

***At the Vanishing Point of Law?
International Law and the Use of Force by Britain and
Canada in the Korean War and Afghanistan Conflict***

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Thesis submitted in partial fulfilment of the requirements
for the degree of D.Phil. in International Relations in the
Department of Politics and International Relations at the
University of Oxford

Michaelmas Term 2013

Word count: approximately 99,485
(including footnotes, excluding bibliography)

Abstract

This thesis examines important aspects of Canada and Britain's participation in the Korean War of 1950-53 and the Afghanistan Conflict of 2001-present with a view to better understanding how international law influenced this participation, and whether key leaders and officials understood said law as a binding and distinct phenomenon. It draws on constructivist International Relations (IR) theory and "interactional" International Law (IL) theory, and employs a method of historical reconstruction and process tracing. I argue that, contrary to what realism might predict, international law helped define and shape each state's possible course of action in the wars, and the justifications that could be made for their behaviour. More specifically, Canada and Britain's involvement in the conflicts suggests that, when states use force, international law can play four broad roles: 1) it helps constitute the identities of the actors at issue; 2) it helps regulate the political and military practice of the actors at issue; 3) it permits and legitimates certain political and military practices that otherwise might not be permitted; and 4) it helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice. However, I also contend that, contrary to what IL scholars might predict, the discourse and actions of Canadian and British leaders and officials during the Korean War and Afghanistan Conflict offer mixed support for the hypothesis that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making. In sum, my findings suggest that international law can play important roles in world politics and the use of force by states, but it is unclear whether these effects are attributable to an obligatory quality in law.

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Acknowledgments

Researching and writing a doctoral thesis is a rather large endeavour, and I have numerous people to acknowledge and thank for their help along the way. Many of the ideas expressed in this thesis are a collective product of the debates I have had with colleagues and professors during my time as a doctoral candidate in the Department of Politics and International Relations at the University of Oxford. I thank them all for their challenging feedback and positive encouragement. I would like to note in particular the support I have received from my supervisor, Jennifer Welsh, over the past four years. She has entrusted me with considerable intellectual freedom while still providing extensive inspiration and analytical guidance.

Financial support for the research and writing of this thesis has been provided by the following organizations: Canada's Social Sciences and Humanities Research Council; IODE Canada; the Commonwealth Scholarship; the Canadian Council on International Law; the Mackenzie King Memorial Trust; the John Dobson Foundation; Linacre College; and the Department of Politics and International Relations. I thank all of these organizations for believing in my work. I could not have completed this thesis without their support.

On a more personal level, I would like to thank my parents, Melodie Mayson and Ted Richmond. Their keen editing skills and emotional encouragement over the past four years have been very much appreciated. I would also like to thank my parents-in-law, Jill and Kip Cobbett, for all of their support as well. Finally, I dedicate this thesis to my wife, Anne Cobbett. I told her in the summer of 2009 that we were going to have an adventure overseas. Neither of us realized, however, how challenging, memorable, and fun the following years would be. Through it all, Anne has been patient, encouraging, and humorous. I am lucky to call her my partner, and I thank her for her continued love and support. Bird.

Introduction

Following the death and destruction of World War II, the use of military force by states and the conduct of states in war became subject to extensive legal restrictions in the United Nations Charter (in 1945) and Geneva Conventions (in 1949), respectively. For instance, although the use of force by states and the conduct of states in war were governed by international treaties and customary international law prior to World War II, the Charter and the four Geneva Conventions subjected these fields of activity to international legal rules that were historically unprecedented in nature and scope. Regarding the Charter, this treaty differed from the 1919 Covenant of the League of Nations in many key ways.¹ While the Covenant was aimed at confronting the narrow concept of “aggression”, the Charter was designed to address a broader range of threats to international peace and security. Further, the Charter focused less on prohibiting the formal and specific phenomenon of “war” and more on regulating the general phenomenon of “force”, and it regulated such activity in a wide range of circumstances.² Finally, if a state resorted to war in breach of the Covenant, the League Council was committed only to economic sanctions as a response. In contrast, under the Charter, the Security Council could use force without attempting economic sanctions first, and the Council was envisaged as taking military measures in its own right, rather than merely advising or recommending action to states. Regarding the Geneva Conventions, these treaties also differed from previous agreements in many key ways.³ While the Prisoner of War (POW) Convention of 1929 contained 97 articles, the Third Geneva Convention regarding POWs contained 143 articles.⁴ Moreover, under the 1949 Convention, the categories of persons entitled to POW status were

¹ See Dinstein 2011, and Lowe et al. 2010: 10-12.

² See e.g. Article 2(4) of the Charter, which states that all members of the UN “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 [UN]”).

³ See Sassòli & Bouvier 2006, and the website of the International Committee of the Red Cross: www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm

⁴ Geneva Convention (III) relative to the Treatment of Prisoners of War, signed on 12 August 1949.

broadened, and the conditions and places of captivity were more precisely defined, including the relief that POWs are entitled to receive and the judicial proceedings that can be instituted against them. Finally, the 1949 Convention established the principle that all POWs shall be released and repatriated without delay after the cessation of active hostilities.

Despite the extensive legal restrictions in the UN Charter and Geneva Conventions, however, the use of force has continued and millions of people have died in armed conflict.⁵ This perceived “gap” between formal law and actual practice led Hersch Lauterpacht, a legal scholar, to note that “if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law”.⁶ Embedded in this observation, it seems, is the realist idea that because there is no true supranational authority able to protect states or control their conduct during hostilities, states, especially powerful ones, are not constrained by the international law on the use of force (*jus ad bellum*) or the international law of armed conflict (*jus in bello*) when they use force, and will indeed violate law if it conflicts with their political and military interests in such matters.⁷ In response to this view, however, some International Relations (IR) and International Law (IL) scholars have sought to demonstrate that the relationship between international law and the use of force by states is more complex than realism might suggest, and that law can have an important impact in state decisions on war.⁸

The following study aims to contribute to this interdisciplinary literature. To this end, it addresses two main questions. First, in the post World War II period, how, if at all, does

⁵ In a recent historical survey of world conflicts post World War II, entitled *The Pursuit of International Criminal Justice*, M. Cherif Bassiouni and a team of scholars found that between 1945 and 2008, some 313 conflicts occurred, causing an estimated 92-100 million people killed. Those figures are twice the number of victims in World Wars I and II combined. The conflicts studied were of an international and non-international nature, as defined by the *jus in bello*, as well as purely internal conflicts, civil wars, and regime victimization.

⁶ 1952: 382.

⁷ For scholars whose views generally resonate with this realist idea, see e.g. Clausewitz 1966, Kennan 1984, Mearsheimer 2003, and Morgenthau 2006.

⁸ See e.g. Hoyt 1961, Chayes 1974, Henkin 1979, Byers 2002, Wheeler 2004, and Brunnée & Toope 2010.

international law influence state practice regarding the use of military force, and the nature and scope of such force? Second, if international law plays a role in such practice, to what extent do policy-makers understand it as a binding and distinct set of legal rules, and to what degree does the legal status of these rules impact their decision-making? To address these questions, this study analyzes key aspects of Canada and the United Kingdom's participation in the Korean War of 1950-53 and the Afghanistan Conflict of 2001-present. These key aspects touch upon each state's policy and practice regarding: a) whether and how to be involved in the two wars; b) the major international legal issues related to each conflict; and c) the treatment of captured enemy fighters. I draw on constructivist IR theory and "interactional" IL theory, and employ a method of historical reconstruction and process tracing. I argue that, contrary to what realism might predict, international law helped define and shape each state's possible course of action in the wars, and the justifications that could be made for their behaviour. More specifically, Canada and Britain's involvement in the conflicts illustrates the four roles that I theorize international law plays in the use of force: 1) it helps constitute the identities of the actors at issue; 2) it helps regulate the political and military practice of the actors at issue; 3) it permits and legitimates certain political and military practices that otherwise might not be permitted; and 4) it helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice. However, I also contend that, contrary to what IL scholars might predict, the discourse and actions of Canadian and UK leaders and officials in the Korean War and Afghan Conflict offer mixed support for the hypothesis that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making. In sum, my findings suggest that international law can play important roles in world politics and the use of force by states, but it is unclear whether these effects are attributable to an obligatory quality in law.

Such a study, and the questions it addresses, are significant for four reasons. First, existing IR research that examines the role of non-material factors in world politics and the use of force by states has often focused more on moral norms and less on the specific phenomenon of international law.⁹ Moreover, as will be discussed in the next chapter, the current political science research on norms has not adequately distinguished legal norms from other types of norms (such as moral and political norms), and scholars have not adequately explained how legal norms operate differently from non-legal norms in world politics.¹⁰ As Martha Finnemore notes, if policy-makers do not know and do not care about the legal status of the rules they consider relevant to their decision-making, “what reason do we have to think that ‘legalness’ matters at all in compliance with norms?”¹¹ Thus, insofar as the *jus ad bellum* and *jus in bello* are particular forms of international law,¹² and to the extent they contain rules that can and should be analyzed as distinct legal phenomena,¹³ then asking how such rules influence the use of force, and whether the legal status of these rules matters, poses questions that have not been adequately addressed in existing IR and political science literature.

Second, while some IR and IL work *has* analyzed the role of law in world politics and found that legal rules can limit the exercise of state power, this research has often avoided security issues.¹⁴ And this, in turn, has allowed the realist claim to stand that law only affects “secondary” issues in foreign policy, and is dispensed with if it impinges on the use of force.¹⁵ To this extent, then, studying law’s influence on the use of force by states addresses a gap in IR and IL research,

⁹ Price 1997, Thomas 2001, Tannenwald 2007, Percy 2007, and Petrova 2008.

¹⁰ Finnemore 2000: 701-02.

¹¹ 2000: 701.

¹² For descriptions of the *jus ad bellum* as a branch of international law from the perspective of IL scholars, see Brownlie 1963, Franck 2002 and Gray 2008. For descriptions of the *jus in bello* as a branch of international law, again from an IL viewpoint, see Sassòli & Bouvier 2006, Fleck 2009, and Dinstein 2010.

¹³ The idea that international law and international legal rules can and should be analyzed as phenomena distinct from other factors in world politics is discussed later in this chapter.

¹⁴ Kratochwil 1989, Byers 1999, and Toope 2000.

¹⁵ Simpson 2000: 457, and Wheeler 2004: 190.

and addresses an issue area that realists cannot dismiss as unimportant. If international law is found to play a role in situations where realists argue that states ought to be purely interested in maintaining their relative power position, such as decisions about when and how to use military force, this suggests that law can play an important role in influencing state decision-making.¹⁶

Third, as will be discussed in the next chapter, while some constructivists *have* argued that legal norms are distinct from non-legal norms,¹⁷ and constructivist theory frequently cites international law and draws on legal philosophy,¹⁸ constructivism has inadequately explained how legal and non-legal norms differ, and what exactly distinguishes international law from other phenomena in world politics. This is because, this study posits, constructivism has not adequately focused on the concept of legal obligation. As I suggest later below, the binding nature of international law is what potentially distinguishes it from other factors in international relations. To this extent, therefore, if this study finds that some Canadian and British policy-makers in the Korean War and Afghanistan Conflict felt bound by *jus ad bellum* and *jus in bello* rules, and that they were influenced in part by this perception of obligation in their decision-making, then this thesis will contribute to an analytical and empirical gap in constructivist literature.

Finally, the current IR and IL research on the use of force by states often focuses on recent conflicts¹⁹ or US practice.²⁰ To this extent, then, studying the role of international law in the Korean War addresses a historical gap in this research, and examining Canada and Britain broadens the empirical scope of this work. Further, as elaborated later below, focusing on Canada and Britain's participation in the Korean War and Afghanistan Conflict is significant because these

¹⁶ This point is based on a more general observation made by Sarah Percy about the potential significance of norms in state decisions regarding the use of force (2007: 10).

¹⁷ Katzenstein 1996, and Arend 1996 and 1999.

¹⁸ Onuf 1989, Kratochwil 1989, and Reus-Smit 2004.

¹⁹ The current IR and IL literature that examines the use of force by states often focuses on the 1999 Kosovo Intervention (Roberts 1999), the still ongoing Afghanistan Conflict (Wheeler 2002), the invasion of Iraq in 2003 (Murphy 2004), and the 2011 Libya Intervention (Lehmann 2012).

²⁰ Beck 1993, Byers & Nolte 2003, Roth 2003, Boyle 2004, Wheeler 2004, Tannenwald 2007, and Carvin 2010.

cases are empirically puzzling and politically relevant, and offer potential insights for developing and assessing our theories of the role of international law in world politics and the use of force.

Below, I critically review the existing literature on the role of law in the use of force by states. I then outline this study's research design, method, and premises. Next, I explain why I focus on Canada and Britain's participation in the Korean War and Afghanistan Conflict, and what this means for the extent of my epistemological claims. I conclude by outlining how the remainder of the thesis is organized.

Existing literature on the role of international law in the use of force by states

Existing literature on how international law influences state practice in the use of force can be divided into two main groups: 1) early IL research from the 1960s and 1970s that seeks to study the impact of law in various world crises; and 2) recent IR and IL work from the 1990s and 2000s that aims to demonstrate the relevance of normative factors in world politics. Below, I briefly describe some of the key studies in each category and critically analyze their theoretical, methodological, and epistemological assumptions. I argue that the older IL work offers empirical insights and methodological guidance that are sometimes ignored by contemporary scholars. However, I also suggest that this research is theoretically underdeveloped, lacks comparative analysis and examination of *jus in bello* rules, and can be unconvincing about what constitutes evidence of law's influence. Regarding the recent IR and IL work, I argue that while it is more theoretically developed than the older IL research, it tends to focus on the United States and its body of empirical work is still growing.

Early International Law research

Until 1960, there was little scholarly study of the role of international law in state decision-making and the use of force.²¹ In 1961, however, Edwin Hoyt examined whether principles of the UN Charter acted “as a restraint and as an incentive to action” in the American military response to the 1950 attack by North Korea on South Korea.²² He argues convincingly that the US assisted South Korea within the UN framework for political *and* legal reasons.²³ However, while Hoyt is rigorous in his legal-historical method,²⁴ he focuses on describing the US response from the perspective of international law and does not offer an adequate theoretical account of how this law influenced US behaviour. Moreover, his findings are based on only one US case study. Although Hoyt notes that during the Korean War, “the British Labour Government took care to disassociate itself from” some US positions,²⁵ one is left wondering why the UK took this view, whether other US allies such as Canada held similar views, and whether international law played a role in this regard. Finally, while Hoyt argues that, in war, “legal considerations receive low priority”,²⁶ he does not study the role of *jus in bello* rules in the Korean conflict and offers no evidence for this view. One is left pondering whether *jus in bello* rules *do* receive low priority in war, whether *jus ad bellum* rules receive higher priority leading up to war, and what this may mean about the relationship between the two branches of international law.

²¹ Prior to 1960, while a few studies had examined the role of law in state relations and diplomacy (Corbett 1951 and 1959) and the politics and ethics of international law (Visscher 1957), and others saw law wholly as part of the political process (McDougal 1953), these works did not focus on the role of international law in the use of force by states.

²² 1961: 45.

²³ The political reasons were the fact that US allies were likely to lose confidence in America if it did not help the South Koreans, and a desire to show the USSR that the US was willing to fight. The legal factor was the fact that policy-makers believed that the North Korean attack was aggression and a clear violation of the UN Charter (1961: 54-55).

²⁴ Hoyt succinctly and accurately outlines the principles of the UN Charter that were at issue in the Korean War (1961: 45-47). He also analyzes, among other things, government documents, speeches, and interview data.

²⁵ 1961: 69.

²⁶ 1961: 67.

Following Hoyt, the American Society of International Law (ASIL) released a series of studies in the 1970s that looked at the effect of law in four world crises.²⁷ These studies performed the important task of gathering historical evidence into a collection of descriptive statements on the roles of international law and international organizations in the crises examined.²⁸ Unfortunately, this empirical work is sometimes ignored by contemporary scholars who seek to study law's role in international relations.²⁹ In contrast, this thesis relies on the ASIL series in two ways. First, it follows the series' methodological warning that, when studying the influence of international law in the use of force by states, one should not try to analyze the operation of law *throughout* the event.³⁰ This study therefore examines key aspects of Canada and Britain's participation in the Korean War and the Afghanistan Conflict with a view to better understanding how international law influenced these uses of force, and how leaders and officials understood this law. Focusing on key aspects is important because leaders in Canada and Britain will have made many decisions regarding the Korean War and Afghanistan Conflict, and the aim of this thesis is not to examine all of these choices or the conflicts in their entirety.

Second, this thesis draws on, and seeks to build upon, the ASIL study that is most often cited in the literature, namely Abram Chayes' analysis of the Cuban missile crisis. In that work, Chayes examines how law entered the policy-making process of the US leaders who responded to the maritime transfer of nuclear missiles from the USSR to Cuba in 1962. He finds that, during the crisis, US leaders "did not ignore legal considerations" and "made a considerable effort to integrate

²⁷ The four crises are: 1) the Suez Canal crisis of 1956 (Bowie 1974); 2) Cyprus in 1958-67 (Ehrlich 1974); 3) the UN operation in the Congo in 1960-64 (Abi-Saab 1978); and 4) the Cuban missile crisis of 1962 (Chayes 1974).

²⁸ Boyle 1985: 78.

²⁹ See e.g. Arend 1996: 303.

³⁰ For instance, in his study of the Cuban missile crisis of 1962, Abram Chayes "breaks up" the event by examining three US decisions: 1) the choice of the naval blockade against Cuba as opposed to harsher or milder responses; 2) the decision to seek support from the Organization of American States; and 3) the US approach to the UN. Similarly, in his examination of the 1956 Suez Canal crisis, Robert Bowie emphasizes that his goal "is not to recount the history of the crisis in detail", but to "explore what part international law, norms, or agencies played in the decisions and actions of the major protagonists" (1974: ix).

legal factors into their deliberations”.³¹ Chayes’ study is relevant because, by observing that the US response to the missile crisis was a naval blockade *instead of* invasion, and this was due in part to legal considerations, it implies that one way to show that law constrained a state’s use of force is by finding evidence that: a) some leaders of the state or their advisors wanted to implement military responses that were broader or more severe than the force that was actually employed; and b) these broader or more severe responses were avoided in part because other leaders or advisors thought this would be more consistent with international law. This study assumes that finding such evidence regarding Canada and Britain’s participation in the Korean War and Afghanistan Conflict would help suggest that law influenced the behaviour of these states in these wars.

Notwithstanding its insights, there are also limits to Chayes’ investigation that this thesis seeks to address. For instance, to show that law constrained the choices of US leaders during the missile crisis, Chayes cites statements that indicate these men were influenced more by *moral* concerns (i.e. that a surprise attack against Cuba would be inconsistent with US values) than by legal factors (i.e. that a surprise attack would be prohibited by international law).³² While Chayes admits that their concerns were expressed in moral terms, he argues “it is hard to believe” leaders were unaware of the legal overtones of these terms.³³ And, if leaders were unaware of the overtones, Chayes implies this is unimportant because, regarding the use of force, legal norm and moral precept express “the same deep human imperative”.³⁴ However, while it may be “hard to believe” that leaders are unaware of the legal overtones of any moral concerns they express in a crisis, this study assumes more explicit evidence is needed to show they felt bound by international

³¹ The US President and his advisors, Chayes concludes, “were properly concerned with the possibilities – for good or ill – in the situation they faced and in the courses open to them”, and “Law and legal institutions played a part in defining and shaping those possibilities” (1974: 100-101).

³² 1974: 38-40.

³³ 1974: 39-40.

³⁴ As Chayes argues, it “does little justice to ourselves” or to the leaders who struggled with one another and with their own consciences during the missile crisis “to try to package” the two aspects of legal norm and moral precept “into neat, analytically separate components” (1974: 40).

law and were influenced by law in their decision-making. I discuss what this evidence would look like later below. Finally, while legal norms and moral precepts may express a similar “human imperative”, this thesis seeks in part to assess the extent to which international law is understood by leaders as distinct from moral concerns. One purpose of drawing this distinction is to help address the realist criticism that international law is not really law but a “body of ethical distillation”.³⁵

Another important work in the development of scholarship about law’s impact on the use of force is Louis Henkin’s 1979 book, *How Nations Behave*. In it, Henkin assesses the role of international law in four cases.³⁶ In each case, the legal rules he studies are different, while the effect he examines is the same, namely the influence of law on the national policy and decision-making process of the state at issue.³⁷ Henkin’s method suggests that different rules will often be relevant in different uses of force, and one does not have to study cases with the same rule present in each case to study what role, if any, law played in these cases.³⁸ This thesis employs this approach by examining key aspects of Canada and Britain’s participation in the Korean War and the Afghanistan Conflict with a view to better understanding how international law influenced these uses of force, and how leaders and officials understood this law. These key aspects involve international legal rules relating to the prohibition on the unilateral use of non-defensive force, and the treatment of Prisoners of War (POWs) and captured enemy individuals. However, different

³⁵ Acheson 1996: 107.

³⁶ The four cases are: the Suez-Sinai crisis of 1956 (where, Henkin argues, the law worked, then failed, but was vindicated); the abduction and trial of former Nazi Adolph Eichmann by Israel in 1960 (where the law failed to prevent Israel from kidnapping Eichman in Argentina); US reaction to the Cuban missile crisis (where Henkin argues the law had other influences); and US involvement in Vietnam from 1954 to 1973 (where uncertain law had uncertain effects).

³⁷ 1979: 242-43. Put another way, Henkin’s “independent variable” is the specific international legal rule that arises in each case study, while his “dependent variable” is the national policy and decision-making process of the state at issue.

³⁸ Granted, this view (i.e. that one does not have to find historical cases with the same international legal rule present in each case to study what role, if any, international law played in these cases) is different from some constructivist IR scholars who study the role of moral norms in international politics. In this literature (Price 1997, Tannenwald 2007, and Percy 2007), the same norm (e.g. the norm against chemical weapons, nuclear weapons, and mercenaries, respectively) is present, to varying degrees, in each historical case that is studied.

specific rules from each category are relevant to different aspects of Canada and Britain's involvement in the wars, and to each conflict.

In addition to its methodological insight, *How Nations Behave* is analytically relevant. Unlike the descriptive focus of Hoyt and the ASIL series, Henkin situates his empirical work in a broader theory of law and foreign policy. In essence, he argues that states obey international law because it is in their long-term interest to maintain order and remain respected.³⁹ This study does not disagree with this view. However, it will argue in the next chapter that rationalist accounts that emphasize the instrumental use of international law by states do not go far enough. Specifically, they cannot adequately explain why states feel obliged to obey international law, and how law can help constitute states' identities and influence their conduct.

