4 (October 2016): 680-700.
[41] 107th Congress, Authorization for Use of Military Force, Public Law 107-40, September 18, 2001, https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf (accessed August 13, 2019). Some parts of this citation will be cited again throughout this chapter - the source remains the same.
[42] For more information on the principles of necessity and appropriateness in self-defense, see Chapter I on the legal doctrine of *jus ad bellum* or the use force in international affairs.
[43] AUMF, Public Law 107-40, September 18, 2001.
[44] Ibid.
[45] For more information on the War Powers Act, see Chapter III.

several contingent points.[46] The first one is the meaning and legal coverage of the term "force:" since the AUMF authorizes the President to use "all necessary and appropriate force" to prevent future terrorist attacks against the US and its citizens, the authorization has been interpreted so as to authorize a broad range of counterterrorist actions. President Bush, for instance

> invoked the AUMF as a ground of authority for military detention—at Guantanamo and elsewhere and for trial by military commission. It also construed the AUMF to authorize warrantless surveillance of "international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations," despite the restrictions of the Foreign Intelligence Surveillance Act. In addition, it argued that the AUMF authorized military detention of some U.S. citizens and residents, including at least two who were captured inside the United States. The public and the academy fiercely debated these issues as well as broader issues about the AUMF's meaning and scope, such as: the degree to which the AUMF triggered the president's war powers and was a legally sufficient substitute for a war declaration; whether and to what extent the president's authority under the AUMF was limited by international law; and the proper extent of judicial review of presidential actions taken under the AUMF.[47]

The second concern regards the geographical scope of this authorization to use military force which covers actions against "nations, organizations, or persons … [that] … planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Since 2001, Presidents Bush and Obama cited the AUMF to justify the use of force together with other actions in a number of countries such as Afghanistan, Pakistan, Yemen, Somalia or Syria.[48] This leads to the third contentious point of the authorization, namely the nexus of the "nations, organizations, or persons" targeted to the September 11 terrorist attacks. This is particularly relevant in President Obama's case who referenced the AUMF to use force (in the form of targeted killings performed by drone strikes) against both Al Qaeda and Islamic State operatives. Obama referenced the AUMF to use force against the Islamic State as an "associated force" of Al Qaeda and successor of Al Qaeda in Iraq even after 2014 when ISIS broke ties with Al Qaeda.[49] Last but not least, the fourth contentious point is the authorization's duration.[50] The AUMF, as passed on

[46] For a detailed analysis of these contingent points, see Curtis A. Bradley and Jack L. Goldsmith, "Obama's AUMF Legacy," *American Journal of International Law* 110, no. 4 (October 2016): 628-645. The list of contentious points can be found at p. 629.
[47] Ibid., p. 630.
[48] Paul Szoldra, "Happy Birthday to the Forever War: The AUMF is Turning 17 Years Old," *Business Insider*, September 14, 2008, https://www.businessinsider.com/happy-birthday-to-the-forever-war-the-aumf-is-turning-17-years-old-2018-9 (accessed August 16, 2019); Curtis A. Bradley and Jack L. Goldsmith, "Obama's AUMF Legacy," pp. 628, 635 & 642-643.
[49] Curtis A. Bradley and Jack L. Goldsmith, "Obama's AUMF Legacy," pp. 632-645; Jack L. Goldsmith and Matthew Waxman, "The Legal Legacy of Light Footprint Warfare," *The Washington Quarterly* 39, no. 2 (Summer 2016): 7-21, pp. 14-15.
[50] Curtis A. Bradley, "President Obama's War Powers Legacy," *American Journal of International Law* 110, no. 4 (October 2016): 625-627, p. 630. See also references in the previous footnote.

September 18, does not set any time frame for the actions it authorizes the President to undertake. The Obama Administration therefore continued to broaden the AUMF's scope just as the Bush Administration had done. It construed

> the AUMF to authorize the U.S. military to detain four groups of individuals: (1) members of Taliban forces; (2) members of Al Qaeda forces who are engaged in hostilities against the United States or its coalition partners; (3) members of associated forces; and (4) those persons who have given substantial support to one of the other groups. The administration also argued that "the AUMF is not limited to persons captured on the battlefields of Afghanistan," and that "individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself."[51]

In this regard, it is interesting to outline the significant gap in the interpretation of executive prerogatives between Obama the candidate and Obama the President: according to Senator Barack Obama in 2007, the President "does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."[52] President Obama, on the other hand, employed military force even when the threat to US national security was not necessarily imminent.[53] Consequently, despite

> his frequent rhetoric about ending the AUMF-authorized conflict, part of Obama's legacy will be cementing the legal foundation for an indefinite conflict against various Islamist terrorist organizations.[54]

President Obama inherited a highly militarized national security apparatus from President Bush and the AUMF as a legal framework bestowing upon the President significant authority to employ force in combating terrorism. Factual circumstances (situation on the ground married to public opinion discontent regarding the wars in Afghanistan and Iraq)[55]

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[51] Ibid., p. 633. For further information on the Obama Administration and the interpretation of the AUMF, see Jack Goldsmith and Matthew Waxman, "The Legal Legacy of Light Footprint Warfare."

[52] Charlie Savage, "Barack Obama's Q&A," *The Boston Globe*, December 20, 2007, http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/ (accessed October 31, 2019).

[53] The best example in this case is the March 2011 US participation to the UNSC authorized military mission to protect civilians in Libya. President Obama approved the use of military force even though it was not to defend the US from an imminent attack. Lacking Congressional authorization, this unilateral executive action was justified by a Justice Department legal opinion concluding that supporting "the President had the constitutional authority to direct the use of military force in Libya because he could reasonably determine that such use of force was in the national interest" and that "prior congressional approval was not constitutionally required to use military force in the limited operations under consideration." (p. 1) Two national interests were cited as reasons for this unilateral use of force: preserve regional stability in North Africa and support the Security Council's "credibility and effectiveness" (p. 10). Caroline D. Krass (Principal Deputy Assistant Attorney General), "Authority to Use Military Force in Libya: Memorandum for the Attorney General," *Opinions of the Office of Legal Counsel in Volume 35* (April 1, 2011): 1-14, https://fas.org/irp/agency/doj/olc/libya.pdf (accessed August 16, 2019).

[54] Curtis A. Bradley, "President Obama's War Powers Legacy," p. 629.

[55] See Jack Goldsmith and Matthew Waxman, "The Legal Legacy of Light Footprint Warfare."

complement the list of factors explaining the differences between Obama the candidate and Obama the President. To sum up:

> during the Obama administration, the AUMF received extensive interpretation by courts that largely followed Obama administration arguments, …; Congress ratified the judiciary's interpretation, with the administration's support; the administration conducted extensive targeting in many countries under the authority of the AUMF; and the president construed the AUMF to cover the conflict with the Islamic State, which formed the basis for targeting that organization in a number or countries. The 2001 AUMF, which is likely to be the primary foundation of U.S. military force against organized terror for the indefinite future, is very much the AUMF that President Obama crafted, argued for, and nurtured. It will stand as one of his primary legal legacies.[56]

The Bush Administration and International Law

In his own words (see previous chapter), September 11 reinvented George W. Bush's presidency, it reinvented his public image (from one of an internal policy president to one of a wartime leader)[57] and transformed his Administration (from one that was politically adrift to one whose actions would have to reassure the American people in times of crisis).[58] Following 9/11, inspired by the religious beliefs part of his private operational code, Bush proved himself to be a president with grand foreign policy visions and ambitions (similar to the ones of Ronald Reagan, another US president with strong religious beliefs he came to know rather well),[59] exhibiting what could be labeled as an "heroic presidential leadership"[60] style. In the President's own words, he sought to "seize the opportunity to achieve big goals" such as "world peace"[61] prompting Bob Woodward to conclude: "His vision clearly includes an ambitious reordering of the world through pre-emptive and, if necessary, unilateral action to reduce suffering and bring peace."[62] The President's grandiose post-9/11 foreign policy objectives having terrorism prevention as the utmost national security imperative set the tone for the Bush Administration's actions in the GWOT.

At rhetorical level, by declaring the 9/11 attacks an act of war against the United States, the Bush Administration started building a Global War on Terror narrative which set the framework for the development of matching material practices, i.e., an actual, proactive war against terrorists and their supporters. Language generates practices that gain a life of

[56] Curtis A. Bradley, "President Obama's War Powers Legacy," p. 638.
[57] On the reinvention of George W. Bush's public image in the 18 months following the 9/11 attacks (from 9/11 to March 2003) see Jon Roper, "*The Contemporary Presidency*: George W. Bush and the Myth of Heroic Presidential Leadership," *Presidential Studies Quarterly* 34, no. 1 (March 2004): 132-142.
[58] Ibid., pp. 134-135.
[59] Peter W. Rodman, *Presidential Command*, pp. 234-235.
[60] For further information on the heroic presidential leadership, see Jon Roper, "*The Contemporary Presidency*: George W. Bush and the Myth of Heroic Presidential Leadership."
[61] Ibid., p. 141.
[62] Ibid.

their own determining leaders to adapt their language to justify the new practices thus creating a legitimizing narrative for their actions. Language and practice therefore co-constitute each other; they are both part of the war on terror discourse.[63]

Through their very magnitude, the September 11 attacks generated a sense of crisis that allowed "an authoritative actor like President Bush[64] to articulate a militaristic counterterrorism discourse."[65] Drawing from the chapter on the public operational code, one can identify a public operational code of the war on terror (operational code pertaining to the US President). Given the psychological impact of the events on the American society at large, the media and other branches of government did not consider challenging this dominant discourse as any such attempt would have been labeled as "unpatriotic, disloyal, divisive or naïve."[66] Following President Bush's declaration of a war on terror from the day of the terrorist attacks as well as other official declarations coupled with concrete counter-terrorist measures - such as the setting of new institutional structures (see, for instance, the Department of Homeland Security) or the creation of a new legal framework approved by Congress (e.g., the PATRIOT Act) - represented concrete manifestations of the Global War on Terror rhetoric.[67] They all contributed to the institutionalization of the GWOT rhetoric at both political and societal levels, institutionalization which, through time, self-perpetuated itself as an almost uncontested "regime of truth."[68] As outlined in the chapter on the public operational code, the war on terror basically provided the Washington establishment with "an overarching threat narrative by which to rationalize its practices."[69] The GWOT rhetoric proves once more that the US foreign policy needs an overarching threat to gain coherence (as already outlined in the analysis of the public operational code of the US President).

The Global War on Terror discourse therefore comprises several recurrent narratives (which can also be identified in the Inaugural, Farewell, and State of the Union Addresses analyzed to recreate the public operational code of the American President):

> the terrorist attacks of 11 September 2001 were an 'act of war;' terrorism is the most serious security threat of the new century; the combination of terrorists, rogue states and weapons of mass destruction (WMD) poses a serious and ongoing threat; terrorists today represent a new

[63] Richard Jackson, "Culture, Identity and Hegemony: Continuity and (the Lack of) Change in US Counterterrorism Policy from Bush to Obama," *International Politics* 48, no. 2/3 (March 2011): 390-411, p. 393.
[64] On presidential rhetoric in general and how it helps define reality, see David Zarefsky, "Presidential Rhetoric and the Power of Definition," *Presidential Studies Quarterly* 34, no. 3 (September 2004): 607-619.
[65] Richard Jackson, "Culture, Identity and Hegemony," p. 397.
[66] Ibid., p. 398.
[67] Ibid., p. 394.
[68] Ibid., p. 395.
[69] Ibid.

> kind of terrorism which is religiously motivated, and more lethal and unconstrained; the war against terrorism is necessary, legitimate, proportionate, defensive and just; the severity of the terrorist threat means that America must retain the right to attack pre-emptively to disrupt future attacks; and a major international effort led by the United States and a long-term commitment will be required to win the war against terrorism.[70]

Given that, to a certain extent, some of these narratives are part of the public operational code of the US President, the GWOT rhetoric was not built from scratch but upon preexisting societal narratives. In the US, the counterterrorist discourse originated in the Reagan Administration; following 9/11, the Bush Administration did nothing but to reproduce pre-existing narratives and practices which mirrored already-established societal threat perceptions as well as the responses to such threats.[71] Consequently, many of the elements part of the 9/11 discourse are also embedded in the overall American political discourse. As part of this discourse, through the Self vs. Other dichotomy, terrorists are portrayed as the antithesis of American society (based on values such as democracy, freedom, justice, etc. – all part of the public operational code): fighting terrorism therefore became an act of reaffirmation of America's values and its national identity.[72] Other elements of the public operational code are also part of the war on terror rhetoric: the good vs. evil dichotomy, "American exceptionalism," America's role in history ("manifest destiny" or a divine calling to safeguard universal values).[73] Challenging this rhetoric given its symbolic load would have been labeled as unpatriotic at least. Moreover, GWOT rhetoric (just as America's counterterrorist actions) was guided towards a core American foreign policy interest (also evident in the public operational code): preserving America's hegemony.[74]

Declaring a "war on terror" after 9/11 was not only a linguistic metaphor employed by President Bush; it triggered a legal state of affairs that created the setting for the adoption of an entire array of (legal) and political measures meant to prevent future attacks on the United States territory.[75] First among equals was the use of military force, oftentimes employed preventively. In peacetime, law enforcement authorities investigate crimes that have already taken place. In wartime, countries can adopt emergency measures to (proactively) respond to national security threats. Decision-makers employ emergency prerogatives to act preventively against those threats.[76]

[70] Ibid., p. 393.
[71] Ibid., p. 394.
[72] Ibid., p. 398.
[73] Ibid.
[74] Ibid., p. 399.
[75] John Yoo, *War by Other Means*, pp. 8-17.
[76] Ibid., p. 8.

The first legal conundrum the Bush Administration was faced with was whether what would later be known as the Global War on Terror was actually a war as per the classical understanding of the term - a military confrontation between the regular armed forces of different nation states.[77] Moreover, the United States had previously treated terrorist attacks (albeit not of the magnitude of the September 11 attacks) as criminal law cases under the jurisdiction of US law enforcement.[78] Both the nature of the threat and its magnitude rendered this traditional approach insufficient in the eyes of US post-9/11 decision-makers. In the words of John Yoo, former head of the Department of Justice's Office of Legal Counsel:

> If 9/11 did not trigger a war, as … critics contend, then the United States is limited to fighting al Qaeda with the law enforcement and the criminal justice system, with all of their protections and delays. … A return to this state of affairs would be a huge mistake. Bipartisan studies of the failings that led up to 9/11 refer to the inadequacy of the criminal justice approach to deal effectively with an ideologically motivated military organization like al Qaeda.[79]

First and foremost, the nature of the threat did raise the question of whether a state can declare war against terror/terrorism. The thinking of post-9/11 Justice Department officials focused on the consequences of an entity's actions rather than on its status under international law. In the words of John Yoo, the "status as an international terrorist organization rather than a nation-state"[80] should not make a difference when determining whether the US was at war or not. Nevertheless, Yoo did admit that the fact that Al Qaeda hijackers fought "on behalf of no nation" represented, from the legal standpoint, a "singular and defining characteristic … to a lawyer."[81] Al Qaeda was an ideology-driven terrorist network supported by the Taliban (at the time of the 9/11 attacks the *de facto* regime of Afghanistan), making use of 21st century technological developments, employing unconventional operating procedures and waging an asymmetric war against its enemies as part of a conflict with unclear jurisdiction.[82] Consequently, Al Qaeda's very nature and its *modus operandi* erased "the traditional boundaries between the battlefield and the home front."[83] Hence, the need for a global war against it. The US declaration of war was triggered by "violence on a large scale, …, undertaken for political reasons by a foreign state or entity, which require[d]

[77] Ibid., p. 2.
[78] Matthew C. Waxman, "Police and National Security: American Local Law Enforcement and Counter-Terrorism after 9/11," *Journal of National Security Law & Policy* 3 (2009): 377-407. Information on American policing and national security before 9/11 in pp. 379-385.
[79] John Yoo, *War by Other Means*, pp. 2-3.
[80] Ibid., p. 4.
[81] Ibid., p. 5.
[82] Ibid., pp. 5-8.
[83] Ibid., p. 8.

military response."[84] In the view of DoJ officials therefore, under international law, the trigger for military action in self-defense is an armed attack or the threat of one, regardless of the entity conducting the attack.[85] DoJ officials supported their claim on UNSC Resolution 1368 from September 12, 2001[86] which labeled the 9/11 terrorist attacks as a threat to international peace and security and recognized America's right to self-defense, "code words in international law justifying the use of military force."[87]

From a legal standpoint, as explained in the chapter dedicated to the institutional operational code, there is a difference between a declaration of war and the actual use of military force: in the US, a declaration of war is a Congressional prerogative; the President can nonetheless send troops into combat given his Commander-in-Chief prerogatives absent an official declaration of war from the Congress. The scholarly community, backed by historical practice and constitutional jurisprudence, is largely of the opinion that, in the case of a sudden attack against the homeland, the President can employ armed force in self-defense to protect the homeland without prior Congressional approval. Following 9/11, the DoJ mirrored this view. For a detailed legal argument, the conclusion of the memorandum authored by John Yoo on the constitutionality of the President's military actions against terrorists and nations supporting them is worth being cited at length:

> In light of the text, plan, and history of the Constitution, its interpretation by both past Administrations and the courts, the longstanding practice of the executive branch, and the express affirmation of the President's constitutional authorities by Congress, we think it beyond question that the President has the plenary constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001. Force can be used both to retaliate for those attacks, and to prevent and deter future assaults on the Nation. Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas. In both the War Powers Resolution and the Joint Resolution, Congress has recognized the President's authority to use force in circumstances such as those created by the September 11 incidents. Neither statute, however, can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.[88]

[84] Ibid., p. 10.
[85] Ibid., p. 11.
[86] For further information on UNSC Resolution 1368 (September 12, 2001), see Chapter I.
[87] John Yoo, *War by Other Means*, p. 11.
[88] John C. Yoo (Deputy Assistant Attorney General, Office of Legal Counsel), "The President's Constitutional Authority To Conduct Military Operations Against Terrorists And Nations Supporting Them," *Opinions of the Office of Legal Counsel in Volume 25* (September 25, 2001): 188-214, https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2013/10/Memorandum-from-John-C-Yoo-Sept-25-2001.pdf (accessed January 30, 2020), p. 214.

