

Explaining International Acts

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Résumé de l'article

Cette contribution au symposium portant sur l'ouvrage de Evan Criddle et Evan Fox-Decent, « *Fiduciaires of Humanity* », se positionne à l'encontre de la revendication de certains critiques voulant que les normes juridiques internationales se préoccupent uniquement des résultats, plutôt que du processus de délibération et de justification plus souvent associé à certains domaines du droit interne. L'article explore cette proposition en se référant à des exemples, notamment l'intervention au Kosovo de 1999, les frappes en Syrie d'avril 2018 et les résultats de la Commission Chilcot au Royaume-Uni. Bien que les processus de délibération menant à l'élaboration de lois internationales ne puissent être assujettis à une révision judiciaire au même titre que les lois purement internes, la volonté d'assurer une forme de « transparence » au sein des constitutions intérieures ainsi que les autres mécanismes de surveillance créent des incitatifs ex ante pour assurer l'intégrité des processus de décision et des justifications dans la conduite des affaires étrangères. De plus, les explications a posteriori des lois internationales peuvent elles-mêmes contenir une signification juridique en tant qu'expression de l'opinio juris de l'État. Les académiciens et les praticiens ne devraient pas ignorer la « culture de justification » qui existe au niveau international, même hors des cours et tribunaux internationaux.

EXPLAINING INTERNATIONAL ACTS

*Chimène I. Keitner**

This contribution to the symposium on Evan Criddle & Evan Fox-Decent's "Fiduciaries of Humanity" pushes against the strong claim by some critics that international legal norms are concerned solely with outcomes, rather than with processes of deliberation and justification more commonly associated with certain areas of domestic law. It explores this proposition by looking at examples including the 1999 Kosovo intervention, the April 2018 Syria strikes, and the results of the Chilcot Inquiry in the United Kingdom. Although deliberative processes that lead to international acts may not be judicially reviewable to the same extent as those that lead to purely domestic acts, the push for "transparency" among domestic constituencies, as well as other oversight mechanisms, create ex ante incentives for integrity in decision-making processes and rationales in the conduct of foreign affairs. In addition, ex post explanations of international acts may themselves carry legal significance as expressions of a state's *opinio juris*. Scholars and practitioners should not discount the "culture of justification" that exists at the international level, even outside international courts and tribunals.

Cette contribution au symposium portant sur l'ouvrage de Evan Criddle et Evan Fox-Decent, « *Fiduciaries of Humanity* », se positionne à l'encontre de la revendication de certains critiques voulant que les normes juridiques internationales se préoccupent uniquement des résultats, plutôt que du processus de délibération et de justification plus souvent associé à certains domaines du droit interne. L'article explore cette proposition en se référant à des exemples, notamment l'intervention au Kosovo de 1999, les frappes en Syrie d'avril 2018 et les résultats de la Commission Chilcot au Royaume-Uni. Bien que les processus de délibération menant à l'élaboration de lois internationales ne puissent être assujettis à une révision judiciaire au même titre que les lois purement internes, la volonté d'assurer une forme de « transparence » au sein des constitutions intérieures ainsi que les autres mécanismes de surveillance créent des incitatifs ex ante pour assurer l'intégrité des processus de décision et des justifications dans la conduite des affaires étrangères. De plus, les explications a posteriori des lois internationales peuvent elles-mêmes contenir une signification juridique en tant qu'expression de l'*opinio juris* de l'État. Les académiciens et les praticiens ne devraient pas ignorer la « culture de justification » qui existe au niveau international, même hors des cours et tribunaux internationaux.

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Introduction

Evan Criddle and Evan Fox-Decent's *Fiduciaries of Humanity* brings insights from the field of "fiduciary political theory" to the study of international law.¹ While their analysis focuses primarily on substantive legal norms, it also prompts consideration of whether process-oriented norms exist, or should exist, in public international law. Ethan Leib and Stephen Galoob have questioned the relevance of fiduciary norms to international law on the grounds that, in their view, a "rigorous culture of justification [does not] appl[y] to the international legal realm,"² which they contend is instead concerned primarily with "how states behave."³ This critique overlooks that, in international law as in domestic law, the *why* of state action matters, not just the *what* of state action. The "culture of justification" that exists at the international level includes an expectation that states will articulate the legal and policy bases for their actions, particularly when such actions depart from accepted norms of state behavior.⁴ In a variety of contexts, states are expected—and seek—to explain their international acts.

This contribution pushes against the strong claim that international legal norms are concerned solely with outcomes, rather than with the processes of deliberation and justification more commonly associated with certain areas of domestic law. Although deliberative processes that lead to international acts may not be judicially reviewable to the same extent as those that lead to purely domestic acts, the push for "transparency" among domestic constituencies, as well as other oversight mechanisms, create *ex ante* incentives for integrity in decision-making processes and rationales in the conduct of foreign affairs. In addition, *ex post* explanations of international acts may themselves carry legal significance as ex-

¹ Evan J Criddle & Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (New York: Oxford University Press, 2016) [Criddle & Fox-Decent, *Fiduciaries of Humanity*].

² Ethan J Leib & Stephen R Galoob, "Fiduciary Political Theory: A Critique" (2016) 125:7 Yale LJ 1820 at 1877. Criddle and Fox-Decent counter that Leib and Galoob's account relies on "a crude caricature" of international human rights law, and that "[t]here are significant aspects of international legal order—international adjudication and global administrative law—with national analogues that Leib and Galoob endorse as fruitful sites for public fiduciary theorizing." See Evan J Criddle & Evan Fox-Decent, "Keeping the Promise of Public Fiduciary Theory: A Reply to Leib and Galoob" (2016) 126 Yale LJ Forum 192 at 195, 206, online: <www.yalelawjournal.org/forum/keeping-the-promise-of-public-fiduciary-theory-a-reply-to-leib-and-galoob>.

³ Leib & Galoob, *supra* note 2 at 1871.

⁴ The term "culture of justification" is associated with the work of Etienne Mureinik. See Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10:1 SAJHR 31 at 32. See also David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14:1 SAJHR 11 at 11.

pressions of a state’s *opinio juris*—that is, a belief that international law required or prohibited those acts. Public explanations of a state’s international legal understandings can help clarify and crystallize the content of legal norms. Scholars and practitioners should not discount the “culture of justification” that exists at the international level, even outside international courts and tribunals.

The expectation of reason-giving serves important functions.⁵ As former US State Department Legal Adviser Abram Chayes observed, “the requirement of justification provides an important substantive check on the legality of action and ultimately on the responsibility of the decision-making process.”⁶ This is so both from the perspective of ensuring the integrity and legality of decision-making processes, and from the perspective of fostering cooperative relations among states who collectively create, and are bound by, international legal norms. The norm of justification helps ensure that state conduct flows from reasoned decision-making processes, even where there is room for disagreement about the precise contours of applicable legal rules.

I. Forms and Functions of International Legal Justification

International legal rules shape and constrain policy options in the conduct of foreign affairs.⁷ In government, as in the private sector, policy clients want to understand what the rules are, why and how they apply, and what courses of conduct are legally available. They may also seek to identify opportunities to shape the legal environment in which they operate, in order to maximize the material and non-material benefits enjoyed by stakeholders.⁸ Articulating public justifications for their international acts enables states to shape the understandings and expectations of other actors in the international legal system.

Foreign ministry legal advisers act as intermediaries between the domestic and international legal realms by translating international law for domestic decision-makers, and by conveying a state’s international legal positions to its foreign counterparts. Iain McLeod, Legal Adviser at the

⁵ See Harold Hongju Koh, “The Legal Adviser’s Duty to Explain” (2016) 41:1 Yale J Intl L 189 at 195 [Koh, “Legal Adviser’s Duty”].

⁶ Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press, 1974) at 42.

⁷ Of course, international law also plays an essential enabling role, allowing states to cooperate through treaties, international institutions, and other arrangements.

⁸ An additional series of questions, which animate aspects of Fox-Decent and Criddle’s ambitious project, consist in identifying the relevant “stakeholders” in decisions made at the national level, but that may impact individuals well beyond a country’s borders.

UK Foreign and Commonwealth Office, has reportedly described the role of the foreign ministry as both “provid[ing] good legal advice, drawing on the right expertise” and “engag[ing] with the outside world to explain what the law is and why that is the case.”⁹ These tasks represent the internal and external, or *ex ante* and *ex post*, dimensions of international legal justification, in which foreign ministry legal advisers play a central role.