Recent International Relations and International Law research

Like the older IL research before it, a body of IR and IL work developed in the 1990s and 2000s that also addresses, albeit at times indirectly, the role of international law in the use of force by states.⁴⁰ In the field of IR, this work can be located within a larger literature that, in its initial phase, aimed to show that contrary to realist predictions, normative factors matter in world politics and can affect state behaviour.⁴¹ More recently, this larger literature has sought to specify *how* such factors matter.⁴² It is in light of these scholarly developments that this study conceives of

³⁹ 1979: 48, 51-52.

⁴⁰ Beck 1993, Roberts 1999, Byers 2002, Roth 2003, Kritsiotis 2004, Wheeler 2004, Brunnée & Toope 2010, and Scharf & Williams 2010.

⁴¹ Finnemore 1993, Katzenstein 1996, and Risse, Ropp & Sikkink 1999.

⁴² Kratochwil 2000, Tannenwald 2007, and Hurd 2007.

international law as a type of “normative structure” in world politics,⁴³ and seeks to assess how, if at all, law influences state practice regarding the use of force.

Recent research is more theoretically developed than the older IL literature. However, it is often US focused and its body of empirical work is still growing. For example, in his 1993 book, *The Grenada Invasion*, Robert Beck analyzes the role of international law in the US-led invasion of Grenada in 1983.⁴⁴ Drawing on interviews and memoirs of members of the Reagan administration, Beck finds that, while international legal considerations were “not determinative of policy”, they “acted briefly as a restraint” and then “as a justification for action”.⁴⁵ Although Beck’s investigation suggests the evidentiary utility of interviews and memoirs for studying contemporary uses of force, it does not compare different states or conflicts. Similarly, in their 2010 book, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser*, Michael Scharf and Paul Williams focus on US practice, and conduct only one case study (on the treatment of detainees in the war on terror). And, in his 2004 study of NATO’s 1999 bombing campaign in Kosovo, Nicholas Wheeler focuses on US targeting policy and one use of force. Granted, focusing on the United States is understandable insofar as its power makes it a strong test for studying the role of international law in the use of force by states, and conducting single case studies helps us to better understand how law influenced a specific case. However, inasmuch as our theoretical understanding of the role of law in the use of force by states is being based disproportionately on US practice and single case studies, and to the extent that the power of

⁴³ The term “normative structure” is based on Byers 1999: 8. Broadly, or ontologically speaking, I conceive of international law as a normative structure. Specifically, or theoretically speaking, I define it in the text below, and in the next chapter, as a distinct set of binding rules that are generally determinate.

⁴⁴ Beck’s study focuses on two related questions: 1) how did the Reagan administration decide to launch the invasion of Grenada?; and 2) what role did international law play in that decision?

⁴⁵ 1993: 207. If law had been a critical factor in administrative deliberations, Beck suggests, one might expect Reagan’s decision to use military force to have *followed*, not preceded, the two invitations for assistance that the US received from the Governor-General of Grenada and the Organization of Eastern Caribbean States. However, Beck observes, Reagan’s “essential decision to act” was made before these “legally significant” events.

the US makes it different from most other contemporary states, then examining less studied and less anomalous states, such as Canada and Britain, can help make our theories of international law more comprehensive, and comparing different uses of force can help strengthen the empirical basis upon which our conclusions are derived.⁴⁶

Notwithstanding its US focus, Wheeler's study is particularly insightful and thus worthy of additional analysis. In it, Wheeler examines what role the international legal prohibition on the targeting of civilians in war (the "civilian immunity norm") played in the Kosovo Intervention. By comparing public statements of US and NATO leaders, he finds that legal factors "shaped the possibilities of action" in Kosovo, NATO "recognized the need to justify its actions", and this "was an inhibiting factor on what could be attacked".⁴⁷ Wheeler's study is relevant because it situates itself within a broader constructivist theory of international law and international politics. Likewise, this thesis argues in the next chapter that, of three major theories in the field of IR (realism, neo-liberal institutionalism, and constructivism), the latter provides the most convincing and extensive account of international law's constraining and "productive" influence.

However, this study also argues that there are limits to Wheeler's theoretical perspective, and seeks to address these shortcomings. For instance, as will be elaborated in the next chapter, while Wheeler defines international law as indeterminate and a social "process", this thesis contends that – although international law is not *only* a set of rules, and non-legal factors are a part of law as practiced in the real world – international law is better conceived as a distinct set of binding rules that are generally determinate. Furthermore, although Wheeler argues convincingly that the civilian immunity norm shaped the possibilities of action at the *beginning* of NATO's intervention, he inadequately acknowledges that, as the war dragged on, other factors became more

⁴⁶ As Anthony Clark Arend notes, recent research on the role of law in foreign policy decision-making has "tended to focus on United States foreign policy decision-making". Clearly, he argues, "for any comprehensive theory to be developed, scholars must examine the behaviour of a wide range of states and a variety of issue areas" (1996: 306).

⁴⁷ 2004: 213.

relevant.⁴⁸ This study agrees with Wheeler that one does not have to quantify the influence that a political, military, or legal factor had in a use of force to establish such influence. However, it also believes that, when possible, one should acknowledge which factors were more relevant.⁴⁹ This is because one of the goals of studying the role of international law in the use of force by states should be to learn more about how law influences and *fails* to influence such force, rather than assume it has a uniform or consistent effect. And recognizing that law's impact may vary is important because otherwise, one risks eroding the distinct and independent role that law potentially plays, and supporting the critical view⁵⁰ that questions whether one can really show the influence of legal norms in world politics because proponents tend to see the effect of norms wherever they look.

Finally, although Wheeler demonstrates that the civilian immunity norm affected NATO's targeting in Kosovo, one could argue this shows the impact of moral and political factors more than international law. For instance, insofar as enemy civilians are viewed as innocent non-parties to a war, the civilian immunity norm is arguably morally easy for members of the public to support and politically rewarding for states to respect in war.⁵¹ By contrast, inasmuch as enemy fighters are viewed as guilty parties to an armed conflict, the international legal rules governing the treatment of POWs and detainees⁵² are arguably more difficult for members of the public to support and less politically rewarding for states to respect in war. To this extent, examining these latter rules, as this

⁴⁸ During the initial weeks of the campaign, NATO targeted military facilities that posed little risk to Serb civilians. However, as the hostilities dragged on and NATO leaders became desperate "to bring the war to a satisfactory end", the Alliance targeted "dual-use" military-civilian facilities such as power stations (Wheeler 2004: 199). The selection of these targets posed the greatest risk to Serb civilians and, therefore, the greatest threat to the effective operation of the civilian immunity norm that Wheeler studies. For a moral critique of NATO's targeting practices, see Shue 2003.

⁴⁹ While Wheeler admits the "best argument" that NATO was inhibited by law is regarding targets struck in the opening weeks of the war, he skirts the issue of whether this inhibiting power decreased over time by arguing that "a choice does not have to be made" as to the relative weight to be accorded to political and military factors versus legal considerations "in shaping the internal decision-making process within" NATO (2004: 199, 201). Instead, Wheeler argues, what is crucial to his argument "is that whatever the strategic rationale for decisively striking Yugoslavia at the beginning of the campaign, NATO members could not plausibly defend this strategy to their domestic publics" (2004: 201).

⁵⁰ See e.g. Sinclair 2010: 160.

⁵¹ For a study whose premises resonate with this observation, see Petrova 2008. In it, Petrova stresses the perceived moral equality of enemy civilians, and the role of public opinion and NGOs, in limiting the use of cluster bombs in war.

⁵² The term "detainee" is controversial because it can suggest a captured individual is not legally a POW. I use the term in this study mainly because Canada and the UK often employ it when referring to such persons.

study in part seeks to do, provides a harder case for assessing whether the law of war is, as Lauterpacht noted earlier, at the “vanishing point” of international law or whether, alternatively, states adhere to such law in part *because* it is law and less because of moral or political factors.

As previously indicated, much of the recent IR and IL work that studies the role of international law in the use of force by states is US focused. One important exception is Nigel White’s 2009 examination of whether Britain’s uses of force since World War II are consistent with international law, and how this law impacts domestic politics in the UK.⁵³ By analyzing Parliamentary debates in nine cases, he finds that in its military interventions since 1945, “Britain has consistently tried to utilize international law to justify its actions, though often it argues against orthodox interpretations of the laws”.⁵⁴ White’s work is relevant to this study because it assesses the role of *jus ad bellum* rules in Britain’s use of force in Korea in 1950 and Afghanistan in 2001.⁵⁵ As such, this thesis draws on White’s study, and builds on his work in three ways. First, insofar as an examination of the Korean War and Afghanistan Conflict comprises only a small portion of White’s book, this study expands on this analysis and investigates these cases in greater detail. Such in depth analysis, I suggest below, is important because it better enables one to detect the four roles that I theorize international law plays in the use of force, and to assess whether states feel bound by this law. Second, while White only focuses on *jus ad bellum* rules,⁵⁶ this thesis looks at the role of *jus ad bellum* and *jus in bello* rules in the use of force by states. Examining both areas of international law is important because, as seen earlier, scholars often assume, without adequate empirical substantiation, that *jus in bello* rules receive low priority in war. Again, assessing whether this is in fact the case, and whether *jus ad bellum* rules receive higher priority leading up to war, can help us better understand the relationship between the two branches of international law,

⁵³ 2009: v, 1-4.

⁵⁴ 2009: 2, 5.

⁵⁵ 2009: 96-103, 195-204.

⁵⁶ As White notes, *jus in bello* rules are not directly the subject matter of his book, though they are referred to (2009: 2).

and how law impacts states when they use force. Finally, while White uses public Parliamentary debates to evaluate the relevance of international law in executive decision-making on the use of force,⁵⁷ this study will, as elaborated below, look at additional sources of evidence (e.g. the private views of leaders and officials) and employ additional research tools (e.g. interviews) to analyze such decision-making more comprehensively, and strengthen the empirical basis against which the relevance of law is assessed.

Research design, method, and premises

In addressing the question of how international law influences state practice regarding the use of force, researchers encounter at least three methodological challenges. First, insofar as current IR scholars have yet to articulate a comprehensive theory of the role of international law in the use of force by states,⁵⁸ the availability of clear, “testable” hypotheses is somewhat limited. To this extent, therefore, developing theory in this area of study is arguably as important as evaluating the analytical propositions that are available. Second, as Michael Byers notes, the “legitimizing and constraining effects of the international legal system are less noticeable than power derived from military strength, wealth or even moral authority, although they are perhaps equally important”.⁵⁹ Thus, studying the role of international law in the use of force by states requires conceptual tools and research methods that can theorize and detect the influence of this “less noticeable” phenomenon. Finally, insofar as international law is, as I suggested earlier, a normative structure, and inasmuch as such social facts are not “out there” in the world like physical phenomena such as

⁵⁷ 2009: 5.

⁵⁸ Within the small but growing body of recent IR work that seeks to explicitly address international law (i.e. as opposed to earlier concepts such as “regimes” or “institutions”), much of the analysis fails to address the use of force by states (e.g. Goldstein et al. 2000, Goldsmith & Posner 2005). And of the work that does in part address this issue, one of the leading studies emphasizes that it does not aim to provide a theory of international law (Reus-Smit 2004: 4).

⁵⁹ 1999: 6.

tanks,⁶⁰ then studying international law can only be done indirectly and by proxy. To this extent, then, an issue for researchers examining the impact of law in world politics and the use of force by states is how close they can or should get to their subject.

Some IR studies respond to the above challenges by examining the influence of international law in world politics and the use of force over broad periods of time, and by focusing on proxy concepts such as institutions or treaties.⁶¹ In contrast to these approaches, this thesis investigates the influence of international law in the use of force by states over shorter periods of time, and by theorizing that law plays four observable roles in such situations. In addition to studying the influence of international law, this thesis also analyzes the extent to which key leaders and officials understand this law as a binding and distinct set of legal rules, and the degree to which the legal status of these rules affects their decision-making. In doing so, I seek to respond to Andrew Hurrell's suggestion that, if we want to understand whether and how states feel bound by international law, then we need to look in more detail at how this sense of obligation plays out within the policy-making process and among the individual policy-makers who are capable of feeling a sense of obligation.⁶²

Thus, as previously noted, this study examines important aspects of Canada and Britain's participation in the Korean War and the Afghanistan Conflict. These important aspects touch upon each state's policy and practice regarding: a) whether and how to be involved in the two wars; b) the major international legal issues related to each conflict; and c) the treatment of captured enemy

⁶⁰ Jackson 2000: 49.

⁶¹ For instance, Stephen Krasner studies the impact of the legal concept of sovereignty over a period of 350 years, and acknowledges that the effects of this concept have been felt over time because it has been embodied in institutions (1993: 238). Further, in his examination of the moral and legal norm proscribing the use of chemical weapons, Richard Price analyzes the evolution of the norm over a long period of time, and focuses in part on how the codification of this norm in international agreements helps explain the non-use of chemical weapons in the twentieth century (1995 and 1997). Finally, Beth Simmons studies the impact of international human rights law in world politics over the past sixty years, and considers how the domestic ratification of such treaties has affected the realization of human rights (2009).

⁶² 1996: 221.

individuals. I center my analysis on the discourse and practice of the main political and military leaders of Canada and Britain during each war, as well as the views and actions of some key government officials. I examine relevant public statements, government documents, private papers, memoirs and diaries, court cases, inquiry testimony, secondary literature, and original interview data. I draw on these sources to reconstruct: a) the policy options that were considered by leaders and officials about the important aspects of Canada and Britain's involvement in the conflicts noted above; b) whether and how the thinking and decisions of leaders and officials were influenced by international law; and c) the extent to which leaders and officials saw this law as a binding and distinct phenomenon.

In conducting the above study, this thesis employs five major methodological and analytical premises. First, it uses a method of historical reconstruction⁶³ and process tracing.⁶⁴ By this I mean that my primary goal is to understand how international law influenced Canada and Britain's involvement in the Korean War and Afghanistan Conflict, and how key leaders and officials viewed said law, and not to explain this involvement or these wars in their entirety.⁶⁵ With this aim in mind, I accept that structures – both material and ideational – as well as human agency will have affected Canada and Britain's participation in the two conflicts.⁶⁶ The roles that I theorize international law plays in the use of force reflect this assumption. On a more practical level, the use of historical reconstruction and process tracing means that I critically examine the evidentiary sources listed above with reference to the hypotheses and questions posited in this and the following chapter.⁶⁷ Focusing on a micro-level of analysis of the decision-making processes within each of

⁶³ I use the term “historical reconstruction” with reference to the methodological insights of Hurrell 1996 and Trachtenberg 2006.

⁶⁴ I use the term “process tracing” with reference to the methodological observations of George & Bennett 2005 and Bennett 2008.

⁶⁵ Hollis & Smith 1992, and Trachtenberg 2006.

⁶⁶ Trachtenberg 2006: 6.

⁶⁷ Trachtenberg 2006: 16, 79.

my cases, I look for the observable implications – described more below and in the next chapter – of the impact that I theorize international law has, and the way that I hypothesize it is interpreted.⁶⁸ Finally, by comparing the results of this analysis across my cases, I seek to strengthen the inferences I make, and assess whether the influence and understanding of law varies temporally and by state.

Second, although disagreement exists as to what will constitute evidence of the influence of international law in world politics and the use of force by states,⁶⁹ I investigate this influence by positing that law plays four observable roles in such situations. I employ this approach, rather than assessing whether there was compliance with international law, because the fact of compliance is not, in and of itself, sufficiently compelling evidence for the influence of law. This is because one could find – e.g. through rigorous legal inquiry⁷⁰ – that a state is complying with international law without necessarily knowing what role that law played or did not play in this compliance. For instance, a state might be complying for reasons unrelated to international law. And, conversely, one could find that another state is not complying, but fail to see that international law was nonetheless important in the state’s decisions in this regard.⁷¹

In addition, because I am concerned mainly with *how* international law influences the use of force, as opposed to *whether* it does so, I do not focus on disproving what I call “Clausewitz’s null-

⁶⁸ Bennett 2008: 705.

⁶⁹ This disagreement stems from differing ontological, theoretical and epistemological views on what the “threshold” is for inferring that law affected a particular outcome, and how observable that threshold should be. In addition, as Beth Simmons usefully notes, basic divisions exist over who has the burden of proof: those who believe that international law compliance is pervasive and thus believe that it falls to the sceptics to prove otherwise, versus those who view international law as inherently weak and epiphenomenal and require firm causal evidence of its impact (2009: 4).

⁷⁰ Generally speaking, the legal method involves: 1) defining the legal question that arises from the facts at issue; 2) determining the law that is most relevant to this question; 3) applying the facts to this law; and 4) concluding whether the act or omission at issue was or will be consistent with this law.

⁷¹ This is arguably because, as Benedict Kingsbury usefully notes, “[T]he concept of ‘compliance’ with law does not have ... any meaning except as a function of prior theories of the nature and operation of the law to which it pertains” (1998: 346). For a survey of the literature on compliance, see Bradford 2005. For a critical assessment of this literature, see Brunnée & Toope 2010: chapter 3.

hypothesis”.⁷² The extreme version of this view would assume that, insofar as war is hell and thus incapable of being seriously limited by law, then we should expect to see states use any and all force necessary to meet their political and military objectives in such matters, and treat captured enemy fighters in any way that they believe furthers their goals. Thus, to show that Canadian and British leaders and officials were influenced by international law in the Korean War and Afghanistan Conflict, one would need to find evidence that they did not in fact use any and all force required to meet their political and military objectives in these wars, and did not simply torture or kill any and all enemy fighters that they deemed hostile to their interests. While such an approach may seem extreme, its utility is endorsed by some leading constructivist scholars.⁷³ Alternatively, a less extreme version of the above null-hypothesis could posit that, inasmuch as security concerns and political factors overwhelmingly dominate state relations, then British and Canadian participation in the Korean War and Afghanistan Conflict can be entirely understood with reference to non-legal considerations.

As noted earlier, this thesis seeks in part to respond to realist ideas about the relative unimportance of international law in world politics and the use of force by states. To this extent, it will address and offer evidence against the extreme and less extreme versions of the null-hypothesis described above. However, I do not focus on disproving this null. Again, although doing so could help address the question of *whether* international law influenced Canada and Britain’s participation in the Korean War and Afghanistan Conflict, it would inadequately respond to the issue of *how* this law affected such participation. With this latter aim in mind, this thesis thus analyzes whether and

⁷² This null-hypothesis is based in part on the following quote from German war theorist Carl von Clausewitz: “Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it ... To introduce the principle of moderation into the theory of war itself would always lead to logical absurdity” (quoted in Thomas 2001: 1).

⁷³ See e.g. Thomas 2001 and Price 2008.

how key aspects of Canada and Britain's involvement in the Korean War and Afghanistan Conflict reflect the four roles that I theorize international law plays in the use of force.

Third, I focus on the major political and military *leaders* of Canada and Britain because, from a legal and theoretical perspective, it is not “states” that decide to use force but “the decision-making elites in states” who act on their behalf.⁷⁴ Regarding the decisions of whether and how to use force in the Korean War and Afghanistan Conflict, the analysis of these choices focuses on the Prime Ministers of Canada and Britain who were in power leading up to and during these wars, as well as relevant Foreign Secretaries and Defence Ministers. This is because, in Canada and Britain, the decision to use military force rests primarily with the Prime Minister,⁷⁵ and the Foreign Secretary and Defence Minister often contribute to these decisions.⁷⁶ I also examine the views and actions of some high-level government officials, because these individuals often advise the above leaders, and their perspective helps contextualize the policy background behind the decisions to use force. Where possible, I also assess the input of relevant government Legal Advisers, because these individuals provide leaders and officials with advice on the international legality of such decisions.⁷⁷ Regarding the policy and practice of Canada and Britain with respect to enemy individuals captured in the two wars, insofar as these decisions involved strategic considerations, the analysis again focuses on the relevant Prime Ministers, Foreign Secretaries, and Defence Ministers in power at the time. However, inasmuch as these decisions also involved operational considerations of military conduct in the field, the analysis also briefly examines the views and actions of some key military leaders and officials in the Armed Forces and Defence Departments of Canada and Britain.

⁷⁴ Arend 1999: 43.

⁷⁵ Heyman 2005: 9.

⁷⁶ For instance, regarding Canada's Foreign Secretary and Defence Minister, Janice Gross Stein and Eugene Lang note that the leaders in these positions are “most responsible for Canada's role in the world” (2007: 37).

⁷⁷ Wood 2008: 1-2.

Fourth, I seek in part to understand whether and how Canada and Britain *felt bound* by international law in the Korean War and Afghanistan Conflict because the binding nature of law is what potentially distinguishes it from other phenomena in international relations, such as political, military and moral factors, which are not binding.⁷⁸ And distinguishing international law from other phenomena, this study believes, is important for moral, theoretical, and empirical reasons. First, the specificity of international law is morally significant because, as Jutta Brunnée and Stephen Toope note, in international society “some distinction between legal obligations and broader social norms is crucial in upholding an admittedly weak rule-of-law tradition”.⁷⁹ Moreover, the distinctness of international law is analytically important because, as will be discussed in the next chapter, IR scholars of different theoretical perspectives have all struggled to articulate what *difference* law makes in international relations, and how that difference should be conceived.⁸⁰ This study believes that legal obligation is what potentially constitutes law’s “added value”.⁸¹ Finally, the proposition that international law is distinct and binding is supported by the empirical observation that states and other international actors overwhelmingly act and speak as if it has these traits and should be thought of as “law”. For example, the constitutions of many states explicitly incorporate international law into their provisions,⁸² the national laws of numerous countries contain language that refers to international law, and municipal courts throughout the world apply principles of international law to decide domestic cases.⁸³ Similarly, the leaders of international

⁷⁸ For scholars who stress the distinctness of international law, and the relevance of legal obligation for understanding this specificity, see e.g. Hurrell 1996: 214, Byers 1999: 6, Simmons 2009: 7, and Brunnée & Toope 2010: 9-13.

⁷⁹ 2010: 27. As noted earlier in this chapter, some realists argue that international law is not really law but a “body of ethical distillation” (Acheson 1996: 107). To address such pessimistic views of international law (i.e. that it does not exist or is not really “law”), and to help build the rule of law in international society based on public and universal principals, international law, however nascent it may be, should be thought of as distinct from other social phenomena, such as the private moral views of individuals or the political and military considerations of states.