Immediately after September 11, President Bush did not hesitate to declare war against terrorism.[89] By far the most consequential decision in the Global War on Terror was to treat the 9/11 terrorist attacks as an act of war against the United States.[90] An offensive policy based on the prevention of future terrorist attacks was, from 9/11 onwards, what guided America's actions. In a Texas-style type of language, President Bush made it clear that America would "fight overseas by bringing the war to the bad guys."[91] In President Bush's message to Congress on September 20, 2001,[92] the November 2001 executive order,[93] the already cited Congressional Authorization to Use Military Force, or the PATRIOT Act[94] (passed by Congress on October 26, 2001) there are constant references to the need to deter and prevent a future attack on US territory. Moreover, the President declared that the US would "make no distinction between the terrorists … and those who harbor them."[95] Prevention, strength, and determination are therefore key elements of the Bush Administration's actions in the GWOT. In the words of former VP, Dick Cheney:

> Weakness, vacillation, and the unwillingness of the United States to stand with our friends—that is provocative. It encouraged people like Osama bin Laden … to launch repeated strikes

[89] Addressing the nation from the Oval Office on the evening of September 11, President Bush assured the American people that "America and our friends and allies join with all those who want peace and security in the world, and we stand together to win the war against terrorism." George W. Bush, "Address to the Nation on the Terrorist Attacks" (speech, Washington, D.C., September 11, 2001), The American Presidency Project (online by Gerhard Peters and John T. Woolley, https://www.presidency.ucsb.edu/node/216451 (accessed June 29, 2020). This, of course, did not amount to a formal Congressional war declaration.

[90] Robert Jervis, "Do Leaders Matter and How Would We Know?," *Security Studies* 22, no. 2 (2013): 153-179, p. 174-175.

[91] George W. Bush cited in Bob Woodward, *Bush at War*, p. 281.

[92] Speaking about his Administration's strategy in the War on Terror, President Bush talks about "a comprehensive national strategy to safeguard our country against terrorism, and respond to any attacks that may come." He also determines as a purpose of the intelligence community to "know the plans of terrorists before they act, and to find them before they strike." George W. Bush, "Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11" (speech, Washington, D.C., September 20, 2001), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/213749 (accessed June 29, 2020).

[93] On November 13, 2001, President Bush issued a military order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. Section 1 (Findings) (c) stipulates: "Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government." Subparagraph (e) stipulates: "To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks …." White House Office of the Press Secretary, "President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," November 13, 2001, https://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html (accessed August 17, 2019).

[94] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (famously known as the PATRIOT Act), is a post-9/11 bill passed by Congress with overwhelming majority and signed into law by President Bush with the purpose of "arming law enforcement with new tools to detect and prevent terrorism." On the webpage the US Department of Justice dedicates to the piece of legislation, the preamble stipulates that "the Department of Justice's first priority is to prevent future terrorist attacks." United States Department of Justice, "The USA PATRIOT Act: Preserving Life and Liberty."

[95] George W. Bush, "Address to the Nation on the Terrorist Attacks," September 11, 2001.

> against the United States, our people overseas and here at home, with the view that he could, in fact, do so with impunity.[96]

Following September 11 there was no doubt in the minds of Washington decision-makers and DoJ officials that the US was at war, but a different kind of war against a different kind of enemy. The mutation in the nature of the threat and the enemy (a terrorist organization capable of organizing an attack as destructive as the one perpetrated by the conventional military forces of a nation) generated the need to adapt the rules of war so as to be able to counter this new enemy. A new legal framework altogether was therefore necessary to fight Al Qaeda. In the words of John Yoo:

> To pretend that rules written at the end of World War II, before terrorist organizations and the proliferation of know-how about weapons of mass destruction, are perfectly suitable for this new environment refuses to confront new realities.[97]

Al Qaeda was thus labeled as a non-state actor with the ability to inflict state-like damage. Nevertheless, as a terrorist organization, it did not guide its conduct by the same rules as states. Therefore, the US government did not consider the existing legal framework (US legislation or international treaties and customary international law) suitable to defeat this new enemy. A new legal framework ought to be developed. Moreover, the argument followed, the illegitimacy of Al Qaeda's actions made America's response legitimate;[98] Al Qaeda's 9/11 actions were the trigger (and legitimation) for any future action in the GWOT. In the words of President Bush:

> the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should be consistent with the principles of Geneva [the principles enshrined in the Geneva Conventions].[99]

Consequently, September 11's implications for both the law on the use of force (*jus ad bellum*) and the law of armed conflict or international humanitarian law (*jus in bello*) are consequential. Following 9/11, international humanitarian law suffered a massive

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[96] Dick Cheney cited in James M. Lindsay, "George W. Bush, Barack Obama and the Future of US Global Leadership," *International Affairs* 87, no. 4 (July 2011): 765-779, p. 767. The citation is from one of VP Cheney's interviews on NBC News, "Meet the Press," March 16, 2003 (for citation, see footnote 9 of the article).

[97] John Yoo, *War by Other Means*, p. 22.

[98] Ibid., pp. 64-9.

[99] The President obviously refers here to the Geneva Conventions. The White House, "Memorandum for The Vice President, The Secretary of State, The Secretary of Defense, The Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff. Subject: Humane Treatment of al Qaeda and Taliban Detainees," Washington, February 7, 2002, https://www.aclu.org/sites/default/files/field_document/20100615_dos_release_1_doc_-_already_released.pdf (accessed February 5, 2020), para. 1.

reinterpretation at the hands of the Bush Administration with multiple provisions of the Geneva Conventions (especially the ones on the prisoner of war status awarded to enemy combatants) being reinterpreted. This was not only due to a new kind of threat, generated by a new kind of enemy, but especially to the very changes in the nature of warfare; following 9/11, a new type of conflict emerged between the armed forces of a nation state and "a non-state actor that could wage international conflicts with all the power of a nation."[100] The United States therefore labeled the fight against Al Qaeda (extended to countries such as Afghanistan or Pakistan) as an international armed conflict,[101] conflict triggered by the September 11 attacks perpetrated by the terrorist organization. Following 9/11, the conclusion of the Bush Administration's Justice Department was that the GCs applied solely to states and civil wars and not to Al Qaeda since the terrorist organization was not a High Contracting Party to the CGs.[102] Moreover, the DoJ determined that there was no customary international law applicable to terrorist organizations or to acts of terrorism of the magnitude of the ones perpetrated on 9/11 since the US

> has never in its history consented to the idea that the laws of war protect terrorists. … has *not* agreed to an international practice of considering war with terrorists to be covered by the Geneva Conventions. *This* is the law of the land.[103]

Moreover, a January 2002 memorandum issued by the Office of Legal Council concluded that "customary international law has no binding legal effect on either the President or the

[100] John Yoo, *War by Other Means*, p. 25.
[101] "The 9/11 attacks and the struggle with al Qaeda represented an international armed conflict that extended beyond the territory of the United States." Ibid., p. 26. More precisely, "customary international law, as a matter of domestic law, does not bind the President, or restrict the actions of the United States military, because it does not constitute either federal law made in pursuance of the Constitution or a treaty recognized under the Supremacy Clause." Ibid. p. 2.
[102] According to a memorandum from the Office of Legal Counsel issued in January 2002 (just a few months after the 9/11 attacks), the "Geneva Conventions, like treaties generally, structure legal relationships between nation-States, not between nation-States and private, transnational or subnational groups or organizations. Article 2, which is common to all four Geneva Conventions, makes the application of the Conventions to relations between state parties clear" (pp. 4-5). Further on, the document unequivocally states that "Al Qaeda is not a High Contracting Party" (p. 9). Jay S. Bybee (Assistant Attorney General), "Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense: Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees," U.S. Department of Justice - Office of Legal Counsel, January 22, 2002, 1-37, https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf (accessed February 5, 2020). For an overview and legal analysis of the interagency legal process (between the Departments of Justice, State, and Defense) leading to the legal conclusion outlined, see Charles Garraway, "Afghanistan and the Nature of Conflict," *International Law Studies* 85, no. 1 (2009): 157-180. For another legal analysis, see Richard B. Bilder and Detlev F. Vagts, "Speaking Law to Power: Lawyers and Torture," *The American Journal of International Law* 98, no. 4 (October 2004): 689-695.
[103] John Yoo, *War by Other Means*, p. 36.

military because it is not federal law, as recognized by the Constitution."[104] References to the law of the land and the US Constitution made it evident that US domestic law and domestic interpretation of international agreements overruled international law (this approach towards international law comes as no surprise given the US institutional code on international law). The national interest trumped international law as coping with the threat at hand was of foremost importance even if it overruled longstanding international norms. In the words of John Yoo:

> it was far more important as a matter of policy not to fatally hamstring-intelligence gathering by imposing a legal process never meant for the case, even if diplomacy would seem to counsel otherwise. Appearances and the massaging of international sensibilities could wait.[105]

It was this type of (legal) thinking that guided the Bush Administration's actions in the Global War on Terror. Law became subsumed to the ultimate goal of safeguarding national security (just as outlined by the institutional code on international law, IL is subsumed to foreign policy imperatives).

Following the September 11 attacks, in the initial phases of the war on terror, President Bush decided that: the GCs (in their entirety) did not apply to America's conflict with Al Qaeda "in Afghanistan or elsewhere throughout the world"[106] since the terrorist organization was not a High Contracting Party to the Conventions; the provisions of the GCs did apply to the conflict with the Taliban (President Bush also reserved the prerogative to exercise its constitutional authority to wave the Conventions' applicability to other conflicts); decided that Common Article 3 of the GCs was not applicable to Al Qaeda or Taliban detainees given the article's applicability to non-international armed conflicts whereas the United States had determined that its conflicts with Al Qaeda and the Taliban amounted to an international armed conflict; just as the Taliban detainees, Al Qaeda fighters captured by US forces were labeled "unlawful combatants" (a concept long contested by the international legal community at large) and were denied prisoner of war status.[107] The reasoning behind all these measures was based on the premise that, following September 11, in Washington "it has

[104] Jay S. Bybee, "Memorandum for Alberto R Gonzales, …" January 22, 2002, p. 37. More precisely, "customary international law, as a matter of domestic law, does not bind the President, or restrict the actions of the United States military, because it does not constitute either federal law made in pursuance of the Constitution or a treaty recognized under the Supremacy Clause." p. 2. For legal analyses, see Charles Garraway, "Afghanistan and the Nature of Conflict," 157-180; and Richard B. Bilder and Detlev F. Vagts, "Speaking Law to Power," 689-695.
[105] John Yoo, *War by Other Means*, p. 40.
[106] The White House, "Humane Treatment of al Qaeda and Taliban Detainees," February 7, 2002, para. 2(a).
[107] Ibid., para. 2(d).

become accepted wisdom that future opponents are unlikely to abide by international humanitarian law."[108]

At the level of rhetoric, the US complemented these policies with statements[109] of support toward the GCs and its principles and the guarantee that all detainees labeled as "unlawful combatants" were treated humanely as per the principles of the Geneva Conventions.[110] Despite the fact that the US rhetorically supported the Geneva Conventions and its principles, practice proved otherwise. Moreover, regarding customary international law, the Office of Legal Counsel considered that following a tradition dating back to "at least Bush 41, … international law that did not take the form of a treaty was not federal law because it was not given such authority by the Constitution's Supremacy Clause."[111] A key question followed: "why should we follow Europe's view of international law, why should we not fall back on our traditions and historical state practices?"[112] At the end of the day, it was not the almost unanimous opinion of the international community that weighted in, but the need for flexibility in developing rules that could help the US cope with the new threat while also giving the enemy what the US considered to be a humane treatment. This, in the words of DoJ officials, aligned US actions with American values.[113] Critics of the Administration, on the other hand, consider that President Bush effectively decided to set aside the Geneva Conventions without asking Congress, by "asserting that a president could nullify, disregard, or reinterpret treaties on his own."[114] This kind of unilateral reliance on presidential power is now part of US (legal) precedent. Just as President Bush referenced precedent to justify and legitimize some of his actions in the Global War on Terror, any

[108] Michael Byers, *War Law*, p. 121.
[109] The very memorandum approving these measures stipulates that the United States shall "treat detainees humanely, including those whose are not legally entitled to such treatment" since America "has been and will continue to be a strong supporter of Geneva and its principles." The President directs the US Armed Forces to treat detainees "to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." The White House, "Subject: Humane Treatment of al Qaeda and Taliban Detainees," February 7, 2002, para. 3.
[110] John Yoo, *War by Other Means*, pp. 43-4. For instance, during a press conference at the Department of Defense, Secretary of Defense Donald Rumsfeld defended the Bush Administration's treatment of prisoners captured in the Global War on Terror: "Whatever the detainees' legal status may ultimately be determined to be, the important fact, from the standpoint of the Department of Defense, is that the detainees are being treated humanely. They have been, they are being treated humanely today, and they will be in the future. I'm advised that under the Geneva Convention, an unlawful combatant is entitled to humane treatment. Therefore, whatever one may conclude as to how the Geneva Convention may or may not apply, the United States is treating them -- all detainees -- consistently with the principles of the Geneva Convention. They are being treated humanely." U.S. Department of Defense, "DoD News Briefing - Secretary Rumsfeld and Gen. Pace" (news transcript, January 22, 2002), https://archive.defense.gov/transcripts/transcript.aspx?transcriptid=2254 (accessed August 17, 2019).
[111] John Yoo, *War by Other Means*, p. 33.
[112] Ibid.
[113] Ibid., p. 44.
[114] Charlie Savage, *Power Wars*, p. 46.

future President could cite President Bush's actions "in emergencies real or claimed, to act unilaterally, to keep things secret, or to defy a statutory or treaty constraint."[115]

In conducting the GWOT President Bush made evident his expansive view of executive power. "The White House is necessarily a hierarchy. No one is the president's equal."[116] Within the Bush Administration, key figures such as the President himself and his VP were strong proponents of an exclusive and inherent executive power.[117] As a matter of principle, both Cheney and Bush aimed at reversing the 1970s congressional reassertion of constitutional authority.[118] VP Cheney and John Yoo, Deputy Assistant Attorney General at the Office of Legal Counsel from the Justice Department, were proponents of the energetic executive model. The model was based on Alexander Hamilton's vision of an energetic executive, i.e. war powers ought to be vested in the President who can order speedy and decisive military action to safeguard national security.[119] To some legal experts, the energetic executive model is based on a flawed assumption since, in their view, Hamilton referred only to certain emergency situations (such as repelling a sudden attack against the United States) and not to unilateral military action, in general.[120] In the framework of the Global War on Terror, President Bush made exceptional claims to presidential authority when he suspended the Geneva Conventions, denied the writ of *habeas corpus* to GWOT detainees, made extensive use of signing statements or ordered the warrantless monitoring of messages from and to domestic parties in the US.[121] President Bush's actions in the GWOT also came from an expansive view on the Commander-in-Chief Clause.[122] The President did not hesitate to invoke unilateral power by referring to the Commander-in-Chief Clause and asserting foreign

[115] Ibid.
[116] Charles E. Walcott and Karen M. Hult, "White House Structure and Decision Making: Elaborating the Standard Model," *Presidential Studies Quarterly* 35, no. 2 (June 2005): 303-318, p. 304.
[117] For a detailed analysis, see Gordon Silverstein, "*The Law*: Bush, Cheney, and the Separation of Powers: A Lasting Legal Legacy?," *Presidential Studies Quarterly* 39, no. 4 (December 2009): 878-895.
[118] James P. Pfiffner, "*The Contemporary Presidency*: Constraining Executive Power: George W. Bush and the Constitution," *Presidential Studies Quarterly* 38, no. 1 (March 2007): 123-143, p. 124.
[119] Chris Edelson and Donna G. Starr-Deelen, "The Flawed Energetic Executive Model," *Presidential Studies Quarterly* 45, no. 3 (September 2015): 581-601, pp. 581-582.
[120] Ibid., p. 582-583. For more information on the energetic executive model and its misinterpretation of Hamilton, see pp. 583-587. For the need of unilateral executive action in emergency situations, see pp. 587-592.
[121] James P. Pfiffner, "*The Contemporary Presidency*: Constraining Executive Power," p. 123. The article also presents a succinct analysis of the mechanisms through which the Constitution constrains executive power.
[122] For detailed information, see David Gray Adler, "*The Law*: George Bush as Commander in Chief: Toward the Nether World of Constitutionalism," *Presidential Studies Quarterly* 36, no. 3 (September 2006): 525-540; and David Gray Adler, "*The Law*: Presidential Power and Foreign Affairs in the Bush Administration: The Use and Abuse of Alexander Hamilton," *Presidential Studies Quarterly* 40, no. 3 (September 2010): 531-544.