Internally, foreign ministry legal advisers identify what actions a state can take consistent with its international (and, at times, domestic) legal obligations. Certain actions may be, in the words of former US State Department Legal Adviser Harold Koh, “lawful but awful.”¹⁰ Others fall squarely within the range of legally available options, and legal advisers can help policy clients map out the potential implications and repercussions of different approaches. Yet other actions may, in rare circumstances, be deemed “illegal but legitimate,”¹¹ such as the NATO air campaign in Kosovo in the spring of 1999, discussed further below. The legal reasoning underpinning this *ex ante* advice is generally shielded from public view, at least at the time it is issued, to promote comprehensiveness and candor.

Customary international law derives its legitimacy and binding force largely from state consent expressed in the form of behaviour, but this does not mean that international law lacks a culture of justification. The classic understanding of customary international law norms is that they are formed through the consistent practice of states accompanied by *opinio juris*—a sense of legal obligation. Certain legal norms, such as the prohibition on torture, are reinforced by what states say as much as by what they do, since persistent affirmation of a conduct-regulating norm enables

⁹ The Hague Institute for Global Justice, News Release, “The Hague Conference on International Legal Diplomacy” (23 April 2015), online: <www.thehagueinstituteforglobaljustice.org>, archived at <https://perma.cc/HKS3-M79Y> (reporting the conference paper delivered by Iain McLeod).

¹⁰ Harold Hongju Koh, “The State Department Legal Adviser’s Office: Eight Decades in Peace and War” (2012) 100:5 *Geo LJ* 1747 at 1758.

¹¹ See e.g. The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (New York: Oxford University Press, 2000) (indicating that the military intervention “was illegal because it did not receive prior approval from the United Nations Security Council” but that it was nevertheless “justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule” at 4).

the international community to characterize deviant practice as a legal violation.¹²

Publicly articulating the international legal rationales that underpin a state's actions may serve a variety of functions, in addition to clarifying and crystallizing the content of customary international law. Elihu Root posited in 1907 that “[t]he more clearly and universally the people of a country realize the international obligations and duties of their country, the less likely they will be to resent the just demands of other countries that those obligations and duties be observed.”¹³ In his account, explaining the international law basis of a state's actions helps foster self-restraint and, in turn, underpins compliance:

In every civil community it is necessary to have courts to determine rights and officers to compel observance of the law; yet the true basis of the peace and order in which we live is not fear of the policeman; it is the self-restraint of the thousands of people who make up the community and their willingness to obey the law and regard the rights of others.¹⁴

Root's description of a virtuous circle of public explanation and behavior modification anticipates UK Legal Adviser McLeod's reported emphasis on the importance of “engag[ing] with the outside world to explain what the law is and why that is the case.”¹⁵

This “outside world” includes a legal adviser's counterparts in other governments, as well as the broader public. US State Department Legal Advisers have long engaged in “legal diplomacy” vis-à-vis US partners, and have also endeavoured to explain the international legal framework governing US actions to a wider audience. For example, in 2016, State Department Legal Adviser Brian Egan stated that “[l]egal diplomacy plays a key role in building and maintaining the counter-ISIL military coalition. ... Legal diplomacy builds on common understandings of international law, while also seeking to bridge or manage the specific differences in any particular state's international obligations or interpretations.”¹⁶

¹² See Chimène I Keitner, “Cheap Talk’ About Customary International Law” in David L Sloss, Michael D Ramsey & William S Dodge, eds, *International Law in the U.S. Supreme Court: Continuity and Change* (Cambridge: Cambridge University Press, 2011) at 494–95 (describing states' statements as evidence of customary international law, understood as “crystallized patterns of mutual expectations” at 495).

¹³ Elihu Root, “The Need of Popular Understanding of International Law” (1907) 1:1 *Am J Intl L* 1 at 2.

¹⁴ *Ibid.*

¹⁵ McLeod, *supra* note 9.

¹⁶ Brian Egan, “International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations” (2016) 92 *Intl L Stud* 235 at 244.

Egan cited the example of letters submitted by states to the UN Security Council under Article 51 of the *Charter of the United Nations*,¹⁷ setting forth self-defense rationales for non-consensual uses of force against ISIL on Syrian territory. He indicated:

Public explanations of legal positions are an important part of legal diplomacy. The United States is not alone in providing such public explanations. Over the last eighteen months, for example, nine of our coalition partners have submitted public Article 51 notifications to the U.N. Security Council explaining and justifying their military actions in Syria against ISIL. Though the exact formulations vary from letter to letter, the consistent theme throughout these reports to the Security Council is that the right of self-defense extends to using force to respond to actual or imminent armed attacks by non-State armed groups like ISIL. Those States' military actions against ISIL in Syria and their public notifications are perhaps the clearest evidence of this understanding of the international law of self-defense.¹⁸

In Egan's account, public articulations of international legal rationales—and other states' reactions to those rationales—create a feedback loop to ascertain and help ensure the international lawfulness of a state's behavior.

Egan also offered thoughts on the broader significance of a state's public explanation of how it interprets international legal obligations:

It is not enough that we act lawfully or regard ourselves as being in the right. It is important that our actions be understood as lawful by others both at home and abroad in order to show respect for the rule of law and promote it more broadly, while also cultivating partnerships and building coalitions. Even if other governments or populations do not agree with our precise legal theories or conclusions, *we must be able to demonstrate to others that our most consequential national security and foreign policy decisions are guided by a principled understanding and application of international law*.¹⁹

In the United States, the role of setting forth such explanations often falls to the State Department Legal Adviser, whose ability to speak authoritatively on behalf of the US government is buttressed by his or her status as a Senate-confirmed official.²⁰ Although the task of public explanation may

¹⁷ See *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI, art 51 [*“UN Charter”*].

¹⁸ *Ibid* (also noting that “governments seek to understand each other’s legal rationale for military operations” most often through “private discussions [that] help frame the public conversation on some of the central legal issues, and [that] are crucial to securing the vital cooperation of partners who want to understand our legal basis for acting” at 244).

¹⁹ *Ibid* at 247 [emphasis added].

²⁰ See Koh, “Legal Adviser’s Duty”, *supra* note 10 (noting the “responsibility of government international lawyers to explain publicly their government’s international law ra-

fall to different officials in different countries,²¹ states routinely describe their own actions, and characterize other states' behaviour, in legal terms.²² Even if some of this “international law talk” is strategic, reference to international law has become embedded in national decision making,

tionale for its actions [...] a loyalty that government legal advisers owe not just to their clients and ministers but also to their publics and national citizenries”; and discussing a “transparency norm” under which “senior government lawyers, and the Legal Adviser of the foreign ministry, in particular, should be expected not just to give legal advice in private but also to explain in public the international legal basis supporting the action that their government has taken” at 189–90). See also John B Bellinger III, “International Legal Public Diplomacy” (2007) 83 Intl L Stud 205 (indicating that “I and my staff talk about the law to help our counterparts in ministries of foreign affairs around the world, as well as international organizations, non-governmental organizations, opinion makers and the public, understand our legal rationales and, in nations that lack a strong rule of law tradition, to help people understand the importance of law in forming good policy” at 208).

²¹ See Daniel Bethlehem, “A Transatlantic View of International Law and Lawyers: Cooperation and Conflict in Hard Times” in D Stephen Mathis, Anthea Roberts & Carlos M Vasquez, eds, *International Law as Law: Proceedings of the One Hundred Third Annual Meeting of the American Society of International Law, Washington, 2009* (2010) 103 Am Soc Intl L Proc 455 (Former FCO Legal Adviser Daniel Bethlehem explained: “I do not speak publicly for the Foreign Office or the British Government. Within our system, that role is the preserve of ministers. So, while there is a representational role, it is not quite the same as that of my counterpart here in Washington” at 460). For detailed international legal expositions by other government representatives, see e.g. The Right Honourable Jeremy Wright, “The Modern Law of Self-Defence” (11 January 2017), *EJIL: Talk!* (blog), online: <www.ejiltalk.org/the-modern-law-of-self-defence>, archived at <https://perma.cc/4X9C-WVST> (where the UK Attorney General sets out “how the UK applies the long-standing rules of international law on self-defence to our need to defend ourselves against new and evolving types of threats from non-state actors”); George Brandis, “The Right of Self-Defence Against Imminent Armed Attack in International Law” (25 May 2017), *EJIL: Talk!* (blog), online: <www.dipublico.org/106020/the-right-of-self-defence-against-imminent-armed-attack-in-international-law>, archived at <https://perma.cc/68W2-Q59K> (where the Australian Attorney-General “state[s] publicly the Australian Government’s position on the principle of imminence of armed attack as a ground for the use of force justified by the principle of self-defence” and indicating that “[s]ince customary international law places State practice at the heart of the law’s development, we have a responsibility to proactively engage in debate, including public statement of the positions of governments”).