⁸⁰ Morgenthau 1949, Goldstein et al. 2000, and Finnemore 2000.

⁸¹ Brunnée & Toope 2010: 55.

⁸² For instance, the constitutions of the US, Germany, France, Italy, Austria, and Greece all refer to international law. See Arend 1999: 34.

⁸³ Ibid.

organizations, from the United Nations to the European Union, frequently refer to international law, and virtually all actors in the international system behave with the understanding that the international legal rules about which they speak are law and not, for instance, nonbinding moral norms or political “rules of the game”.⁸⁴ Granted, notwithstanding the above reasons for conceiving of international law as binding and distinct, this study aims in part to assess whether policy-makers do in fact understand it to have these traits, and the degree to which the legal status of rules impacts their decision-making regarding the use of force.

Finally, as evidence of whether Canadian and British leaders and officials in the Korean War and Afghanistan Conflict felt bound by international law, I analyze the sources noted earlier for “law talk” and employ the concept of legal obligation.⁸⁵ If leaders and officials felt bound by law, then we should see them: a) recognize that the use of military force and the status and treatment of captured enemy fighters were in part legal issues, in that they were governed by a pre-existing set of international legal rules; b) discuss the extent to which they were legally obligated to consider these rules when deciding whether and how to use force in Korea and Afghanistan, and what policy to adopt for captured enemy fighters; and c) acknowledge that, due to their legal nature, these rules should be applied reciprocally and equally.⁸⁶ Furthermore, if leaders and officials felt bound by law in the Korean War and Afghanistan Conflict, then we would also expect them to recognize that breaching the relevant international legal rules at issue could lead to civil litigation or criminal

⁸⁴ Arend 1999: 34. As Hedley Bull notes, the activity of state leaders, their legal advisers, national and international courts, and international assemblies is carried on in terms of the assumption that the international legal rules with which they are dealing are rules of law. If, Bull argues, the rights and duties asserted under these rules “were believed to have the status merely of morality or of etiquette, this whole corpus of activity could not exist”. The “fact that these rules are believed to have the status of law, whatever theoretical difficulties it might involve, makes possible a corpus of international activity that plays an important part in the working of international society” (2002: 136).

⁸⁵ This method is based on part of Nina Tannewald’s approach to studying the influence of the “nuclear taboo” on US military policy and behaviour since World War II (2007: 69).

⁸⁶ These observable implications are based in part on Reus-Smit 2004: 39.

prosecution at the domestic or international level,⁸⁷ and would require legal justification at the domestic and international level.⁸⁸ An example of such recognition is the analysis present in the so called “Torture Memos” that circulated among US political and military leaders in the years immediately following the al Qaeda attacks of 11 September 2001.⁸⁹ Finally, if leaders and officials felt bound by law in the Korean War and Afghanistan Conflict, then we should see them express concern that their decisions regarding the use of force should follow, not precede, any legally significant events associated with these conflicts. An example of such concern, or lack thereof, is former US President Ronald Reagan’s decision to use force in Grenada in 1983 prior to receiving two invitations for assistance from the Governor-General of Grenada and the Organization of Eastern Caribbean States.⁹⁰

Case selection

This study focuses on Canada and Britain’s participation in the Korean War and Afghanistan Conflict. It does so for the following reasons.

Why focus on Canada and the United Kingdom?

This thesis focuses on Canada and Britain for four main reasons. First, as previously noted, much of the IR and IL research on the role of international law in the use of force by states has

⁸⁷ This observable implication assumes that, in addition to their obligatory character, international law and legal norms are different from non-legal institutions and norms because violation of the former can lead to formal sanctioning while breach of the latter cannot. See Simmons 2009: 7.

⁸⁸ As some constructivist IR scholars have argued, one way to study the impact of norms on state behaviour is to assess the nature and method of the justifications that states provide when they violate a norm, and the reactions of other states to the violation (Percy 2007: 36-7, Price & Tannenwald 1996: 126, and Finnemore & Sikkink 1998: 892). Expanding on these arguments, one can posit that if a state contemplates that a formal legal justification for its action will be required at the domestic and international level, then it is reasonable to infer that some leaders and officials of the state likely felt bound to consider the international legal rule(s) most relevant to said action.

⁸⁹ See Greenberg & Dratel 2005. The legal analysis in the memos was highly contorted. However, the documents paid a lot of attention to the domestic and international legal aspects of the US response to the al Qaeda attacks, and recognized that US officials involved in this response could be held criminally liable.

⁹⁰ Beck 1993: 207.

focused on US practice and single case studies. Again, however, insofar as our theoretical understanding of the influence of law in the use of force is being based disproportionately on US practice and single case studies, and inasmuch as the power of the US makes it different from most other contemporary states, then examining less studied and less anomalous states, such as Canada and Britain, can help make our theories of international law more comprehensive, and comparing different uses of force can strengthen the empirical basis upon which our conclusions are derived.

Moreover, insofar as we would expect America's closest allies to be motivated primarily by their alliance with the US, and inasmuch as their conduct is thus tied to a hegemonic power that is not seriously constrained by international law, then Britain and Canada are harder cases than other Western countries for assessing the influence of international law on the use of force.⁹¹

Even if one accepts the above arguments, though, one might retort that Canada is a weak case and thus less revealing about the potential impact of international law on the use of force. Insofar as Canada is perceived as a law-abiding state that pursues its interests mainly through multilateral institutions,⁹² and if one believes that in order to show law's relevance one must find examples where international law constrains states that are perceived as less law-abiding, then Canada is admittedly a weaker case than, say, Russia or Iran.⁹³ On the other hand, in the Afghanistan Conflict, Canada and Britain have had less financial, technological, and human resources per geographic area of responsibility than the US. As well, during some of the most violent periods of the war, Canada⁹⁴ and Britain⁹⁵ have suffered more casualties as a proportion of

⁹¹ I thank Andrew Hurrell for this observation.

⁹² As Jennifer Welsh notes, Canada's active role in the development of the United Nations following World War II "solidified Canada's reputation as a good multilateralist and upstanding member of a new class of 'middle powers'", and that, since then, Canada's international vocation has "evolved into a more general support for multilateral institutions and the rule of law" (2010: 363).

⁹³ For an analysis of the role of the laws of war in Russia's use of force in Chechnya, see Kramer 2011. For a related study of Iran's military policy and practice regarding the Geneva Conventions, see Van Engeland 2011.

⁹⁴ In a September 2006 report, the Canadian Centre for Policy Alternatives estimated that, after the US, Canada had sustained the highest number of military deaths as a result of hostile actions in Afghanistan since the original invasion in 2001 (27 of 244 coalition military deaths). Further, since February 2006, when Canadian ground troops were re-

total force size than the US or any other NATO country. In light of these considerations, one could posit that complying with the *jus in bello* is relatively costly for Canada and Britain – i.e. we might expect states with a) less resources per area and per capita of the Afghan population, and b) more casualties relative to their allies, to be more likely to use disproportionate force and less likely to be tolerant of fighters who have killed their soldiers.⁹⁶ To this extent, then, Canada is a stronger case for assessing law's impact in the use of force than one might initially assume.

The second reason I focus on Canada and Britain is because these states are similar in domestic political composition yet different in external power capabilities, and these traits are analytically and methodologically relevant to this study. For example, Canada and Britain are both parliamentary democracies led by a Prime Minister who,⁹⁷ with the Cabinet, is primarily responsible for conducting foreign relations, entering into treaties and, as noted earlier, deciding whether to use military force. Both states share common history and profess a commitment to the rule of law in their domestic and international affairs.⁹⁸ These similarities help this study to control the number of domestic variables it must consider in order to understand why and how Canada and Britain used force in Korea and Afghanistan, and to focus on the international political and legal factors involved. Moreover, although similar in the above respects, Canada and Britain are also different in their relative power capabilities, insofar as the UK possesses nuclear weapons while

deployed to combat operations in Kandahar, Canada had sustained 43 per cent of all military deaths among US allies in the coalition (20 of 47 non-US deaths). Finally, when adjusted for the relative size of troop commitments, a Canadian soldier in Kandahar during this time period was nearly three times more likely to be killed in hostile action than a British soldier, and four-and-a-half times more likely to be killed than an American soldier. See CCPA, "Canada's Fallen: Understanding Canadian Military Deaths in Afghanistan" (Ottawa, Sept. 2006).

⁹⁵ Research from Cambridge University has found that, from around 2008 to 2010, the rate at which UK troops were killed in Afghanistan was almost four times that of US soldiers, and double the rate which is defined as "major combat" ("British dead and wounded in Afghanistan, month by month", The Guardian newspaper website, updated June 2013).

⁹⁶ I thank David Blagden for this idea.

⁹⁷ Savoie 2010: 172.

⁹⁸ For instance, regarding the UK, Foreign Secretary William Hague, in a speech given on 15 Sept. 2010, stressed the need "to strengthen a rules-based international system based on our values", and explained that the Government saw human rights and upholding international law "as essential to and indivisible from our foreign policy objectives".

Canada does not,⁹⁹ Britain is a permanent member of the UN Security Council; and it has a larger population,¹⁰⁰ economy,¹⁰¹ and military.¹⁰² This difference in power allows this study to assess whether the influence of international law on state conduct regarding the use of force varies with the relative capabilities of a country. And this, in turn, helps this investigation to critically assess the realist idea that powerful states are not constrained by international law when they use force, and the possibility that law plays a different role for less powerful states in such matters.

The third reason I focus on Canada and Britain is because the participation of these states in the Korean War and Afghanistan Conflict is empirically puzzling and politically relevant, and offers potential insights for developing and assessing our theoretical understanding of the role of international law in world politics and the use of force. As I elaborate in chapters two and three, both countries thought Korea was not strategically important, and their Liberal and Labour governments (respectively) were focused on socio-economic issues following the Second World War. Most importantly, the alliance with the US and fear of the USSR do not adequately explain why and how these states decided to use force in Korea, and to support UN activity regarding the crisis. Canada's actions, for instance, are difficult to explain considering that, relative to its small population size,¹⁰³ the costs Canada bore by participating were significant,¹⁰⁴ while the domestic

⁹⁹ Britain successfully tested an atomic bomb in 1952, and a hydrogen bomb in 1957. By 2001, at the start of the Afghan Conflict, Britain's nuclear deterrent consisted of the Trident II system (Phythian 2007: 30, Self 2010: 194).

¹⁰⁰ Britain's population was about 50 million people in 1950, and 59 million in 2001. Canada's population was about 13.7 million people in 1950, and 31 million in 2001. See www.statistics.gov.uk and www.statcan.gc.ca

¹⁰¹ Following World War II, Britain was insolvent and its economy was in bad shape relative to the US, Australia, Canada, Sweden and Switzerland. Relative to the rest of Europe and Japan, however, the UK economy was in better shape, and it recovered more quickly (Hobsbawm 1995: 20). By contrast, Canada emerged from World War II in better economic shape than the UK. In absolute terms, though, Canada's economy was still smaller. And this economic inequality between the two states still existed in 2001.

¹⁰² Following World War II, Britain and Canada both demobilized much of their armed forces and decreased their defence spending. However, in absolute and relative terms, Canada did so much more extensively than the UK. See Wood 1966: 17-18; Warner 1993: 99-100; and Self 2010: 39. The military inequality between Britain and Canada, in absolute and relative terms, still existed in 2001.

¹⁰³ Canada's population in 1950 was about 13.7 million people. By comparison, the population of the US was about 150.7 million, and the population of the UK was about 50 million.

¹⁰⁴ Canada suffered 1,588 casualties in the Korean War, with 516 killed in action or dead on active service (Bercuson 2004). Moreover, after the US and Britain (and not including South Korea's forces), Canada committed the third

benefits that Canadian leaders gained were limited.¹⁰⁵ Canada and Britain's participation in the Korean War, I suggest, cannot be fully understood without reference to normative considerations such as the obligations and rights that leaders believed their countries had under international law.

Similarly, as I elaborate in chapters four and five, the extensive and costly involvement of Britain and Canada in the still-ongoing Afghanistan Conflict is also not immediately easy to explain in strict national interest terms, narrowly conceived. The US alliance and perceived threat of al Qaeda may help explain why the UK and Canada initially used force in Afghanistan. However, it is less clear why these states have kept troops in the country for so long, and why they have agreed to contribute to the difficult "nation building" and counter-insurgency efforts there. As with the Korean War, I contend that Britain and Canada's involvement in the Afghan Conflict cannot be fully understood without reference to normative considerations such as the rights and obligations that leaders and officials thought their countries had under international law.

Furthermore, because the conduct of states in war became subject to extensive legal restrictions in the Geneva Conventions of 1949, and insofar as the influence of international law would be expected to increase over time, one might anticipate that the international legal rules on the treatment of POWs and captured individuals should play a greater role in Canada and the UK's participation in the Afghanistan Conflict (which began in 2001) than in the Korean War (which began in 1950). Canadian and UK forces in Afghanistan, however, have reportedly transferred captured suspected Taliban and al Qaeda fighters to US and Afghan authorities knowing they could

largest overall contribution of troops, ships, and aircraft to the UN operation in Korea. And this contribution was particularly costly considering that a) following World War II, Canada had, as noted above, demobilized much of its armed forces and decreased its defence spending in absolute and relative terms, and b) the Liberal government in power at the time had hoped to focus on socio-economic issues following World War II, and "was profoundly unhappy over the necessity of once again debating warlike moves" and rearmament (Wood 1966: 21).

¹⁰⁵ In contrast to World War II, the Korean War generated vastly less public and media interest in Canada (Granatstein & Oliver 2011: 240). This casts doubt on the potential argument that Canada's leaders decided to participate in the war to please their domestic constituencies or the media.

be mistreated or tortured.¹⁰⁶ If this study finds that the role of international law has now changed when Canada and the UK use military force, such a conclusion will be relevant to policy makers and citizens in these countries and abroad. As Commonwealth states which have done much to develop and promote international law, Canada and Britain tend to pride themselves on their normative commitment and perceived historical fidelity to this institution.

The final reason I focus on Canada and Britain's participation in the Korean War and Afghanistan Conflict is because there is extensive data available about the policies and actions of these states in the first and, to a lesser extent, second war.¹⁰⁷ Because the Korean War occurred in 1950-53, government documents and private papers about this conflict are available in edited collections and the archives of Canada and the UK. There are also memoirs and diaries of leaders and officials that refer to the conflict.¹⁰⁸ Good secondary literature on the war exists, although this work often focuses on the US.¹⁰⁹ A valuable study of Canada's diplomacy in the crisis is available, and it refers to extensive interviews with former leaders and officials.¹¹⁰ There is also a helpful two-volume official history of Britain's part in the crisis.¹¹¹ Regarding the Afghanistan Conflict, because no archival material is yet available, the data is drawn from interviews I conducted with key leaders and officials from Canada and Britain.¹¹² In these interviews, I aimed to understand which factors have influenced Canada and Britain's participation in the Afghan war, and to assess the hypotheses described in this and the following chapter. I also "triangulated" the findings from my review of relevant news articles, Parliamentary statements, UN documents, public speeches, and

¹⁰⁶ See "Afghanistan – detainees transferred to torture: ISAF complicity?" (Amnesty International, 2007); "All Afghan detainees likely tortured: diplomat", CBC news (18 Nov. 2009); "Military told to heed abuse claims", *Toronto Star* (25 Feb. 2010); and "Afghan torture allegations erupt in UK", CBC news (21 April 2010).

¹⁰⁷ Selecting data rich cases is important because we learn more from case studies that let us answer more questions about the case, and the more data we have the more questions we can answer, and the more assessments we can make of our hypotheses and theories (Van Evera 1997: 79).

¹⁰⁸ See e.g. Attlee 1954, Truman 1956, Pearson 1973, and Pickersgill 1975.

¹⁰⁹ See e.g. Rees 1964, Foot 1987, MacDonald 1986 and 1990, Cotton & Neary 1989, and Kaufman 1997.

¹¹⁰ Stairs 1974.

¹¹¹ Farrar-Hockley 1990 and 1995.

¹¹² The leaders and officials that have been interviewed are listed in the bibliography.

the memoirs and diaries of important political figures and government officials.¹¹³ In addition, there are formal investigations,¹¹⁴ official reports,¹¹⁵ Parliamentary proceedings,¹¹⁶ and court cases¹¹⁷ in Canada and Britain that refer to oral evidence, witness statements, and government documents related to the Afghan war. Finally, although the secondary literature on Canada and Britain's involvement in the Afghan Conflict is still developing, this also means that this study helps contribute to this growing body of work.

Why focus on the Korean War and Afghanistan Conflict?

Insofar as there are good theoretical and empirical reasons for focusing on Canadian and British uses of force in the post World War II period, the next issue is which uses of force should be studied. Since 1945, Canada and the UK have allied to use military force in five armed conflicts: the Korean War of 1950-53; the Gulf War of 1991; the Kosovo Intervention of 1999; the Afghanistan Conflict of 2001-present; and the Libya Intervention of 2011.¹¹⁸ Focusing on the Korean War and the Afghanistan Conflict has the following three advantages.

First, examining these two wars allows this thesis to focus in part on the international law regarding the treatment of POWs, and focusing on such law is relevant to this study's overall aim. For example, while Canada did not employ regular ground forces in the Gulf War, the Kosovo Intervention, or the conflict in Libya, and the UK did not send regular ground forces to the latter two wars, both states did send regular troops to the Korean War and Afghan Conflict. Moreover, in

¹¹³ Meyer 2005, Goldenberg 2006, Campbell 2008, Chrétien 2008, Martin 2009, and Blair 2010.

¹¹⁴ See e.g. Canada's Military Police Complaints Commission 580-page report of 27 June 2012 (which examined whether certain MPs failed to investigate the detainee transfer orders of commanders in Afghanistan from May 2007 to June 2008), and Britain's ongoing Iraq Inquiry (which makes some helpful reference to the Afghan Conflict).

¹¹⁵ See e.g. the report entitled *Independent Panel on Canada's Future Role in Afghanistan* (January 2008), and the UK House of Commons Defence Committee, *Operations in Afghanistan*, HC 554, 17 July 2011.

¹¹⁶ See e.g. Canada's Special Committee on the Canadian Mission in Afghanistan.

¹¹⁷ See e.g. the main Afghan detainee cases in Canada (*Amnesty International Canada et al v. Attorney General of Canada et al*, 2008 FC 336) and the UK (*R (Evans) v SS Defence*, [2010] EWHC 1445 (Admin)).

¹¹⁸ This list does not include cases where Britain has used force without Canadian participation, or the peacekeeping operations to which Canada and the UK have contributed since 1945.

the Korean War and Afghan Conflict, the troops that Canada and the UK sent have captured enemy fighters, and the leaders of both states have had to make decisions on the POW policies that their country should adopt. These empirical details are theoretically relevant. As I suggested earlier, in contrast to examining, for instance, the civilian immunity norm in armed conflict, studying the impact of the international legal rules on POWs and captured individuals may be a harder case for investigating whether the law of war is at the “vanishing point” of international law or whether, alternatively, states adhere to such law in part *because* it is law and less because of political or moral factors. Furthermore, POWs and detainees are an issue area in international politics that has seen the greatest efforts at legal codification and regulation over the years, and yet the treatment of captured enemy fighters is far from being a sweeping success story.¹¹⁹ To this extent, therefore, studying the influence of the international legal rules on POWs and captured individuals is a strong test for assessing the success and progress of the *jus in bello* regime more generally,¹²⁰ and for analyzing whether and how normative structures influence state behaviour in world politics.

Second, because I seek to examine how international law influences the use of force by states in the post World War II period, focusing on the Korean War and the Afghanistan Conflict allows me to investigate the full chronological spectrum of this period. Moreover, because these two wars represent opposite ends of this time period, focusing on these conflicts helps me assess whether, as posited earlier, the impact of international law in the use of force increases over time.

Finally, insofar as the Korean War was a conventional “industrial” armed conflict involving large numbers of soldiers and mechanized fighting,¹²¹ while the Afghanistan Conflict represents a less conventional “counter-insurgency” war involving a smaller number of soldiers fighting lightly

¹¹⁹ Scheipers 2010: 1-2.

¹²⁰ Ibid.

¹²¹ Johnston 2003, and Granatstein & Oliver 2011.

armed Taliban and Al Qaeda fighters,¹²² then studying these two wars allows me to examine whether international law impacts state practice across different types of armed conflict. And this, in turn, helps make our theories of the role of international law in the use of force more comprehensive, and broadens the empirical basis upon which our conclusions are derived.

Notwithstanding the above advantages, the tradeoffs of focusing on Canada and Britain's involvement in the Korean War and Afghanistan Conflict should also be acknowledged. Foremost among them is the observation that, by examining the behaviour of only two states in two wars, this study is limited in its ability to generalize its findings broadly to other states or conflicts.¹²³ Furthermore, insofar as Canada and the UK are members of a particular Western group of liberal-democratic states,¹²⁴ the conclusions this investigation derives are likely limited to countries within and across this group. On the other hand, however, the in-depth analysis that this thesis conducts offers important insights into the nature and impact of the relevant international legal rules on the two states and two wars that are studied. And this, in turn, offers rich material for theoretical development and refinement.¹²⁵

It should also be acknowledged that, in both the Korean War and Afghanistan Conflict, the dominant Western actor was the United States,¹²⁶ not Canada or the UK. Further, the key factors determining Canadian and British policy in these wars were often non-legal in nature, such as the perceived security threat of the USSR (in Korea) and al Qaeda (in Afghanistan), as well as Canada and the UK's political and economic relationship with America. Nonetheless, this study takes the view that, for all of the reasons described in this introduction, it is still theoretically and empirically

¹²² Egnell 2011, and Griffin 2011.

¹²³ Bennett 2008: 719.

¹²⁴ Armstrong, Farrell & Lambert 2009: 139.

¹²⁵ Ragin 2004: 135.

¹²⁶ As noted by the leading study of Canada's diplomacy in the Korean War, Canadian leaders knew that, in the end, the parameters of the crisis in Korea would be determined by the US (Stairs 1974: 39). And, as observed by the official account of Britain's participation in the war, the US "features frequently in [this] account due to the scale of American influence and participation" (Farrar-Hockley 1990: viii).

fruitful to analyze how, *despite* an environment of US dominance and perceived security threats, international law impacted Canada and Britain's use of force in Korea and Afghanistan.