policy preeminence.[123] With his tendency to subsume constitutional limitations on the executive to national security imperatives, President Bush blurred the lines between the three branches of government by becoming lawmaker and judge apart from chief executive.[124]

The President's view on executive power therefore influenced the Administration's approach towards international law. This approach was largely generated by the President's post-9/11 attitude coupled with his Administration's reluctance to challenge his views. In the words of former Deputy Attorney General, James Comey:

> the pressures to bend the rules and to make convenient exceptions to laws when they got in the way of the president's agenda were tempting. And it was a temptation fed by the urgency of the topic and the nature of the people around the president, people who couldn't take the long view or understand the importance to the country of doing things the right way, no matter the inconvenience. … the importance of institutional loyalty over expediency and politics.[125]

Bush and Iraq: Foreign Policy Decision-Making

As outlined by his private operational code, George W. Bush came into office with little foreign policy expertise (to the extent that his first Secretary of State, Colin Powell, even wondered whether the President fully comprehended the implications of his policies);[126] to compensate for that, he packed his Administration with foreign and national security heavyweights (most of whom had also been members of Bush 41's Administration).[127] As the only MBA President (see his private operational code), President Bush's decision-making style was both delegative and process dependent. Although placing high value on discipline and internal order within his Administration, Bush allowed VP Cheney and Secretary of Defense Rumsfeld to act as free agents[128] and National Security Adviser Condoleezza Rice to go way beyond the NSA's role as honest broker.[129] Both VP Cheney and Secretary Rice were eager to reassure the President:[130] this increased decision-making biases within the Bush Administration as the President's policy preferences were hardly ever debated by his closest

[123] For a review of presidential power in national security, see Louis Fisher, "Presidential Power in National Security: A Guide to the President-Elect," *Presidential Studies Quarterly* 39, no. 2 (June 2009): 347-362. For President Bush, see p. 347.
[124] James P. Pfiffner, "Constraining Executive Power," pp. 140-141.
[125] James Comey, *A Higher Loyalty*, p. 73.
[126] John P. Burke, "*The Contemporary Presidency*: Condoleezza Rice as NSC Advisor: A Case Study of the Honest Broker Role," *Presidential Studies Quarterly* 35, no. 3 (September 2005): 554-575, p. 555.
[127] Ibid.
[128] Ibid., p. 573.
[129] Ibid., p. 555. See also, "It is the president's responsibility to create an atmosphere in which the White House staff and cabinet officers give the president all of the relevant evidence to help him make an informed decision. If they bend their advice to suit his preconceptions, they are not serving his best interests, nor the country's." James P. Pfiffner, "Did President Bush Mislead the Country in his Arguments for War with Iraq?," *Presidential Studies Quarterly* 34, no.1 (March 2004): 25-46, p. 45.
[130] John P. Burke, "*The Contemporary Presidency*: Condoleezza Rice as NSC Advisor," p. 573.

advisers. Just as President Obama, Bush 43 was "suspicious of bureaucracy and [did] not want to be fed decisions that have been pre-cooked, watered down or papered over by his advisors."[131] As outlined by his private operational code, President Bush was a confident leader and decision-maker who questioned the policy options presented by his advisers while at the same time not displaying curiosity about nitty-gritty policy details (as he preferred to delegate those details to other Administration members).[132]

The importance of the President's advisers cannot be underestimated. At the end of the day, the presidential staff organizes the information the chief executive receives: as different staff members provide different types of information, multiple sources of information can help the President gain a more informed overall view on the implications of his policies and, therefore, influence his decision-making.[133] Consequently, the formalization of the decision-making process is crucial to White House decision-making. The opportunity for face-to-face advocacy helps the quality of information the President receives,[134] while it also allows the heads of different departments to advocate for their proposed policy options.

A potential invasion of Iraq was first brought up by Bush Administration top officials while considering options for intervention in Afghanistan. Few days after September 11, President Bush gathered his national security team at Camp David to discuss intervention plans for Afghanistan when Paul Wolfowitz (deputy Secretary of Defense under Donald Rumsfeld) attempted to persuade the President that an Iraq invasion should also be part of the Global War on Terror. At that point, President Bush dismissed the option, but did not renounce it completely. Two years later, to a certain extent, the decision over Iraq was not whether to intervene, but how to legitimize and justify the intervention.[135] Iraq would become the embodiment of the Bush Doctrine:[136] prevention, unilateralism, and democracy promotion.[137] Part of the legitimation and justification process was obtaining a United

[131] Evan Thomas, "The Quiet Power of Condi Rice," *Newsweek*, December 15, 2002, https://www.newsweek.com/quiet-power-condi-rice-140693 (accessed May 25, 2020).
[132] John P. Burke, "*The Contemporary Presidency*: Condoleezza Rice as NSC Advisor," p. 573.
[133] Andrew Rudalevige, "The Structure of Leadership: Presidents, Hierarchies, and Information Flow," *Presidential Studies Quarterly* 35, no. 2 (June 2005): 333-360, pp. 345-346.
[134] Charles E. Walcott and Karen M. Hult, "White House Structure and Decision Making," p. 316.
[135] James M. Lindsay, "George W. Bush, Barack Obama and the Future of US Global Leadership," p. 769.
[136] For more information on the Bush Doctrine, see Chapter I.
[137] President Bush's 2002 commencement address at West Point perfectly summarizes his Doctrine: "For much of the last century America's defense relied on the cold war doctrines of deterrence and containment. In some cases those strategies still apply. But new threats also require new thinking. … we wait for threats to fully materialize we will have waited too long. … Yet the war on terror will not be won on the defensive. We must take the battle to the enemy, disrupt his plans and confront the worst threats before they emerge. In the world we have entered the only path to safety is the path of action. And this nation will act. … All nations that decide for aggression and terror will pay a price. We will not leave the safety of America and the peace of the planet at the mercy of a few mad terrorists and tyrants. We will lift this dark threat from our country and from the world. …

Nations Security Council Resolution approving the use of force against Saddam Hussein's regime. When the UNSC felt short of providing that legitimation, the Bush Administration formed a Coalition of the Willing and invaded Iraq without UN approval. With the post-invasion situation spiraling out of control, Bush redirected his foreign policy towards democracy promotion, the so-called "freedom agenda." In his second Inaugural, employing a language from the public operational code of the US President, President Bush declared to be "the policy of the United States to seek and support the growth of democratic institutions in every nation and culture, with the ultimate goal of ending tyranny in our world."[138]

Just as with other administrations and Presidents, historical precedents influenced decision-making. The ghost of Srebrenica loomed large over the decision to invade Iraq.[139] The idea that a delayed intervention would come at the expense of innocent civilians' lives could not escape the Bush Administration. Within the Bush Administration, the person with the most military experience (Secretary of State Colin Powell) was the one most reluctant to use military force in Iraq.[140] Since the 1990-1991 Gulf War (when he was Chairman of the Joint Chiefs of Staff), Powell had understood the usefulness of UNSC resolutions: internationally, they help garner support for an international coalition; internally, they help bringing Congress along[141] and justifying the Administration's use of force. The rest of the Administration was largely in favor of a prompt Iraq invasion. President Bush failed to manage divergent views among his advisers; as the "MBA President" his preferred leadership model was the management model which deferred decision-making to his Cabinet. Given his lack of direct involvement, he sometimes lost control over his national security team. The same lack of involvement generated deadlocks in decision-making.[142] Such an attitude helped VP Cheney and Secretary of Defense Rumsfeld whose pro-Iraq intervention alliance was difficult to control not only by Secretary Powell but also by NSA Condoleezza Rice.[143]

Bush's managerial / delegative decision-making style and his risk-prone attitude towards decision-making (generated by his belief that decisions are to be made under uncertainty) were part of the President's private operational code (consequence of the time

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By confronting evil and lawless regimes we do not create a problem, we reveal a problem. And we will lead the world in opposing it." George W. Bush, "Commencement Address at the United States Military Academy in West Point, New York."

[138] George W. Bush, "Inaugural Address," January 20, 2005.

[139] Derek Chollet, *The Long Game: How Obama Defied Washington and Redefined America's Role in the World* (New York: Public Affairs, 2016), pp. 134-137.

[140] Peter W. Rodman, *Presidential Command*, pp. 197-198.

[141] Ibid., p. 199.

[142] Ibid., pp. 277-278.

[143] Ibid., p. 233.

spent at Harvard Business School and at the helm of the Texas Rangers).[144] Bush's expectations for policy making coherence and discipline in execution within his Administration were not fulfilled precisely because of his belief that the President should focus on the big picture and delegate the details to his team. Bush 43 planned to emulate his father's Administration by installing a collegial type of decision-making. To produce good policy outcomes, a collegial type of decision-making presupposes (to a certain extent) that the President coordinates the different policy views within his Administration. Bush 43's impressive national security team, packed with seasoned national security veterans, failed to reach consensus precisely because of the lack of coordination from the President who was unable to balance the very strong and experienced personalities part of his team.[145]

This allowed for strong and decisive decision-makers such as VP Cheney and Secretary Rumsfeld to impose their policy preferences. As already stated, one of the most restrained members of Bush's Administration when it came to the use of force, in general, and the intervention in Iraq, in particular, was State Secretary Powell. Given his military background, Powell was accustomed to respecting the chain of command and therefore obeyed the President's decisions. He also did not try to develop a personal relationship with the President and only started having one-on-one meetings with him when he learnt that Secretary Rumsfeld had such meetings on a regular basis.[146] Given that President Bush's operational code placed high value on personal relations, Powell's reluctance allowed VP Cheney and Secretary Rumsfeld to have the President's ear. Both Cheney and Rumsfeld shared a similar worldview and decision-making style with the President given their time in both government and the private sector (for instance, VP Cheney was a former White House Chief of Staff, Secretary of Defense, congressional leader, and CEO of major private companies). Another influential member of the Administration was NSA Condoleezza Rice, a close family friend of President Bush (once she became Secretary of State during the second Bush Administration the weight of the State Department in decision-making increased).[147] Despite different influences within his Administration, in the months prior to the Iraq intervention Bush sided with Secretary Powell and decided to try to obtain an UN resolution to approve the use of force against Saddam Hussein's regime. He did so to defer to his State Secretary despite VP Cheney's insistence that such a resolution would not be

[144] Ibid., pp. 234-235.
[145] Ibid., pp. 234-237. Bush "wanted his preferred outcome to emerge from the process and to reflect the consensus of his government." See, p. 249.
[146] Ibid., pp. 238-241.
[147] Ibid., pp. 248 & 270.

necessary. Powell, on the other hand, insisted on the symbolic importance of an UN resolution that would have shown to the international community that the Bush Administration made an effort to avoid going to war. Despite not agreeing that such a resolution would be necessary, VP Cheney and Secretary Rumsfeld saw the wisdom behind seeking the UNSC's approval before intervening in Iraq.[148] Apart from the pressures coming from within his own Administration, President Bush decided to seek a second UN resolution that would unequivocally approve the use of force against the regime of Saddam Hussein following external pressures from UK Prime-Minister, Tony Blair (who, in return, was also being pressured by his own party in the UK, the Labour Party).[149] Just as outlined by the institutional operational code on international law, law was subsumed to foreign policy interests: President Bush's decision to seek an UN Resolution approving its preferred policy in Iraq was rather based on such a resolution's legitimizing force (i.e. on how such a resolution could be instrumentalized to help fulfill foreign policy objectives) than on the belief that international law ought to be obeyed.

As already stated, the idea of invading Iraq was years in the making. It first came from Secretary Rumsfeld's deputy, Paul Wolfowirz, while the Administration was discussing intervention plans for Afghanistan. Just days after 9/11, in a meeting at Camp David, Wolfowirz asked: "Shouldn't we go after Iraq? Isn't Iraq a part of this?"[150] Despite rebuking the idea at first, a few days after the Camp David meeting (also in September 2001), President Bush asked Secretary Rumsfeld to stay behind after an Oval Office meeting and asked the following of him: "I want you to develop a plan to invade Iraq. … Do it outside the normal channels. Do it creatively so we don't have to take so much over."[151] With President Bush holding a personal grudge against Saddam Hussein for his failed attempt of assassinating his father during the 90s, VP Cheney (Secretary of Defense during Operation Desert Storm) publicly going against Saddam Hussein, and with Paul Wolfowitz's Camp David intervention in mind, journalist Peter Baker concluded:

> There's no question those guys were focused on Saddam Hussein long before 9/11, … And that they were focused on regime change. They signed on to that as a policy.[152]

[148] Chris Whipple, *The Gatekeepers*, pp. 239 & 243.
[149] Peter W. Rodman, *Presidential Command*, p. 260.
[150] Chris Whipple, *The Gatekeepers*, p. 237.
[151] Ibid., pp. 237-238.
[152] Ibid., p. 239.

September 11 did nothing but to provide the perfect context. It also strengthened the idea that it was unacceptable for a regime enemy to the United States with the capacity to possess an arsenal of chemical, biological, and maybe nuclear weapons to be left in power.[153]

President Bush wrote in a letter to his father after giving the green light to Operation Enduring Freedom: "In spite of the fact that I had decided a few months ago to use force, … I know I have taken the right action … Iraq will be free, the world will be safer."[154] Bush's grandiose and rather messianic vision of foreign policy coupled with his strong belief in the power of democracy (both part of his private operational code) were two of the main factors behind the Iraq invasion. In Secretary Powell's words, within the Bush Administration there was "this thinking – I'll call it that, nothing more – that if only we could make a democracy out of Iraq, the whole Middle East would change."[155] President Bush's first CIA Director, George Tenet, pointed out that countries' decision to go to war are based on (geo)political considerations or their worldview. In the case of the Bush Administration and the Iraq invasion the worldview involved President Bush's belief that the Middle East had to be remade into a region dominated by democratic regimes (belief consequence of his private operational code).[156] Bush 41's National Security Adviser, Brent Scowcroft, summarized best the Bush Administration's and the President's own approach behind the Iraq invasion:

> After 9/11, I think they said, 'Look, this is a nasty world, we're the only superpower and while we've got that unprecedented power, we ought to use it to remake the world. And we're in this mess. Why don't we take this little jerk of a dictator, kick him out, make Iraq a democracy, it'll spread to the region, and we will have done something for the world.'[157]

The Obama Administration and International Law

A former constitutional law professor, President Obama was adamant that his Administration would take a different approach towards law than the one of his predecessor. Obama's first White House Counsel, Gregory B. Craig, stated that the new Administration was "charting a new way forward, taking into account both the security of the American people and the need to obey the rule of law."[158] The differences between rhetoric and actual governing would become evident early on during the first Obama Administration. President Obama exhibited

[153] Ibid., p. 238.
[154] Ibid., p. 245.
[155] Ibid., p. 255.
[156] George Tenet cited in Ibid.
[157] Ibid., p. 245.
[158] Charlie Savage, "Obama's War on Terror May Resemble Bush's in Some Areas," *The New York Times*, February 17, 2009, https://www.nytimes.com/2009/02/18/us/politics/18policy.html (accessed August 14, 2019).

both continuity and change in combating terrorism[159] Changes were first made evident at the level of rhetoric[160] as Obama tried to rule out the "war on terror" syntagma. For instance, in December 2009, during a speech at West Point, he made no reference to the war on terror, but only to the two wars America was involved in at the time (nevertheless, he did employ elements part of the public operational code of the US President, elements that were indicative of the Global War on Terror rhetoric).[161] Later on during his presidency Obama considered that terrorism remained "the most direct threat to America at home and abroad," but labeled as "naïve and unsustainable"[162] an US foreign policy strategy based on invading countries that harbor terrorism.

Regarding the role international law plays in combating terrorism, as a rational and calculated decision-maker (as made evident by his private operational code), the President exhibited a rather pragmatic view on international law: while equating America's exceptionalism with the country's willingness to affirm international law, Obama presented international law as a tool to be employed when America faced less than direct threats to its national security. When the country faced core threats to its national security, unilateral action (implying the use of force) was oftentimes the preferred tool to be employed.[163] Just as President Bush before him, President Obama therefore drew from the institutional operational code in considering international law a foreign policy tool.