²² Scholars have drawn different conclusions from this observation. See Jack L Goldsmith & Eric A Posner, *The Limits of International Law* (New York: Oxford University Press, 2005) (noting that “[i]nternational law rhetoric pervades international relations,” and opining that, often, “international legal rhetoric is used to mask or rationalize behavior driven by self-interested factors that have nothing to do with international law” at 226). International law and international relations scholars with a more constructivist orientation emphasize that international law shapes states’ endogenous preferences and redefines their self-interest to encompass rules-based behavior.

and shapes states' assessment of legally available courses of conduct, whether or not that conduct is judicially reviewable.²³

International law's practice of justification extends beyond foreign ministries. As UK Legal Adviser McLeod has reportedly emphasized, "international legal issues are increasingly no longer the preserve of foreign ministries alone, but necessarily engage various government departments."²⁴ A number of countries assign a policy coordinating role to a national security council or equivalent body.²⁵ Government lawyers across agencies may also coordinate directly regarding their respective legal interpretations, and craft public communications setting forth shared legal views.²⁶ International law thus not only shapes—and is shaped by—interactions and negotiations among states, but also by interactions and negotiations among different agencies within states, each with its own institutional culture, equities, perspective, and personnel. Although such interactions are more likely to characterize intra-governmental deliberations in liberal democracies than in authoritarian states, they illustrate a convergence between domestic and international decision-making processes, and the role of law in each, across a range of issue-areas.²⁷

²³ See e.g. The Right Honourable Jeremy Wright, "The Importance of International Law for Government Lawyers" (Keynote address delivered at the Government Legal Service International Law Conference, 15 October 2015), online: <www.gov.uk/government/speeches/the-importance-of-international-law-for-government-lawyers>, archived at <https://perma.cc/4X9C-WVST> (indicating that "I have been struck in my first year as Attorney General just how central [international law] is to the daily work of government," and that "[a]s government lawyers who help ground decision-making in the international rule of law we have a crucial role to play in ensuring that the short-term and expedient solution to any given problem—which may be legally arguable—is set in the wider political and legal context that protects the UK's longer-term interests in having a responsive but robust international legal system").

²⁴ McLeod, *supra* note 9.

²⁵ See Geneva Centre for the Democratic Control of Armed Forces, "National Security Councils (and Related Bodies)" (November 2010) at 1, online: <www.davidmlaw.com/wp-content/uploads/2012/01/NSCs_2010.pdf>.

²⁶ See John Bellinger, "Charlie Savage and the NSC Lawyers Group" (8 November 2015), *Lawfare* (blog), online: <www.lawfareblog.com/charlie-savage-and-nsc-lawyers-group>, archived at <https://perma.cc/M2CN-DV7V>; Rebecca Ingber, "Interpretation Catalysts and Executive Branch Legal Decisionmaking" (2013) 38:2 *Yale J Intl L* 359 at 400–01.

²⁷ This observation is related to insights offered by the study of global administrative law (GAL). Benedict Kingsbury describes reason-giving in this context as follows:

A requirement that reasons be given for certain types of decisions, and for the adoption of certain norms, is found in many areas of global governance practice. Normative and functional reasons for this requirement are readily identifiable. Governance mechanisms can be arrayed along a spectrum between essentially political and essentially legal modes of operation, based

II. Justifying Uses of Force

When a state engages in acts that are not self-evidently reconcilable with accepted international legal rules, that state has three basic options with regard to public explanation: (1) offering a legal rationale and attempting to persuade relevant audiences that its actions can be accommodated within existing legal rules, and/or that the legal rules should be modified; (2) offering a policy rationale, while attempting to preserve the integrity and binding force of potentially conflicting legal rules; or (3) remaining silent.

By way of illustration, the United Kingdom and the United States adopted different approaches in justifying their respective participation in the NATO bombing campaign in Kosovo in 1999. The United Kingdom chose the first option, embracing humanitarian intervention as internationally lawful in certain circumstances, even absent Security Council authorization.²⁸ The United States, by contrast, chose the second option. As Acting Legal Adviser Michael Matheson explained, “[t]here was broad consensus within NATO that armed action was required to deal with intolerable atrocities by the Federal Republic of Yugoslavia (‘FRY’) in Kosovo, but also a shared concern that the chosen justification not weaken international legal constraints on the use of force.”²⁹ As a result, “NATO decided that its justification for military action would be based on the unique combination of a number of factors that presented itself in Kosovo, without enunciating a new doctrine or theory.”³⁰ He acknowledged that

upon the degree of commitment to deliberation and reason-giving in their decision-making.

Benedict Kingsbury, “The Concept of ‘Law’ in Global Administrative Law” (2009) 20:1 *Eur J Intl L* 23 at 47; cf Micah Schwartzman, “Judicial Sincerity” (2008) 94:4 *Va L Rev* 987 (observing that “the principle of legal justification is based on the idea that legal and political authorities act legitimately only if they have reasons that those subject to them can, in principle, understand and accept” at 1004).

²⁸ The United Kingdom articulated the view in October 1998 that “as matters now stand and if action through the Security Council is not possible, military intervention by NATO is lawful on grounds of overwhelming humanitarian necessity.” United Kingdom, Foreign and Commonwealth Office, “FRY/Kosovo: The Way Ahead; UK View on Legal Base for Use of Force”, note circulated to NATO allies (7 October 1998), cited in Adam Roberts, “NATO’s ‘Humanitarian War’ over Kosovo” (1999) 41:3 *Survival* 102 at 106. See also UNSC, 54th Year, 3988th Mtg, UN Doc S/PV.3988 (1999) (stating that “on the grounds of overwhelming humanitarian necessity, military intervention is legally justifiable” at 12).

²⁹ Michael J Matheson, “Justification for the NATO Air Campaign in Kosovo” in *International Law in Ferment: Proceedings of the Ninety Fourth Annual Meeting of the American Society of International Law, Washington, 2000* (2000) 94 *American Society Intl L Proceedings* 301 at 301.

³⁰ *Ibid.*

“[t]his process was not entirely satisfying to all legal scholars,” but, in his view, “it did bring the Alliance to a position that met our common policy objectives without courting unnecessary trouble for the future.”³¹

The problem of “courting unnecessary trouble for the future” is difficult to avoid in a legal system in which norms are shaped by behavior. This problem is underscored by Jack Goldsmith’s later assessment of “the precedential value of the Kosovo non-precedent precedent for Crimea.”³² Regardless of accompanying disclaimers, the rationale offered for past actions will, predictably, be invoked by other actors in defense of their own conduct. This does not, however, mean that precedents are infinitely malleable. When Vladimir Putin cited the “well-known Kosovo precedent”³³ to justify the annexation of Crimea, many observers rejected this comparison as spurious.³⁴ As with any system of argumentation and legitimation, the mere ability to advance an argument does not dictate that the argument will be accepted as valid by other participants in the system.

This brings us back to the thorny question of humanitarian intervention—not, for the purposes of this discussion, as a substantive legal matter, but rather as an illustration of the range of approaches to justifying state actions that do not fall squarely within established legal parameters. As a matter of “black letter law”, as indicated above, the *UN Charter* regulates the non-consensual use of force in another state’s territory by requiring Security Council authorization under Chapter VII and—in exceptional circumstances—by allowing a state to act in self-defense, and then report such action to the Security Council under Article 51.³⁵ On its face, military intervention absent Security Council authorization falls

³¹ *Ibid.*

³² Jack Goldsmith, “The Kosovo Precedent for Syria Isn’t Much of a Precedent”, (24 August 2013), *Lawfare* (blog), online: <www.lawfareblog.com/kosovo-precedent-syria-isnt-much-precedent>, archived at <https://perma.cc/WAT7-CPCV> (noting that “the United States tried to make sure that the NATO intervention into Kosovo would not be a precedent under international law for future interventions,” but that this would depend on “how the action is interpreted and used in the future”). See also Jack Goldsmith, “The Precedential Value of the Kosovo Non-Precedent Precedent for Crimea” (17 March 2014), *Lawfare* (blog), online: <www.lawfareblog.com/precedential-value-kosovo-non-precedent-precedent-crimea>, archived at <https://perma.cc/2CWP-Y9K4>.