As a final caveat, I should note that, although I seek to understand how international law influenced Canada and Britain's participation in the Korean War and Afghanistan Conflict, I define "influence" in a non-positivist manner. According to strict positivist understandings,¹²⁷ X influences Y when it causes Y, and this assumes 1) X and Y exist independent of each other, 2) X precedes Y temporally, and 3) but for X, Y would not have occurred.¹²⁸ However, if international law is understood as a normative structure, and insofar as such social facts are not easily amenable to study by positivist methods,¹²⁹ then law will not "cause" outcomes in the way understood by positivists.¹³⁰ To this extent, then, it is more appropriate to analyze the extent to which international law guided behaviour and created a "zone of permissibility" for the actions of Canadian and British leaders and officials, and indirectly influenced behaviour by providing these individuals with reasons for action.¹³¹

Outline of the argument

This thesis begins by developing a theoretical framework for assessing the influence of international law. Chapter one therefore addresses four related questions: how should we conceive of international law?; how have three major IR theories (realism, neo-liberal institutionalism, and constructivism) engaged with international law?; how does an "interactional" lens and the concept of legal obligation respond to the shortcomings of these three theories?; and what roles does international law play in the use of force by states? I suggest that international law is best thought

¹²⁷ Goldstein & Keohane 1993: 11-12, and King, Keohane, & Verba 1994.

¹²⁸ Wendt 1999: 79.

¹²⁹ Jackson 2000: 49.

¹³⁰ Kratochwil 2000: 63-5, and Haggis 2009: 31.

¹³¹ Kratochwil 2000: 63-6.

of as a distinct set of binding rules. Moreover, I contend that while constructivism takes us beyond the materialist and state-centered focus of realism and neo-liberal institutionalism, and the weak or functional roles that these theories allocate to law, it has inadequately explored the concept of legal obligation and, as a result, has yet to adequately explain the potentially distinct nature and effects of international law. In contrast, the interactional theory of Brunnée and Toope focuses on obligation and thus offers a more comprehensive account of law's impact. Finally, by drawing on the analytical insights of constructivism and interactional theory, and employing additional philosophical reflections and historical examples I have derived from the IR and IL literature, I posit that international law plays four main roles in the use of force: 1) it helps constitute the identities of the actors at issue; 2) it helps regulate the political and military practice of the actors at issue; 3) it permits and legitimates certain political and military practices that otherwise might not be permitted; and 4) it helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice.

The thesis then applies this framework to its case studies. Chapter two looks at Britain and the Korean War, and chapter three examines Canada and that conflict. Both chapters follow a similar structure. After providing a brief background to the war, I summarize the dominant scholarly views of why Britain and Canada participated in the conflict, and suggest how this study challenges and advances these views. The rest of the chapters then analyze Britain and Canada's involvement in the war from the perspective of international law. By considering key aspects of UK and Canadian policy and practice, I first assess whether and how these aspects reflect the four roles that I theorize international law plays in the use of force. I then investigate the extent to which UK and Canadian policy-makers understood international law as a binding and distinct set of legal rules, and the degree to which the legal status of these rules impacted their decision-making. I do so

by examining Britain and Canada's interpretation of the UN Security Council resolutions on the Korean crisis, and their understanding of a key provision of the Geneva Convention on POWs.

I then turn to the Afghanistan Conflict. Chapter four looks at Britain and the war, and chapter five analyzes Canada and the conflict. Again, both chapters are structured similarly. After providing a brief background to the war, I summarize the dominant scholarly views of why the UK and Canada have participated in the conflict, and suggest how my research challenges and contributes to these views. I then examine Britain and Canada's involvement in the conflict from the perspective of international law. By considering key aspects of UK and Canadian policy and practice, I first investigate whether and how these aspects reflect the four roles that I theorize law plays in the use of force. I then assess the extent to which UK and Canadian policy-makers understood international law as a binding and distinct set of legal rules, and the degree to which the legal status of these rules impacted their decision-making. I do so by examining Britain and Canada's interpretation of their obligations and rights under the UN Charter and NATO treaty, as well as the UK's understanding of relevant international human rights law and Canada's interpretation of the Geneva Convention on POWs.

This study concludes by summarizing its findings, analyzing the implications of these findings for IR and IL theory, and positing some suggestions for future research.

Chapter 1: Theoretical Framework

This chapter outlines the theoretical framework that guides this study's examination of the influence of international law on Canada and Britain's participation in the Korean War and the Afghanistan Conflict. It begins by assessing how international law should be conceived. Next, I summarize and critically analyze how three major International Relations (IR) theories (realism, neo-liberal institutionalism, and constructivism) engage with the topic of international law. In discussing each theory, I draw out their main limitations for understanding how international law impacts the use of force by states. As a response to these limitations, I then suggest the key insights of interactional theory as argued by International Law (IL) scholars Jutta Brunnée and Stephen Toope. Finally, by drawing on the analytical insights of constructivism and interactional theory, and employing additional philosophical reflections and historical examples I have derived from the IR and IL literature, I posit the roles that international law can play in the use of force.

This chapter makes four main arguments. First, for the purpose of studying its influence in the use of force, international law is best thought of as a distinct set of binding rules that are generally determinate. Second, by prioritizing normative structures and granting international law with "productive" power, constructivism takes us beyond the materialist and state-centered focus of realism and neo-liberal institutionalism, and the weak or functional roles that these theories allocate to law. However, constructivism has inadequately explored the concept of legal obligation and, as a result, has not yet been able to adequately explain the potentially distinct nature and effects of international law in world politics. Third, in contrast to constructivism, interactional theory focuses on obligation and thus offers a more comprehensive account of law's nature and impact. Finally, while IR theorists often focus narrowly on its constraining influence, international law can play four broad roles in the use of force: 1) it helps constitute the identities of the actors at issue, whether

these actors are states (i.e. at the macro level of analysis), or individual leaders and soldiers (i.e. at the micro level of analysis); 2) it helps regulate the political and military practice of the actors at issue, where regulate means to govern or control by law; 3) it permits and legitimates certain political and military practices that otherwise might not be permitted; and 4) it helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice for states and other international actors.

How should we conceive of international law – as rules or process?

In theorizing how to conceive of international law, some IL and IR scholars argue that it is best understood as process,¹³² and that it is indeterminate.¹³³ For instance, Rosalyn Higgins argues that law refers to “specialized social processes” that include many things besides rules, and that international law is “a continuing process of authoritative decisions” directed towards the attainment of certain declared values.¹³⁴ Moreover, in his study of the 1999 Kosovo Intervention, Nicholas Wheeler relies on Higgins’ theory and argues that international law is not a “fixed category”, and there is not a “single correct way of applying the law in particular cases because it is open to different interpretations, each of which is plausible in its own terms”.¹³⁵ In contrast to these perspectives, this study takes the view that – although international law is not *only* a set of rules, and non-legal factors are a part of law as practiced in the real world – international law is better thought of as a distinct set of binding rules that are generally determinate.

This view is adopted for three reasons. First, if one defines international law as process, and then studies how it influences the decision-making process of states regarding the use of force, confusion could arise about what the independent variable is, and how it can be distinguished from

¹³² McDougal 1953, Reisman 1992, Higgins 1994, and Wheeler 2004.

¹³³ Wheeler 2004, and Sinclair 2010.

¹³⁴ 1994: 2, 4-6.

¹³⁵ 2004: 191.

the decision-making process itself. As Higgins herself acknowledges, one of the reasons “traditionalists” define international law as rules is that, if it is regarded as more than rules, international law can become “confused with other phenomena, such as power or social or humanitarian factors”.¹³⁶

Second, if one defines international law, as Higgins does, as the “entire” authoritative decision-making process,¹³⁷ this risks turning international law into everything and nothing, thus making it difficult to define theoretically and observe empirically. This also risks supporting the critical view that international law is whatever powerful states say it is. For example, while the law as process view is influenced by legal scholars Harold Lasswell and Myres McDougal and the “New Haven” school of policy science of the 1950s and 1960s, Friedrich Kratochwil notes that this policy-oriented approach to international law is “in constant danger of becoming just an apology for the policies and preferences of the most powerful”.¹³⁸

Finally, if one does not believe that international legal rules are, at some level, determinate and independent of individual interpretations of them, it is difficult for one to objectively assess state behaviour against these rules because every assessment will, in Wheeler’s words, be “plausible” and thus consistent with almost any argument one seeks to advance. For instance, Wheeler himself begins his study of the Kosovo Intervention by stating that “NATO’s compliance with the laws of war represents an important case for exploring how far law influences the conduct of military operations”.¹³⁹ The issue of compliance, however, is in part a *legal* issue that

¹³⁶ 1994: 3.

¹³⁷ 1994: 2.

¹³⁸ 2000: 42. In a 1955 article, McDougal found – without even considering the views or actions of other states – that the US could legally engage in atmospheric nuclear tests “in preparation for the defence of itself and its allies and of all the values of a free world society” (1955: 361). Commenting on this view, Michael Byers notes that, despite its usefulness as a justification for US foreign policy, the policy-oriented approach accords no independent influence to international law. And, by expanding the ambit of analysis to include a plethora of non-legal factors, this approach leaves “the *specificity* of international law behind” [emphasis in original] (2010: 614).

¹³⁹ 2004: 189.

presupposes one can determine whether NATO *is* complying with the laws of war. And this presupposes that, at least at some minimal level, international law is determinate and exists independent from individual interpretations of it.¹⁴⁰

International law in the study of international relations

While the above section considered the specific issue of how international law should be conceived for purposes of studying its influence in the use of force by states, the following section addresses the more general question of how international law has been theorized by three major IR approaches, namely realism, neo-liberal institutionalism, and constructivism. In explaining each theory, I draw out their shortcomings for understanding how international law impacts the use of force. And this, in turn, sets the stage for outlining the key insights of an interactional lens.

a) Realist approaches

While neo-realism tends to ignore international law,¹⁴¹ and contemporary realist thought has had little to say on the topic when compared to other IR theories,¹⁴² it is important to note that early or “classical” realism explicitly addresses international law.¹⁴³ Notwithstanding this engagement,

¹⁴⁰ From an IL perspective, the issue of compliance presupposes that one can: 1) define the legal issue most relevant to NATO’s targeting activities (e.g. the question of whether “dual-use” civilian-military targets can be bombed); 2) determine the *jus in bello* rule most relevant to NATO’s targeting activities; 3) apply the relevant facts to this rule; and 4) conclude whether NATO did or did not comply with the *jus in bello*. These steps essentially comprise the legal method, and Wheeler uses this method in his study. What helps make this method systematic is the fact that it is not random or idiosyncratic. It does not rely, for instance, on Higgins’ view that individuals will each “know” which legal claims are intellectually supportable and which are not (1994: 7), based, presumably, on a sense of professional duty. Instead, the legal method relies on a commitment to the four steps above, and an awareness that one’s reasoning is potentially subject to external review.

¹⁴¹ For instance, neo-realist Kenneth Waltz does not discuss international law in his often-quoted *Theory of International Politics*. The only references Waltz makes to “laws”, notes Martti Koskeniemi, are to the laws of logical relation and scientific explanation (2000: 28).

¹⁴² As Casper Sylvest observes, although the continued growth of interdependence and the proliferation of international institutions and international law have fostered an interest in re-integrating IL and IR scholarship, so far “realism has had little to contribute to this interdisciplinary development” (2010: 410).

¹⁴³ Early realist thinkers, such as Hans Morgenthau, Carl Schmitt, and E.H. Carr engaged with the topic of international law in part because of a perception among some scholars in the 1930s and 1940s that the study of international relations

however, classical realism is generally dismissive of the significance of international law in world politics and the use of force by states. This is because, from a realist perspective, states are engaged in a continuous and self-interested struggle for material power. They are portrayed as homogenous actors principally concerned with survival in an anarchic system, as having fixed and conflicting goals, and as focusing primarily on the distribution of military capabilities.¹⁴⁴ And international law, as will be seen below, is thought of as political and primitive when compared to domestic law, and as weak and ineffective in constraining the struggle for power and the use of military force.

For example, E.H. Carr argues that international law differs from domestic law in that it is the law of an undeveloped community, and lacks a judiciary, an executive, and a legislature.¹⁴⁵ Similarly, Hans Morgenthau posits that international law is “primitive” law because, unlike domestic law, it has no central law-enforcing authority.¹⁴⁶ Despite these shortcomings, both scholars still think international law exists and should be considered “law”. For Carr, this is because law’s relation to politics is the same in the international and domestic sphere.¹⁴⁷ As in the domestic sphere, where law is a function of political society, Carr argues international law “is a function of the political community of nations”.¹⁴⁸ However, due to the embryonic character of this community and the tiny number of its members, international law is “weaker” than domestic law, and its rules, however general in form, will always “be aimed at a particular state or group of

focused too much on legal and moral considerations, and not enough on power and political factors. Indeed, because many early realists (e.g. Morgenthau and Schmitt) had been trained in law but were nonetheless skeptical of the empirical and political relevance of international law, some contemporary scholars argue that the discipline of IR emerged out of an intellectual split between two groups of German, British and American lawyers during this time period (Byers 2010: 613, and Koskenniemi 2000 and 2002).

¹⁴⁴ Legro & Moravcsik 1999.

¹⁴⁵ 2001: 159.

¹⁴⁶ 2006: 285.

¹⁴⁷ 2001: 160.

¹⁴⁸ 2001: 165.

states”. For this reason, Carr notes, power is “more predominant” in international than in domestic law, and international law is “more frankly political” than other branches of law.¹⁴⁹

Because Carr emphasizes the weakness of international law and the importance of power, one might conclude, as Chris Reus-Smit does, that realists believe international law is not really binding.¹⁵⁰ Such a conclusion reflects some realist views, such as Dean Acheson’s remarks that international law is not really law but a “body of ethical distillation”.¹⁵¹ Yet other realists express more subtle positions. Morgenthau, for instance, refers to international law as “a system of binding legal rules”.¹⁵² And Carr argues that international law exists insofar as there is an international community which recognizes it as binding, and notes that, by some “process”, international law has come into being.¹⁵³ On the other hand, while Morgenthau and Carr may think of international law as binding, their interest in the concept of obligation is limited. For example, Carr believes an explanation of *why* international law is regarded as binding “cannot be obtained from the law itself”.¹⁵⁴ This study disagrees with Carr’s view, and argues later below that law has distinct internal traits that help explain its “felt sense” of obligation. Instead, Carr thinks law is regarded as binding “because, if it were not, political society could not exist and there could be no law”.¹⁵⁵ An explanation of *how* or by what “process” international law is regarded as binding, Carr says, is the job of “the social psychologist”.¹⁵⁶ Thus, insofar as researchers are interested in whether states feel bound by international law, and how this sense of obligation plays out in the policy-making process regarding the use of force, then realism provides limited insight into these analytical concerns.

¹⁴⁹ 2001: 165.

¹⁵⁰ 2004: 16.

¹⁵¹ 1996: 107.

¹⁵² 2006: 285.

¹⁵³ 2001: 160, 165.

¹⁵⁴ 2001: 160.

¹⁵⁵ 2001: 164.

¹⁵⁶ 2001: 160.

Consistent with their belief that international law is primitive and weak, realists emphasize that it is also ineffective. As Morgenthau stresses, to recognize that international law exists is not to assert “that it is as effective a legal system as the national legal systems are and that, more particularly, it is effective in regulating and restraining the struggle for power on the international scene”.¹⁵⁷ This limitation of international law, Morgenthau thinks, is particularly obvious with respect to the use of force by states. As he argues, unlike the numerous “typical” treaties that regulate issues such as postal services, the “spectacular instruments” of international law such as the UN Charter “are indeed of doubtful efficacy (that is, they are frequently violated) and sometimes even of doubtful validity (that is, they are often not enforced in case of violation)”.¹⁵⁸

Realist approaches usefully draw our attention to the possibility that the content and objectives of international law can reflect the distribution of power in the international system, and the interests of strong states. However, there are at least four problems with how realism conceives of international law and its role in the use of force. First, realism does not offer an adequate account of how law can come to constrain strong states.¹⁵⁹ As indicated by studies such as Abram Chayes’ investigation of the US response to the Cuban missile crisis of 1962,¹⁶⁰ and Nicholas Wheeler’s examination of US and NATO targeting policy in the Kosovo Intervention of 1999,¹⁶¹ contrary to what realism might predict, international law can help restrain the behaviour of powerful states. Moreover, as Chris Reus-Smit notes, strong states do not invariably ignore international law, and when they choose to deliberately violate it they do so knowing this will incur political costs.¹⁶²

Second, insofar as realism emphasizes that international law simply reflects the distribution of power and the interests of strong states, it cannot adequately explain how weaker states use law

¹⁵⁷ 2006: 285.

¹⁵⁸ Ibid.

¹⁵⁹ Reus-Smit 2004: 17.

¹⁶⁰ Chayes 1974.

¹⁶¹ Wheeler 2004.

¹⁶² 2004: 17.

to influence strong states and shape outcomes in world politics.¹⁶³ An example of this is how, during the Kosovo Intervention, France used its interpretation of the relevant *jus in bello* targeting rules to influence the administration of US President Bill Clinton. In France's view, NATO planes should not be allowed to bomb bridges on the Danube River due to the disproportionate risk this would cause to civilians. Some key US Air Force Generals disagreed. Nonetheless, in the end, Clinton decided not to allow American pilots to bomb the Danube bridges.¹⁶⁴

Third, realism does not offer an adequate account of how legal rules that are originally institutionalized for reasons of power and interest can, over time, influence events in ways that may conflict with such power and interest. For instance, in his study of the historical impact of the concept of sovereignty, Stephen Krasner finds, consistent with realist predictions, that the view that the 1648 treaties of Westphalia were a turning point in history is "wrong", and the forces behind the elimination of universal institutions and the primacy of the sovereign state "were material".¹⁶⁵ However, he also acknowledges that the "impact of ideas about the sovereign state system has been felt over time because they have been embodied in institutions".¹⁶⁶ In other words, Krasner's study indicates that a legal rule that is institutionalized for reasons of power and interest can nonetheless have independent subsequent impact, by "precluding a range of alternative political practices".¹⁶⁷

Finally, by arguing that international law is primitive because it lacks domestic institutions such as a legislature, judiciary, and centralized enforcement, realism articulates assumptions that potentially misrepresent what it is that makes international law "law", and what explains its "felt sense" of obligation. As Brunnée and Toope argue, when we assume the defining features of domestic law, and by extension of all law, are formal enactment by a superior authority, application

¹⁶³ Reus-Smit 2004: 17-18.

¹⁶⁴ This example is drawn from Wheeler 2004, and research the author conducted for his Masters' thesis on the Kosovo Intervention. See Richmond 2005.

¹⁶⁵ 1993: 235, and 261.

¹⁶⁶ 1993: 238.

¹⁶⁷ Goldstein & Keohane 1993: 22.

by courts, and centralized enforcement, we are bound to see international law as a “poor cousin”.¹⁶⁸ We also risk misjudging how law operates in international society and obscuring its potential power. As will be discussed later below, what distinguishes law from other types of social ordering is not form, but adherence to specific “criteria of legality”.¹⁶⁹

b) Neo-liberal institutionalism

Like realists, neo-liberal institutionalists tend to emphasize material factors and the agency of states. Nonetheless, they are less dismissive of the significance of international law in world politics.¹⁷⁰ This is because they tend to see states as rational egoists who recognize that their long-term interests are often best achieved through co-operation, and that – because of problems such as cheating, insufficient information, and high transaction costs – co-operating often requires regimes or institutions, including formal ones such as international law.¹⁷¹ Neo-liberal institutionalism helps us to better understand why states co-operate under conditions of anarchy, particularly regarding “secondary” issues such as trade.¹⁷² However, as will be elaborated below, its assumption that states are rational actors who use international law instrumentally fails to adequately explain why states feel obliged to obey this particular “institution”, and how international law can help constitute states’ identities and influence their conduct, particularly regarding the use of military force.

¹⁶⁸ 2010: 6.

¹⁶⁹ Brunnée & Toope 2010: 6.

¹⁷⁰ Indeed, over the past twenty years, neo-liberal scholars have often called for greater collaboration between the fields of IR and IL, and written on the challenges and opportunities of such interdisciplinary cooperation. See Abbott 1989; Slaughter Burley 1993; Keohane 1997; and Slaughter, Tulumello & Wood 1998.

¹⁷¹ Robert Keohane defines institutions as “persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activity, and shape expectations” (1989: 3).

¹⁷² In “Legalization and World Politics”, a leading neo-liberal account of international law described in the text below, six of the seven case studies address secondary issues such as third-party dispute resolution, the European Union’s legal system, international monetary affairs, and world trade. Regarding trade, Frederick Abbott’s study of the North American Free Trade Agreement is indicative of the neo-liberal view more generally (2000: 519-547). In it, Abbott examines the trend of states using “hard” law (precise, binding obligations with third-party delegation) in international trade governance, and explains this trend in the context of NAFTA. Consistent with the summary of neo-liberal institutionalism in the text above, he finds that law reduces intergovernmental transaction costs and private risk premiums; promotes transparency and provides corollary participation benefits; and restrains strategic political conduct.

A leading neo-liberal account, by Judith Goldstein et al., argues that “legalization” is a particular form of institutionalization characterized by three criteria: 1) obligation; 2) precision; and 3) delegation.¹⁷³ By offering these criteria, these scholars are seeking to clarify why institutions that are legalized are different from those that are not, and how such legalized institutions can be identified in IR and IL research. As such, they are responding to a gap in the literature of both disciplines, namely the fact that scholars, including constructivists, have not yet adequately explained the “distinctiveness” of international law. However, Goldstein et al.’s articulation of obligation, precision and delegation – and the concept of legalization more generally – also have limits, particularly with respect to conceptualizing how international law influences the use of force by states. For example, regarding obligation, Goldstein et al. argue that “fully legalized institutions bind states through law: their behaviour is subject to scrutiny under general rules, procedures, and discourses of international law”.¹⁷⁴ With respect to this study, insofar as Canada and Britain are bound to obey the international law on the use of force (*jus ad bellum*) and the international law of armed conflict (*jus in bello*), these two “institutions” meet the obligation criterion. However, to draw this conclusion, and to note that the use of force by Canada and Britain and the conduct of these states in war are thus “subject to scrutiny” under the above institutions, is only to describe the legal nature of these institutions. We would not, for instance, be saying anything about why or how Canada and Britain may feel obliged to obey them.