In the Obama Administration, the President was the chief lawyer. As made evident by his private operational code, a former University of Chicago constitutional law professor, prior to becoming President, Obama was a proponent of limited executive prerogatives in the

[159] Richard M. Pious, "Prerogative Power in the Obama Administration: Continuity and Change in the War on Terrorism," *Presidential Studies Quarterly* 41, no. 2 (June 2011): 263-290, pp. 282-288.
[160] For general elements of Obama's rhetoric, see Kevin Coe and Michael Reitzes, "Obama on the Stump: Features and Determinants of a Rhetorical Approach," *Presidential Studies Quarterly* 40, no. 3 (September 2010): 391-413.
[161] See Barack Obama, "Remarks at the United States Military Academy at West Point, New York" (speech, New York, December 1, 2009), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/287174 (accessed May 22, 2020). Even though in his speeches he refrained from employing the "war on terror" syntagma, President Obama did draw upon rhetorical elements part of President Bush's "war on terror" rhetoric. For more information, see Richard Jackson, "Culture, Identity and Hegemony," pp. 401-405.
[162] Barack Obama, "Commencement Address at the United States Military Academy in West Point, New York" (speech, New York, May 28, 2014), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/305525 (accessed May 22, 2020).
[163] "On the other hand, when issues of global concern do not pose a direct threat to the United States, when such issues are at stake -- when crises arise that stir our conscience or push the world in a more dangerous direction but do not directly threaten us -- then the threshold for military action must be higher. In such circumstances, we should not go it alone. Instead, we must mobilize allies and partners to take collective action. We have to broaden our tools to include diplomacy and development; sanctions and isolation; appeals to international law; and, if just, necessary and effective, multilateral military action. In such circumstances, we have to work with others because collective action in these circumstances is more likely to succeed, more likely to be sustained, less likely to lead to costly mistakes." Ibid.

framework of constitutional and legal constraints. As Senator, Obama stated that he wanted "to send a signal to this administration [the Bush Administration] that …, President Bush is not above the law. No President is above the law."[164] During his presidential campaign, Obama expressed his concerns regarding President Bush's use of executive power stating that law must guide all governmental actions, that three co-equal branches composed the government, and that the legislative must oversee the executive, especially when it takes actions via executive orders.[165] In candidate Obama's own words:

> I taught constitutional law for ten years. I take the Constitution very seriously. The biggest problems that we're facing right now has to do with George Bush trying to bring more and more power into the executive branch and not go through Congress at all. And that's what I intend to reverse when I'm President of the United States of America.[166]

During the electoral campaign, Obama attacked Bush's unilateral application of controversial policies.[167] Interestingly enough, by the time Obama took office, many of the policies his predecessor had enacted after September 11 had been amended. What remained were concerns of the civil liberties groups and the public opinion regarding the post-9/11 security state.[168] Regarding the use of force, also during the electoral campaign, the future President exhibited a limited view on the use of force stating that under the Constitution the President cannot authorize unilaterally a military attack (without Congressional approval) unless to stop "an actual or imminent threat to the nation."[169]

Unlike President Bush, more ideologically driven, President Obama exhibited a higher degree of concern towards the rule of law; also, as a former civil rights lawyer, Obama was particularly concerned about the protection of civil liberties. Bush and Obama exhibited different conceptions on both the role of law and the concept of rule of law. Starting with the President, the Bush Administration did not approach government in a lawyerly fashion. As previously presented, George W. Bush was the only President to hold an MBA degree; a former CEO and private-sector manager, just like the other key figure in his Administration,

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[164] Barack Obama, "Nomination of General Michael Hayden," Congressional Record: May 25, 2006 (Senate), Page S5296, https://fas.org/irp/congress/2006_cr/obama052506.html (accessed August 17, 2019).
[165] Charlie Savage, *Power Wars*, p. 51.
[166] Barack Obama cited in Charlie Spiering, "Flashback: In 2008, Obama Criticized George W. Bush For Going Around Congress With Executive Action," *Washington Examiner*, February 13, 2014, https://www.washingtonexaminer.com/flashback-in-2008-obama-criticized-george-w-bush-for-going-around-congress-with-executive-action (accessed August 17, 2019).
[167] Charlie Savage, *Power Wars*, p. 55.
[168] Ibid.
[169] Barack Obama cited in David A. Fahrenthold, "On Debt and Libya, It's President Obama vs. Senator Obama," *The Washington Post*, June 24, 2011, https://www.washingtonpost.com/politics/on-debt-and-libya-its-president-obama-vs-senator-obama/2011/06/22/AGhK4AjH_story.html?noredirect=on (accessed August 17, 2019).

VP Dick Cheney, Bush believed that the President's role was the one of a "decider." As exhibited by his private operational code in both his personal life and as decision-maker, Bush trusted his instincts, did not second guess his decisions, and was not found of extensive meetings and deliberations prior to deciding on a course of action. In his own words, he was not a "textbook player," but a "gut player." VP Cheney was an expert in handling governmental bureaucracy, oftentimes sidestepping policy processes to silence internal dissent and push forward his preferred policies. The legal teams in both the White House and the Justice Department were packed with like-minded lawyers who, just as the President and the VP, strongly favored the expansion of executive powers. All these factors sometimes led to a certain disregard towards the law.[170] All legal questions had a similar answer: "the president could do whatever he deemed necessary to protect national security."[171]

The Obama Administration, on the other hand, was packed with policymakers with a legal background. Both President Obama and VP Biden were lawyers by formation. The Obama Administration's lawyerish approach to decision-making became evident from the transition period when Tom Donilon, Obama's future Deputy National Security Adviser and subsequent National Security Adviser, started coordinating legal policy matters.[172] Consultations with lawyers from governmental agencies were part and parcel of the National Security Council decision-making process Donilon would design. The "*interagency national security lawyers group*"[173] would thus be revived during the Obama Administration with policymakers constantly received advice from lawyers throughout the bureaucratic decision-making process. Lawyers worked in parallel with policymakers and oftentimes took the lead in defining the framework within which decisions were made. John Brennan, Obama's Chief Counterterrorism Adviser and CIA Director, described this interagency process at length:

> The interagency lawyers will get together to look at what is being proposed and then have that discussion, that is very rich, about whether or not, what is being proposed is consistent with the law and consistent with best practice, or are we actually sort of now going in new areas and new directions, … What we have now within U.S. government, at the insistence of the president and others, is that type of discourse among lawyers. We want to make sure that we

[170] Charlie Savage, *Power Wars*, p. 63. For a different perspective, see Curtis A. Bradley, "The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy," *Duke Journal of Constitutional Law & Public Policy* 4, no. 1 (2009): 57-75.
[171] Charlie Savage, *Power Wars*, p. 63.
[172] For the way the Obama Administration was shaped and the role of the National Security Advisor, see John P. Burke, "The National Security Advisor and Staff: Transition Challenges," *Presidential Studies Quarterly* 39, no. 2 (June 2009): 283-321. For Donilon's predecessor, James Jones's role as administrator within the Obama Administration, see Kevin Marsh, "The Administrator as Outsider," 827-842.
[173] Charlie Savage, *Power Wars*, p. 64. For more information on this process, see pp. 64-65.

> hear all the different views and perspectives. That provides us [with] a good sense of what those legal parameters are within which we can work.[174]

In the words of Tom Donilon,

> Virtually every issue we faced had significant legal issues – many of first impression, … We never had a meeting that didn't include the legal adviser to the National Security Council or her assistant. My own training as a lawyer was essential to my ability to function as national security adviser because the legal issues were so pervasive and because the president and the vice president were lawyers and addressed these legal issues rigorously.[175]

"Lawyerliness shaped Obama's governance as a matter of style and thought, not just process."[176] Both Obama Administrations included several lawyers in top decision-making positions: apart from the VP, secretaries and heads of governmental agencies (such as Obama's Secretaries of State, Hillary Clinton and John Kerry), or several White House Chiefs of Staff were lawyers by training.[177] This had a great influence on decision-making given the difference in thinking between politicians and lawyers. The latter

> [w]hen analyzing a problem, they try to identify all the issues and grapple with the strongest arguments against their own position. They demand good writing. They attempt to keep options open as an end in itself. They prize rigorous adherence to process. They consider it a judicial virtue to move incrementally and stay within the narrow facts at hand.[178]

The influence of a lawyerish approach on the decision-making processes and the policies resulting from those processes is further explained by Abram Chayes, renowned US international law scholar,

> an administration that wants to legitimize its actions with legal arguments finds that legal concerns organize and mold its deliberations, even when military, diplomatic, and political considerations are also important to the ultimate outcome. … There is a continuous feedback between the knowledge that the government will be called upon to justify its action and the kind of action that can be chosen.[179]

Despite of the weight of legal considerations on the Obama Administration's foreign policy decision-making, John Brennan (similar to Jack Goldsmith and John Yoo) admits that he

> never found a case that our legal authorities, or legal interpretations that came out from that lawyers group, prevented us from doing something what we thought was in the best interest of the United States to do … Can there be shifts [in the law]? Yes. And those shifts are affected whether we're attacked, you know, on 9/11, or in other types of threats and

[174] John Brennan cited in Ibid., p. 278.
[175] Tom Donilon cited in Ibid., p. 67.
[176] Ibid., p. 65.
[177] Ibid.
[178] Ibid.
[179] Abram Chayes, *The Cuban Missile Crisis* (New York: Oxford University Press, 1974), p. 103, cited in Ibid., p. 67.

> challenges to our system. … That's why a Harold Koh and a Jeh Johnson, … they really want to wrestle it to the ground. Is there a right answer? Truth is elusive – as is 'right'.[180]

In the beginning of his presidency, Obama seemed not to share Bush's worldview that "the world was a battlefield."[181] In the words of renowned law scholar and Legal Adviser in the Department of State during the first Obama Administration, Harold Koh, during his presidency Obama realized that "it was easier to take purist stances from the faculty lounge than from a position of responsibility."[182] The threats against the American people were real and they required real time answers. Obama would thus proceed to amply employing the whole array of governmental tools at his disposal. Many of his liberal supporters would soon become disappointed with his actions.[183] Obama is thus the perfect example of how social and institutional constraints bend decision-makers' personal traits - how the institutional and the public operational codes mold the private operational code of the person holding the role of President of the United States. Obama exemplifies how leaders come to embrace the public and institutional operational codes of the office they hold and even employ them as tools to fulfil their political agendas.

Just to provide an example, Obama authorized a drone strike against Anwar al-Awlaki, an Al Qaeda affiliated American citizen who had not been previously trialed and condemned. This drone strike resulting in the killing of an American citizen protected by the US Constitution raised questions as to the differences in international law approach between the Bush and Obama Administrations. The Bush Administration acted based on the premise that the existing legal framework prior to 9/11 was outdated and, to a certain extent, non-applicable; the President, as head of the executive and Commander-in-Chief, was entitled to decide on the right course of action based on his constitutional prerogatives. President Obama, on the other hand, focused on interpreting the legal framework he inherited from President Bush; his initial attempt was to re-establish legal supremacy in foreign policy and national security decision-making. Nonetheless, both approaches generated a similar end result, i.e. when the President deemed a certain course of action necessary, legal advisers created the legal justification for such course of action.[184] Consequently, it can be concluded that both leaders made use of all three operational codes to fulfil their political agendas; it

[180] John Brennan cited in Charlie Savage, *Power Wars*, pp. 278-279.
[181] Ibid., p. 241. See previous chapter for further information on Obama's worldview and perception on threats.
[182] Harold Koh cited in Ibid., p. 242.
[183] Ibid., p. 61.
[184] Ibid., p. 151.

must be outlined though that the institutional and public operational codes molded the private codes of each individual holding the office of President of the United States.

Obama, Libya, and Syria: Foreign Policy Decision-Making

Apart from a significant increase in targeted killings conducted by drones and taking place even outside combat areas and the use of force as part of an international coalition to defeat the Islamic State,[185] other Obama Administration instances regarding the use of force were just as controversial: the usage of military force in 2011 to enforce the UN-mandated no-fly zone in Libya[186] or Obama's 2013 decision not to use military force against Syrian President, Bashar Al-Assad to impose the previously drawn red line on the usage of chemical weapons against civilians.[187] In using force, as a general rule, Obama shifted "away from substantial troop deployments to a lighter footprint style[188] of warfare"[189] oftentimes via targeted killings executed by drones.

Faced with a potential genocide in Libya, key American partners (such as France or the UK) were calling for military intervention to save the lives of innocent civilians. President Obama nevertheless was skeptical as to the success of such a military intervention to enforce the UN-mandated no-fly zone.[190] His national security team presented him with three major options: inaction, which would have entailed leaving the UK and France on their own to enforce the no-fly zone; support for the French and British initiative; or expanding the military objective to include civilian protection, thus increasing the military effort.[191] Decision-making does not take place in a vacuum. The "ghost" of Iraq was in the room haunting the decision-makers even though this time around "the threat was imminent, the

[185] Curtis A. Bradley, "President Obama's War Powers Legacy," p. 625.
[186] UNSC Res. 1973 (2011).
[187] During a press conference at the White House on August 20, 2012, President Obama had this to say about the situation in Syria: "We have been very clear to the Assad regime, but also to other players on the ground, that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus. That would change my equation. … We have communicated in no uncertain terms with every player in the region that that's a red line for us and that there would be enormous consequences if we start seeing movement on the chemical weapons front or the use of chemical weapons. That would change my calculations significantly." Barack Obama, "Remarks by the President to the White House Press Corps" (remarks, Washington, D.C., August 20, 2012), White House Office of the Press Secretary, https://obamawhitehouse.archives.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps (accessed August 16, 2019).
[188] What Goldsmith and Waxman called a "Light Footprint Warfare" is characterized by "drone strikes, cyber attacks and Special Operations raids that made use of America's technological superiority" as "the new, quick-and-dirty expression of military and covert power." David E. Singer, "Global Crises Put Obama's Strategy of Caution to the Test," *The New York Times*, March 16, 2014, https://www.nytimes.com/2014/03/17/world/obamas-policy-is-put-to-the-test-as-crises-challenge-caution.html (accessed August 16, 2019).
[189] Curtis A. Bradley, "President Obama's War Powers Legacy," p. 625.
[190] Derek Chollet, *The Long Game*, pp. 97-98.
[191] Ibid., p. 98.

intelligence undisputed, and the world was clamoring for America to do something."[192] At that point, President Obama feared the consequences of inaction for America's leadership, especially in the case of a massive humanitarian crisis. In the President's own words:

> I'm as worried as anyone about getting sucked into another war. … But if Benghazi falls, we'll get blamed. We can't underestimate the impact on our leadership.[193]

This being said, Obama did not equate the situation in Libya with a vital national interest. Cautious by nature (as already made evident by his private operational code) and with the two wars in Afghanistan and Iraq on his mind, Obama agreed with his back then Defense Secretary, Robert Gates, that the United States risked getting into a morass.[194] He also considered that bureaucracies tend to drive decision-makers toward binary decisions by providing the pros and cons for a certain course of action in black and white terms.[195] Labeling Libya as not being "so at the core of US interests that it makes sense for us [the US] to unilaterally strike the Qaddafi regime,"[196] the President proposed a hybrid approach: he thus widened the intervention's scope from enforcing a no-fly zone to protecting civilians by attacking Libyan ground forces while at the same time deciding that the US would lead the intervention in its initial phases only to later on allow NATO-led forces to take the lead (with US support). The US would thus not put troops on the ground or lead strike missions.[197] The Obama Administration concluded that such a limited operation, with "unique capabilities" did not reach the threshold of "hostilities" mentioned in the War Powers Act and did not require Congressional approval (which the Administration did not seek).[198]

Following military operations for the enforcement of the no-fly zone and the killing of Muammar al-Gaddafi, Libya fell into severe political instability.[199] The lack of a post-intervention strategy in the 2011 Libyan intervention was one of the factors that influenced the Obama Administration's approach towards Syria.[200] On August 28, 2013, negotiations within the UNSC on a formal response to the chemical attacks on the civilian population failed due to China and Russia's opposition; on the 29th, British Prime Minister, David

[192] Ibid.
[193] Ibid.
[194] Ibid., p. 99.
[195] Ibid., p. 100.
[196] Ibid., p. 99.
[197] Ibid., pp. 99-100.
[198] Ibid., p. 105. For further information, see also Chapter III.
[199] The question still remains as to whether the 2011 Libyan intervention answered humanitarian imperatives or it targeted regime change. For an analysis concluding that the intervention actually targeted regime change, see Stephen R. Weissman, "*The Law*: Presidential Deception in Foreign Policy Making: Military Intervention in Libya 2011," *Presidential Studies Quarterly* 46, no. 3 (September 2016): 669-690.
[200] Derek Chollet, *The Long Game*, p. 137.