³³ President of Russia Vladimir Putin, News Release, “Address by President of the Russian Federation” (18 March 2014), online: <en.kremlin.ru/d/20603>, archived at <https://perma.cc/CE7D-X79P>.

³⁴ See e.g. Ilya Somin, “Why the Kosovo ‘Precedent’ Does Not Justify Russia’s Annexation of Crimea”, *The Washington Post* (24 March 2014), online: <www.washingtonpost.com>, archived at <https://perma.cc/N4LL-SDWF>; Daniel W Drezner, “Putin’s Excuse for a Referendum is Wrong: Crimea Isn’t Kosovo—at All”, *The Guardian* (17 March 2014), <www.theguardian.com>, archived at <https://perma.cc/Y9RG-WMLX>.

³⁵ See *UN Charter*, *supra* note 17 at arts 39, 51.

outside these parameters, even if conducted on humanitarian grounds. Nevertheless, in August 2013, the United Kingdom³⁶ and Denmark³⁷ maintained that military action would be lawful in response to the use of chemical weapons by the Syrian regime. As set forth in a UK policy paper:

If action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).³⁸

This attempt to articulate a legal rationale prompted withering criticism, including from Jack Goldsmith, who observed that “[t]he UK ‘legal position’ contains not a bit of legal analysis.”³⁹ That said, he opined that

³⁶ See UK, Prime Minister’s Office, “Chemical Weapon Use by Syrian Regime: UK government legal position”, Policy Paper (London: Prime Minister’s Office, 29 August 2013), online: <[www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/html-version](http://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version)>, archived at <https://perma.cc/4EXB-QUDA> [UK, “Chemical Weapon Use”].

³⁷ See Denmark, Ministry of Foreign Affairs, “General Principled Considerations on the Legal Basis for a Possible Military Operation in Syria”, UPN Alm del Bilag 298 (30 August 2013), online: <www.ft.dk/samling/20121/alm-del-upn/bilag/298/1276299/index>, archived at <https://perma.cc/K4MA-8UEG>. See also Anders Henriksen & Marc Schack, “The Crisis in Syria and Humanitarian Intervention” (2014) 1:1 J Use Force & Intl L 122 at 127.

³⁸ UK, “Chemical Weapon Use”, *supra* note 36. See also Daniel Bethlehem, “Stepping Back a Moment: The Legal Basis in Favour of a Principle of Humanitarian Intervention” (12 September 2013), *EJIL: Talk!* (blog), online: <www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention>, archived at <https://perma.cc/4BJC-UWCF>.

³⁹ Jack Goldsmith, “UK Legal Position on Humanitarian Intervention in Syria” (29 August 2013), *Lawfare* (blog), online: <www.lawfareblog.com/uk-legal-position-humanitarian-intervention-syria>, archived at <https://perma.cc/FJ5Q-JFWS> (observing that the UK position “does not explain how humanitarian intervention as it describes it is consistent with the U.N. Charter’s clear prohibition on the use of force absent Security Council authorization or in self-defense” and “does not try to explain why it believes

“it is always better for nations to offer a poor or weak legal justification than no justification at all,”⁴⁰ since the absence of a proffered legal justification may be taken as signifying “indifference to international law.”⁴¹ Taking a different approach, Monica Hakimi opined that the United States, after striking a Syrian airfield associated with a chemical weapons attack in April 2017, should “issue a bland statement supporting the *ius ad bellum* but should not try to present a legal justification for the strikes” because “[a]ny legal justification would be novel and a stretch” and “would increase the risk of ‘opening the door’ in future cases (especially because several other states have already endorsed the strikes).”⁴²

US President Donald Trump announced on April 6, 2017, that he had ordered “a targeted military strike on the airfield in Syria” from which Bashar al-Assad had launched a chemical weapons attack, and that “[i]t is in [the] vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons.”⁴³ Commentators quickly jumped in to opine on the international legality, or lack thereof, of the US action.⁴⁴ Senator Tim Kaine of the Senate Foreign Relations Committee requested “that the Administration provide Congress with its detailed legal analysis for this action under domestic and international law,”⁴⁵ and a nonprofit advocacy group brought a lawsuit under the *Freedom of Information Act*⁴⁶ “to obtain the Trump administration’s legal justification behind the US airstrikes in Syria during April 2017.”⁴⁷ It ap-

that humanitarian intervention as it describes it represents the general and consistent practice of states followed from a sense of legal obligation ... because there would be no basis for such a position”).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Monica Hakimi (8 April 2017 at 5:35am), comment on Monica Hakimi, “US Strikes Against Syria and the Implications for the *Jus Ad Bellum*”, *EJIL: Talk!* (blog), online: <www.ejiltalk.org/us-strikes-against-syria-and-the-implications-for-the-jus-ad-bellum/>, archived at <https://perma.cc/MU3P-XB6L>.

⁴³ US, The White House, Office of the Press Secretary, “Statement by President Trump on Syria”, (Mar-a-Lago, Florida: 6 April 2017), online: <uk.usembassy.gov/statement-president-trump-syria/>, archived at <https://perma.cc/5PAV-3G3P>.

⁴⁴ See e.g. Ryan Goodman, “What Do Top Legal Experts Say About the Syria Strikes?” (7 April 2017) *Just Security*, online: <www.justsecurity.org/39712/top-legal-experts-syria-strikes/>, archived at <https://perma.cc/74YY-DQ9U>.

⁴⁵ US, Tim Kaine, Letter from Senator Tim Kaine to the Honorable Rex Tillerson (Virginia: 8 February 2018), online: <assets.documentcloud.org/documents/4375419/371106063-Kaine-Calls-on-Trump-Administration-to.pdf>, archived at <https://perma.cc/22GL-F7FQ>.

⁴⁶ *Freedom of Information Act*, 5 USC § 552 (1967).

⁴⁷ Chris Mirasola, “Summary: Lawsuit to Release the Legal Justification of Syria Airstrikes” (14 February 2018), *Lawfare* (blog), online: <www.lawfareblog.com/>

pears that, to combine Jack Goldsmith's and Monica Hakimi's observations, the United States was willing to risk the appearance of "indifference to international law" to avoid "the risk of 'opening the door' in future cases." In these circumstances, other considerations appear to have outweighed pressures to conform to the norm of explanation.⁴⁸

One year later, when the United States, the United Kingdom, and France bombed Syrian targets in response to the regime's alleged repeated use of chlorine and sarin to attack civilians in April 2018, the United Kingdom explicitly characterized the operation as lawful humanitarian intervention.⁴⁹ Many expert observers rejected this position as a legal matter.⁵⁰ France, meanwhile, issued a statement affirming that its actions conformed to the "goals and values" of the *U.N. Charter*.⁵¹ The United

summary-lawsuit-release-legal-justification-syria-airstrikes>, archived at <https://perma.cc/4MSL-DGVN>.

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- ⁴⁹ See UK, Prime Minister's Office, "Syria Action: UK Government Legal Position", Policy Paper, (London: Prime Minister's Office, 14 April 2018), online: <www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>, archived at <https://perma.cc/Y8V8-9HA5> (stating that "[t]he UK is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering").
- ⁵⁰ See e.g. Dapo Akande, "Legality of the UK's Air Strikes on the Assad Government in Syria" (2018), online: <d3n8a8pro7vhmx.cloudfront.net/campaigncountdown/pages/2243/attachments/original/1523875290/Akande_Opinion_UK_Government's_Legal_Position_on_Syria_Strike_April_2018.pdf?1523875290>, archived at <https://perma.cc/EW5P-DNGT>; Marko Milanovic, "The Syria Strikes: Still Clearly Illegal" (15 April 2018), *EJIL: Talk!* (blog), online: <www.ejiltalk.org/the-syria-strikes-still-clearly-illegal>, archived at <https://perma.cc/4ARQ-6D26>; Jack Goldsmith & Oona Hathaway, "Bad Legal Arguments for the Syria Airstrikes", (14 April 2018), *Lawfare* (blog), online: <lawfareblog.com/bad-legal-arguments-syria-airstrikes>, archived at <https://perma.cc/VY2T-UU8A>.
- ⁵¹ France, Permanent Representative of France to the United Nations, "Syrie: le Silence n'est plus une solution" by François Delattre (New York: UN Security Council, 14 April 2018), online: <onu.delegfrance.org/Syrie-le-silence-n-est-plus-une-solution>, archived

States has maintained a long-standing position of not “enunciating a new doctrine or theory” of humanitarian intervention.⁵² Instead, US Ambassador to the United Nations Nikki Haley indicated that the strikes were “justified, legitimate, and proportionate,” and that the US action formed “part of a new course charted last year to deter future use of chemical weapons.”⁵³ US Secretary of Defense Jim Mattis explained the strikes as defending “an important national interest in averting a worsening catastrophe in Syria, and specifically deterring the use and proliferation of chemical weapons.”⁵⁴ Mattis further characterized the strikes as “demonstrat[ing] international resolve to prevent chemical weapons from being used on anyone, under any circumstance, in contravention of international law,”⁵⁵ and maintained that “[w]e did what we believe was right under international law, under our nation’s laws.”⁵⁶ As in 2017, other states did not broadly condemn this use of force against Syrian targets notwithstanding the lack of Security Council authorization or an argument of self-defense.⁵⁷

The unresolved question remains what effect these actions and reactions will have on the international law governing the use of force. Given

at <https://perma.cc/E649-LE7B> (indicating that “[n]otre action s’inscrit en pleine conformité avec les objectifs et les valeurs proclamés, dès ses premières lignes, par la Charte des Nations unies”).