Martha Finnemore and Stephen Toope have expanded on this observation. They argue that, while the issue of obligation and how norms affect state behaviour is arguably the central concern of lawyers and political scientists, neo-liberal institutionalists offer no theory of obligation and seem

¹⁷³ Goldstein et al. 2000.

¹⁷⁴ 2000: 387.

remarkably uncurious about this concept.¹⁷⁵ To be fair, neo-liberals do try to show how the principle of *pacta sunt servanda*¹⁷⁶ and the degree to which states consent to treaties yield differing levels of obligation.¹⁷⁷ However, it is true that this explanation is very formal and contractual,¹⁷⁸ and prioritizes the agency of states. Moreover, to say states feel bound by international law because they have consented to it only begs the question of why states see consent as obligation-inducing.¹⁷⁹ While neo-liberals tend to respond to this issue by arguing that the binding nature of legalized regimes stems from the legitimacy of the background institution of the international legal system, they have limited analytical resources to explain why states attach legitimacy to this system.¹⁸⁰

Because the neo-liberal institutionalist account of obligation is formal and contractual, and relies on state consent, it cannot adequately explain how customary international law, which does not operate on the basis of explicit state consent or formal agreements, arises or helps influence state behaviour.¹⁸¹ And, insofar as the use of force by states and the conduct of states in war are regulated by treaties *and* custom, then the neo-liberal account is ill equipped to theorize how international law influences state practice in these issue areas.¹⁸²

Regarding the second criterion of legalization, precision, Goldstein et al. argue that legalized institutions “demonstrate a high degree of precision, meaning that their rules unambiguously define the conduct they require, authorize, or proscribe”.¹⁸³ This study agrees that the idea of precision helps us in part to understand why a rule or institution should be thought of as distinctly legal in

¹⁷⁵ 2001: 748.

¹⁷⁶ Neo-liberal institutionalists define *pacta sunt servanda* as “the principle that rules and commitments contained in international legal agreements are regarded as obligatory, subject to various defences or exceptions, and not to be disregarded as preferences change” (Abbott et al. 2000: 409). A more simple definition is that “promises are binding”.

¹⁷⁷ Abbott et al. 2000: 408-412.

¹⁷⁸ Finnemore & Toope 2001: 748-749.

¹⁷⁹ Hart 1994: 224.

¹⁸⁰ Reus-Smit 2004: 20.

¹⁸¹ Finnemore & Toope 2001: 748-749.

¹⁸² In light of the significance of customary law on the topic of the use of force, Finnemore and Toope argue it is not surprising that the Legalization collection contains but the briefest discussion of security issues, for they simply cannot fit within a narrow judicial and treaty-based perspective on law’s influence in world affairs (2001: 747).

¹⁸³ 2000: 387.

nature. As will be discussed later below, IL scholars such as Jutta Brunnée, Stephen Toope, and Thomas Franck often argue that concepts similar to precision – for instance “clarity” or, as noted earlier, “determinacy” – are key traits of international law that help explain its ability to promote adherence and its perception of legitimacy among international actors.¹⁸⁴ Where this study disagrees with Goldstein et al., however, is with their application of the precision criterion to the *jus ad bellum*, and the implication that this branch of international law is not a fully “legalized” institution. As an example of precision, Goldstein et al. argue that the 1999 Kosovo Intervention is an instance “of a decline in the precision of rules governing armed interventions, as challenges to the old norms of territorial sovereignty have mounted”.¹⁸⁵ This view, however, fails to recognize the extra-legal justifications that all but one NATO member offered for the intervention,¹⁸⁶ and the clear criticisms that many states made of the unilateral bombing campaign.¹⁸⁷ These actions suggest that most states believe the key *jus ad bellum* rules – i.e. the general ban on the use of force and the two limited exceptions to this ban, self-defence and authorization from the UN Security Council – are not ambiguous and not declining in precision.

And yet, while the Kosovo Intervention may not suggest that the key *jus ad bellum* rules are declining in precision, it cannot be ignored that, regardless of the extent to which these rules are viewed as unambiguous by most states, NATO members still chose to use military force against the

¹⁸⁴ Brunnée and Toope argue that one of the eight internal features of law is “clarity”: citizens must be able to understand what is permitted, prohibited or required by law – the law must be clear (2010: 26). Similarly, Franck contends that one of the four “objective factors” that can assist in the identification of legitimate rules of international law is “determinacy”: the ability of a rule to convey a clear message (1990: 25, 32, 35-36; and 1998: 713).

¹⁸⁵ 2000: 386.

¹⁸⁶ Contrary to the idea that the key *jus ad bellum* rules – i.e. the general ban on the use of force and the two exceptions to this ban, self-defence and Security Council authorization – were perceived as ambiguous at the time of the Kosovo Intervention, most NATO members agreed on the nature and scope of these rules, and were worried about acting in contravention of them. Only one member, Belgium, justified NATO’s action as lawful humanitarian intervention. Generally speaking, the other members did not justify the intervention on legal grounds, and were satisfied that their action was illegal but legitimate for moral and political reasons (Richmond 2005).

¹⁸⁷ In response to the Kosovo Intervention, China, Russia, India, Namibia, Belarus, Ukraine, Iran, Thailand, Indonesia, South Africa, and the 133 developing states of the G77 all reaffirmed that unilateral humanitarian intervention was illegal and unacceptable, and the UN General Assembly in September 1999 voted 107 to seven (with 48 abstentions) in favour of a resolution rejecting “unilateral coercive measures”. See Byers & Chesterman 2003: 184.

Federal Republic of Yugoslavia (FRY) in perceived violation of these rules. This indicates that the intervention is less an instance of a decline in the precision of the key *jus ad bellum* rules, and more an example of a decline in the fidelity of NATO member states to these rules, and in the degree to which these states feel bound to limit their actions to conform with the views of other states about these rules. And this, in turn, suggests two points relevant to this inquiry. First, while the precision of a rule helps us in part to understand why the rule should be thought of as legal in nature, this precision alone does not predict whether the rule will inspire fidelity among those to whom it is addressed. Second, the precision of a rule and the impact of the rule may not be correlated.

In terms of the third criterion of legalization, delegation, Goldstein et al. argue that “legal agreements delegate broad authority to a neutral entity for implementation of the agreed rules, including their interpretation, dispute settlement, and (possibly) further rule making”.¹⁸⁸ Regarding this study, the UN Charter arguably delegates primary authority to the Security Council to implement two of the three key *jus ad bellum* rules (i.e. the general ban on the use of force and one of its exceptions, Council authorization).¹⁸⁹ Moreover, the International Court of Justice (ICJ) has interpreted and pronounced on *jus ad bellum* rules in some of its caselaw.¹⁹⁰ However, insofar as the Security Council is a political entity whose decisions are often made on non-legal grounds, it is not a “neutral entity” in the way a court is.¹⁹¹ And, while the ICJ is arguably neutral, states have generally consented to the Court interpreting and pronouncing on *jus ad bellum* rules on a case by

¹⁸⁸ 2000: 387.

¹⁸⁹ See e.g. Article 2(4) (which prohibits the threat or use of force); Article 24(1) (which states that UN members confer on the Security Council primary responsibility for maintaining international peace and security); and Article 39 (which states that the Council shall determine breaches of the peace, and how to restore international peace and security).

¹⁹⁰ Among others, see e.g. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, [1986] I.C.J. Rep. 14; and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226. For a study of the role and record of the ICJ in the settlement of disputes which are likely to affect international peace, see Akande 2003.

¹⁹¹ The political nature of the Security Council is suggested by: 1) the existence of the veto power outlined in Article 27 of the Charter, which ensures that the five permanent members of the Council cannot have action mandated by that body used against them or their allies; and 2) the fact that Article 39, which assigns to the Council the duty of determining threats to international peace, grants the Council significant discretion regarding the types of situation with which it deals, and the measures it can take. See Lowe et al. 2010: 13-14.

case basis, and have not delegated “broad authority” to it for implementing these rules. Finally, to the extent that the second exception to the ban on the use of force, self-defence, is primarily interpreted by states,¹⁹² this also suggests that the key *jus ad bellum* rules do not meet the delegation criterion. Similarly, regarding the *jus in bello*, states party to the Geneva Conventions have delegated some monitoring duties to the International Committee of the Red Cross,¹⁹³ and the ICRC is neutral insofar as it does not take sides in a war.¹⁹⁴ Moreover, various *ad hoc* international criminal tribunals¹⁹⁵ and the now permanent International Criminal Court (ICC) have interpreted and pronounced on the international criminal law aspects of some *jus in bello* rules. However, the ICRC is not a court, and any monitoring it conducts is generally subject to the consent of the states at issue. Moreover, while *ad hoc* tribunals and the ICC have interpreted and pronounced on the individual criminal responsibility of violating certain *jus in bello* rules, states arguably believe that the primary authority to implement the *jus in bello* still lies with them.¹⁹⁶ To this extent, therefore, it is questionable whether this area of law meets the criterion of delegation.

In sum, while the *jus ad bellum* and *jus in bello* arguably meet the obligation criterion of the concept of legalization, and the *jus ad bellum* meets the precision component, this assessment tells us very little about why or how these branches of international law may influence state practice regarding the use of force. Moreover, both areas of law arguably fail to meet the delegation criterion. Consequently, these three criteria, and the concept of legalization more generally, offer

¹⁹² Article 51 of the Charter states that nothing in that treaty shall impair the inherent right of self-defence if an armed attack occurs against a UN member, until the Security Council has taken measures to maintain international peace.

¹⁹³ Article 9 of the 1949 Geneva Convention on Prisoners of War states that the provisions of the treaty “constitute no obstacle to the humanitarian activities which the [ICRC] ... may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of [POWs]”.

¹⁹⁴ See *Statutes of the International Red Cross and Red Crescent Movement*, adopted at the 25th International Conference, Geneva, 1986. As the *Statutes* note, “to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature”.

¹⁹⁵ Following World War II, International Military Tribunals were established in Germany and the Far East. Moreover, in the 1990s, the UN Security Council created the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda. See Kittichaisaree 2005: 17-27.

¹⁹⁶ The Rome Statute of the ICC emphasizes that the Court’s jurisdiction shall be “complementary” – i.e. not concurrent or primary – to national criminal jurisdictions. See Kittichaisaree 2005: 281.

limited theoretical guidance for this inquiry. In contrast, constructivist scholars offer more promising ideas, as will be seen below.

c) Constructivist perspectives

A third major IR theory that engages with the topic of international law is constructivism. While constructivists have much to say on the social nature of international relations, four claims should be highlighted for present purposes. First, insofar as structures shape the behaviour of states and other actors, normative and ideational structures are as important as material structures.¹⁹⁷ As Alexander Wendt argues, shared knowledge embedded in normative and ideational structures affects how actors respond to their material environment, and inter-subjective beliefs shape actors' identities and, in turn, their interests.¹⁹⁸ Second, if one wants to understand the behaviour of states and other actors, one needs to understand how their social identities condition their interests and actions.¹⁹⁹ Such identities must be seen as social, Chris Reus-Smit notes, because they are *learned* – i.e. actors are in a constant dialogue with the prevailing norms of legitimate agency that constitute role identities to define their senses of self.²⁰⁰ Third, although constructivists grant relevance to the constitutive power of normative and ideational structures, they stress that these structures only exist because of the “routinized practices” of knowledgeable social agents, which makes them human artifacts amenable to change.²⁰¹ Finally, constructivists emphasize the significance of “reasons for action”.²⁰² From this perspective, a reason is both an individual or collective motive (e.g. the reason why NATO bombed the FRY), and a justificatory claim (e.g. the reason NATO gave for bombing

¹⁹⁷ Reus-Smit 2004: 21.

¹⁹⁸ 1995: 73, 1999: 92-138.

¹⁹⁹ Reus-Smit 2004: 22.

²⁰⁰ Ibid.

²⁰¹ Wendt 1987, and Reus-Smit 2004: 22.

²⁰² Kratochwil 1989.

the FRY).²⁰³ Thus, reasons have internal (or private) and external (or public) aspects. Importantly, normative and ideational structures are constitutive of actors' reasons in both senses.²⁰⁴

Because constructivists see normative structures as important to understanding international relations, and as constitutive of actors' reasons for action, they tend to portray international law as one such normative structure, and a site for "communicative" struggles over legitimate identity and rightful behaviour. By prioritizing normative structures, and granting international law with "productive" power, constructivists thus take us beyond the materialist and state-centered focus of realism and neo-liberal institutionalism, and the weak or functional roles that these theories allocate to law. Furthermore, by demonstrating that in addition to its productive force, international law can also constrain state behaviour, including the behaviour of powerful states in war,²⁰⁵ constructivists show that international law can play an important role in world politics.

Notwithstanding its insights, however, constructivism's engagement with international law suffers from at least two limitations. First, although constructivists frequently cite international law and draw on legal philosophy, they are unclear about what exactly distinguishes international law from other phenomena in world politics, and how legal norms differ from political and moral norms. For example, some constructivists ponder whether any valid distinctions exist between legal and non-legal norms;²⁰⁶ some think that categorical differences do not exist but that legal argument is a particular kind of "practical reasoning";²⁰⁷ while still others believe legal norms are indeed distinct.²⁰⁸ Reflecting these disagreements, constructivists have tended to distinguish among norms based on *function* rather than substance – e.g. between regulative norms, which order and constrain

²⁰³ Reus-Smit 2004: 22.

²⁰⁴ Through processes of socialization, Reus-Smit argues, reasons shape actors' definitions of who they are and what they want, and through processes of public justification they frame logics of argument (2004: 22).

²⁰⁵ Wheeler 2004.

²⁰⁶ Finnemore 2000.

²⁰⁷ Kratochwil 1989 and 2000.

²⁰⁸ Katzenstein 1996, and Arend 1996 and 1999.

behaviour, and constitutive norms, which create new actors, interests, or categories of action²⁰⁹ – and have said much on the *effects* of norms in the use of force by states, particularly the effects of moral norms.²¹⁰ However, constructivists have had less to say about the particular *nature* of legal norms and international law, and the distinct impact these phenomena may have in the use of force.²¹¹

The second limitation of constructivism's treatment of international law is that, like neo-liberal institutionalism, it has not adequately explored the concept of legal obligation.²¹² And yet if the binding nature of international law is what distinguishes it from other phenomena in international relations, then a fuller account of obligation is critical for understanding how law operates. Constructivism's inadequate engagement with obligation is unfortunate because, as a social theory of international relations, it can help increase our understanding of the concept.²¹³ For instance, by showing how international law can help socialize actors and shape their interests and choices, constructivism supports the view that law's obligatory effect results from a commitment to law that is generated by, as will be discussed below, adherence to specific criteria of legality.²¹⁴ In turn, by engaging with such "interactional" legal theory, constructivism will be better able to discern the distinct impact of international law.

²⁰⁹ Finnemore 2000.

²¹⁰ Price 1997, Thomas 2001, Tannenwald 2007, and Percy 2007.

²¹¹ While some constructivists have written on the nature of legal norms and legal reasoning (Onuf 1989, and Kratochwil 1989), these scholars have not focused on the distinct impact these phenomena may have in the use of force by states.

²¹² While some constructivists have discussed the concept of legal obligation (Reus-Smit 2003 and 2004: 41-43), this work has not focused on the concept in the context of the use of force by states.

²¹³ Brunnée & Toope 2010: 12.

²¹⁴ Ibid.

The “interactional” approach

In their book, *Legitimacy and Legality in International Law*, Brunnée and Toope draw together the legal theory of Lon Fuller and the ideas of constructivism to advance a pragmatic view of how international legal obligation is created and maintained. In doing so, they help us to better understand the distinct role law plays in international society. In sum, they make three main arguments. First, legal norms can only arise in the context of social norms based on shared understandings. Second, internal features of law are crucial to law’s ability to promote adherence, to inspire “fidelity”. Third, legal norms are built, maintained or destroyed through a continuing practice of legality. These three elements, Brunnée and Toope argue, produce a distinctive legal legitimacy and a sense of commitment among those to whom law is addressed.

First, legal norms can only arise in the context of pre-existing social norms based on shared understandings. Drawing in part on two of the constructivist propositions noted earlier – i.e. that normative structures shape the behaviour of actors, but that structures only exist because of social agents – Brunnée and Toope argue that shared understandings are collectively held back-ground knowledge, norms or practices which are generated and maintained through social interaction.²¹⁵ On the one hand, they note, agents generate and promote particular understandings, while on the other, once in existence, shared understandings become “structures” that shape how actors perceive themselves, form interests, and argue.²¹⁶ Social norms, Brunnée and Toope posit, emerge when societies generate shared understandings of the need for norms, and deeper shared understandings of the need for specific norms to guide behaviour.²¹⁷ Such understandings may include merely a basic acceptance of the need for law in a society, or they may be more substantive and value-

²¹⁵ 2010: 64.

²¹⁶ 2010: 65.

²¹⁷ 2010: 86.

laden.²¹⁸ However, *interactional* law only emerges when shared understandings become fused with a “practice of legality”, rooted in Fuller’s eight criteria described below, and embraced by a “community of practice” that adheres to those criteria in day-to-day decision-making.²¹⁹ Importantly, these criteria are not simply a list for checking whether a particular legal form – e.g. a treaty – is “law”. Instead, Brunnée and Toope argue, the criteria “come alive” when actors reason with rules in continuing processes of mutual engagement, creating a “community of legal practice”.²²⁰

Second, internal features of law are crucial to understanding its ability to promote adherence. As was noted earlier, some IR perspectives assume that the defining features of law are found in its form – e.g. in enactment by legislature, application by courts, and central enforcement. In contrast, Brunnée and Toope argue that what distinguishes law from other types of social ordering is not form, but adherence to eight specific criteria of legality: generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action.²²¹ First, legal norms must be general, meaning that they prohibit, require or permit certain conduct. Second, they must be promulgated, and thus accessible to the public, enabling citizens to know what the law requires. Third, law should not be retroactive, but prospective, enabling citizens to take it into account in their decision-making. Fourth, the law must be clear – i.e. citizens must be able to understand what is permitted, prohibited or required by law. Fifth, law should avoid contradiction, not requiring or permitting and prohibiting at the same time. Sixth, law must be realistic and not demand the impossible. Seventh, law’s requirements of citizens must remain relatively constant. Finally, there should be congruence between legal norms and the

²¹⁸ 2010: 86.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ 2010: 6.

actions of officials operating under law.²²² When these eight criteria are met, law will tend to attract its own adherence.²²³ Fidelity is generated and obligation felt, Brunnée and Toope posit, because adherence to the eight criteria of legality produces law that is legitimate in the eyes of the persons to whom it is addressed.²²⁴

Finally, legal norms are built, maintained or destroyed through a continuing practice of legality. In other words, international law is created and maintained through interaction. The idea of continuous practice is not new to IL scholars, as it is central to customary international law and is also involved in the evolution of treaties. However, Brunnée and Toope argue that a very particular kind of practice is required to make and sustain international legal norms, namely “inclusive practice” that adheres to the criteria of legality.²²⁵ Importantly, and perhaps counter-intuitively, this perspective reveals the weakness of some customary and treaty rules.²²⁶ However, by appreciating law’s grounding in social interaction, interactional theory also identifies the locus of law’s power to shape human behaviour, through the generation of fidelity, rather than through reciprocal advantage, as rationalists might posit, or through coercion, as realists might argue.²²⁷

²²² 2010: 26.

²²³ Fuller called this effect “fidelity to law” (1958: 630, and 1969: 39-41). Others refer to it as law’s “loyalty-advantages” (Waldron 1994: 282), or the “self-bindingness” of law. Brunnée and Toope call it law’s “obligatory quality”, and argue that legal obligation is thus best viewed as an “internalized commitment” and not an externally imposed duty matched with a sanction for non-performance (2010: 27).

²²⁴ 2010: 27.

²²⁵ 2010: 54.

²²⁶ This weakness, Brunnée and Toope contend, “lies not in the absence of enforcement or other attributes of ‘hard’ law, but in a legitimacy deficit resulting from limited participation in norm building and insufficient attention to the requirements of legality” (2010: 54). An example of this, they argue, is the anti-torture norm, as there is inadequate congruence between the norm as codified and the actions of officials operating under the norm (2010: 220-270).

²²⁷ An example where such fidelity has been generated, Brunnée and Toope contend, is the prohibition on the use of force and its exceptions (2010: 271-349).

Positing the four roles of international law in the use of force by states

Drawing on the analytical insights of constructivism and interactional theory described above, and employing additional philosophical reflections and historical examples I have derived from the IR and IL literature, I posit that international law can play four main roles in the use of force: 1) it helps constitute the identities of the actors at issue, whether these actors are states (i.e. at the macro level of analysis), or individual leaders and soldiers (i.e. at the micro level of analysis); 2) it helps regulate the political and military practice of the actors at issue, where regulate means to govern or control by law; 3) it permits and legitimates certain political and military practices that otherwise might not be permitted; and 4) it helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice for states and other international actors. I elaborate on each role below.

First, international law helps constitute the identities of the actors at issue, whether these are states, or individual leaders and soldiers. As we saw earlier, constructivists often emphasize the “productive” power of normative structures such as international law, and argue that normative structures can help shape actors’ identities and interests, and act as a site for “communicative” struggles over legitimate identity and rightful behaviour. Thus, insofar as the *jus ad bellum* and *jus in bello* are normative structures, we would expect them to have productive influence on the actors bound by their rules, and to help shape the identities and interests of these actors. For instance, regarding the *jus in bello*, Chris Reus-Smit notes that when states negotiated the laws of war, “they were not just formulating and enshrining a set of rules, they were enacting and proclaiming a particular conception of legitimate statehood and rightful state action”.²²⁸ Thus, regarding this inquiry, to the extent that Canada and Britain were involved in negotiating the Geneva Conventions following World War II, we would expect them to believe that, as well as formulating and

²²⁸ 2004: 20.

enshrining a set of legal rules, they were also enacting and proclaiming a particular conception of legitimate statehood and rightful state conduct.

Second, in addition to its constitutive role, international law helps regulate the political and military practice of actors leading up to and during the use of force. By regulate, I mean that international law helps govern or control such political and military practice by law – i.e. by a felt sense of legal obligation – and less by material self-interest, as rationalists might suggest, or by coercion, as realists might argue. As noted above, constructivists often stress the productive power of normative structures such as international law. This is in part a reaction to neo-liberal institutionalists, who tend to argue that, inasmuch as norms and ideas affect state behaviour at all, this influence is best conceived as a constraint on such behaviour.²²⁹ However, as we saw earlier, constructivists also argue that international law can constrain state action regarding the use of force, including the conduct of strong states.²³⁰ Further, even constructivists who stress the constitutive nature of most international legal norms acknowledge that *jus ad bellum* and *jus in bello* norms *regulate* the use of force.²³¹ Thus, if we accept that these branches of international law help regulate the use of force, then the question becomes how we should define the concept of “regulate”.