Cameron, lost a vote in the House of Commons that would have authorized him to use force against the Assad regime (France nonetheless still remained pro-intervention); also, on August 29th, 140 US Congress members (21 Democrats included) signed a letter asking the President to seek Congressional authorization for the use of military force against the regime of Bashar al-Assad;[201] on August 30th, after authorizing targets during an NSC meeting, President Obama decided against an US intervention in Syria. On August 31, 2013, in a speech given in the White House Rose Garden, the President summarized his decision not to enforce his self-imposed red line, but to seek Congressional authorization for a Syrian intervention:

> But having made my decision as Commander in Chief based on what I am convinced is our national security interests, I'm also mindful that I'm the President of the world's oldest constitutional democracy. I've long believed that our power is rooted not just in our military might, but in our example as a government of the people, by the people, and for the people. And that's why I've made a second decision: I will seek authorization for the use of force from the American people's representatives in Congress.[202]

Reports indicate that President Obama might have considered internal and external concerns about the legitimacy of a unilateral military strike lacking both UNSC approval and Congressional authorization. Nevertheless, to a large extent, the explanation for Obama's decision lays with his wish to avoid the political consequences of yet another military involvement in the Middle East.[203]

By some accounts, removing Bashar al-Assad from office was an early objective of the Obama Administration. To avoid the US being trapped into another Middle Eastern quagmire, the Administration planned a "managed transition" via diplomatic means.[204] Once the Syrian crisis unfolded, Obama was not necessarily adamant to avoid a military intervention; he was rather concerned about the implications of such an intervention for his Administration's global strategy given that "decisions are not made in isolation from other interests."[205] Within the Obama Administration, decision-makers (such as back then National Security Adviser Susan Rice) were perfectly aware of the dangers of inaction since it entailed that Bashar al Assad would continue to possess a chemical weapons arsenal. Therefore, not

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[201] Douglas L. Kriner, "*The Contemporary Presidency*: Obama's Authorization Paradox: Syria and Congress's Continued Relevance in Military Affairs," *Presidential Studies Quarterly* 44, no. 2 (June 2014): 309-327, p. 310.
[202] Barack Obama, "Remarks on the Situation in Syria" (speech, Washington, D.C., August 31, 2013), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/304717 (accessed May 26, 2020).
[203] Douglas L. Kriner, "*The Contemporary Presidency*: Obama's Authorization Paradox," pp. 310-311.
[204] Derek Chollet, *The Long Game*, pp. 128-129. For further information on the factors constraining America's actions in Syria, see pp. 129-132.
[205] Ibid., p. 133.

enforcing Obama's red line could jeopardize both the security of American citizens as well as America's standing within the international community.[206]

As former Secretary of State, Hillary Clinton, put it there were no easy solutions when it came to Syria:

> Do nothing, and a humanitarian disaster envelops the region. Intervene militarily, and risk opening Pandora's Box and wading into another quagmire, like Iraq. Send aid to the rebels, and watch it end up in the hands of extremists. Continue with diplomacy, and watch it run headfirst into a Russian veto. None of these approaches offered much hope of success.[207]

The ghosts of Srebrenica and Iraq loomed large over the Obama Administration:[208] non-intervention could lead to a humanitarian catastrophe; intervention could have been the first step towards an Iraq-type of protracted war.[209] In the end, the Syrian conundrum could be summarized as a choice between America's perceived moral responsibility to intervene for humanitarian purposes to prevent mass atrocities and President Obama's reluctance to do so out of fear of a new quagmire in the Middle East.[210] In defending Obama's decision not to intervene, NSA Susan Rice differentiated between America's "special obligations in instances of genocide"[211] and the strategic wisdom of military interventions. In the end, she argued, mass atrocities aside, what weighted more heavily on the President's rational decision not to intervene was the damage an American intervention in the Syrian civil war would have caused to America's strategic interests[212] by the implicating the US in another (potentially protracted) conflict in the Middle East.

Asked whether the humanitarian catastrophe was not compelling enough to determine him to use force in Syria, Obama replied: "It is, I think, a false notion that somehow we were in a position to, through a few selective strikes, prevent the kind of hardship that we've seen

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[206] Jennifer Epstein, "Rice: Inaction in Syria Dangerous," *Politico*, September 9, 2013, https://www.politico.com/story/2013/09/susan-rice-syria-096474 (accessed May 25, 2020).
[207] Hillary Rodham Clinton, *Hard Choices*, p. 389, cited in Derek Chollet, *The Long Game*, p. 127. For the clash in opinions over Syria between Hillary Clinton and Robert Gates, see Derek Chollet, *The Long Game*, p. 136.
[208] National Security Adviser, Susan Rice, declared that the Administration's preferred course of action in Syria would not resemble actions taken in Kosovo, Afghanistan, Iraq, or Libya meaning that America was not about to go into another war. Jennifer Epstein, "Rice: Inaction in Syria Dangerous."
[209] Derek Chollet, *The Long Game*, p. 136.
[210] Robert Malley and Jon Finer, "The Long Shadow of 9/11: How Counterterrorism Warps U.S. Foreign Policy," *Foreign Affairs* (July/August 2018), https://www.foreignaffairs.com/articles/2018-06-14/long-shadow-911 (accessed April 27, 2020).
[211] Conor Friedersdorf, "Susan Rice: The U.S. Must Fight Terrorists Abroad in Iraq, Syria and Beyond," *The Atlantic*, June 26, 2016, https://www.theatlantic.com/politics/archive/2016/06/susan-rice-on-brexit-the-orlando-shooting-and-isis/488849/ (accessed May 25, 2020).
[212] Ibid.

in Syria."[213] Rational as ever, the President clearly made a cost-benefit calculus when deciding not to intervene: the calculus considered the extent of the necessary military effort versus the potential outcome to be achieved on the ground. When being asked whether the military effort would have been worth it, the President recognized his country's limitations: "Well, it's not that it's not worth it. It's that, after a decade of war, you know, the United States has limits."[214] Obama wanted to depart from the US post-Cold War model of military interventions which entailed the United States leading military operations (assisted by its allies).[215] As made evident by his private operational code and decision-making philosophy, Obama did not want to overstretch America's military capabilities by intervening in a country where the US did not have a core national security interest. In not allowing humanitarian imperatives to become a reason for military intervention, Obama stayed true to one of his foreign policy approaches during the campaign:

> if that's the criteria [humanitarian intervention] by which we are making decisions on the deployment of US forces, then by that argument you would have three hundred thousand troops in the Congo right now, where millions have been slaughtered as a consequence of ethnic strife, which we haven't done.[216]

International law was nonetheless part of the debate on whether to intervene in Syria or not (as the Administration needed a legal basis for a potential military intervention). At NSC level, the Principals agreed with the need for a military intervention to show Bashar al-Assad (and the world) that attacking innocent civilians with chemical weapons comes at a high price. Upholding international moral values nonetheless conflicted with the Administration's national interests given the lack of viable options.[217] President Obama even approved targets for attack in Syria during an NSC meeting prior to taking a final walk with his Chief of Staff, Denis McDonough, and deciding against the intervention. Susan Rice summarized Obama's legal conundrum (from the perspectives of both international law and US constitutional law):

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[213] Scott Pelley, "Obama Calls on Russia to Pull Troops Back from Ukraine Border, Begin Negotiations," *CBS News*, March 28, 2014, https://www.cbsnews.com/news/obama-calls-on-russia-to-pull-troops-back-from-ukraine-border-begin-negotiations/ (accessed April 28, 2020).

[214] "And our troops who've been on these rotations and their families and the costs and the capacity to actually shape, in a sustained way, an outcome that was viable without us having a further commitment of perhaps another decade, you know, those are things that the United States would have a hard time executing. And it's not clear whether the outcome in fact would have turned out significantly better." Ibid.

[215] Derek Chollet, *The Long Game*, p. 100.

[216] Barack Obama cited in Ryan Lizza, "The Consequentialist: How the Arab Spring Remade Obama's Foreign Policy," *The New Yorker*, April 25, 2011, https://www.newyorker.com/magazine/2011/05/02/the-consequentialist (accessed May 6, 2020). As pointed out in the article, the citation comes from one of Obama's 2007 campaign rallies in New Hampshire.

[217] Susan Rice, "In Syria, America Had No Good Options," *The Atlantic*, October 7, 2019, https://www.theatlantic.com/ideas/archive/2019/10/susan-rice-how-obama-found-least-bad-syria-policy/599296/ (accessed May 25, 2020).

> We did not have a clearly valid international legal basis for our planned action, …, but we could argue that the use of banned chemical weapons made our actions legitimate, if not technically legal. Domestically, we could invoke the president's constitutional authority to use force under Article II, but that would trigger a 60-day clock under the War Powers Act—meaning that if our actions lasted longer than 60 days, he would need to obtain congressional approval to continue military action. Therefore, before we used any significant force in Syria to address its chemical-weapons use, the president thought it best to invest members of Congress in the decision, and through them the American people.[218]

Given the rational decision-maker that he was, creating a constitutional precedent for his Administration's major military interventions was, for President Obama, subsumed to strategic imperatives: thinking of his broader Middle East strategy, Obama considered using this precedent to ask Congress for an authorization to use military force against Iran (in case the situation would have emerged).[219] Moreover, Obama was keenly aware that a lighter military intervention would have not produced major effects (such as significantly damaging the Syrian chemical weapons) or changed the course of the civil war; fearing that the deployment of ground forces would lead to a second Iraq quagmire, aware of the length and scope of military actions in Afghanistan and of the disastrous consequences of the intervention in Libya, Obama wanted the Congress involved in a new decision to militarily intervene in another country.[220]

As in previous instances, throughout the debate over Syria, the President consulted with his advisers. Within the Administration, Secretary of State John Kerry, CIA Director John Brennan, and UN Ambassador Samantha Power argued for a stronger US involvement (either by arming rebels, conducting targeted strikes against Assad's forces or establishing safe zones for civilians). On the other hand, NSA Susan Rice, White House Chief of Staff Denis McDonough, Defense Secretary Ash Carter, and Joint Chiefs of Staff Chairmen Martin Dempsey and Joe Dunford were weary of further involvement of US military forces.[221]

Obama's approach nonetheless changed with the rise of ISIS. The President perceived the terrorist organization to be a clear threat to American interests, a threat significant enough to warrant a change in Obama's cost-benefit analysis on America's use of force. The President gave the green light for a train-and-equip program (ran by the Pentagon) as well as for air strikes and the insertion of special operations forces in Syria.[222] Just as before, the Obama Administration approached the situation in Syria incrementally out of the desire to

[218] Ibid.
[219] Ibid.
[220] Ibid.
[221] Given that she had worked in the Clinton Administration when the Rwanda genocide took place, it must be outlined that, initially, NSA Susan Rice had been a promoter of a more sustained US military involvement with the purpose of preventing another humanitarian catastrophe of the magnitude of Rwanda genocide. Ibid.
[222] Derek Chollet, *The Long Game*, p. 148.

avoid America's past mistakes[223] such as being trapped into another protracted war involving US ground forces. Moreover, with his ISIS approach the President also made evident his approach towards the use of force (and a key component of his foreign policy): under President Obama, America used force when its core interests were at stake, but seeked to mobilize allies when other challenges to international order emerged[224] (such was the case with Libya and, to a certain extent, Syria).

Last but not least, it must be outlined that, in the case of Libya, the President argued that a Congressional approval was not required since his Administration's actions did not reach the threshold of hostilities. President Obama therefore proceeded to acting unilaterally.[225] On the other hand, Obama asked for authorization to intervene in Syria[226] and for post-authorization for his actions against ISIS.[227] John Yoo criticized President Obama for asking Congressional approval to intervene in Syria claiming that "the Framers did not lodge the war power solely with Congress" as Congressional approval tends to be a lengthy process since the legislative does "not act with unity, secrecy, and speed."[228]

Drones and the Use of Force

Drones were first employed in the war on terror during the Bush Administration. It was President Obama nonetheless the one that started using drones extensively both for surveillance purposes, but also to eliminate threats to US national security. The usage of drones to combat terrorism was justified as "part of a war against battlefield terrorists."[229] According to John Yoo, killing terrorists was lawful under the existing state of war following the 9/11 attacks:

> Killing the enemy is what warfare is. Targeted attacks further the goals of the laws of war by eliminating the enemy's leaders with minimal but more effective force and reducing harm to innocent civilians.[230]

[223] Ibid., p. 154.
[224] Barack Obama, "Address to the Nation on United States Strategy to Combat the Islamic State of Iraq and the Levant Terrorist Organization (ISIL)" (speech, Washington, D.C., September 10, 2014), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/307345 (accessed May 22, 2020).
[225] For Obama in Libya, see Chris Edelson and Donna G. Starr-Deelen, "The Flawed Energetic Executive Model," pp. 592-594.
[226] Ibid., pp. 594-595.
[227] Ibid., pp. 595-598.
[228] John Yoo, "Right on the Constitution, Wrong on the Policy," *National Review*, August 31, 2013, cited in Ibid., p. 582.
[229] Jack Devine, interview by Jonathan Masters, "Are Cold War Spy-Craft Norms Fading?," *Council on Foreign Relations*, March 15, 2018, https://www.cfr.org/interview/are-cold-war-spy-craft-norms-fading (accessed March 19, 2018).
[230] John Yoo, *War by Other Means*, p. 51.

According to the US government therefore, given the state of war between the US and Al Qaeda targeting the organization's leadership was not assassination, but a lawful wartime action.[231] Historically, Israel and the US (more considerably, after September 11) supported the use of force against another country's territory if it harbored terrorists. For instance, following the killing of Yassin and al-Rantissi by Israeli forces,[232] White House spokesman, Scott McClellan, unequivocally declared: "Israel has the right to defend itself."[233] Extra-judicial killings (i.e. killings conducted without the sanctioning of a court of law) nevertheless are banned by both customary international law and human rights treaties.[234] America's approach towards targeted killings as a tool of war prompted some international law experts to state that, in the way it conducted itself in the post-911 era, the US undermined the very "scope of humanitarian law."[235]

In a clear example of the differences between the American and European perspectives on international law, European legal scholars tend to regard targeted killings as extrajudicial killings, considered illegal under international law. The case of Yassin and Rantissi made evident once more these divergent views between Europe and the US.[236] As

[231] Ibid., p. 58.

[232] Abdel-Aziz al-Rantissi was the leader of the Islamist group Hamas for only 25 days prior to being killed by Israeli helicopter gunships in April 2004. Sheikh Ahmed Yassin, al-Rantissi's predecessor, had shared a similar death in March 2004. For more information, see Derek Brown, "Abdel-Aziz al-Rantissi," *The Guardian*, April 19, 2004, https://www.theguardian.com/news/2004/apr/19/guardianobituaries.israel (accessed August 13, 2019).

[233] The concise press statement issued by the Office of the Press Secretary following al-Rantissi's death stated: "As we have repeatedly made clear, Israel has the right to defend itself from terrorist attacks. Hamas is a terrorist organization that attacks civilians, and that claimed responsibility for the suicide attack today that killed one and injured other Israeli guards at the Erez crossing." Nevertheless, the US cautioned that it "is gravely concerned for regional peace and stability. The United States strongly urges Israel to consider carefully the consequences of its actions, and we again urge all parties to exercise maximum restraint at this time. This is especially true at a moment when there is hope that an Israeli withdrawal from Gaza will bring a new opportunity for progress toward peace. All parties should focus on the positive, concrete steps needed now to make the Gaza withdrawal successful." White House Office of the Press Secretary, "Statement Regarding Abdel Aziz Rantissi," April 17, 2004, https://georgewbush-whitehouse.archives.gov/news/releases/2004/04/text/20040417-3.html (accessed August 13, 2019).

[234] For a comprehensive review of the existing jurisprudence in both human rights law and international humanitarian law, see William J. Aceves, "When Death Becomes Murder: A Primer on Extrajudicial Killing," *Columbia Human Rights Law Review* 50, no. 1 (Fall 2018): 116-184. The prohibition against extrajudicial killings is a norm of customary international law as both an "extension to the right to life norm" (Ibid., p. 119) and as an international humanitarian law principle concerning the right to life in armed conflicts. In the particular case of the US, civil liability for extrajudicial killing and torture is determined through the Torture Victim Protection Act (Ibid., p. 119). For further information on international law treaties protecting the right to life, see United Nations Human Rights Office of the High Commissioner, "International Standards," https://www.ohchr.org/EN/Issues/Executions/Pages/InternationalStandards.aspx (accessed August 13, 2019).

[235] Dan Belz, "Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?," p. 127.

[236] Following the death of al-Rantissi, European leaders did not hesitate to condemn what they labeled as an act of assassination. The back then EU High Representative for Common Foreign and Security Policy, Javier Solana stated that: "The European Union has consistently condemned extrajudicial killings. Israel has a right to protect its citizens from terrorist attacks, but actions of this type are not only unlawful, they are not conducive to lowering tension." The UK Foreign Secretary, Jack Straw, declared: "The British government has made it

per the European perspective, extra-judicial killings go against "global standards of due process" that

> require that suspected criminals be apprehended, prosecuted and convicted before being punished. Capital punishment is permitted, but death sentences can only be imposed by duly constituted courts. Yassin and Rantissi may well have incited and organized suicide bombings, but they should have been captured and prosecuted rather than simply killed.[237]

From the US perspective:

> Israel's actions were legal because the killings were aimed at preventing further terrorist attacks. The international law of self-defence - as opposed to that of human rights - provides the framework for this analysis. The policy of 'targeted killing' is seen as a part of the global war on terrorism. In this respect, it is comparable to the 2001 invasion of Afghanistan, which the United States similarly justified as an act of self-defence.[238]

As already stated, the US started employing drones in the GWOT during President Bush.[239] After September 11, given the new security imperatives, the CIA was gradually transformed from an intelligence agency into a "killing machine, an organization consumed with man hunting."[240] September 11 led to the emergence of a new military-intelligence complex: the military took on human spying whereas the CIA focused on military-like operations. During the Bush Administration, a new type of war making emerged out of this complex, a type of war making perfected by President Obama who preferred it over the "boots on the ground" approach defined by high costs, regime change, and long-term American occupation of foreign countries.[241] In the words of former CIA director, John Brennan: "instead of the 'hammer' America now relies on the 'scalpel'."[242]

Immediately after the attacks of September 11, President Bush signed a secret order bestowing upon the CIA powers it had lost following the controversies of the 1970s.[243] The practice of secret wars was therefore re-established by President Bush and would later on be fully embraced by President Obama. The CIA Director thus became "a military commander

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repeatedly clear that so-called 'targeted assassinations' of this kind are unlawful, unjustified and counter-productive." He was seconded by the French Foreign Ministry (declaring "once again that extrajudicial executions contravene international law and are unacceptable."), and the Italian Foreign Minister, Franco Frattini ("Italy, like the whole of the European Union, has always condemned the practice of targeted assassinations, which contribute to furthering the spiral of hatred and violence.") For these and more international reactions to the same case, see *BBC News*, "Rantissi Killing: World Reaction," Last Updated: April 18, 2004, http://news.bbc.co.uk/2/hi/middle_east/3635907.stm (accessed August 13, 2019).