⁵² Matheson, *supra* note 29 at 301.

⁵³ US, Permanent Representative of the United States to the United Nations, Remarks at an Emergency UN Security Council Meeting on Syria by Ambassador Nikki Haley (New York: UN Security Council, April 14 2018), online: <usun.state.gov/remarks/8389>.

⁵⁴ US, Department of Defense, News Release, “Statement by Secretary James N Mattis on Syria” (13 April 2018), online: <dod.defense.gov/News/News-Releases/News-Release-View/Article/1493610/statement-by-secretary-james-n-mattis-on-syria>, archived at <https://perma.cc/LXC3-BXKR>.

⁵⁵ *Ibid.*

⁵⁶ Helene Cooper, “Mattis Wanted Congressional Approval Before Striking Syria. He Was Overruled”, *The New York Times* (17 April 2018), online: <www.nytimes.com>, archived at <https://perma.cc/M627-T7EY>.

⁵⁷ For a summary of the 2017 responses, see Monica Hakimi, “The Attack on Syria and the Contemporary Jus Ad Bellum” (15 April 2018), *EJIL: Talk!* (blog), online: <www.ejiltalk.org/the-attack-on-syria-and-the-contemporary-jus-ad-bellum>, archived at <https://perma.cc/9P6L-8VDX> [Hakimi, “The Attack on Syria”]. For a detailed breakdown of reactions to the April 2018 strikes, see Alonso Gurmendi Dunkelberg et al, “Mapping States’ Reactions to the Syria Strikes of April 2018” (22 April 2018), online: *Just Security* <www.justsecurity.org/55157/mapping-states-reactions-syria-strikes-april-2018/>, archived at <https://perma.cc/R3BF-TVMJ>; Alonso Gurmendi Dunkelberg et al, “Update: Mapping States’ Reactions to the Syria Strikes of April 2018” (7 May 2018) online: *Just Security* <www.justsecurity.org/55790/update-mapping-states-reactions-syria-strikes-april-2018/>, archived at <https://perma.cc/Z2T7-ZVAX>.

that the United States and France did not join the United Kingdom's legal explanation, the limiting principles guiding their respective interventions remain unclear. This has led former US State Department Legal Adviser John Bellinger to opine that "in the absence of a clearly articulable international legal basis, administration officials should explain in more detail why the strikes were 'justified' and 'legitimate'."⁵⁸ The use of these adjectives to characterize the attack suggests that, in other circumstances, unauthorized uses of force might *not* be justified or legitimate. One could infer a set of limiting principles from the specific facts of the Syria interventions, but it remains unclear how fact-bound the apparent exception to the requirement of Security Council authorization should be. Should we only countenance an exception in cases of chemical weapons attacks suspected of including sarin (rather than only chlorine), when used by a regime backed by a veto-wielding member of the UN Security Council?⁵⁹ Or in other circumstances as well?⁶⁰

There have been unsuccessful proposals to restrain the use of the Security Council veto in situations of mass atrocities.⁶¹ Where interventions are not authorized by the United Nations in such situations, and where states are unwilling to forego the use of force, this creates pressure either to craft theories of humanitarian intervention, or to expand the definition

⁵⁸ John Bellinger, "The Trump Administration Should Do More to Explain the Legal Basis for the Syrian Airstrikes" (14 April 2018), *Lawfare* (blog), online: <www.lawfareblog.com/trump-administration-should-do-more-explain-legal-basis-syrian-airstrikes>, archived at <https://perma.cc/5BLF-DSFC>.

⁵⁹ See e.g. Sarah Almukhtar, "Most Chemical Attacks in Syria Get Little Attention. Here Are 34 Confirmed Cases", *The New York Times* (13 April 2018), online: <www.nytimes.com>, archived at <https://perma.cc/G8WJ-86PQ>.

⁶⁰ For another example of possible pressure on the Article 2(4) framework, see Asaf Lubin, "Israeli Air Strikes in Syria: The International Law Analysis You Won't Find" (3 May 2017) *Just Security*, online: <www.justsecurity.org/40475/israeli-airstrikes-syria-international-law-analysis-wont-find>, archived at <https://perma.cc/P2U6-UAD8> (observing that "since the Syrian Civil War commenced Israel has engaged in at least 17 of these strikes, and ... the blogosphere has remained silent"). But see Charles J Dunlap, Jr, "On Israeli Airstrikes in Syria: Lawful and No Need for Transparency" (8 May 2017) *Just Security*, online: <www.justsecurity.org/40612/israeli-airstrikes-syria-lawful-transparency>, archived at <https://perma.cc/J3Q9-S4ZY> (countering that "people are either for or against Israeli strikes against Hezbollah arms shipments, and it is hard to see how additional transparency about the facts or even the law would alter those views").

⁶¹ See e.g. Global Center for the Responsibility to Protect, "UN Security Council Code of Conduct", online: <www.globalr2p.org/our_work/un_security_council_code_of_conduct>, archived at <https://perma.cc/J2TE-VTTT>. See also Sebastian von Einsiedel, David M Malone & Bruno Stagno Ugarte, "The UN Security Council in an Age of Great Power Rivalry" (2015) United Nations University Working Paper No 4 at 20, online: <collections.unu.edu/eserv/UNU:6112/UNSCAgeofPowerRivalry.pdf>, archived at <https://perma.cc/LKG6-4UTF>.

of permissible acts of self-defense. Some states articulate *ex ante* legal rationales, whereas others may let the *ex post* reactions of other states (whether in the form of condemnation or acquiescence) serve as a barometer of the perceived conformity of an act with the applicable legal framework.⁶² Although the constraining function of law and its accompanying culture of justification are certainly more visible where actors offer legal rationales explicitly, actors' sensitivity to the reactions of other community members also attests to the character of the international community as one governed by norms, and not just sheer power.

III. Pressures for Public Explanation: The Chilcot Inquiry

A range of domestic and international actors can create pressures for public justification in situations where government lawyers and national security decision-makers might not otherwise offer one.⁶³ For example, in 2009, UK Prime Minister Gordon Brown established a committee of privy counsellors to review the United Kingdom's policy on Iraq since 2001.⁶⁴ This entailed a public examination of the legal basis of the United Kingdom decision to participate in military action in Iraq in 2003, absent explicit authorization by the Security Council.⁶⁵ The Chilcot Inquiry de-

⁶² Monica Hakimi suggests that the reactions of other states to the U.S. strikes in April 2017 "look[ed] a lot like deciding to make the operation lawful," and that "[i]n 2017 and today, the United States and other states that have supported it have made claims on the law. They have argued, if only implicitly, against the application of Article 2(4). They have argued that the legal prohibition of chemical weapons is nearly sacrosanct and can, in certain circumstances, justify a forcible response. These are arguments about the law." Hakimi, "The Attack on Syria", *supra* note 57.

⁶³ For an example of pressure from a members of Congress, see US Senator Tim Kaine, Press Release, "Kaine Calls on Trump Administration to Release Legal Justification for U.S. Airstrikes in Syria" (9 February 2018), online: <www.kaine.senate.gov/press-releases/kaine-calls-on-trump-administration-to-release-legal-justification-for-us-airstrikes-in-syria>, archived at <https://perma.cc/W2AV-42C7>. For an example of pressure from civil society, see Ian Bassin, "Syria Strike: Where's the Legal Justification?", *Project Democracy* (7 April 2017), online: <protectdemocracy.org/update/syria-strike-wheres-legal-justification/>, archived at <https://perma.cc/YV7Z-8LT9>; Justin Florence & Allison Murphy, "The Syria War Powers Memo: Why it Matters", (14 February 2018), *Lawfare* (blog), online: <www.lawfareblog.com/syria-war-powers-memo-why-it-matters/>, archived at <https://perma.cc/9RZ7-PEMH>.