The primary definitions of regulate are 1) to govern or control by law, or 2) subject to, especially, legal restrictions.²³² The first definition is more active and socio-political, in that the words “govern” and “control” suggest that, if international law regulates the use of force by states or the conduct of states in war, then international law *does* something to these activities. The second definition is more descriptive and legal, in that stating that the use of force by states and the

²²⁹ See e.g. Goldstein & Keohane 1993: 20, and Simmons 2009: 5, 8.

²³⁰ As discussed earlier, constructivists such as Chris Reus-Smit argue that realists cannot adequately explain why and how international law can constrain state action regarding the use of force.

²³¹ Kratochwil 2000: 48.

²³² *Canadian Oxford Dictionary*.

conduct of states in war are regulated by international law because said uses of force and conduct are “subject to legal restrictions” only restates a description about the legal nature of these activities.²³³ Thus, for purposes of studying the impact of international law in the use of force, the active definition of regulate is more useful. Recall that there are three elements to this definition: 1) govern; 2) or control; and 3) by law. I assume that govern means to control or influence (a person, a function, the course of events, etc.), and control means the power of restraining.²³⁴ Most importantly, I posit that in the active definition of regulate, it is crucial that a person, function, or course of events is being governed or controlled in part by *law* – i.e. by a felt sense of legal obligation – and less by material self-interest, as rationalists might suggest, or by coercion, as realists might argue. By employing the active definition of regulate, and the interactional concept of obligation, I am theorizing that a) Canada and Britain’s participation in the Korean War and Afghanistan Conflict were governed or controlled, at least in part, by *jus ad bellum* and *jus in bello* rules, and b) it is a felt sense of legal obligation among at least some policy-makers that did this governing or controlling.

The third role that international law plays in the use of force is that it permits and legitimates certain political and military practices that otherwise might not be permitted. As Nina Tannenwald argues, in addition to constitutive and regulative influence, norms also have permissive effect.²³⁵ “This refers”, Tannenwald notes, “to the way norms ... by serving as focal points, selectively divert our normative gaze.”²³⁶ For instance, she argues that the “nuclear taboo”, the norm she studies, labels some weapons as “weapons of mass destruction” and others as “conventional” and thus

²³³ Similarly, recall that neo-liberals argue that one of the three criteria of legalization is obligation, and define obligation by noting that “fully legalized institutions bind states through law: their behaviour is *subject to scrutiny* under ... international law” [emphasis added] (Goldstein et. al. 2000: 387). In other words, the neo-liberal definition of obligation is more descriptive than active.

²³⁴ *Canadian Oxford Dictionary*.

²³⁵ 2007: 46.

²³⁶ *Ibid.*

legitimate.²³⁷ Similarly, because much of what the *jus ad bellum* and *jus in bello* do is prohibit certain conduct (such as the unilateral use of non-defensive force, or the inhumane treatment of captured enemy fighters), it can be easy to forget that these branches of international law also permit certain conduct (such as the use of force in self-defence or when authorized by the Security Council, and the intentional killing of combatants in war or the unintentional killing of civilians in war if this is militarily necessary and proportional). However, by permitting this conduct, it is important to remember that the *jus ad bellum* and *jus in bello* are also helping to legitimate the use of armed force and the killing of human beings in certain circumstances.²³⁸ And there is something about international law that makes it especially appealing to leaders when justifying and explaining why and how their countries have gone to war. As David Kennedy notes, when states use force, law has become the mark of legitimacy, and legitimacy has become the currency of power.²³⁹

Fourth, and finally, international law helps structure the development of new international legal rules and new legitimate practice for states, international institutions, and other international actors. As previously noted in the analysis of constructivism and of interactional theory, shared understandings are collectively held back-ground knowledge, norms or practices which are generated and maintained through social interaction. Moreover, while agents generate and promote particular shared understandings, once in existence, shared understandings become normative and ideational structures that can create new categories of action and act as a site for communicative struggles over legitimate identity and behaviour. Thus, to the extent that the *jus ad bellum* and *jus in bello* represent particular shared understandings among a “community of legal practice” (to use Brunnée and Toope’s term), then we would expect these branches of international law to help

²³⁷ In this case, Tannenwald posits, the nuclear taboo draws our attention to one particular “normative injunction” (i.e. weapons of mass destruction), while obscuring other “facts” about the world and shielding other practices from attention (i.e. the continued use of conventional weapons) (ibid).

²³⁸ For a critical elaboration of this argument, see Jochnick & Normand 1994: 49-95.

²³⁹ Kennedy 2005 and 2006.

structure the process by which agents within this community seek to generate and promote new legal norms or new legitimate practices. For example, when state leaders and officials negotiated the collective security provisions of the UN Charter and the mandate of the Security Council during and following World War II, the nature and scope of these negotiations were shaped in part by shared understandings of pre-existing treaties such as the Covenant of the League of Nations and the Kellogg-Briand Pact of 1928.²⁴⁰

²⁴⁰ This theoretical idea is based on empirical observations in Lowe et al. 2010: 9-13.

Chapter 2: Britain and the Korean War

Employing the theoretical framework outlined in the previous chapters, I now turn to the empirical component of this study. This chapter examines important aspects of the United Kingdom's participation in the Korean War of 1950-53 with a view to better understanding how international law influenced this participation, and whether key leaders understood said law as a binding and distinct phenomenon. The aspects of Britain's participation that are assessed touch upon its policy and practice regarding: a) whether and how to be involved in the Korean crisis; b) the major international legal issues related to the conflict; and c) the treatment of captured enemy fighters.

The chapter is organized as follows. It begins by providing a brief background to the Korean War. Next, I summarize the dominant scholarly view of why Britain participated in the conflict, and suggest how this study challenges and advances this view. The rest of the chapter then analyzes Britain's involvement in the war from the perspective of international law. By considering the key aspects of UK policy and practice noted above, I first analyze whether and how these aspects reflect the four roles of international law that were theorized earlier. Next, I analyze the extent to which UK policy-makers understood international law as a binding and distinct set of legal rules, and the degree to which the legal status of these rules impacted their decision-making. I do so by examining Britain's interpretation of the UN Security Council resolutions on the Korean crisis, and its understanding of a key provision of the Third Geneva Convention on Prisoners of War (POWs).²⁴¹ I conclude by summarizing my findings.

Throughout the chapter, I argue that Britain's participation in the Korean War offers evidence in support of this study's main thesis that, when states use military force abroad,

²⁴¹ Geneva Convention (III) relative to the Treatment of Prisoners of War, signed on 12 August 1949.

international law helps define and shape their possible course of action, and the justifications that can be advanced for their behaviour. However, I also suggest that the discourse and actions of UK leaders during the conflict offer mixed support for my second hypothesis that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making.

Brief background to the Korean War

Following the Second World War, Korea, a former Japanese colony, was occupied by the USSR north of the 38th parallel of latitude and by the United States south of the parallel.²⁴² This division was intended to last only until arrangements for the granting of Korean independence had been concluded by the two powers.²⁴³ After two years of bilateral talks proved fruitless, the US requested in September 1947 that the United Nations appoint a Temporary Commission on Korea (UNTCOK) to supervise an election in the area.²⁴⁴ Although protested by the USSR, this request was passed by the UN General Assembly on 14 November of that year.²⁴⁵ After being refused entry into the north, learning that most political groups in the south opposed a separate election below the 38th parallel, and noting that Syngman Rhee – the US-backed temporary leader in the south – controlled the police and thus might illegitimately influence the outcome of an election, UNTCOK referred the situation back to the UN.²⁴⁶

Following US lobbying, the Commission was instructed by the Interim Committee of the General Assembly to observe elections “in such parts of Korea as are accessible”.²⁴⁷ An election

²⁴² Farrar-Hockley 1990 4-6.

²⁴³ Stairs 1974: 4.

²⁴⁴ Farrar-Hockley 1990: 16.

²⁴⁵ The request passed by a vote of 43 to zero. A number of Scandinavian and Arab states abstained, and the Communist members of the Assembly declined to participate (Farrar-Hockley 1990: 16).

²⁴⁶ MacDonald 1990: 10.

²⁴⁷ Farrar-Hockley 1990: 18.

was held on 10 May 1948, and UNTCOK endorsed the result notwithstanding complaints of ballot rigging and intimidation, and the continuing reservations of some Commission delegates.²⁴⁸ A government was organized under Rhee, and the UN General Assembly recognized the Republic of Korea (ROK), with Seoul as its capital, on 12 December 1948.²⁴⁹ Meanwhile, in the north, a separate election was held on 25 August 1948. Its legitimacy was also questioned.²⁵⁰ Nonetheless, the Democratic People's Republic of Korea (DPRK) was established in Pyongyang under Kim il-Sung, and recognized by the USSR and its allies on 12 October 1948. A new UN Commission on Korea (UNCOK) was created by the General Assembly on 12 December, and it later sent military observers to monitor the 38th parallel.²⁵¹ The USSR withdrew the last of its troops that month, and the US removed its remaining forces on 30 June 1949.²⁵² Six months later, in January 1950, US Secretary of State Dean Acheson remarked in a speech that America's defence perimeter in the Pacific did not extend to Korea, and that such areas would have to depend for their defence upon themselves and the United Nations.²⁵³

On 25 June 1950, DPRK forces crossed the 38th parallel in an attempt to unify the peninsula by force under the communist regime of Kim il-Sung.²⁵⁴ ROK forces, which were weaker militarily than those of the North, virtually collapsed and retreated south, abandoning Seoul.²⁵⁵ In response, US President Harry S. Truman announced on 27 June that America would provide air and naval support to South Korea, increase military aid to the Philippines and Indo-China, and deploy the Seventh Fleet to protect Taiwan (then known as Formosa).²⁵⁶ A US naval presence around Taiwan,

²⁴⁸ Farrar-Hockley 1990: 18.

²⁴⁹ The Resolution recognizing the ROK was passed by the Assembly by a vote of 48 to six (the Soviet bloc), with one abstention (Farrar-Hockley 1990: 28).

²⁵⁰ Ibid: 20.

²⁵¹ Farrar-Hockley 2001.

²⁵² Farrar-Hockley 1990: 25-26.

²⁵³ Rees 1964: 18.

²⁵⁴ MacDonald 1990: 7, and Cumings 2001: 474.

²⁵⁵ Farrar-Hockley 1990: 16, Bercuson 2004, and Palmowski 2008.

²⁵⁶ Truman 1956: 357-8.

Truman argued, was needed to prevent any Communist attack against the island, and any Nationalist actions against the Chinese mainland.²⁵⁷

In addition to these measures, Truman sought UN support for an international military operation to restore peace in the area.²⁵⁸ To this end, the United States secured three key resolutions from the UN Security Council. The first, Resolution 82 of 25 June, determined that the attack by North Korea constituted “a breach of the peace”, called for a cessation of the hostilities and the withdrawal of DPRK forces to the 38th parallel, and called on all member states to help the UN in the execution of the resolution and to refrain from assisting the North Korean authorities.²⁵⁹ Second, Resolution 83 of 27 June noted that UNCOK had reported that a) North Korea had neither ceased hostilities nor withdrawn, and b) urgent military measures were required to restore international peace.²⁶⁰ It also noted that South Korea had asked the UN for help, and recommended that UN members “furnish such assistance ... as may be necessary to repel the armed attack and to restore international peace and security in the area”. Finally, Resolution 84 of 7 July welcomed the international support given to the two earlier resolutions, and noted that UN members had offered to assist the ROK.²⁶¹ It also recommended that all members providing military forces and other assistance make such provisions available to a unified command under the US.²⁶² Importantly, the

²⁵⁷ Truman 1956: 357-8. At the time of Truman’s speech, Taiwan was the location of Chiang Kai-shek’s Chinese Nationalist government, which had been driven from the mainland by Mao Tse-tung’s Communist government in 1949.

²⁵⁸ Truman 1956: 349-366.

²⁵⁹ UNSC Resolution 82 (25 June 1950), [S/1501], *Complaint of Aggression upon the Republic of Korea*. The resolution was adopted by nine votes to none, with one abstention (Yugoslavia). One permanent member of the Council, the USSR, was absent during the vote.

²⁶⁰ UNSC Resolution 83 (27 June 1950), [S/1511], *Ibid*. The resolution was adopted by seven votes to one (Yugoslavia). Two Council members, Egypt and India, did not participate in the voting. The USSR was again absent during the vote.

²⁶¹ UNSC Resolution 84 (7 July 1950), [S/1588], *Ibid*. The resolution was adopted by seven votes to none, with three abstentions (Egypt, India, and Yugoslavia). As with the previous two resolutions, the USSR was absent during the vote.

²⁶² In addition, the resolution authorized the unified command to use the UN flag in its operations against DPRK forces, and requested the US to provide the Security Council with reports on the command’s activities.

US was able to pass the three resolutions above because the USSR was boycotting the Security Council at the time and was thus unable to exercise its veto as a permanent member.²⁶³

Truman named General Douglas MacArthur as the head of the unified UN command.²⁶⁴ US forces stationed in Japan were dispatched to arrive in Korea on 1 July 1950, and 39 other UN member states – including Britain and Canada – agreed to contribute to the US-led effort.²⁶⁵ During the summer, UN forces established a perimeter near Pusan in the south-east corner of the country. On 15 September, they began to recapture South Korea through a number of amphibious landings around the peninsula, and on 26 September they retook Seoul.²⁶⁶ By 20 October, UN forces had reached the Chinese border and were occupying most of North Korea. This advance occurred under a “rollback” doctrine, whereby US leaders decided that, rather than simply restoring the status quo broken by North Korea’s original attack, UN forces would instead cross the 38th parallel and seek to unify Korea by force and eliminate the DPRK.²⁶⁷ As will be discussed later below, the UK helped draft a General Assembly resolution which aimed to provide UN support for this policy of rollback.

In response to the crossing of the 38th parallel by UN forces, Communist China decided to intervene in the war. Over the coming months, approximately one million Chinese soldiers entered Korea from China.²⁶⁸ They helped the DPRK push back the UN forces, and reconquer Seoul on 4 January 1951. UN forces then captured the city again on 15 March 1951, in part as a result of the leadership of US General Matthew Ridgway. Ridgway’s success showed it was possible to hold and push back enemy forces without adopting the more aggressive tactics of General MacArthur.

²⁶³ The USSR had been boycotting the Security Council since January 1950 for its refusal to recognize Communist China’s representative in the place of Nationalist China’s representative following the 1949 military victory of the Communist Party of China over the Chinese Nationalist Party (Kuomintang) in the Chinese civil war of 1948-52.

²⁶⁴ Truman did so on 8 July 1950 (Truman 1956: 366).

²⁶⁵ For details of these offers of assistance – which ranged from naval, air and ground forces, to food and medical supplies – see the 1950 *Yearbook of the United Nations* at 226-228.

²⁶⁶ Farrar-Hockley 1990: 143-158, and Palmowski 2008.

²⁶⁷ MacDonald 1990: 29.

²⁶⁸ Palmowski 2008.

Throughout the war, MacArthur publicly argued that the military effort in Korea should be extended to China. He also publicly criticized President Truman's decisions regarding the conflict, and tried to sabotage diplomatic efforts aimed at ending the war. As a result, Truman dismissed MacArthur in April 1951. Following an unsuccessful Chinese offensive that month, the war developed into a stalemate. Opposing forces became divided roughly along the 38th parallel, and engaged in trench warfare for two more years.²⁶⁹ Difficult and protracted peace negotiations continued during this time, due to disagreement over the future demarcation line, and the ideologically charged issue of whether POWs who did not wish to return to North Korea or China should nonetheless be repatriated.²⁷⁰ An armistice was finally signed on 27 July 1953, after Joseph Stalin's death in March led to a slight relaxing of Cold War tensions.²⁷¹ Sixty years later, the war continues today through a "cold peace", with about 20,000 US soldiers stationed in South Korea and one million North and South Korean troops confronting each other along the demilitarized zone.²⁷²

Why Britain participated in the Korean War

In the language of political scientists, the "puzzle" to be explained is why Britain participated so extensively in the Korean War when a number of factors suggested it should not or would not do so. For instance, many UK officials initially believed that the Korean crisis should be solved by other states,²⁷³ and throughout the war political and military leaders thought Korea was not strategically important.²⁷⁴ Furthermore, Britain was encumbered with other imperial concerns

²⁶⁹ Young & Kent 2004: 151, and Farrar-Hockley 1990: vii.

²⁷⁰ Palmowski 2008.

²⁷¹ MacDonald 1990: 87.

²⁷² Cumings 2001: 474-475, and "N Korea under scrutiny as Obama visits border", Al Jazeera website, 25 March 2012.

²⁷³ Farrar-Hockley 1990: 1.

²⁷⁴ See e.g. *Extract from the Conclusions of a Meeting of the Cabinet*, 29 Nov. 1950, [CAB 128/18], doc. 79 in Yasamee & Hamilton 1991: 215-221, where Prime Minister Attlee said "it was of the first importance that the [UN] should not be trapped into diverting a disproportionate effort to the Far East", and while UN "operations in Korea had been important as a symbol of their resistance to aggression ... Korea was not in itself of any strategic importance to the democracies and it must not be allowed to draw more of their military resources away from Europe and the Middle East".

at the time, such as a counter-insurgency campaign in Malaya,²⁷⁵ and the Labour government of Prime Minister Clement Attlee was focused on improving the social and economic conditions of a country still impoverished and in debt from World War II. Despite these considerations, however, Britain ultimately participated, at great cost,²⁷⁶ in a divisive and bloody civil war located on the other side of the world.²⁷⁷ Generally speaking, scholars cite three main reasons: 1) the perceived security threat of the USSR and the assumption that the Soviets were ultimately responsible for North Korea's attack; 2) a belief that strengthening the UK's relationship with America was the best way to address the Soviet threat, and that fighting in the Korean War would further this goal; and 3) the view that, in light of Britain's experience with Germany in World War II, aggression must not be appeased.²⁷⁸

Britain, like the US, was surprised by North Korea's attack on South Korea,²⁷⁹ and viewed it as primarily a Soviet initiative.²⁸⁰ This view was influenced by the development of Britain's foreign and defence policy following World War II. Since 1945, Attlee's government had feared the expansion of the USSR and posited that a close alliance with the US was vital to British security and the maintenance of the UK's position as a great power.²⁸¹ To meet the Soviet threat, Foreign

²⁷⁵ Farrar-Hockley 1990: 1.

²⁷⁶ Regarding the financial cost of the Korean War, Britain's defence spending rose from £700m in 1948 to £1,112m in 1951-52, increasing its share of the budget from six per cent to ten per cent and committing the UK to a higher expenditure per head on defence than even in the US (Self 2010: 39). In terms of the human cost of the war, British casualties were 1,078 killed in action, 2,674 wounded, and 1,060 missing or taken prisoner (Hickey, 21 March 2011).

²⁷⁷ On the violent nature of the conflict, Bruce Cumings notes that "Eventually the Korean War will be understood as one of the most destructive and one of the most important wars of the twentieth century. Perhaps as many as 4 million Koreans died, three-quarters of them civilians" (2001: 475).

²⁷⁸ These three factors are emphasized, to varying degrees, by Lowe 1989, MacDonald 1990, Yasamee & Hamilton 1991, Farrar-Hockley 1990, and Self 2010.

²⁷⁹ MacDonald 1990: 19.

²⁸⁰ As Sir Pierson Dixon, Deputy Under Secretary of State, observed in his assessment on 26 June 1950, Soviet involvement was "virtually certain". Moreover, as the UK Ambassador in Moscow remarked in a 30 June telegram to Kenneth Younger, deputy Foreign Secretary, the "attack was certainly launched with Soviet knowledge and almost certainly Soviet instigation". See FK 1015/62, calendar to doc. 2; and NS 1029/4, doc. 8, both in Yasamee & Hamilton 1991: 4, 18-20. Privately, Ministers and officials generally agreed with these views (Yasamee & Hamilton 1991: vi).

²⁸¹ MacDonald 1990: 1, and Self 2010: 77-82.

Secretary Ernest Bevin²⁸² aimed to harness US power towards British interests and commit America to the containment of communism.²⁸³ By 1947, Bevin's approach was paying off. Relations between Washington and Moscow had deteriorated under Truman; the President had declared publicly in March the "Truman Doctrine" – i.e. that the US was prepared to support all free peoples resisting communism; and the US had agreed in June to help finance the recovery of Europe through the Marshal Aid Program.²⁸⁴ And still, Bevin was so keen to ensure that the US did not fall back to an isolationist policy that, during the Berlin crisis of 1948-49,²⁸⁵ he allowed American bombers to be based on UK soil without any formal guarantee of consultation before their use.²⁸⁶ Bevin regarded the NATO alliance of 1949 as a great achievement, as it further demonstrated US commitment to the defence of Europe and the policy of containment.²⁸⁷ In sum, by 1950, the Labour government "had moved inescapably into the economic, political and military orbit of the United States".²⁸⁸ As such, Callum MacDonald, a leading authority on Britain and the Korean War, argues that when Truman drew the line against communist aggression in Korea, the UK participated in the ensuing conflict in order to consolidate the Anglo-American alliance and resist such aggression.²⁸⁹

As was acknowledged in this study's introduction, addressing the perceived security threat of the USSR and strengthening Britain's relationship with America are undoubtedly crucial to understanding UK decision-making regarding the Korean War. However, as will be elaborated later below, scholars such as MacDonald sometimes prioritize these goals to such a degree that they

²⁸² Bevin was Foreign Secretary from 27 July 1945 to 9 March 1951. He was ill for much of his tenure during the Korean War, and Kenneth Younger, his deputy, often acted in his place.

²⁸³ Edmonds 1986: 21, and Self 2010: 80.

²⁸⁴ Morgan 1989: 270, and Self 2010: 81.

²⁸⁵ For a description of the Berlin crisis, see Young & Kent 2004: 92-93.

²⁸⁶ MacDonald 1990: 3.

²⁸⁷ Ibid, and Young & Kent 2004: 128-130.

²⁸⁸ MacDonald 1990: 4.