[237] Michael Byers, *War Law*, p. 68.

[238] Ibid., p. 70.

[239] For more information, see The Bureau of Investigative Journalism, "The Bush Years: Pakistan Strikes 2004-2009," https://www.thebureauinvestigates.com/drone-war/data/the-bush-years-pakistan-strikes-2004-2009 (accessed August 18, 2019).

[240] Mark Mazzetti, *The Way of the Knife*, p. 4.

[241] Ibid., pp. 5 & 8.

[242] John Brennan cited in Ibid., p. 5.

[243] Ibid., p. 9.

running a clandestine, global war with a skeleton staff and very little oversight."[244] Following the October 2001 intervention in Afghanistan, President Bush, Vice President Cheney, and their close advisers in the White House were the sole members of a small group deciding on the capture and killing of US enemies in Afghanistan.[245] Secretary of Defense Rumsfeld also played a crucial part in this new kind of war. Two legal documents came to the aid of the Department of Defense and its Secretary. According to a loophole in the Intelligence Authorization Act of 1991, the Pentagon could send troops to any country the US was at war with or would be sometime in the future.[246] The second document was none other than the AUMF the US Congress passed following 9/11 giving the United States President power to wage war against the 9/11 perpetrators and their supporters. Based on these two documents, the Department of Defense could virtually wage a global war.[247]

The concept of self-defense (against an imminent threat) was central to the legal justification provided by lawyers of both Bush and Obama Administrations. During the '80s, Reagan Administration lawyers wrote secret memos arguing that targeting and killing terrorists plotting to attack the United States did not amount to assassination,[248] but to acts of self-defense; so did legal counselors in the State and Defense Departments as well as the White House from September 11 onwards.[249] America's drone war started after September 11 sidelining many questions regarding "assassination, covert action, and the proper use of the CIA in hunting America's enemies."[250] Several factors influenced US decision-makers' preference towards drones as they were

> the ultimate weapon for a secret war. … a tool that killed quietly, a weapon unbound by the normal rules of accountability in combat. Armed drones would allow American presidents to order strikes on remote villages and desert camps where journalists and independent monitoring groups could not go. The strikes were rarely discussed publicly by a spokesman standing at a podium, but they were cheered in private by politicians from both parties hoping to flex American muscle without putting American lives at risk.[251]

The revelations regarding the CIA detention centers and interrogation techniques provided another incentive for using armed drones. The neatness and secrecy defining targeted killings

[244] Ibid., p. 13.
[245] Ibid.
[246] Ibid., pp. 76-77.
[247] Ibid., pp. 63-83.
[248] For more information, see Matthew Spurlock, "The Assassination Ban and Targeted Killings," *Just Security*, November 5, 2015, https://www.justsecurity.org/27407/assassination-ban-targeted-killings/ (accessed August 18, 2019).
[249] Mark Mazzetti, *The Way of the Knife*, p. 57.
[250] Ibid., p. 99. For further information on the development of the drone program, see Ibid., pp. 85-101.
[251] Ibid., pp. 99-100.

by drones (risk-free for American soldiers conducting a remote war)[252] made it evident to Washington decision-makers that it was more beneficial to erase America's enemies instead of jailing them.[253]

President Bush's legacy to his successor involved not only the US army's overt, boots on the ground type of military involvement in Iraq and Afghanistan, but also a covert war extended to other countries such as Pakistan. In July 2008, President Bush signed a secret order allowing the CIA to escalate its covert actions in Pakistan.[254] President Obama's escalation of this drone war unilaterally waged in Pakistan's tribal areas is one of the main lines of his counterterrorist policy.[255] Just like his predecessor, Obama pledged that America would act alone if need be, especially in the Afghanistan/Pakistan area which he considered the actual forefront in the Global War on Terror. In the President's own words: "If we have actionable intelligence about high-value terrorist targets and President Musharraf [back then President of Pakistan] won't act, we will."[256]

The CIA played a crucial role in Obama's foreign policy, as a tool in his secret drone war.[257] Given the CIA's central role in Obama's drone war, decision-making in the White House during the Obama years was influenced by the CIA Director.[258] In the first Obama Administration, key players regarding the decision-making process were former chief counterterrorism adviser, John Brennan, and former CIA Director, Leon Panetta. Panetta was influential (and successful) in advancing the CIA's interests[259] acting more like a military leader in charge of a targeted killings campaign, than as the head of an intelligence agency.[260] Brennan, former foreign policy and intelligence adviser to Obama during his 2008 presidential campaign would become his chief counterterrorism adviser during his first term in office and eventually, CIA Director. He was a key player in Obama's drone war by assisting the President to manage the targeted killings program from the White House.[261]

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[252] See the Economy of Force argument in Ibid., p. 192.
[253] Ibid., p. 121.
[254] Ibid., p. 171.
[255] Ibid., p. 267.
[256] Barack Obama, "The War We Need To Win" (speech, Washington, D.C., August 1, 2007), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/277525 (accessed May 5, 2020).
[257] Mark Mazzetti, *The Way of the Knife*, p. 235. For detailed information, see pp. 214-235.
[258] Mark Mazzetti explains that "when it came to questions about war and peace in Pakistan, it was what the CIA believed that really counted." Ibid., p. 263. See also p. 292. One of Obama Administration's main rules in foreign policy and national security was to keep any divergences about such matters hidden from the public eye. Ibid., p. 235.
[259] Ibid., p. 220.
[260] For instance, Panetta managed to get approval over a list of CIA paramilitary operations which basically entailed building a new Air Force of drones. Ibid., p. 228.
[261] Ibid., p. 217.

Several factors contributed to Obama's decision to boost the role of drones and targeted killings as part of his counterterrorism efforts. Seven years after 9/11, the Bush Administration's practices eroded public opinion support and became overly expensive (especially the wars in Iraq and Afghanistan). During his 2008 presidential campaign Obama criticized President Bush's approach to counterterrorism and pledged to change the focus of the Global War on Terror by withdrawing troops from Iraq and refocusing the GWOT towards Afghanistan and the search for Osama bin Laden, closing down the Guantanamo detention center, and putting an end to the controversial CIA coercive interrogation program. Continuing to develop the drone program emerged as a fitted solution. Early into his presidency, Obama realized that he had inherited something similar to a secret army, one that would allow him to wage war without the publicity and economic costs of a military campaign. Moreover, the political conditions were also ripe for the usage of drones as Republicans were in no position to criticize an ambitious antiterrorist campaign (and the Democrats had not yet publicly criticized the usage of drones).[262]

The CIA's involvement in the war on terror had major implications for the use of force[263] (and international humanitarian law). The White House gave the CIA unparalleled powers regarding the conduct of hostilities on the battlefield such as leeway in conducting missile strikes even when the target's identity was uncertain. The rules covering the signature strikes allowed for those strikes to take place "based on patterns of activity deemed suspicious,"[264] thus lowering even further the bar for killing. Furthermore, the generous definition provided to the concept of combatant (i.e., all military-aged males were considered enemy fighters in areas of known military activity)[265] allowed the Obama Administration to

[262] Ibid., pp. 218-220.
[263] Ibid., pp. 290-91.
[264] Ibid., p. 290.
[265] Ibid., pp. 290-91. Through Executive Order 13732, President Obama directed the Director of National Intelligence to release a summary of the number of strikes taken by the US against terrorists outside of active hostilities areas and the number of victims (both combatants and non-combatants). As per the document released by the DNI, the two terms are defined as follows: "Non-combatants are individuals who may not be made the object of attack under applicable international law. The term "non-combatant" does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of U.S. national self-defense. Males of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants." Director of National Intelligence, "Summary of 2016 Information Regarding United States Counterterrorism Strikes Outside Areas of Active Hostilities," https://www.dni.gov/files/documents/Newsroom/Summary-of-2016-Information-Regarding-United-States-Counterterrorism-Strikes-Outside-Areas-of-Active-Hostilities.pdf (accessed August 14, 2019).

claim that its military actions resulted in a small number of civilian casualties as oftentimes civilians were equated to legitimate military targets.[266]

Regarding targeted killings, within the Obama Administration, lawyers and decision-makers were daunted by a question their predecessors had been asking themselves for decades: what was the legal authority for sending troops into a country the US was not at war with (e.g., Pakistan)?[267] Such an act would amount to a blatant breach of the principle of sovereignty, one of the seven principles of international to be found in Article 2 of the UN Charter. Defense Secretary, Donald Rumsfeld, had asked himself this very question in the first days of the Global War on Terror.[268] The CIA, with its ability to conduct covert actions and therefore infiltrate everywhere in the world, turned out to be the obvious answer: turning military personnel into CIA operatives (and vice versa), thus blurring the line between the military and spies. This led to a decade-long evolution of US war waging that saw its apex during the operation that killed Osama bin Laden: a military operation carried out by Navy SEALS troops under the Title 50[269] authority of the CIA to launch covert actions, with CIA Director, Leon Panetta, in charge of the operation.[270]

Apart from raising multiple legal questions, the usage of drones changes the face of warfare. Critics of targeted killings via drone strikes consider that they transform war into a risk-free enterprise conducted via remote control thus lowering the standards for declaring

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[266] Concerning the combatant non-combatant distinction, let us say a few words regarding some relevant terminology. International humanitarian law treaties define terms such as "combatant," "prisoner of war," and "civilian," but not "unlawful/unprivileged combatant/belligerent." A definition for "unlawful/unprivileged combatant/belligerent" proposed by a Legal Adviser at the Legal Division of the International Committee of the Red Cross, is "all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy." Knut Dörmann, "The Legal Situation of "Unlawful/Unprivileged Combatants"," *International Review of the Red Cross* 85, no. 849 (March 2003): 45-74, p. 46. This definition includes civilians directly participating in hostilities and militias or volunteer corps members not part of regular armed forces, but related to one of the parties to the conflict. See pp. 46-7.

[267] Mark Mazzetti, *The Way of the Knife*, pp. 286-287.

[268] Throughout the Global War on Terror, Donald Rumsfeld fought for the Department of Defense to remain a major player in all important decisions regarding the conflict. After 9/11, both Congress and the 9/11 Commission (set up to investigate the causes of the tragedy and make recommendations on how to avoid future similar attacks) pressured for the creation of the role of Director of National Intelligence. The DNI was to basically preside over the intelligence community. A seasoned Washington insider since the 1960s, Rumsfeld appealed to his Congressional contacts making sure that the role of DNI is neutralized and much of the budgetary power on military operations remained with the Defense Department. See Ibid., p. 224. President Bush sided with those in favor of a weak DNI, one that would not be able to exert a strong authority over the intelligence community. See Donald M. Snow and Patrick J. Haney, *U.S. Foreign Policy*, p. 128.

[269] The Covert Action Statute does not differentiate between institutions that can undertake covert actions. Consequently, "targeted killings conducted by the military that fall within the definition of "covert action" set forth in 50 U.S.C. § 413(b) are subject to the same statutory constraints as are CIA covert actions. 50 U.S.C. § 413b(e)." For more information, see *Lawfare*, "Distinguishing CIA-Led from Military-Led Targeted Killings," https://www.lawfareblog.com/distinguishing-cia-led-military-led-targeted-killings (accessed August 14, 2019).

[270] Mark Mazzetti, *The Way of the Knife*, pp. 286-287.

war.[271] Lowering the bar for war, changing the rules of engagement in combat, and redefining what a war zone is are only some of the legal challenges posed by this new tool of warfare.[272] The manner in which the battlefield is defined is another legal question behind the usage of drones. Such questions also have implications for international humanitarian law. For instance, a clear delineation of the conflict zone makes targeting and killing enemy combatants lawful. Moreover, it should be established whether, at the time of the attack, the targets were directly participating in hostilities or not. This poses a legal conundrum for targeted killings since many of the targets of such killings are terrorist leaders assassinated even outside of active hostilities.[273] The principle of distinction, at the very core of IHL, obliges states to differentiate between combatants and civilians. One of the core concerns regards civilians and their potential participation in conflict: when can civilians be considered active participants in hostilities? Oftentimes drone strikes make such differentiation difficult.[274] Another pertinent question is whether, in cases when the Geneva Conventions do not apply because the War on Terror does not amount to an armed conflict, customary IHL is applicable. In such cases, some experts state, "customary humanitarian law adds nothing and should be seen to add nothing."[275]

Chapter Summary: Operational Codes, Executive Power, and Foreign Policy Decision-Making in the Bush and Obama Administrations

This chapter was dedicated to analyzing the connection between the three operational codes previously outlined, foreign policy decision-making, executive power, and compliance with the law on the use of force (and, to a lesser extent, international humanitarian law). Throughout the chapter, the three operational codes previously outlined in this research (institutional operational code on international law, public operational code of the US President, and private operational codes of George W. Bush and Barack Obama) were employed to explain decision-making and compliance with two branches of international law in the Bush and Obama Administrations. As outlined, both Presidents exhibited extensive views on both executive power and the use of force. Whereas the magnitude of the use of force was similar for both Presidents as they both made extensive use of military force, the approach was rather different: President Bush started two wars in Afghanistan and Iraq showcasing the "boots-on-the-ground" type of use of force, while President Obama preferred

[271] Ibid., p. 100.
[272] Ibid.
[273] Emily Crawford, "Armed Conflict, International," para. 44.
[274] Gabor Rona, "Interesting Times for International Humanitarian Law," p. 65.
[275] Ibid., p. 69.

a lighter footprint, employing drones to conduct targeted killings to safeguard national security. The two Presidents coincided in employing international law as a foreign policy tool and in their selective interpretation of international law provisions (both regarding *jus ad bellum* and *jus in bello*).

Fear of another terrorist attack was the main detonator of foreign policy actions during the Bush Administration with significant consequences for international law compliance and the way President Bush employed executive power. During a meeting of the National Security Council, President Bush told Attorney General John Ashcroft "Don't let this happen again."[276] Jack Goldsmith's depiction of this phrase's significance should be quoted at length for it provides a clear description of the state of affairs in the Bush Administration:

> This simple sentence set the tone for everything Ashcroft's Justice Department would do in the aftermath of 9/11. Bush was not telling Ashcroft to do his best to prevent another attack. He was telling him to stop the next attack, period – whatever it takes. The Commander in Chief's order had an enormous impact on the Attorney General, who would invoke it to me years later when approving or urging me to approve aggressive counterterror actions. Through Ashcroft and other senior advisors, the President's personal mission to check Islamist terrorism at any cost trickled down and pervaded the administration.[277]

Together with the urge to prevent another September 11, the power structures within the Administration were also key in determining the Administration's perception of both international law and executive power. In this regard, the crucial roles of VP Dick Cheney and Defense Secretary Donald Rumsfeld are not to be underestimated. During President Bush's second term, VP Cheney even fused his office with the one of the President. This unprecedented arrangement (traditionally, the President and the VP have different offices in terms of personnel) gave Cheney enormous power in the decision-making process behind major foreign policy decisions. One major legal figure in coining legal decisions was David Addington, Cheney's legal counselor and Chief of Staff. Addington shared similar views on the Constitution and executive prerogatives with President Bush himself, his boss (the VP – as FBI Director Comey reports in his memoirs, they both shared the view that "the war on terrorism justified stretching, of not braking, the written law),"[278] and White House Legal Counsel and future Attorney General (following Ashcroft's departure), Alberto Gonzalez. The four of them, together with Attorney General, John Ashcroft, strongly supported the expansion of (unilateral) presidential power. September 11 did nothing but to provide the

[276] Jack Goldsmith, *The Terror Presidency*, p. 74.
[277] Ibid., p. 75.
[278] James Comey, *A Higher Loyalty*, p. 111.

context and the rationale for the expansion of executive authority.[279] Jack Goldsmith remembers that both the President and the VP

> told top aides at the outset of the first term that past presidents had "eroded" presidential power, and that they wanted "to restore it so that they could "hand off a much more powerful presidency" to their successors.[280]

Moreover, according to Jack Goldsmith, the Administration

> got policies wrong, ironically, because it was excessively legalistic, because it often substituted legal analysis for political judgment, and because it was too committed to expanding the President's constitutional powers.[281]

John Yoo, Head of the State Department's Office of Legal Counsel after 9/11 and a Yale legal scholar known for his scholarly research in favor of broad presidential prerogatives regarding the use of force (even in the absence of congressional approval), was of the opinion that the Constitution bestowed upon the President broad military prerogatives (except for the ones explicitly given to Congress). Congress therefore could not limit those powers especially in case of an attack against the United States.[282]

Altogether, the Bush Administration was characterized by a deep distrust in international law which was perceived as a weapon America's enemies would employ to limit its freedom of action on the international arena. The best example in this case is Secretary of Defense Donald Rumsfeld who would go as far as referring to international law as a war weapon by employing the term "lawfare."[283] Initially developed by Air Force Brigadier General Charles Dunlap, lawfare is "the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective."[284] Rumsfeld dreaded a potential "judicialization of international politics"[285] considering that

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[279] Nancy V. Baker, "*The Law*: The Impact of Antiterrorism Policies on Separation of Powers: Assessing John Ashcroft's Role," *Presidential Studies Quarterly* 32, no. 4 (December 2002): 765-778.
[280] Jack Goldsmith, *The Terror Presidency*, p. 89.
[281] Ibid., p. 102.
[282] Ibid., p. 97.
[283] Jack Goldsmith, former Assistant Attorney General for the Office of Legal Counsel, is co-founder of the "Lawfare" blog showcasing legal and policy analysis of national security issues. He co-authors the blog together with Robert Chesney (Professor at Texas Law School where he teaches courses on US national security and constitutional law) and Benjamin Wittes (Senior Fellow of Governance Studies at Brookings Institute). Wittes complements Rumsfeld by defining "lawfare" as "the use of law as a weapon of conflict and, perhaps more importantly, to the depressing reality that America remains at war with itself over the law governing its warfare with others." For an evolution of the term "lawfare" see *Lawfare*, "About Lawfare: A Brief History of the Term and the Site," https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site (accessed January 20, 2020).
[284] Charles Dunlap cited in Jack Goldsmith, *The Terror Presidency*, p. 58. The citation comes from an address Dunlap gave at the 2005 Air and Space Conference and Technology Exhibition (transcript no longer available online). For information, see footnote 50, p. 229 in *The Terror Presidency*.
[285] Ibid., p. 59.