⁶⁴ See UK, The Iraq Inquiry, Surrey, The National Archives, online: <webarchive.nationalarchives.gov.uk/20171123123857/http://www.iraqinquiry.org.uk/the-inquiry/>, archived at <https://perma.cc/XAL2-FG2J>.

⁶⁵ See UK, The Iraq Inquiry, *Section 5: Advice on the Legal Basis for Military Action, November 2002 to March 2003*, (2016), online: <webarchive.nationalarchives.gov.uk/20171123122743/http://www.iraqinquiry.org.uk/the-report/>, archived at <https://perma.cc/92EP-RZE5>. In November 2002, the UN Security Council adopted Resolution 1441 to give Iraq a final opportunity to comply with its disarmament obligations. The resolution provided for further material breaches by Iraq to be referred to the Security Council for

clined to opine on “whether military action was legal,” which it determined could “only be resolved by a properly constituted and internationally recognised Court.”⁶⁶ It described those circumstances as follows:

In mid-January 2003, Lord Goldsmith [the Attorney General] told [Prime Minister] Mr Blair that a further Security Council resolution would be necessary to provide a legal basis for military action. He did not advise [the Prime Minister] until the end of February that, while a second resolution would be preferable, a “reasonable case” could be made that resolution 1441 was sufficient. He set out that view in written advice on 7 March.

The military and the civil service both asked for more clarity on whether force would be legal. Lord Goldsmith then advised that the “better view” was that there was, on balance, a secure legal basis for military action without a further Security Council resolution. On 14 March, he asked Mr Blair to confirm that Iraq had committed further material breaches as specified in resolution 1441. Mr Blair did so the next day.

However, the precise basis on which Mr Blair made that decision is not clear.

Given the gravity of the decision, Lord Goldsmith should have been asked to provide written advice explaining how, in the absence of a majority in the Security Council, Mr Blair could take that decision.⁶⁷

The emphasis on process (“should have been asked to provide written advice”) and legal analysis (“explaining how ... Mr. Blair could take that decision”) in this statement enabled Sir John Chilcot to criticize the United Kingdom’s actions without characterizing them as unlawful. This approach resonates with fiduciary theory’s emphasis on process rather than outcomes. The paramount failure identified by this part of the inquiry was an absence of adequate *justification*, particularly “[g]iven the gravity of the decision” that, “for the first time since the Second World War,” led the United Kingdom to “[take] part in an invasion and full-scale occupation of a sovereign State.”⁶⁸

assessment and reaffirmed that Iraq would face serious consequences for non-compliance.

⁶⁶ Sir John Chilcot, Public Statement on the Report of the Iraq Inquiry (6 July 2016), online: <<http://www.iraqinquiry.org.uk/the-inquiry/sir-john-chilcots-public-statement>>, archived at <https://perma.cc/R94S-M5H6>. Cf Netherlands, Dutch Committee of Inquiry on the War in Iraq, *Report of the Dutch Committee of Inquiry on the War in Iraq, Chapter 8: The Basis in International Law for the Military Intervention in Iraq*, (2010) 57:1 Nethl Intl L Rev 81 at 136–37.

⁶⁷ Chilcot, *supra* note 66.

⁶⁸ *Ibid.*

Although the Chilcot Inquiry faulted Blair for failing to ask Goldsmith to provide a full legal analysis, Dapo Akande suggests, perhaps counterintuitively, that the inquiry actually revealed the central role of international law in policy deliberations: “As would be expected, the legal advisers at the Foreign Office (FCO) and the Attorney General devoted much time and paper to advising on the legality of the war. However, what is perhaps more important here is the relevant policy makers also devoted much time and attention to the question of legality of the conflict.”⁶⁹ Moreover, “[a]ll the main players at the time were of the view that it was essential that the Attorney General be able to say that the use of force would be lawful under international law. No one took the view that legality was irrelevant or that it would be right to go to war if the Attorney General came to the conclusion that it would be unlawful to do so.”⁷⁰ In Akande’s view, “international law mattered because it was seen as essential in providing legitimacy to the policy on Iraq.”⁷¹ This raises the question of whether international law governing the use of force imposes meaningful constraints on decision makers, or whether it emboldens political leaders to act by cloaking their decisions in the mantle of legality, or at least “legitimacy”.

The answer must be that international law does both. As FCO Legal Adviser Sir Michael Wood wrote in a subsequently declassified 2002 memo, “[i]t would be inconceivable that a Government which has on numerous occasions made clear its intention to comply with international law would order troops into a conflict without justification in international law.”⁷² However, policy-makers did not insist on a high threshold of plausibility for the requisite international law justification (whether characterized, in Lord Goldsmith’s words, as “a reasonable case” or the “better

⁶⁹ Dapo Akande, “How and Why International Law Matters: Lessons from the UK’s Iraq Inquiry”, (31 January 2010), *EJIL: Talk!* (blog), online: <www.ejiltalk.org/how-and-why-international-law-matters-lessons-from-the-uks-iraq-inquiry/>, archived at <https://perma.cc/F845-5ZJX>.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Memorandum from Michael Wood, Legal Adviser (15 October 2002)f, online: <[webarhive.nationalarchives.gov.uk/20160512100309/http://www.iraqinquiry.org.uk/media/43502/doc_2010_01_26_11_03_00_737.pdf](http://www.nationalarchives.gov.uk/20160512100309/http://www.iraqinquiry.org.uk/media/43502/doc_2010_01_26_11_03_00_737.pdf)>, archived at <https://perma.cc/7HY4-LGFC>. See also Bob Bauer, “Lawyers Under Pressure: Thoughts on the Chilcot Inquiry”, (11 July 2016), *Lawfare* (blog), online: <www.lawfareblog.com/lawyers-under-pressure-thoughts-chilcot-inquiry/>, archived at <https://perma.cc/26N7-VEBE> (indicating that “Straw and the Prime Minister did both testify that if a proposed action was clearly illegal, the Government should not take it. But [in their view] the legal defect must be clear, and if the competing legal arguments are ‘finely balanced,’ the Ministers may properly urge on the lawyers the one that is consistent with the perceived policy imperative”) [Bauer, “Lawyers Under Pressure”].

view”).⁷³ As Foreign Secretary Jack Straw wrote to Attorney General Goldsmith in February 2003, “[i]t goes without saying that unanimous and express Security Council authorisation would be the safest legal basis for the use of force against Iraq. But I have doubts about the negotiability of this in current circumstances.”⁷⁴ Consequently, he continued, “[w]e are likely to have to go for something less.”⁷⁵ He lamented that “the culture of government lawyers” is such that the advice proffered on questions of international law “is more dogmatic, even though [in his view] the range of reasonable interpretations is almost always greater than in respect of domestic law.”⁷⁶ In contrast to such “dogmatic” interpretations, Straw’s assessment of Resolution 1441—in whose negotiation he had been “immersed”—was that it provided a sufficient basis for the use of force in conjunction, at a minimum, with a material breach by Iraq and “consideration” of reports of further breaches by the Council.⁷⁷

As has become well known, FCO Deputy Legal Adviser Elizabeth Wilmshurst left her government position in 2003 because she “had no doubt the war in Iraq was unlawful.”⁷⁸ She later recounted: “The process of getting advice from Goldsmith, and the advice that eventually came, gave me the impression that international law was regarded simply as an impediment to be removed before military action was possible.”⁷⁹ When asked by Sir John Chilcot whether “it ma[d]e a difference that Jack Straw

⁷³ *Ibid* (noting Lord Goldsmith’s invocation of the “Kosovo precedent”: “Goldsmith noted that in the past, as in Kosovo in 1999 and Operation Desert Fox in 1998, the U.K. Government was prepared to proceed with uses of force so long it could do so on a legal basis that was ‘reasonably arguable’ or ‘respectable.’ An argument of modest strength, one not at all certain to prevail in a judicial contest, had been deemed sufficient”).