²⁸⁹ Ibid: 5. For another study that resonates with MacDonald's argument, see Truscott 1985.

portray the British response to the Korean crisis as “inevitable”.²⁹⁰ The evidence analyzed by this study challenges this teleological and overly-deterministic view, and suggests instead that Britain’s decisions to send military forces to Korea were not inevitable, particularly its decisions to send ground troops. More generally, to understand the UK’s response to the Korean crisis, one must recall that, in addition to addressing the Soviet threat and improving the Anglo-American alliance, four other international objectives were also important to Britain at the time. These were, as a government paper noted in April 1950: 1) maintaining Britain’s position as a world power; 2) maintaining the Commonwealth structure; 3) consolidating the “Western” democratic system; and 4) ensuring that the Middle East and Asia were stable, prosperous and friendly.²⁹¹ Indeed, because this government paper lists the first two goals *ahead* of maintaining the UK’s special relationship with the US and resisting Soviet Communism, some scholars argue that Britain was more concerned with prestige and status at the time than with security.²⁹² Insofar as this is true, then this suggests that non-material considerations and Britain’s self-identity are also relevant to understanding the UK’s response to the Korean crisis.

Furthermore, Britain’s pursuit of the four other goals above during the Korean War sometimes led it to adopt policies that clearly ran *against* the perceived wishes of the US. For instance, the UK’s support for India’s diplomacy regarding the conflict often frustrated US officials.²⁹³ Moreover, Britain’s legal recognition of Mao’s Communist China, its trade interest in

²⁹⁰ MacDonald 1990: 4.

²⁹¹ These objectives are listed in *British Overseas Obligations*, 27 April 1950, Prime Minister’s Office (PREM) 8/1202, PUSC (79), cited in Phythian 2007: 38.

²⁹² Jong-yil 1984: 304.

²⁹³ See *Indian views on China, UN and Korea*, 4-6 July 1950, [UP 123/116, 120, 121], calendar ii to doc. 7; *Sir D. Kelly (Moscow) to Mr. Younger*, 18 July 1950, [FK 1022/152], doc. 22; and *Memorandum by Mr. Bevin*, 30 Aug. 1950, [CAB 129/41], doc. 42, all in Yasamee & Hamilton 1991: 17-18, 71, and 118. In sum, Britain wanted to build up India and have it take a lead in Asia, in order to bolster the non-communist countries in the area in the fight against communism.

that country,²⁹⁴ and London's financial interest in Hong Kong often put UK leaders at odds with their US counterparts during the war, and contributed to Britain's non-participation in the US blockade of Taiwan. In addition, there is evidence that public opinion – both in Britain and internationally – as well as the public's understanding of the relevant tenets of international law and Britain's relationship to that law, influenced the discourse and actions of the Attlee and Churchill governments during the conflict. Finally, and most importantly for this study, there is evidence that a perception of obligation under the UN Charter and Geneva Conventions affected the thinking and decisions of these governments regarding the war, and the justifications that could be advanced for the UK's actions.

Following its decision to fight in Korea, Britain's objectives in the conflict were three-fold. As Yasamee and Hamilton note, first the UK aimed to contribute to the military effort of the UN.²⁹⁵ Second, it sought to prevent the conflict from spreading elsewhere. And third, in the absence of a clear military victory, Britain wished to find a way of ending the fighting by means of a negotiated settlement. The main military problem for the UK was how to support the goals of the UN without diverting scarce resources from areas perceived to be more vital to Britain's strategic interests, such as Western Europe, the Middle East and, in Asia, Malaya and Hong Kong.²⁹⁶

²⁹⁴ See *Mr. Bevin to Mr. Hutchison (Peking)*, 22 July 1950, [FC 1021/2], doc. 24; and *Record by Mr. Denning of a Meeting with the China Association*, 26 August 1950, [FC 1106/206], doc. 41, both in Yasamee & Hamilton 1991: 75, and 116. Established in London in 1889, the China Association aimed to protect and advance British trade with China.

²⁹⁵ Yasamee & Hamilton 1991: v.

²⁹⁶ In a report on global strategy circulated among British policy-makers just prior to the Korean War, the Defence Chiefs of Staff listed Western Europe as the top priority, followed by the Middle East, and noted that the gap in British defence lay in the Far East. See *Report by the Chiefs of Staff*, 7 June 1950, [CAB 131/9], Appendix I in Yasamee & Hamilton 1991: 411-431.

The four roles of international law in Britain's use of force in Korea

Britain's participation in the Korean War offers evidence in support of this study's main thesis that, when states use force, international law helps define and shape their possible course of action, and the justifications that can be made for their behaviour. More specifically, the UK's participation illustrates the four roles that international law can play in the use of force: 1) it helps constitute the identities of the actors at issue; 2) it helps regulate the political and military practice of the actors at issue; 3) it permits and legitimates certain political and military practices that otherwise might not be permitted; and 4) it helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice. Below, I consider important aspects of UK policy and practice regarding the Korean crisis to demonstrate each role more fully.

a) International law helped constitute the identities of key UK leaders

The fact that Britain decided to a) support the Security Council resolutions on the Korean crisis, and b) contribute significant naval, air and ground forces to the UN mission in Korea even though political and military leaders thought the country was not strategically important, suggests that international law can help constitute a state's identity and be used to reorient its political and military objectives. As will be seen below, Prime Minister Attlee felt a strong sense of obligation to the United Nations and the conflict in Korea, and there is evidence that this perception of obligation was partly comprised of and affected by Britain's formal membership in the UN, as well as Attlee's belief in the international rule of law. While other UK leaders, such as the Defence Chiefs of Staff, did not feel the same sense of responsibility with respect to the UN and the Korean crisis, Attlee sought to reorient their thinking and explain the government's actions to the public by reaffirming the importance of a) responding to aggression, b) making the newly created world organization effective, and c) upholding the rule of law in world affairs.

For example, Britain's delegation at the UN in New York was instructed by Attlee to vote for the first Security Council resolution on the Korean crisis which, recall, stated that the attack by North Korea constituted a breach of the peace.²⁹⁷ This affirmative vote was effectively endorsed by the Cabinet on 27 June 1950 at its initial meeting on the Korean conflict.²⁹⁸ During this meeting, the Cabinet Secretary remarked to Attlee that "Korea is rather a distant obligation, Prime Minister". To this Attlee replied, "Distant – yes, but nonetheless an obligation".²⁹⁹ Accordingly, the government also agreed to support the Council's second resolution, provided that its scope was limited to Korea,³⁰⁰ as well as the Council's third resolution.

While Britain's support for the Security Council resolutions was relatively forthcoming, its decisions to send naval, air and ground forces to Korea were less so. For instance, in response to the Council's second resolution, the Chiefs of Staff and the Cabinet both agreed that Britain's naval forces in Japan³⁰¹ should be immediately placed at the disposal of the US Naval Commander "to operate on behalf of the Security Council in support of South Korea".³⁰² However, the Chiefs stressed, no land or air forces should be sent,³⁰³ as doing so would divert hard-pressed resources from areas that were seen as more important to Britain's defence interests, such as Europe and Hong Kong. Consistent with this view, acting Foreign Secretary Kenneth Younger³⁰⁴ and his advisers noted at a meeting on 15 July that the UK "had only one reserve brigade in the East and the Far East and that it would hardly be possible for us to supply in the immediate future even one battalion as a

²⁹⁷ Attlee reported his instructions to the House of Commons on 26 June 1950 (Farrar-Hockley 1990: 31).

²⁹⁸ Yasamee & Hamilton 1991: vi.

²⁹⁹ Farrar-Hockley 1990: 33.

³⁰⁰ Yasamee & Hamilton 1991: vi, and Farrar-Hockley 1990: 32.

³⁰¹ These forces consisted of one light fleet carrier, two cruisers, and five destroyers and frigates. See telegram of instructions (COS (W) 814 of 28 June 1950), in Yasamee & Hamilton 1991: 9, footnote 5.

³⁰² D.O.(50)48, cited in *Minutes of a Meeting of the Defence Committee of the Cabinet*, 28 June 1950, D.O. (50) 11th Meeting [FK 1015/139], doc. 4 in Yasamee & Hamilton 1991: 7.

³⁰³ Ibid: 9.

³⁰⁴ From February 1950 until the Labour government's defeat in the general election of October 1951, Kenneth Younger was the second-ranking Minister in the Foreign Office under Ernest Bevin (Foreign Secretary from 27 July 1945 to 9 March 1951) and Herbert Morrison (Foreign Secretary from 9 March 1951 to 26 October 1951).

token force without seriously jeopardising our reserves for existing commitments in that area”.³⁰⁵ Expressing similar hesitation, albeit for reasons different than those of Younger and the Chiefs, two left-leaning Cabinet Ministers, Chancellor of the Exchequer Stafford Cripps and Health Minister Aneurin Bevan, articulated “significant dissent” at the time, in part over the lack of American consultation regarding the war, and also because contributing to the conflict – and rearmament more generally – would further delay Britain’s socio-economic recovery following World War II.³⁰⁶

As the military position of the UN force in Korea deteriorated in the summer of 1950, concern grew in the US as to why other states were providing so little concrete help.³⁰⁷ Following these developments, the US asked the UN Secretary General to appeal for further contributions, and pressured Britain to send troops.³⁰⁸ The Cabinet thus faced a policy dilemma, in that the government’s purported commitment to the UN, described more below, its need to show its continued relevance to the US, and its continued belief in its world role were pitted against the realities of an already stretched military commitment, the implications of increased military expenditure on its domestic socio-economic program, and the clear warning of the Defence Chiefs.³⁰⁹ In response to this dilemma, Attlee “convinced”³¹⁰ his Cabinet on 25 July to send the 29th Infantry Brigade from the UK.³¹¹ Less than one month later, in response to fresh requests from the US and to advice from UK military leaders that the threat to Hong Kong had decreased,³¹² Attlee

³⁰⁵ *Meeting in the Minister of State’s Room*, 15 July 1950, doc. 21 in Yasamee & Hamilton 1991: 70.

³⁰⁶ Pearce 1991: 189, and *Cabinet Conclusions*, 1 Aug. 1950, [CAB 128/18], cited in Morgan 1989: 424.

³⁰⁷ Stairs 1974: 86.

³⁰⁸ MacDonald 1990: 21-22.

³⁰⁹ Phythian 2007: 42.

³¹⁰ *Ibid.*: 43.

³¹¹ *Extract from the Conclusions of a Meeting of the Cabinet*, 25 July 1950, [CAB 128/18], doc. 27 in Yasamee & Hamilton 1991: 81. The formation and transport of the 29th Brigade was a slow process. The first troops did not arrive at Pusan, Korea, until 3 November 1950 (Farrar-Hockley 1990: 447-450).

³¹² *Minute from Air Marshall Sir W. Elliot to Mr. Attlee*, 17 Aug. 1950 [CAB 21/2281], doc. 38 in Yasamee & Hamilton 1991: 108-110.

and Bevin also agreed to send the 27th Infantry Brigade from that island.³¹³ These contributions indicate the seriousness with which the situation was viewed, and the costs that were prepared to be incurred, as they stripped Britain's remaining military capacity and forced the recall of reservists from the Second World War.³¹⁴

Britain supported the Security Council resolutions on the Korean conflict and contributed to the UN force there because, as noted earlier, it prioritized its relationship with the US and feared Soviet expansion. In addition to these reasons, however, another factor animating the UK's decisions was a belief among the government that a clear breach of the peace and act of aggression had occurred. For example, speaking at a Labour party rally a week after North Korea's attack, Herbert Morrison, the deputy Prime Minister, stressed that:

only by showing that free democracies will take a stand can we hope to convince disturbers of the peace that aggression does not pay ... By accepting this fresh challenge I have every hope that a world war can be averted. That is the only way to preserve the peace. Otherwise we shall slip along the slippery slope that led to the war of 1939; a war that could have been prevented if the nations of the world had had the courage to act in earlier years.³¹⁵

As Morrison's comments suggest, in the circumstances following North Korea's attack, it seemed vital to British policy-makers to support collective security through the UN. Elaborating on this concern, Prime Minister Attlee told another Labour party rally on 30 July that if the United Nations was not to go the way of the League of Nations, "it is absolutely and imperatively necessary that a

³¹³ *Minute by Mr. Attlee of 17 August on FK 1202/26*, in Yasamee & Hamilton 1991: 111, footnote 6. The forces arrived in Pusan on 29 August 1950. It was hoped they could leave after the 29th Brigade arrived. However, because of China's intervention in the war, the 27th Brigade stayed until April 1951 (Yasamee & Hamilton 1991: 128, footnote 3).

³¹⁴ Many of these reservists had just established themselves in peacetime occupations (MacDonald 1990: 21).

³¹⁵ Cited in Donoghue & Jones 1973: 463.

halt should be called to aggression”.³¹⁶ Picking up on this theme in a broadcast to the British public the next day, Attlee emphasized that:

The attack by the armed forces of North Korea on South Korea has been denounced as an act of aggression by the United Nations ... If the aggressor gets away with it, aggressors all over the world will be encouraged. The same results which led to the Second World War will follow; and another world war may result. This is why what is happening in Korea is of such importance to you. The fire that has been started in distant Korea may burn down your own house.³¹⁷

In these remarks, note that Attlee stresses that North Korea’s attack has been labeled as aggression – i.e. an international crime – by the UN; implies the significance of upholding the authority of the world organization; and links the war in far away Korea to Britain’s immediate security interests.

There is evidence that Attlee’s support for the United Nations during the Korean War, and his perception of obligation, noted earlier, regarding the conflict, were sincere and shaped in part by Britain’s formal membership in the UN and by Attlee’s belief in the international rule of law. However, this evidence also suggests that the Prime Minister prioritized these factors more strongly than most other British leaders. For instance, prior to World War II and the founding of the United Nations in 1945, Attlee had been committed to the principles underpinning the League of Nations.³¹⁸ After the war, the Attlee government actively contributed to the establishment of the UN, and Attlee transferred his support for the League to the new world organization.³¹⁹ For example, during the Potsdam Conference in July 1945, Attlee replied to a memorandum from

³¹⁶ Quoted in Harris 1982: 455-456.

³¹⁷ Ibid.

³¹⁸ Pythian 2007: 22.

³¹⁹ Ibid: 6, 22.

Anthony Eden that expressed concern regarding Soviet ambitions in the eastern Mediterranean and Middle East. Attlee emphasized to Eden that:

The concept of the special interest of Great Britain in the strategic areas and the acceptance of responsibility for them involves us in a continuing heavy burden of defence expenditure ... I am afraid of us undertaking responsibilities which we shall be a little [*sic*] fitted to undertake in the economic conditions of the post-war period. If we really believe and intend to operate a world organisation for peace we ought, I think, to get away from old conceptions. In my view the only realistic policy is that of placing all these strategic areas under international control, not the control of one or two powers, but of the United Nations.³²⁰

Attlee's outlook was criticized by some members of the UK Foreign Office. For instance, Gladwyn Jebb, head of the FO's Economic and Reconstruction Department at the time of the Potsdam talks, questioned Attlee's use of the term "power politics" during this period, arguing that:

What is meant by 'power politics'? I should myself like to think that this term refers to the *misuse* of power in the conduct of foreign policy [emphasis in original]. If this is so, the term could apply, for instance, to Hitler's attempt to dominate Europe. But until such a time as the Great Nations are prepared voluntarily to renounce their sovereignty, or at any rate some essential part of it, until such a time in fact as a World State has been created, international politics can only be an expression of power. Marshall Stalin said this in so many words during the present talks in Potsdam; and however much we may deplore it it is impossible to contest the truth of his observation.³²¹

³²⁰ *Minute From Mr Attlee to Mr Eden (Berlin)*, 18 July 1945, doc. 179 in Butler, Pelly & Yasamee 1984: 363-364.

³²¹ *Memorandum by Mr Jebb (Berlin)*, 29 July 1945, doc. 459 in Butler, Pelly & Yasamee 1984: 990-994.

Notwithstanding such criticisms, Attlee continued to espouse his faith in the UN, and its importance to British foreign policy following the Second World War. For instance, in September 1945, he argued in a memorandum to his Cabinet colleagues and the Defence Chiefs of Staff that:

The British Empire can only be defended by its membership of the United Nations Organisation. If we do not accept this, we had better say so. If we do accept this we should seek to make it effective and not at the same time act on outworn conceptions. If the new organisation is a reality, it does not matter who holds Cyrenaica or Somalia or controls the Suez Canal.³²²

The Defence Chiefs tended to disagree with this view. Admiral Andrew Cunningham, the First Sea Lord, noted in his diary at the time that “The PM misreads the lessons of the war – practically preaches unilateral disarmament and advocates not putting in our claim for trusteeship of Cyrenaica and Greater Somalia”.³²³ Similarly, Field Marshall Alan Brooke, the Chief of the Imperial General Staff, wrote in his diary that “We were ... shaken by Attlee’s new Cabinet paper in which apparently the security of the Middle East must rest in the power of the United Nations!!”³²⁴

Again, however, Attlee continued to emphasize the significance of the UN despite the existence of criticism to the contrary. He also stressed the importance of the rule of law in world affairs. Speaking in January 1946 at the opening session of the General Assembly in London, the Prime Minister stated that the UN:

must become the overriding factor in foreign policy. After the First World War there was a tendency to regard the League of Nations as something outside the ordinary range of foreign policy. Governments

³²² Cab 129/1, CP (45) 144, 1 Sept. 1945, cited in Smith & Zametica 1985: 243.

³²³ Cunningham diary, British Library, entry for 3 Sept. 1945, *ibid*: 243.

³²⁴ Alan Brooke diary, 5/11, Liddell Hart Centre for Military Archives, King’s College, London, entry for 3 Sept. 1945, *ibid*: 243.

continued on the old lines, pursuing individual aims and following the path of power politics, not understanding that the world has passed into a new epoch. In just such a spirit in times past in these islands great nobles and their retainers used to practise private war in disregard of the authority of the central government. The time came when private armies were abolished, when the rule of law was established throughout the length and breadth of this island. What has been done in Britain and in other countries on a small stage has now to be effected throughout the whole world.³²⁵

Moreover, at a Labour party meeting in November 1946, in response to party members who thought the government was moving too close to the US in the emerging Cold War, Attlee re-emphasized the centrality of the UN to the party's international policy. At this meeting, Dick Crossman, a critic of Attlee's foreign policy, stressed that the party had fought the 1945 election on a claim that only a Labour government could prevent the division of the Western world into two ideological blocs, and that Attlee's government had now created the impression that British foreign policy was governed by "an exclusive Anglo-American tie-up".³²⁶ In response, Attlee said it was remarkable that Crossman had got through a speech on foreign affairs without once mentioning the UN. "[T]he Government", Attlee added, "does not believe in the forming of groups and opposes groups East, West or centre. We stand for the United Nations".³²⁷ This debate between Attlee and Crossman reflected a more general foreign policy division between the right and left wings of the Labour party following World War II,³²⁸ and this division resurfaced during the Korean War.

³²⁵ Attlee 1954: 198-199.

³²⁶ Quoted in Harris 1982: 302.

³²⁷ Ibid.

³²⁸ During this period, those on the right wing of the Labour party tended to prioritize the UK-US alliance; downplay the possibility of cooperating with the USSR; and accept the *realpolitik* logic of the Cold War. By contrast, those on the left tended to question whether aligning with the US might ultimately erode Britain's sovereignty; believe that cooperating with the USSR was not impossible; and advocate a "third way" socialist internationalism that included a restrictive view of the legitimate use of military force abroad. See Phythian 2007: 35-37.

Again, the above suggests that Attlee's support for the United Nations during the Korean War, and his perception of obligation regarding the conflict, were sincere and shaped in part by Britain's formal membership in the UN and by Attlee's belief in the international rule of law. However, it is important to acknowledge the political context of this support and perception. At the time of the Korean War, the majority of states comprising the UN Security Council and General Assembly were generally considered sympathetic to the US and its allies.³²⁹ As such, some scholars, such as Callum MacDonald, argue that leaders like Attlee and US President Truman "found no difficulty in regarding [the UN] as an important tool in the cold war, lending moral authority to the policy of containment".³³⁰ However, while MacDonald is correct to point out the political circumstances under which Britain and the US were able to respond to the Korean crisis through the UN, he underestimates the extent to which acting through the world organization imposed limitations on US and UK behaviour in the war,³³¹ and the degree to which some British leaders understood UN involvement as providing more than just "moral authority" for the policy of containment. For instance, as will be seen in the next section, acting Foreign Secretary Younger believed that in any action the Security Council took regarding the Korean crisis, it was important that the *legal* authority for such action was correct and made clear, and that the perception that the Western powers were simply making use of UN machinery for their own ends was avoided.

³²⁹ At the outbreak of the Korean War, seven of the Security Council's 11 members were generally considered sympathetic to the Western bloc of states in the emerging Cold War (the US, UK, France, Norway, Nationalist China, Cuba, and Ecuador), while the remaining four were generally viewed as loyal to the Communist bloc (the USSR and Yugoslavia) or as relatively neutral (Egypt and India). Moreover, when the General Assembly voted to create the first Commission on Korea in November 1947, the vote was adopted by 43 votes to zero with six abstentions. These abstentions came from members of the Communist bloc (the USSR, Byelorussia, Czechoslovakia, Poland, the Ukraine and Yugoslavia). See Higgins 1970: 156-157, and 162.

³³⁰ MacDonald 1990: 5.

³³¹ This point is made convincingly by Hoyt 1961 and Stairs 1974. Consistent with their findings, William Stueck observes that President Truman and Secretary of State Acheson's decision to respond to the Korean crisis through the UN system led to legal agreements that restricted America's freedom of action regarding the war, and criticism of this decision by some US military professionals, legislators, and members of the public (2010: 275).

b) International law helped regulate the political and military practice of Britain and the US

In addition to its constitutive effect, international law also had a regulative influence in the Korean War. Two examples of this influence are a) Britain's non-participation in the US naval blockade of Taiwan, and b) the UK's use of the Security Council resolutions and other related international legal instruments to constrain America's response to the crisis.