> the weak "enemy" using asymmetrical legal weapons was not al Qaeda, but rather our very differently motivated European and South American allies and the human rights industry that supported their universal jurisdiction aspirations. Rumsfeld saw this form of lawfare as a potentially powerful check on American military power. He also saw it in more personal terms. … Rumsfeld believed that opponents incapable of checking American military power would increasingly rely on lawfare weapons instead. And as the widely detested critic of "Old Europe," he could expect to be at the top of the target list.[286]

Regarding the use of force, President Obama played by the so-called "Washington playbook"[287] when he decided that the United States would support the intervention in Libya. On the other hand, he felt liberated when deciding against enforcing his own "red line" in Syria (a decision criticized by his Administration).[288] In his own words, Obama described the "Washington playbook" as

> … a playbook that comes out of the foreign-policy establishment. And the playbook prescribes responses to different events, and these responses tend to be militarized responses. Where America is directly threatened, the playbook works. But the playbook can also be a trap that can lead to bad decisions.[289]

This citation summarizes Obama's belief that military force is not a panacea for national security problems. This belief steams from his view on national security threats. As previously outlined, Obama designed his foreign policy based on a core-periphery distinction between threats, with the core being represented by existential threats to US national security (e.g. Al-Qaeda, a nuclear Iran, or existential threats to one of US' key allies (e.g. Israel)); Obama did not deem the situation in Syria to be an existential threat.[290] With a very pragmatic view on national security and an "overly cerebral commitment to the notion of strategic patience,"[291] Obama based his decision-making on whether there was "a core national-security issue at stake?"[292] For instance, despite its confidence in the power of democracy, Obama was aware of its limits and (very much unlike his predecessor) rejected

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[286] Ibid.
[287] Jeffrey Goldberg, "The Obama Doctrine."
[288] For a detailed account of the decision-making behind the non-intervention in Syria, see Ben Rhodes, *The World As It Is: A Memoir of the Obama White House* (New York: Random House, 2018), pp. 223-240. Rhodes was one of Obama's longest serving aides: he had worked as a speechwriter for Obama's 2008 presidential campaign and went on to becoming Obama's Deputy National Security Adviser for Strategic Communications and Speechwriting. In his book, he outlines the dissent coming from National Security Adviser, Susan Rice, and UN Ambassador, Samantha Power regarding President Obama's decision not to impose his own red line. For a concise account on behalf of Ben Rhodes, see Ben Rhodes, "Inside the White House During the Syrian 'Red Line' Crisis," *The Atlantic*, June 3, 2018, https://www.theatlantic.com/international/archive/2018/06/inside-the-white-house-during-the-syrian-red-line-crisis/561887/ (accessed January 17, 2020). Also see, James Taranto, "Obama's 'Red Line' Debacle From the Inside," *Wall Street Journal*, June 8, 2018, https://www.wsj.com/articles/obamas-red-line-debacle-from-the-inside-1528497718 (accessed January 17, 2020).
[289] Jeffrey Goldberg, "The Obama Doctrine, R.I.P.."
[290] Jeffrey Goldberg, "The Obama Doctrine."
[291] Jeffrey Goldberg, "The Obama Doctrine, R.I.P.."
[292] Michael Lewis, "Obama's Way."

the idea that it was America's duty to end tyranny in the world.[293] It was Obama's firm belief that as President he should not place US soldiers in harm's way unless there was a direct threat to the United States. For Obama "dropping bombs on someone to prove that you're willing to drop bombs on someone is just about the worst reason to use force."[294] Obama hesitated resorting to military force only when faced with challenges he did not deem as direct threats to national security; when those direct threats did emerge, he did not hesitate to act unilaterally. This is what made the President one of the "most successful terrorist-hunter[s] in the history of the presidency, one who will hand to his successor a set of tools an accomplished assassin would envy."[295] The usage of drones was one of the most contentious policies of Obama's time in the White House. In this respect, Obama shared the view of CIA Director, John Brennan, that sometimes taking a life is a must to save others. Obama's view of just-war theory was "near-certainty of no collateral damage."[296]

As it can been concluded from this chapter, neither President Bush, nor President Obama were shy in making extensive use of their executive prerogatives in countering terrorism. Since 9/11, the War on Terror was conducted at the initiative of the executive branch and with the passivity of the legislative. Especially in the immediate aftermath of September 11, Congress wholeheartedly supported all actions and legislation proposed by President Bush. This followed a practice dating back to the Cold War era when "war-making authority largely devolved to the president as commander-in-chief."[297]

Following September 11, the Bush Administration set to modify the legal framework to enable the President to counter terrorism more effectively. Rhetorically, the Obama Administration initially exhibited confidence that it could revert certain Bush era policies and legal practices in the Global War on Terror. This proved easier said than done given the legal-political dimension of terrorism-related issues such as torture, targeted killings, surveillance, etc., issues with multiple implications for compliance with the rule of law in the 21st century. In national security matters, there is a thin balance between "what *should* be done and what *can* be done."[298] The "should" is prescribed by the law; the "can" is the actual conduct of an Administration on a daily basis. Conduct which is mainly based on legal

[293] Jeffrey Goldberg, "The Obama Doctrine."
[294] For Obama, this is the shortest way to losing national credibility: "Obama generally believes that the Washington foreign-policy establishment, which he secretly disdains, makes a fetish of "credibility"—particularly the sort of credibility purchased with force." Ibid.
[295] Ibid.
[296] Ibid.
[297] H. W. Brands, "Introduction," *Presidential Studies Quarterly* 34, no. 1 (March 2004): 47-49, p. 48.
[298] Charlie Savage, *Power Wars*, p. 38.

interpretation; nevertheless, as outlined, in national security matters legal interpretation is heavily imbued by political imperatives as the personnel in charge of interpreting the law has sworn allegiance to the law while at the same time being politically accountable. The war on terror provides a special framework not only for war conduct but also for legal interpretation:

> in this twenty-first-century conflict against terrorism, especially, legal theory is malleable. Where the law is ambiguous, government lawyers make policy in another way: they decide which interpretations of the law are reasonably available and which are not. They can be caught between wanting to maximize flexibility for their president and wanting to make their advice conform to a principled worldview, especially when that advice is secret and so not subject to the check of public scrutiny. In matters of national security, the line that separates policy and politics from law has grown blurry.[299]

As outlined throughout this chapter, in defending America's core interests, both Presidents Bush and Obama were faced with multiple legal questions and their political implications (and vice-versa). Both reached a rather similar conclusion. In President Obama's own words:

> The United States will use military force, unilaterally if necessary, when our core interests demand it -- when our people are threatened, when our livelihoods are at stake, when the security of our allies is in danger. In these circumstances, we still need to ask tough questions about whether our actions are proportional and effective and just. International opinion matters, but America should never ask permission to protect our people, our homeland, or our way of life.[300]

A former constitutional law lawyer, counterterrorism decision-making posed for Obama the eternal moral conundrum between moral values and national security imperatives[301] that defines America's foreign policy. The President did not operate in a vacuum. His predecessor left a legal legacy whose constitutional boundaries Obama pushed by increasing the number and scope of drone strikes to include American citizens or stretching the 2001 authorization to use military force to cover America's military actions against ISIS in Syria and Iraq.[302] Although both made extensive use of military force, President Obama was more rational in his approach to the use of force than President Bush.

The similarities between the two Presidents come to show that even though leaders' private operational codes influence their decision-making, and consequently, their states' compliance with international law, the institutional and the public operational codes influence

[299] Ibid.
[300] Barack Obama, "Commencement Address at the United States Military Academy in West Point, New York."
[301] "It is that pattern of decision making on these issues that has become the standard for Obama, vacillating between principles and pragmatism, leading, almost instinctively, with the first, and finishing, more realistically, with the second." Nancy Kassop, "Rivals for Influence on Counterterrorism Policy: White House Political Staff Versus Executive Branch Legal Advisors," *Presidential Studies Quarterly* 43, no. 2 (June 2013): 252-273, p. 269.
[302] James P. Pfiffner, "The Constitutional Legacy of George W. Bush," *Presidential Studies Quarterly* 45, no. 4 (December 2015): 727-741.

and constrain the private codes. Leaders' personal traits are molded by the roles they enter. On the other hand, leaders are not only constrained by the institutional and public operational codes, but they also use them to pursue their agenda. As proven throughout the chapter, both Presidents Bush and Obama made extensive use of their constitutionally mandated executive power and their Commander-in-Chief prerogatives. Both of them also borrowed elements from the public operational code of the United States to construct speeches outlining their policies. In their counterterrorist policies as well as in the decision-making processes behind those policies, Presidents Bush and Obama displayed both similarities and differences. If the public operational code of the US President and the institutional operational code can be credited for the similarities, the differences are most certainly the direct result of their private operational codes.

Conclusion

Why do states comply with international law? This question has been the starting point of this interdisciplinary research in International Relations and International Law that provided an IL concept, compliance, with an IR explanation by employing the concept of operational code. Given the relative lack of enforcement mechanisms that characterizes international law, this research treated states' compliance with international law as a foreign policy behavior. States are bureaucratic constructs: they, in and of themselves, do not choose whether to comply with international law provisions; foreign policy decision-makers, i.e., individuals, make those decisions. This research therefore analyzes compliance with international law (or the lack thereof) in the framework of foreign policy decision-making.

Bringing the decision-making process to the level of the individual, the research enters the IR subfield of foreign policy analysis focusing on decision-makers as individuals and leaders part of an institutional framework that both guides and constraints their actions. In trying to explain compliance with international law, the key concept employed is the concept of operational code. This research thus revolves around the influence of different operational codes on foreign policy decision-making. More precisely, three operational codes are defined: the institutional operational code of the United States regarding international law, the public operational code of the United States President, and the private operational codes of two US Presidents, George W. Bush and Barack Obama. This research argues that states' compliance with international law is influenced by the merger between these three operational codes: individuals (with their private operational codes) enter into a role with its own system of beliefs or public operational code (for the purposes of this research, the role of President of the United States); the individual is thus framed by that role and by an institutional operational code (defined in this research as a set of constitutionally-mandated executive prerogatives regarding foreign policy and international law, in general, and the use of force, in particular).

This research therefore contributes to existing literature by broadening the concept of operational code. When first coined by Nathan Leites in the 1950s, the concept was defined in relation to an entity as Leites set out to create the operational code of the Soviet Politburo. Years later, Alexander George defined the concept as a leader's system of beliefs on history, politics, political conflict, or strategy. Those beliefs shape leaders' understanding of the surrounding environment by providing a cognitive map for the way they perceive that environment and, consequently, influence their choices in terms of preferred courses of

action, i.e., policies. From Alexander George onwards, the literature proceeded to devising increasingly quantitative methods of creating the operational code of numerous political leaders. Methodologically, this research "returns" to the qualitative operational code analysis based on in-depth analysis of biographies, memoirs, speeches, official documents, etc. The private operational codes of George W. Bush and Barack Obama, for instance, is also recreated in a traditional fashion through the analysis of biographies, memoirs, speeches, etc. Moreover, out of the three operational codes, one of them follows Leites's model of recreating the operational code of an entity (in the case of this research, the operational code of the United States President regarding five concepts: foreign affairs / policy, history, enemy(ies), threat(s), and international law).

Three operational codes are therefore created. Out of the three operational codes the first one is broadly defined as a set of institutional prerogatives and practices; the second one is a set of beliefs common to different Presidents regarding certain concepts, beliefs pertaining to an institutional entity or role - the President of the United States; and the third one is coined as a set of beliefs acquired by individuals through their live experiences (prior to taking office). The first one is the institutional operational code of the United States regarding the concept of international law defined as a set of constitutionally-mandated institutional prerogatives regarding international law, in general, and the use of force, in particular, coupled with executive practice regarding war powers and Commander-in-Chief prerogatives, Supreme Court jurisprudence, and the scholarly community's perspective on international law. The second operational code is a public operational code, defined as the set of beliefs of a public entity or role (and not as the set of beliefs leaders expose in public, as the literature generally defines the public operational code); for the purposes of this research, the public operational code is defined in relation to five concepts: foreign affairs / policy, history, enemy(ies), threat(s), and international law. The third operational code is a private operational code defined as the set of beliefs leaders acquire prior to taking office through their formative live experiences (and not as the literature generally defines it, namely as the set of beliefs leaders expose in private). The purpose of this research was to showcase the influence of these three operational codes on leaders and their decision-making processes regarding policies with implications for international law compliance (with a focus on the use of force and, to a lesser extent, the law of armed conflict).

The focus of this research was on post-9/11 US foreign policy decision-making (with an accent on the Global War on Terror). The research therefore focused on compliance with international law from the perspective of a superpower. Following the empirical research, one

of the main conclusions that can be drawn is: "[e]ven in the highly politicized sphere of military action, and even for the single superpower, the question is not whether international law exists, but how and when it matters."[1] Throughout history, "hostile tensions in major international relations meant a crisis for the law."[2] Major events involving key players in international affairs also had significant international law implications. Such is the case with the September 11 terrorist attacks on the World Trade Center and the Pentagon and the subsequent Global War on Terror with major consequences for the law on the use of force and international humanitarian law. As outlined throughout this research, America's actions have constantly influenced international law developments; throughout its history, the US tended to influence IL to match its political interests.[3] Nevertheless, with massive investments in state-of-the-art military technology coupled with its forward looking attitude[4] towards international law, the "United States has long demonstrated a willingness to use its military power in legally questionable circumstances,"[5] such as in Iraq (2003).[6] In the Global War on Terror, for instance, the United States actively pushed for an expansive interpretation of the right to self-defense, especially regarding the right to the preventive use of military force in self-defense against both state and non-state actors (such as terrorist organizations).[7] This combination between unmatched military power and "the deliberative pursuit of normative change" can "test, stretch and sometimes alter the limits of international law."[8]

Moreover, as outlined throughout this research, international law is subsumed to foreign policy and it is oftentimes employed by US decision-makers as a foreign policy tool. Most importantly, international law plays a considerable role in rallying support for America's international actions given its legitimizing force as

> the United States has to regularly depend on allies who value and abide by international law. On other occasions, the United States finds it convenient to deploy legal arguments when seeking to persuade other countries not to use force themselves. It is this combined need for flexibility, compliance and constraint that motivates the law-making and law-changing efforts of the United States. Whenever the US government wishes to act in a manner that is inconsistent with existing international law, its lawyers regularly and actively seek to change the law. They do so by provoking and steering changing patterns of state practice and *opinio juris*, with a view to incrementally modifying customary rules and accepted interpretations of treaties such as the UN Charter.[9]

[1] Michael Byers, *War Law*, p. 11.
[2] Hans-Ulrich Scupin, "History of International Law, 1815 to World War I," para. 91.
[3] Michael Byers, *War Law*, p. 11.
[4] Ibid., p. 10.
[5] Ibid.
[6] Ibid., p. 11.
[7] Ibid.
[8] Ibid.
[9] Ibid., p. 64.