⁷⁴ Letter from Jack Straw, Foreign Secretary to the Honourable Lord Goldsmith, the Attorney General (6 February 2003) at 1, online: <webarchive.nationalarchives.gov.uk/20160512100233/http://www.iraqinquiry.org.uk/media/43520/doc_2010_01_26_11_05_30_485.pdf>, archived at <https://perma.cc/CN9J-8HBZ> [Letter from Straw].

⁷⁵ *Ibid* at 1.

⁷⁶ *Ibid* at 2.

⁷⁷ *Ibid* at 1, 5. See also John Bellinger, “The Chilcot Inquiry and the Legal Basis for the Iraq War” (11 July 2016), *Lawfare* (blog), online: <www.lawfareblog.com/chilcot-inquiry-and-legal-basis-iraq-war>, archived at <https://perma.cc/G9FM-8WF4> (noting that “[a]lthough many academics consider the Iraq war to have been illegal under international law, government lawyers in the US, UK, Australia, Spain, and Poland concluded that the use of force was authorized under UNSCRs 678 and 687 and refreshed and reaffirmed by UNSCR 1441. The Chilcot inquiry could have disputed this conclusion but did not”).

⁷⁸ Elizabeth Wilmshurst, “We Ignored the Rule of Law: The Result Was Iraq”, *The Guardian* (7 July 2016), online: <www.theguardian.com>, archived at <https://perma.cc/J82V-9FU4>.

⁷⁹ *Ibid*.

himself is a qualified lawyer?" Wilmshurst responded simply: "[h]e is not an international lawyer."⁸⁰ In her assessment, the view that the United Kingdom could use force absent an additional Security Council authorization fell outside the range of reasonable interpretations, as defined by the relevant interpretive community—in this case, the community of international lawyers.⁸¹

Former Prime Minister Tony Blair offered a different perspective in his Chilcot Inquiry testimony. Stressing the importance of taking a strong public position in order to assemble a multinational coalition to use force in Iraq, Blair told the House of Commons in January 2003: "There are circumstances in which a UN resolution is not necessary, because it is necessary to be able to say in circumstances where an unreasonable veto is put down that we would still act."⁸² When asked about the apparent inconsistency between this statement and the legal advice he had been given at that time, Blair indicated that "I was saying it not in a sense as a lawyer, but politically,"⁸³ and also clarified that he was envisioning a situation where there had been a material breach by Iraq. Sir Roderick Lyne pushed back on Blair's attempt to draw a distinction between legal justification and political resolve, asking: "Can you really distinguish when you are speaking to the House of Commons as Prime Minister between making a political point and a legal point when you are making a point about

⁸⁰ UK, Elizabeth Wilmshurst Witness Transcript, the Iraq Inquiry (26 January 2010), Surrey, National Archives at 8 lines 8–10, online: <webarchive.nationalarchives.gov.uk/20171123123302/http://www.iraqinquiry.org.uk/the-evidence/witness-transcripts>, archived at <https://perma.cc/E2LK-KRXC>. For a discussion of a 2015 modification in the language of the UK Ministerial Code to delete an explicit reference to "the overarching duty on Ministers to comply with the law including international law and treaty obligations," see generally UK, All-Party Parliamentary Groups, *Meeting Report: The Ministerial Code and the International Rule of Law* (London: Bingham Centre for the Rule of Law, 2015) (The Right Honorable Dominic Grieve, Chair), online: <www.biicl.org/documents/818_ministerial_code_meeting_report.pdf>, archived at <https://perma.cc/76X9-M7MN>.

⁸¹ Christopher Greenwood, who was subsequently elected to the International Court of Justice, reportedly concurred in the assessment that a further resolution was not legally necessary. See David Brummell, "Iraq: Legal Basis for Use of Force: Note of Discussion with Attorney General", Note, (2003) at para 9, online: <www.iraqinquiry.org.uk/media/43716/document2010-01-27-100801.pdf>, archived at <https://perma.cc/654L-2KNR>. The same was true for Iain MacLeod, who had worked on Resolution 1441. See Interview of Iain MacLeod by Sir John Chilcot et al (30 June 2010) at 22, lines 5–10, 50, lines 16–21, online: <www.iraqinquiry.org.uk/the-evidence/witness-transcripts>, archived at <https://perma.cc/E2LK-KRXC>.

⁸² Interview of the Right Honorable Tony Blair by Sir John Chilcot et al (21 January 2011) at 71, lines 13–16, online: <<http://webarchive.nationalarchives.gov.uk/20160512094757/http://www.iraqinquiry.org.uk/media/50865/20110121-Blair.pdf>>, archived at perma.cc/XWE9-36YZ [Blair Interview].

⁸³ *Ibid* at 72, lines 2–3.

legal interpretations of UN resolutions?”⁸⁴ Regardless, Blair’s January 2003 statement directly linked the analysis of legal requirements (“a UN resolution is not necessary”) with political imperatives (“*because* it is necessary to be able to say ... that we would still act”).⁸⁵

The Chilcot Inquiry revealed a division in perspectives between lawyers who had been involved in negotiating prior Resolution 1441 on behalf of the United Kingdom and the United States, and those who were charged with interpreting whether this Resolution authorized the future use of force. The negotiating lawyers maintained that they had been tasked with—and accomplished—securing agreement on language that would not require an additional resolution in order to authorize the use of force in response to a material breach by Iraq.⁸⁶ But some who were not part of the negotiations, relying on solely on the text as adopted, maintained that it did not, in fact, provide the requisite authorization. Blair, who was politically committed to engaging in military action, thus told the House of Commons that “it is necessary to be able to say in circumstances where an unreasonable veto is [or would be] put down that we would still act,” and that this political imperative meant that the United Kingdom *could not* take the position that a second Security Council resolution was required.⁸⁷

Charlotte Peevers offers a different interpretation of Blair’s 2003 statement to the House of Commons. In her view, Blair was attempting to make “a representation of legal authority *in the absence* of having political authority ... [in the form of] majority public support—a democratic mandate—for using force without UN backing.”⁸⁸ Paradoxically, in her view, Blair sought “to claim an excessive sovereign right to wage war on the premise of an *internationalized legal* authority, avoiding the strictures of democratic mandates, or indeed international authority vested in the UN Security Council’s authorization of force.”⁸⁹ This was especially problematic because “[t]he boundaries of that legal authority were, at the time, entirely subject to secrecy and could therefore be publicly represented in any way deemed justifiable by the government; and then later as merely a po-

⁸⁴ *Ibid* at 73, lines 19–23.

⁸⁵ *Ibid* at 71, lines 13–16.

⁸⁶ Letter from Straw, *supra* note 74 at 2–3.

⁸⁷ Blair Interview, *supra* note 82 at 71, lines 14–16, 74, lines 4–18.

⁸⁸ Charlotte Peevers, “Guest Post Part II: The Chilcot Inquiry: The Publication Saga of an Official History” (18 February 2015), *Opinio Juris* (blog), online: <opiniojuris.org/2015/02/18/guest-post-part-ii-chilcot-inquiry-publication-saga-official-history>, archived at <https://perma.cc/U4DQ-7GQZ> [emphasis in original].

⁸⁹ *Ibid*.

litical argument that did not in fact rely upon legal authority!”⁹⁰ All of this turned on whether or not a second resolution was “necessary”, with the term “necessary” sounding in both legal and political registers, both contemporaneously and in subsequent retellings. More broadly, this example encapsulates the difficulty of disentangling legal and policy justifications for international actions, particularly when such actions involve novel contexts or contested legal interpretations. Like the concept of “necessity”, the concept of “legitimacy” has both normative and political overtones. As the language of legitimacy creeps into the international legal lexicon, the tenor of public justification becomes increasingly political.⁹¹

IV. Lawyers, Policymakers, and Public Discourse

The distinction between what countries say and do *as a legal matter*, and what they say and do *as a matter of policy*, carries significant weight in a system of customary international law built on evidence of state practice accompanied by *opinio juris*. In December 2016, the US government published a document entitled *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*.⁹² The report compiled eight years’ worth of “speeches, public statements, reports, and other materials,”⁹³ articulating

⁹⁰ *Ibid.*

⁹¹ For reflections on the concept of “legitimacy” in this context, see Laurie Blank, “Syria Strikes: Legitimacy and Lawfulness”, (16 April 2018), *Lawfare* (blog), online: <lawfare-blog.com/syria-strikes-legitimacy-and-lawfulness>, archived at <https://perma.cc/3FR5-Q55T>; Marko Milanovic, “Illegal but Legitimate?”, (10 April 2017), *EJIL: Talk!* (blog), online: <www.ejiltalk.org/illegal-but-legitimate/>, archived at <https://perma.cc/BP5A-GYFT>.