This is particularly the case in matters regarding the use of force, where the above-mentioned military superiority of the United States coupled with the central role of the United Nations Security Council in enforcing the prohibition to use of force and America's veto power in matters concerning international peace and security within the UNSC allows the US to instrumentalize international law (and, in particular, the law on the use of force) as per its interests while concomitantly blocking other countries' actions counter to those interests. This comes to outline the relationship between international law and power (be it structural or military) and its influence for international law compliance. This is all the more evident in matters concerning states' right to use force in self-defense:

> Only countries with no reason to fear countervailing military forces can contemplate a world without the combined protections of the UN Charter and the customary law of the Caroline incident. President Bush feels able to claim a broad right of … action because other states do not have the capacity to retaliate against the United States. … most countries do not stand to benefit from an extended right of self-defence because it would give all states - including every state's potential enemies - an almost unlimited discretion to use force. The absence of widely reciprocal benefits is usually fatal to the development of customary international law.[10]

The truth of the matter is that powerful states have more means at their disposal than weak states. One of the implications of this is that if the US' expansive view on the use of force, in general, and anticipatory self-defense, in particular, is to generalize, this would provide the most powerful countries in the international system with increased freedom of action.[11] This is all the truer given the centrality of the element of prevention in America's foreign policy. Prevention has been at the center of America's foreign policy since, at least, the end of WWII. The US, the main architect of the post-World War II world order, oftentimes acted proactively to prevent the collapse of this global order attuned to America's interests and beliefs. For the past 70 years, the United States did not wait for threats to emerge; it was compelled to prevent economic, but especially military threats, from materializing.[12] As President Roosevelt made it evident during WWII, America had to "end future wars by stepping on their necks before they grow up."[13] Coming back to global order, as made evident by this research, the concept of "world order," ever present in the foreign policy rhetoric of American Presidents, encompassed international law. As President Bush 41 put it, what he had previously labeled as a "new world order" was a "world where the rule of law,

[10] Ibid., pp. 76-77.
[11] Ibid., p. 79.
[12] Robert Kagan, "Superpowers Don't Get to Retire."
[13] Franklin D. Roosevelt, "Excerpts from the Press Conference" (press conference, August 29, 1944), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/209767 (accessed April 28, 2020).

not the law of the jungle, governs the conduct of nations."[14] Also, as made evident by this research, the post-Cold War world order Bush 41 specifically referred to lacked an overarching threat of the magnitude of the communist threat during the Cold War. Just as before in history, America would take it upon itself to sustain the liberal world order by proactively dispersing emerging threats.[15]

As outlined throughout the research, individuals are behind actual foreign policy decisions. One of the main conclusions of this research is that two very different individuals with different backgrounds and personalities designed foreign policies that, when compared, presented both differences, but, most importantly, also presented similarities. For President Bush terrorism posed an existential threat against America and an offensive strategy implying extensive use of preventive military force was the main tool to counter that threat (together with actions such as surveillance, unwarranted detentions, prosecutions by military tribunals, etc.). Following September 11, President Bush also pushed for a legal framework for his strategies in the Global War on Terror. For President Obama, terrorism raised to the level of a major threat to America's national security, but not necessarily to the level of an existential threat. Moreover, President Obama employed a strategy that would first and foremost avoid troops on the ground. To eliminate America's enemies this strategy involved targeted killings executed by drone strikes. Consequently, just like his predecessor, President Obama used force extensively; nevertheless, whereas President Bush preferred the boots-on-the-ground approach, President Obama preferred a lighter footprint.

As outlined throughout the research, Bush 43 made extensive use of the War on Terror rhetoric. Obama's rhetoric (together with his foreign policy actions) rather prompted him as a "Democratic foreign policy realist."[16] During the presidential electoral campaign, Obama himself labeled his foreign policy as a "return to the traditional bipartisan realistic policy of George Bush's father, of John F. Kennedy, of, in some ways, Ronald Reagan."[17] If Bush can be labeled as a hawk, Obama rather emerged as a foreign policy pragmatist:[18]

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[14] George H.W. Bush, "Address to the Nation Announcing Allied Military Action in the Persian Gulf" (speech, Washington, D.C., January 16, 1991), The American Presidency Project (online by Gerhard Peters and John T. Woolley), https://www.presidency.ucsb.edu/node/265756 (accessed April 28, 2020).
[15] Robert Kagan, "Superpowers Don't Get to Retire."
[16] James M. Lindsay, "George W. Bush, Barack Obama and the Future of US Global Leadership," p. 773.
[17] The Associated Press, "Obama Likens His Foreign Policy to That of Bush Sr., JFK, Reagan," *Haaretz*, March 29, 2008, https://www.haaretz.com/1.5012226 (accessed May 6, 2020).
[18] James M. Lindsay, "George W. Bush, Barack Obama and the Future of US Global Leadership," p. 773. In the words of Susan Rice: "Obama was by nature a pragmatist—more a foreign policy "realist" than a woolly eyed idealist. Yet his pragmatism neither rendered him cold nor tempered his high aspirations for America's capacity to do better at home and abroad." Susan Rice, "'Tough Love: My Story of the Things Worth Fighting For,' by Susan Rice: An Excerpt."

learning from his successor's mistakes of overarching, Obama understood that America's foreign policy cannot focus preponderantly on the GWOT. Obama's worldview presupposed a more multifaceted and pragmatic perception of the international arena then the one of President Bush. Obama's decision not to intervene in Syria is the perfect example of Obama's pragmatic foreign policy perspective based on his belief that as presidents do not decide in a vacuum and one foreign policy decision reverberates over other foreign policy decisions presidents must make a cost-benefit analysis based on the amount of military force needed and the costs incurred versus the actual military benefits / end results on the ground. In the words of back then NSA, Susan Rice: "As pained as we felt, as much as our values were offended, and as amoral the decision not to intervene directly in Syria's civil war seemed, I believe it was also the right choice for the totality of U.S. interests."[19] On a more general level, it must be point out that despite their diverging views on multiple policy issues, both Democrats and Republicans have constantly agreed on one major feature of US foreign policy: "the United States should dominate the world militarily, economically, and politically, as it has since the final years of the Cold War …."[20] The United States is meant to be *primus inter pares* in the world order it helped create following World War II.

Donald Trump, the current President of the United States, could not be more different from his predecessors especially in terms of personality and worldview.[21] Given his controversial policies and the centrality of the President's personality one of the main questions raised by Donald Trump's presidency concerns the balance of powers system that is meant to ensure that the three branches of government check each other so as to prevent any one of them from becoming too powerful. In almost four years as President, Donald Trump benefited from the support given to his policies by Republicans in Congress that even helped him to stay in office following an impeachment procedure.[22] As outlined in this research, over decades, increased polarization along party lines coupled with decreased foreign policy expertise are just two of the factors that generated the decrease in Congressional oversight. Consequently, the legislative's decreased appetite for congressional oversight coupled with the White House's tendency to centralize decision-making generated

[19] Susan Rice, "In Syria, America Had No Good Options."
[20] Barry R. Posen, "Pull Back: The Case for a Less Activist Foreign Policy," *Foreign Affairs* 92, no. 1 (January/February 2013): 116-128, p. 116.
[21] Robert Malley and Jon Finer, "The Long Shadow of 9/11."
[22] For more information on Donald Trump's presidency, the balance of powers, and Congressional oversight during the Trump Administration, see James Goldgeier and Elizabeth N. Saunders, "The Unconstrained Presidency: Checks and Balances Eroded Long Before Trump," *Foreign Affairs* 97 (September/October 2018): 144-156; and Daniel W. Drezner, "Immature Leadership," 383-400.

apathy within the executive branch itself and made the bureaucracy less willing to wield expertise.[23] It is interesting to notice how the Republican Party and a partially dominated-Republican Congress (with occasional acquiescence from the judicial branch) failed to limit the institutional liberty of action of a president whose behavior has oftentimes been harshly criticized even by his closest advisers.[24] This comes to show that leaders' personality traits become all the more important as the lack of willingness of other institutions to enforce their constitutional prerogatives increases. The increase in presidential power, largely at the expense of other branches of government, has made the character features of the President all the more relevant.[25] When it comes to President Trump, what makes him "unique as a president is how much his individual psychology degrades his ability to be a conventionally effective president."[26] Over the years, the President proved hard to contain even by his closest advisers, let alone the other branches of government.

Leaders therefore matter. But the constraints imposed on them by the surrounding environment (both domestically and internationally) cannot be underestimated for they influence decision-making just as much as leaders' individual characteristics.[27] Ultimately, decision-making presupposes that leaders refer to their respective backgrounds and individual traits to make sense of the constraints imposed by the surrounding environment (be them actions of other actors, external events, institutional prerogatives of the roles they hold, etc.). As important as leaders' traits are it cannot be overlooked that, once in office, individuals are progressively socialized into the roles they take as they become accustomed to the constraints and daily practices of those roles.[28] As proven by this research, President Obama makes the perfect case-in-point: despite the heavy criticism he launched against his predecessor during his electoral campaign, as President, Obama continued to make extensive use of executive powers and to employ force extensively, just as President Bush had done. As Robert Jervis puts it: "Presidents like presidential power no matter what their personal preferences."[29] Thus being said, leaders' personality traits also influence the roles they enter into, their decision-making processes as well as the policies resulting from those decision-making processes: as a more rational decision-maker, President Obama did use force extensively but for selected

[23] James Goldgeier and Elizabeth N. Saunders, "The Unconstrained Presidency," p. 145.
[24] Daniel W. Drezner, "Immature Leadership," pp. 385-387.
[25] Ibid., pp. 384-385.
[26] Ibid., p. 384.
[27] For a detailed explanation, see Robert Jervis, "Do Leaders Matter and How Would We Know?," 153-179.
[28] Ibid., p. 155-56.
[29] Ibid., p. 157.

purposes; as a rather gut-feeling player, President Bush favored a more comprehensive use of force.

Presidential power nonetheless depends not only on the personal traits of the individual holding the presidency or on the constitutional prerogatives of the chief executive, but also on the institutional prerogatives of the other two branches of government as well as on their incumbents' willingness to exercise those prerogatives. As already explained, a deferential Congress in matters of foreign affairs and national security has led to an increase in executive power. Major events in a country's history can also mark shifts in institutional behavior, especially if the events are of major interest to the public opinion. For instance, following the 9/11 attacks, the US Congress has been particularly deferential towards President Bush's foreign and security policy initiatives[30] (for instance, by passing the AUMF granting the President considerable leverage in determining who America's enemies would be in the GWOT as well as the right to use military force against those enemies).[31] Throughout America's history, foreign policy constitutional prerogatives stood the test of time; what changed was the interpretation the executive and the legislative gave to those prerogatives in light of different political events: "times of peace and presidential missteps favor congressional defiance. Times of war and presidential success favor congressional deference."[32] Oftentimes, to understand the fluctuation in the power relations between the executive and the legislative one must rather look to the realm of politics rather than the one of (constitutional) law.[33]

Last but not least, ever since 9/11, the most important legal conundrum was how to effectively fight terrorism under the law.[34] At the crossroads of law and politics, three questions define decision-making: What is legal? What is effective? What is appropriate?[35] What is legal is a matter of law, what is effective is a matter of strategy and policy, what is appropriate is a matter of interpretation. What is appropriate generates a logic of appropriateness influenced by the American political culture which makes uncertainty intolerable and doubt a weakness generating the need for assertiveness in leadership since a sign of doubt would run counter to the public opinion's need for strong leaders.[36]

[30] James M. Lindsay, "Deference and Defiance: The Shifting Rhythms of Executive-Legislative Relations in Foreign Policy," *Presidential Studies Quarterly* 33, no. 3 (September 2003): 530-546, pp. 530-531.
[31] Ibid., p. 538. For more information on other measures supported by the US Congress, see pp. 538-543.
[32] Ibid., p. 531.
[33] Ibid., p. 532.
[34] James Comey, *A Higher Loyalty*, p. 82.
[35] Ibid., p. 114.
[36] Ibid., pp. 104-105.

To sum up, this research has focused on operational codes and their influence on decision-making regarding policies with international law implications. Despite its interdisciplinarity (combining IR Theory and International Law) and theoretical approach (merging Louis Henkin's perspective on international law with political psychology and constructivist approaches from IR Theory), this analysis still leaves plenty of room for further research. This research has only focused on the concept of operational code, on leaders, their system of beliefs, as well as the beliefs associated to an institutional entity and the institutional framework that stipulates the prerogatives regarding international law, foreign affairs, and the use of force. As presented in the literature review, multiple factors influence decision-making. This research can therefore be extended to analyze other factors with an effect on decision-making (for an extensive list of such factors, see Chapter II comprising an overview of the factors that influence foreign policy decision-making). Moreover, this research can be extended to cover the role of leaders and institutional constraints in decision-making for other branches of international law apart from the law on the use of force and the law of armed conflict (such as human rights law or environmental law). This research also focused on US foreign policy and war-making presidential prerogatives and practice with a focus on Presidents George W. Bush and Barack Obama; the analysis on presidential prerogatives and practice and presidents' perception on international law can also be extended to other presidents as well (for instance, it could be extended to the other presidents whose speeches were analyzed to create the public operational code of the United States President, namely all US Presidents from Franklin Delano Roosevelt to Bill Clinton). Given the qualitative methodological approach requiring lengthy case studies, one of this research's main limitations came from its strict selection of variables influencing decision-making and its in-depth analysis of only two Presidents. As future avenues for research, a quantitative methodological approach could be employed to, for instance, analyze presidential speeches. Last but not least, even if this research focuses on the relationship between a hegemon and international law it would also be interesting to replicate the same analysis on smaller powers and their relationship with international law (especially regarding the use of force in international relations).

To sum up, it must be outlined once more that this research only looks at one part of a broader picture concerning the factors that influence states' compliance with international law. In broad terms, this research has looked at leaders as socially embedded individuals and has explained foreign policy decision-making (and thus compliance with international law) at the intersection of leaders' individual characteristics and institutional constraints pertaining to

the role they hold. Therefore, this research has implications not only for understanding the relationship between a hegemon and international law compliance, but also for leadership studies, and for understanding how institutional constraints mold leaders' system of beliefs as well as their decision-making.

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Appendix: Abstract

Why do states comply with international law? To answer this question, this research treats decision-makers as socially-embedded individuals part of social and institutional frameworks that constrain their actions and that are, in return, transformed by these individuals. An international law concept, compliance, is thus provided with an explanation pertaining to the IR subfield of foreign policy analysis by employing the concept of operational code. Through the method of structured, focused comparison three operational codes are defined, each showcasing a different theoretical approach. Louis Henkin's approach to international law characterizes the institutional operational code of the United States regarding international law, code broadly defined as a set of constitutionally-mandated executive prerogatives on international law and foreign policy, in general, and the use of force and war powers, in particular. The public operational code, defined as a set of beliefs pertaining to a role, encompasses the IR constructivist approach; for the purposes of this research, the public operational code exposes the US President's view on five concepts - foreign affairs / policy, history, threat(s), enemy(ies), and international law. The private operational code is coined as a set of beliefs leaders acquire prior to taking office from three formative life stages (childhood, education, and profession). With its focus on post-9/11 foreign policy decision-making and US compliance with the law on the use of force and, to a lesser extent, international humanitarian law, this research recreates the private operational codes of former US Presidents, George W. Bush and Barack Obama. The research argues that international law compliance is generated by the influence of these three operational codes on foreign policy decision-making with international law implications. By its interdisciplinary approach to compliance that merges three different theoretical approaches from both IR and international law and by expanding the concept of operational code, the research contributes to existing literature in both disciplines.

Warum verhalten sich Staaten entsprechend des geltenden Völkerrechts? Um diese Frage zu beantworten, werden in dieser Forschungsarbeit Entscheidungsträger als sozial verankerte Individuen angesehen, die Teil eines sozialen sowie institutionellen Konstrukts sind, welches deren Handlungen einschränkt, im Gegensatz dazu aber auch von den Akteuren selbst transformiert wird. Die Compliance, als ein Konzept des internationalen Rechts, bietet dabei einen Lösungsansatz, wenn sie durch das Konzept der *Operational Codes* ergänzt wird, das wiederum einer Subkategorie der außenpolitischen Analyse der internationalen Beziehungen entspricht. Durch einen strukturierten, fokussierten Vergleich werden drei *Operational Codes* definiert, die jeweils einen anderen, eigenständigen theoretischen Ansatz repräsentieren. Louis Henkins Ansatz zu internationalem Recht ist durch einen institutionellen, US-amerikanischen *Operational Code* in Bezug auf Völkerrecht charakterisiert, der übergeordnet durch eine Reihe konstitutionell angeordneter Privilegien des internationalen Rechts und der Außenpolitik, sowie untergeordnet auch durch die Nutzung von Gewalt und Militärstärke definiert wird. Der public *Operational Code*, der eine Reihe von Überzeugungen beinhaltet, die mit einer bestimmten Rolle oder Funktion einhergehen, wird durch den Konstruktivismus geprägt. Letzterer beinhaltet vordergründig die Meinung des Präsidenten der Vereinigten Staaten in Bezug auf Außenpolitik, Geschichte, Gefahren, Feinde und Völkerrecht. Der private *Operational Code* beinhaltet eine Reihe von Überzeugungen, die Entscheidungsträger vor ihrem Amtsantritt aus Erfahrungen aus drei prägenden Lebensabschnitten (in Kindheit, Ausbildung und Beruf) ableiten. Diese Forschungsarbeit konzentriert sich dabei auf die politischen Entscheidungsprozesse der USA nach dem 11. September 2001 sowie auf deren Compliance sowohl mit dem allgemeinen Gewaltverbot des internationalen Rechts, als auch zu einem geringeren Anteil mit dem humanitären Völkerrecht, und bildet mit diesem Fokus die private *Operational Codes* der ehemaligen US Präsidenten George W. Bush und Barack Obama ab. Zusammenfassend wird in dieser Arbeit argumentiert, dass die Compliance mit geltendem Völkerecht überwiegend auf dem Einfluss der genannten drei *Operational Codes* auf außenpolitische Entscheidungsprozesse in Bezug auf internationales Recht basiert. Durch die Ausweitung des Konzepts des *Operational Codes* und einem interdisziplinären Ansatz, der drei verschiedenen Theorieansätze aus den internationalen Beziehungen und dem internationalen Recht in Bezug auf Compliance miteinbezieht, trägt diese Forschungsarbeit maßgeblich zu der Literatur beider genannter Fachgebiete bei.