⁹² US, White House, *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations* (Washington, DC: The White House, 2016), online: <obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf>, archived at <https://perma.cc/F6DA-D8DV>.

⁹³ US, White House, Office of the Press Secretary, Fact Sheet, “Presidential Memorandum: Legal and Policy Transparency Concerning United States’ Use of Military Force and Related National Security Operations’ and Accompanying Report on Transparency in Legal and Policy Frameworks” (5 December 2016), online: <obamawhitehouse.archives.gov/the-press-office/2016/12/05/fact-sheet-presidential-memorandum-legal-and-policy-transparency>, archived at <https://perma.cc/DRV2-W5ZN>. Reactions to the report included Marty Lederman, “President Obama’s Report on the Legal and Policy Frameworks Guiding and Limiting the Use of Military Force [UPDATED]”, (5 December 2016) *Just Security*, online: <www.justsecurity.org/35239/president-obamas-report-legal-policy-frameworks-guiding-united-states-military-force-related-national-security-operations>, archived at <https://perma.cc/EG47-Y6W3> (praising the report, while noting that it “does not address two other Article II questions that have arisen in recent years: (i) whether the President’s Article II authority ever includes the power to act in a way

the “legal and policy frameworks” that had guided US actions in the military and national security arenas. Taking as an example the 2013 Presidential Policy Guidance (PPG) on uses of force outside active areas of hostilities, Laura Dickinson notes that “for the purposes of international law, the 2013 PPG did not purport to establish legal rules. Instead, it imposed, via policy, a set of limitations on the use of force by the United States over and above all existing limitations under the law of armed conflict (LOAC), also known as international humanitarian law (IHL).”⁹⁴ As Dickinson further notes, the adoption of a “legalistic” policy such as the PPG, which “may require government lawyers to interpret it, even if those lawyers are not the ultimate decision-makers,” can have the effect of “blur[ring] the boundaries between law and policy itself.”⁹⁵ This, in turn, may contribute to the view that, in Jack Straw’s words, “the range of reasonable interpretations [of international law] is always almost greater than in respect of domestic law.”⁹⁶ In domestic as in international law, however, the test of an interpretation’s “reasonable[ness]” lies in the reactions of the relevant interpretive community. Reactions by other governments may be communicated bilaterally (for example, in the course of diplomatic exchanges), or via public channels.

Members of civil society also belong to the interpretive community of international lawyers. In the absence of voluntary public release of legal and policy justifications, governmental entities may be compelled to make certain documents public under applicable provisions of national freedom of information acts. There are, however, strict limits on compelled disclosure. For example, in *Corderoy & Ahmed v. IC, A-G & CO*, the UK Upper Tribunal upheld the Information Commissioner’s (ICO) decision to deny requests for legal advice given to the Attorney General about a Royal Air Force drone attack in Syria in 2015 that killed two British citizens.⁹⁷ The event was significant in part because it was “the first time in modern times that a British asset ha[d] been used to conduct a strike in a country where [the United Kingdom] [was] not involved in a war.”⁹⁸ Yet, although

that puts the U.S. in breach of its obligations under the U.N. Charter ... and (ii) whether and when Article II authorizes the President to use force purely for *humanitarian* purposes, at least in limited circumstances” [emphasis in original].

⁹⁴ Laura Dickinson, “Symposium: The Trump Administration and International Law: Policy in the Shadow of International Law” (21 February 2018), *Opinio Juris* (blog), online: <opiniojuris.org/2018/02/21/symposium-the-trump-administration-and-international-law-policy-in-the-shadow-of-international-law>, archived at <https://perma.cc/8XEP-C5BN> [emphasis in original].

⁹⁵ *Ibid.*

⁹⁶ Letter from Straw, *supra* note 73 at 2.

⁹⁷ [2017] UKUT 495 (AAC) (BAILII).

⁹⁸ *Ibid* at para 12.

the court ultimately upheld the result reached by the ICO, it criticized her for relying on the government's representations regarding the requested documents rather than looking at them herself.⁹⁹ The court also grappled with conflicting imperatives under the *Freedom of Information Act*, noting that “[t]he importance of the issue and the public interest in the issue works both ways because it supports the need for frankness and confidentiality between client and lawyer on the one hand and the arguments in favour of transparency and fully informed debate on the other.”¹⁰⁰

The *Corderoy* court appended to its opinion the April 27, 2016 *Report of the Joint Committee on Human Rights of the House of Lords and House of Commons*, which disavowed any desire “to see the Governments’ confidential legal advice,” while insisting that “considerations of transparency and democratic accountability require the Government to explain publicly its understanding of the legal basis on which it takes action which so seriously affects fundamental rights.”¹⁰¹ In the Joint Committee’s view:

When dealing with an issue of such grave importance, taking a life in order to protect lives, the Government should have been crystal clear about the legal basis for this action from the outset. They were not. Between the statements of the Prime Minister, the Permanent Representative to the UN and the Defence Secretary, they were confused and confusing.¹⁰²

The Joint Committee’s request for clarification from the government represents another contribution to international law’s culture of justification, embedded within a domestic culture of legal justification and consultation of Parliament.

The examples described above illustrate the continuing relevance, and limits, of Abram Chayes’s observation that “the requirement of justification provides an important substantive check on the legality of action and ultimately on the responsibility of the decision-making process.”¹⁰³ On the one hand, government lawyers must, as a general matter, be able to articulate a “reasonable” account of a proposed action’s international lawfulness in order for that action to be considered. On the other hand, as the Chilcot Inquiry illustrates, legal advice is rarely insulated from perceived policy imperatives, and lawyers will often (although not invariably) endeavor to accommodate political decision makers’ desired courses of action within available legal frameworks. Public debate about the lawfulness of

⁹⁹ *Ibid* at paras 90–92.

¹⁰⁰ *Ibid* at para 76.

¹⁰¹ *Ibid*, Schedule to Decision at para 3.7.

¹⁰² *Ibid*, Schedule to Decision at para 3.18.

¹⁰³ Chayes, *supra* note 6 at 42.

particular actions, both within other branches of government and among members of civil society, can help create pressures for more robust legal justifications—for example, raising the threshold for what counts as a “reasonable” interpretation—and impose additional costs on decision-makers for taking actions that deviate too widely from accepted norms of behavior. International law does not, as a general matter, require states to offer affirmative public justifications for their actions. However, as illustrated above, states routinely offer explanations (and respond to others’ explanations) in various fora in response to community expectations, and in order more effectively to influence the evolution of standards of behavior within the community.

In the end, international law’s culture of justification—comprised of the exchanges prompted by the public interpretation and elucidation of applicable rules—provides the context within which international legal actors operate. This account resonates with the idea of law as process, which is often associated with the New Haven School.¹⁰⁴ From the perspective of fiduciary theory, the core insight is that an account of compliance that focuses exclusively on outcomes misses an important part of what makes international law *law*: namely, the *ex ante* and *ex post* processes of justification and explanation that shape actors’ collective understandings of what constitutes internationally permissible conduct.

In the international arena, the farther away an action falls from the agreed core of legally available options, the more likely it is to generate international condemnation, and to lead to the imposition of diplomatic and other costs on the offending actor. In the domestic sphere, at least in liberal democratic states, the absence of an acceptable international legal justification provides constituents with a basis for challenging and scrutinizing governmental actions. As Criddle and Fox-Decent note, “[t]he compulsion of legality, of course, provides no assurance against an executive determined to breach its international legal obligations, or (what is more likely) to interpret them in an unreasonable manner.”¹⁰⁵ However, they continue, “the compulsion of legality is a necessary condition of constitutional democracy because it embodies the rule of law,” including the state’s “unwillingness to reject openly the legal basis of its legal and political authority.”¹⁰⁶ While Criddle and Fox-Decent emphasize the important role of international courts, less formal mechanisms—such as domestic and supranational committees of inquiry, diplomatic correspondence, and

¹⁰⁴ See e.g. Eisuke Suzuki, “The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence” (1974) 1:1 *Yale Stud World Pub Ord* 1 at 5.

¹⁰⁵ Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 2 at 330.

¹⁰⁶ *Ibid.*

the “court of public opinion”—also play a crucial role in setting the expectation that states will explain their international acts, and that their acts will, by and large, conform to generally accepted notions of legally justifiable conduct. By speaking the language of international law, states engage in conversations that help define the terms of, and create the conditions for, their continued coexistence.