Regarding the first example, recall that, when the Attlee government decided to support the Security Council's second resolution on the Korean conflict, it did so provided that the instrument's scope was limited to Korea. Accordingly, when the Cabinet and the Defence Chiefs chose to contribute UK naval forces to the UN mission, they both agreed that these forces were to operate under US command on behalf of the Security Council in support of South Korea.³³² In the course of debate leading up to this decision, the First Sea Lord, Lord Fraser of North Cape, said "It was important that any operations that might have to be undertaken by British Naval Forces should be in support of South Korea and not in protection of [Taiwan] or in any way against the Communist Government in China".³³³ The Cabinet Defence Committee, which was chaired by Attlee, agreed.³³⁴ As such, during the next three years of the Korean War, Britain's naval forces did not participate in the blockade of Taiwan, and were "strictly limited to resisting aggression in Korea".³³⁵

In addition to the UK's understanding of the Security Council's second resolution, there is further evidence that international legal considerations helped shape Britain's non-participation in the Taiwan blockade. For example, it was agreed in a meeting on 30 June between acting Foreign Secretary Younger and some Cabinet Ministers that, in any public statement that was made on the

³³² *Minutes of a Meeting of the Defence Committee of the Cabinet*, 28 June 1950, D.O.(50) 11th Meeting [FK 1015/139], doc. 4 in Yasamee & Hamilton 1991: 9.

³³³ *Ibid*: 8.

³³⁴ *Ibid*: 9-10.

³³⁵ MacDonald 1990: 26.

Korean crisis, the UK would “welcome” the US action around Taiwan because the island was a “ward of the allied powers and it was in our interest that orderly government should be maintained there until a peace treaty was signed”.³³⁶ However, it was also agreed that leaders would emphasize that British “forces were not involved in the [Taiwan] action and while we approve of that action we did not participate in it because of the special *legal* position we were in” [emphasis added].³³⁷ Younger and the other Ministers did not specify what they meant by the “special legal position” that Britain was in regarding Taiwan. However, they were likely referring to the fact that the Attlee government: a) had recognized Mao’s Communist regime as the *de jure* government of China on 6 January 1950 while the US had not;³³⁸ b) would continue this recognition during the Korean War;³³⁹ and c) thought that, following an appropriate treaty on the issue, China should regain authority over Taiwan. To this extent, then, Younger and the other Ministers likely thought that the legal position that the UK government had previously articulated prevented it from participating in any coercive military action that – while “welcome” and consistent with Britain’s interest in order – nonetheless conflicted with this legal position and risked a broader war with China.

It is important to note that the government refused to allow UK forces to participate in the Taiwan blockade notwithstanding the fact that some British officials thought that such participation might prove necessary if China attacked the disputed island. For instance, in a draft paper dated 24 July 1950, R.H. Scott of the Foreign Office gave a joint FO-Commonwealth Relations Office view “on behalf of implicit British involvement in [Taiwan] in the event of a Communist attack”.³⁴⁰ In

³³⁶ *Minutes of a Meeting held in the Minister of State’s Room*, 30 June 1950, [FK 1022/59], doc. 9 in Yasamee & Hamilton 1991: 21.

³³⁷ *Ibid.*

³³⁸ Wolf 1983: 299.

³³⁹ Foreign Secretary Bevin told the UK Ambassador in the US that “our attitude is that the Peking Government is without any shadow of doubt the Government of China and that the Nationalist representatives in the United Nations represent nothing but a small clique in [Taiwan] which in itself represents nothing”. See *Mr. Bevin to Sir O. Franks (Washington)*, 11 Aug. 1950, [UP 123/143], doc. 35 in Yasamee & Hamilton 1991: 100.

³⁴⁰ *Draft paper by R.H. Scott of the Foreign Office*, 24 July 1950, (FO 371/83298) [FC 1024/51], in Morgan 1989: 424.

response, Foreign Secretary Bevin strongly dissented to this view, and argued that “any of [Scott’s] recommendations means a general war. If we are not careful, we might provoke it.”³⁴¹ This empirical observation is relevant for two reasons. First, it suggests that, contrary to what an overly-deterministic account might suggest, Britain’s policy on the Korean War was not dictated solely by its alliance with the US, and the outcomes of UK decision-making were not inevitable. Second, this observation resonates with other studies that have found that international law helped regulate a state’s use of force.³⁴² Consistent with this investigation’s findings, these studies assume that – as was noted in the introduction chapter – one way to show law helped govern or control a state’s use of force is by finding evidence that a) some leaders of the state or their advisers considered implementing military responses that were broader or more severe than the force that was actually employed, and b) these broader or more severe responses were avoided in part because other leaders thought this would be more consistent with international law. Finding such evidence regarding Britain’s participation in the Korean War therefore helps suggest that international law influenced the UK in this conflict.

In addition to Britain’s non-participation in the Taiwan blockade, another example of international law’s regulative impact is the UK’s use of the Security Council resolutions and other related legal instruments to constrain the US response to the Korean crisis. This behaviour supports one of the criticisms of realism noted in the preceding chapter, namely that insofar as it stresses that international law simply reflects the distribution of power and the interests of powerful states, realism cannot adequately explain how weaker states use law to influence stronger states and shape outcomes in world politics.³⁴³ To this extent, then, Britain’s use of the Council resolutions and other related instruments to limit the US reaction to the Korean conflict offers evidence against

³⁴¹ The Colonial Office shared Bevin’s view, partly because of the large Chinese population in Malaya and Hong Kong. See *J.J. Paskin to M.E. Denning*, 5 Aug. 1950, [FC 1024/59], in Morgan 1989: 424.

³⁴² Chayes 1974, and Wheeler 2004.

³⁴³ Reus-Smit 2004: 17-18.

realist views, and for alternative accounts, such as constructivism and interactional theory, which specifically posit that international law can play an important role in the use of force by states.

During negotiations on the content of the second Council resolution, the US suggested that the text should also mention other Communist Asian “encroachments”, and attribute the North Korean invasion to “centrally directed Communist Imperialism”.³⁴⁴ Expressing similarly expansive and accusatory language, drafts of Truman’s announcement on 27 June, mentioned earlier, stated that the attack had been launched by “centrally directed Communist Imperialism”.³⁴⁵ Concerned by this wording, Foreign Secretary Bevin (who was ill in hospital) sent the Americans a message. He believed it was “important” that the second resolution “should be confined strictly to events in Korea”, and should not include “any reference to Communist threats in other parts of Asia which had not yet been brought before the Security Council”.³⁴⁶ Similarly, acting Foreign Secretary Younger requested that the language of Truman’s announcement be modified, and any public reference to Soviet or Chinese responsibility for the attack be omitted.³⁴⁷ In the end, the US agreed to Bevin and Younger’s requests. Accordingly, references to Communist “encroachments” and “centrally directed Communist Imperialism” were deleted from the second Council resolution, and use of the latter term was removed from Truman’s announcement on 27 June.³⁴⁸

As with the second Council resolution, there is evidence that, in the discussions leading up to the third resolution, the UK was again able to influence the American negotiating position and shape the outcome of the talks, and Britain’s interpretation of the international legal considerations

³⁴⁴ Farrar-Hockley 1990: 32-33.

³⁴⁵ Yasamee & Hamilton 1991: vi.

³⁴⁶ Ibid, and Farrar-Hockley 1990: 32.

³⁴⁷ Bevin and Younger made these suggestions because there was no hard evidence yet that the USSR or China *was* responsible for North Korea’s attack; Britain wished to contain the Korean crisis by giving Stalin and Mao face-saving room to retreat should the opportunity arise; and the UK did not want to appear to support Chiang Kai-shek, the Nationalist Chinese leader in Taiwan, because this could lead to Chinese Communist actions against British-controlled Hong Kong. See Yasamee & Hamilton 1991: vi, and Farrar-Hockley 1990: 32.

³⁴⁸ Truman 1956: 357.

at issue played a role in this regard. For instance, an early US draft of the third resolution referred to the Security Council's initial "*decision* to assist the Republic of Korea" [emphasis in original], and suggested that a "Committee on Enforcement Action" be created to act as a link between the Security Council and General MacArthur.³⁴⁹ It also implied that Yugoslavia and Egypt be excluded from any such committee, notwithstanding the fact that these states were often considered relatively neutral by members of both the Western and Communist blocs. In response to the US draft, acting Foreign Secretary Younger told Gladwyn Jebb, Britain's UN delegate, that referring to the Council's initial action as a "decision" was erroneous, and that the title "Committee on Enforcement Action" was similarly inappropriate.³⁵⁰ This was because, Younger said, enforcement action means "action under Article 42 [of the Charter], whereas we are all agreed that we are now acting under the first half of Article 39 and this should be kept clear".³⁵¹ Further, he noted, "If a committee is constituted in such a manner as to exclude Yugoslavia and/or Egypt, its creation might lend some weight to the criticism that the Powers opposed to the Soviet bloc are simply making use of United Nations machinery for their own ends."³⁵² Summing up the situation, Younger stated that:

Assistance to Korea is now being given as a result of a recommendation of the Security Council and it therefore seems reasonable that the Council should wish to be as actively associated with the progress of operations as is possible in the circumstances. Moreover it is important from the *legal* and political standpoint and from the point of view of world opinion that the necessary action should be taken under the United Nations 'umbrella' [emphasis added]. On the other hand the facts of the situation make it imperative

³⁴⁹ *Mr. Younger to Sir G. Jebb*, 2 July 1950, [UP 2113/4], doc. 10 in Yasamee & Hamilton 1991: 24-26. The US proposed creating an enforcement committee in part because it wanted to avoid involving the Military Staff Committee envisaged by the Charter. Article 47(iii) of the Charter gave the MSC responsibility for the strategic direction of any armed forces placed at the disposal of the Security Council. If the MSC became involved, however, the US and its allies worried that the USSR could demand to see the Committee's plans for the UN force in Korea.

³⁵⁰ *Mr. Younger to Sir G. Jebb*, 2 July 1950, [UP 2113/4], doc. 10 in Yasamee & Hamilton 1991: 24-26.

³⁵¹ *Ibid.*

³⁵² *Ibid.*

that the actual conduct of military operations should remain squarely in the hands of General MacArthur with the minimum possible interference from outside.³⁵³

Consistent with Younger's views, Jebb was active in New York in steering the American delegation away from the idea of a UN enforcement committee (an option which was also disliked by the US Joint Chiefs of Staff) and towards a solution which emphasized the UN character of operations while at the same time gave freedom for their conduct to General MacArthur.³⁵⁴ On 7 July, a final agreement was reached for a UK-France sponsored resolution on a unified command in Korea.³⁵⁵

The events above must be understood with reference to the main substantive provisions of the UN Charter that were relevant to Britain's interpretation of the Security Council resolutions on the Korean crisis, namely Articles 39, 41 and 42. Article 39 states that "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".³⁵⁶ Under Article 41, the 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".³⁵⁷ And under Article 42, if the Council considers non-forceful measures to be inadequate, "it may take such action by air, sea, or land forces as may be necessary to maintain or

³⁵³ *Mr. Younger to Sir G. Jebb*, 2 July 1950, [UP 2113/4], doc. 10 in Yasamee & Hamilton 1991: 24-26.

³⁵⁴ See *Minutes of a Meeting held in the Minister of State's Room to discuss Korea*, 30 June 1950, [FK 1022/59], doc. 9; *Mr. Younger to Sir G. Jebb*, 2 July 1950, [UP 2113/4], doc. 10; and C.M. (50)43rd Conclusions on CAB 128/18, 6 July 1950, all in Yasamee & Hamilton 1991: 21, 24, and 41 (at footnote 11). For the US perspective on these negotiations, see US Department of State, *Foreign Relations of the United States, 1950. Korea, v. VII*, at 300-301.

³⁵⁵ Yasamee & Hamilton 1991: 26, footnote 8. The final agreement was reached after it was decided to defer action on the creation of a coordinating committee, and after the language of a new draft resolution was amended in response to constitutional problems raised by the UK over the use of the UN flag.

³⁵⁶ Article 39, UN Charter.

³⁵⁷ Article 41, UN Charter.

restore international peace and security”.³⁵⁸ Because the second Security Council resolution on the Korean crisis had *recommended* – i.e. not decided – that UN members help restore peace in the area, UK leaders thought that, as Younger noted above, the UN force in Korea was “acting under the first half of Article 39 and this should be kept clear” in the third Council resolution. Leaders also thought that a UN enforcement committee was thus inappropriate because, as Younger further noted, enforcement action means action under Article 42 (and not, by implication, under Article 39). These events support another criticism of realism noted in the preceding chapter. Namely, they illustrate how a legal provision – in this case, the term “recommend” in the second Council resolution – that may have been selected for reasons of power or expediency can nonetheless have independent subsequent impact by “precluding a range of alternative political practices”³⁵⁹ – in this case, by limiting the institutional responses that the US delegation at the UN could convincingly propose. Finally, these events also suggest the particular impact that the term “recommend” in the second Council resolution had on the thinking and actions of UK leaders. In light of Prime Minister Attlee’s support for the UN leading up to and during the Korean War, and his desire to strengthen the organization and make it effective, one might expect Britain to have agreed with the US proposal to create an enforcement committee that would act as a link between the Security Council and General MacArthur. However, the UK opposed such institutional development, and explained its opposition with reference to the Council’s prior resolutions on the crisis.

In addition to influencing the US negotiating position on the Korean conflict, Britain also used its understanding of the initial Council resolutions, as well as other related international legal instruments, to constrain America’s behaviour with respect to Taiwan. For instance, the Attlee Cabinet and Foreign Office officials were concerned that the US blockade of the disputed island

³⁵⁸ Article 42, UN Charter.

³⁵⁹ Goldstein & Keohane 1993: 22.

could lead to an expansion of hostilities in the area³⁶⁰ and, as noted earlier, tended to think that the scope of the Council resolutions was limited to Korea. Articulating the government's concern, Foreign Secretary Bevin warned US Secretary of State Acheson on 8 July that America could not rely on wholehearted UK support for a policy based on denying to Mao's government territory that had been promised to China under the Cairo Declaration of December 1943, and reaffirmed at the Potsdam Conference in July 1945.³⁶¹ As a short-term response, Bevin successfully pressed for President Truman to make a second declaration, issued on 19 July 1950,³⁶² which effectively marked the beginning of an agreed policy to put Taiwan "on ice".³⁶³ Thus, when General MacArthur ignored the advice of the US Joint Chiefs and visited Taiwan at the end of July,³⁶⁴ and Washington announced a program of military aid to Chiang Kai-shek's Nationalist government there, this led to British concern about American intentions regarding the island. In response, the Truman administration denied any intention of seeking a special position on Taiwan, or of encouraging Chiang to attack China.³⁶⁵ Further, when MacArthur issued a message to the US Veterans of Foreign Wars in August that emphasized the strategic importance of Taiwan, he was forced to withdraw his statement by Truman. Following this incident, Bevin suggested placing the Taiwan issue before the UN. Under this proposal, the General Assembly would establish a committee that could decide when peace and security had returned to the Pacific, allowing the

³⁶⁰ Yasamee & Hamilton 1991: xi.

³⁶¹ *Mr. Younger to Sir O. Franks (Washington)*, 8 July 1950, [FK 1022/56], doc. 15 in Yasamee & Hamilton 1991: 42.

³⁶² Speaking to Congress, Truman explained the US response to North Korea's attack, and expressed his desire to ensure that Taiwan did "not become embroiled in hostilities disturbing to the peace of the Pacific and that all questions affecting [the island] be settled by peaceful means as envisaged in the [UN] Charter" (US Department of State, *Department of State Bulletin*, XXIII, 578, 31 July 1950, 166).

³⁶³ *Sir O. Franks (Washington) to Mr. Bevin*, 10 August 1950, [FC 10345/19], doc. 34; *B.D.C.C. (Singapore) to Ministry of Defence*, 20 August 1950, [FC 1024/61], doc. 39; and *Sir O. Franks (Washington) to Mr. Bevin*, 4 January 1951, [FK 1071/16], doc. 103, all in Yasamee & Hamilton 1991: 96, 111, and 286.

³⁶⁴ Rees 1964: 73.

³⁶⁵ MacDonald 1990: 27.

cession of the island to China.³⁶⁶ Acheson said he was prepared to discuss the proposal, although the two allies ultimately remained divided on the issue.³⁶⁷

c) International law helped permit and legitimate Britain's political and military practice

There are two examples that suggest that, when the UK responded to the Korean crisis, international law helped permit and legitimate certain conduct that otherwise might not have been permitted. The first is the fact that Britain intervened militarily in what was in many respects an ideologically divisive and extremely violent *civil* war, and justified this publicly and privately with reference to the Security Council resolutions on the crisis and the UN Charter's provisions on self-defence. The second example is the fact that the UK ultimately supported the US decision to cross the 38th parallel in Korea in October 1950, and that it helped draft a General Assembly resolution aimed at providing UN support for this policy of rollback.

Regarding the first example, due to the majority interpretation of the Council resolutions on the Korean conflict, the US and UK thought they were allowed to intervene militarily in what was in many ways an ideologically divisive and tremendously destructive civil war.³⁶⁸ UK military action in this conflict, as we saw Prime Minister Attlee and deputy Prime Minister Morrison stress earlier in public, was justified insofar as North Korea's original attack was denounced as aggression by the UN Security Council, and because the UK was acting pursuant to the Council's resolutions on the crisis. In addition to these statements, there is further evidence that international legal

³⁶⁶ Bevin recognized the difficulty of asking the Truman administration to go any further when Taiwan was an ideologically divisive issue in US domestic politics (at the time, many Republican politicians criticized Truman for "loosing" China to the communists). However, Bevin thought that his proposal might restrain China, please India, and create a situation in which Britain could live with the temporary US "neutralization" of Taiwan (MacDonald 1990: 27).

³⁶⁷ MacDonald argues that, while Acheson said he was prepared to discuss Bevin's proposal, in fact the Truman administration had no intention of ever surrendering Taiwan but concealed this from the British (1990: 27).

³⁶⁸ The issue of how the Korean War was understood by UK leaders, and whether it was considered an international conflict or a civil war under international law, is addressed later in the text below. For a legal letter that implies the rules of war should likely apply to the Korean conflict because such rules "have been applied in civil wars" in the past, see *Copy of Letter from the Attorney-General to the Lord Chancellor*, 4 Sept. 1950, Annex to *Legal Implications of the Korean Conflict*, 14 Sept. 1950, C.P. (50)207. This letter is described more fully later below.

considerations were relevant to explaining Britain's use of force to the UK public and British officials, and to securing the support of the international community.

For instance, in response to public concerns over the international legality of America and Britain's reaction to the conflict,³⁶⁹ a sophisticated legal defence was developed and articulated by the Attlee government, and prolonged and careful legal analysis of the situation was ordered. One of the concerns was the fact that South Korea was not itself a member of the UN, and this seemed inconsistent with the Charter's language on the international actors that could use force in self-defence. Article 51 states that nothing in the Charter "shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a *member* of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security" [emphasis added].³⁷⁰ At a meeting on 4 July 1950, the Cabinet responded to this concern by observing that, although South Korea was not a member of the UN, "the action taken on her behalf was clearly in accordance with the principle embedded in [Article 51]".³⁷¹ As Attlee explained in Parliament the following day, the purpose of this provision was "not to create a new right but merely to make it clear that an inherent right vested in every State is not prejudiced".³⁷²

Elaborating on this position, the Foreign Office's UN department sent an update to Britain's diplomats stationed abroad on 7 July. It stated that under international law:

[A]ny state which is attacked has a right to defend itself and any other state has a right to assist the state which is the subject of aggression. The Charter does not take away or limit this common law right, which is, indeed, specifically preserved in Article 51. No valid objection can be made on the grounds that Article 51

³⁶⁹ For commentary on these concerns, see the two-part article by Keeton entitled "International law and Korea", in the *Manchester Guardian*, 29 and 31 July 1950. Some of the concerns were expressed by left-leaning Labour party members and "backbench" Members of Parliament (Phythian 2007).

³⁷⁰ Article 51, UN Charter.

³⁷¹ *Extract from the Conclusions of a Meeting of the Cabinet*, 4 July 1950, [CAB 128/18], doc. 11 in Yasamee & Hamilton 1991: 28.

³⁷² HC Debs., Hansard, 5 July 1950, col. 494.

refers specifically to the event of ‘an armed attack ... against a member of the United Nations’. The Republic of Korea, although not a member of the United Nations is not thereby disqualified from receiving assistance from a member when subject to an attack ... [E]ven if that [Security Council] resolution were not valid (as claimed by the Soviet Union), all that is now being done to assist the Republic of Korea remains justified by the right of collective self-defence recognised by the Charter ... His Majesty’s Government are not at present at war. They are engaged in a collective international police operation under the authority of the Security Council to repel aggression and to restore international peace and security in Korea.³⁷³

In sum, the statements above suggest that Attlee’s Cabinet believed that the action taken on South Korea’s behalf was consistent with the customary international law on self-defence, and that FO officials thought that Britain was using force in Korea under the authority of the Security Council or, insofar as this basis was invalid, under the doctrine of collective self-defence.

Cognizant of the specific arguments above, the Cabinet concluded at its meeting on 4 July that, more generally, while Attlee “should not ignore the constitutional points which were being made, [he] should argue that the action which the Western Powers were taking in South Korea was fully in accordance with the *spirit* of the United Nations Charter and was in fact the first significant demonstration of the principle of collective security against aggression” [emphasis added].³⁷⁴ Moreover, the Cabinet held, the Prime Minister should emphasize “that it was the duty of peace-loving nations to make the machinery of the United Nations work effectively, despite legal quibbles, and not to allow it to be frustrated by the abstentions of a single member”.³⁷⁵ For this purpose, the government concluded, such nations “were entitled to take advantage of procedures which, though they might appear to conflict with the strict letter of the Charter, had been accepted

³⁷³ Intel No. 143 of 7 July 1950, [UP 2113/53], in Yasamee & Hamilton 1991: 22, footnote 8.

³⁷⁴ *Extract from the Conclusions of a Meeting of the Cabinet*, 4 July 1950, [CAB 128/18], doc. 11 in Yasamee & Hamilton 1991: 28.

³⁷⁵ *Ibid.*

as reasonable by member States”.³⁷⁶ As Attlee stated the next day, he hoped that Parliament would not spend very much time on these “legal subtleties”, and instead concentrate on the central reality: “If the United Nations is not to go the way of the League of Nations, the members must be prepared to act when the need arises. If the peoples wish to avoid another world war they must support their Governments in asserting the rule of law”.³⁷⁷

In Attlee’s arguments, note that he articulates a slight contradiction, namely that Parliament should not worry too much about the international legal nuances of America and Britain’s use of force in Korea, but that governments and their constituents should be upholding the rule of law there. This suggests that the broad substantive aims of the collective security regime were likely relevant to Attlee’s thinking on the Korean conflict, but that he was less concerned about implementing this regime according to the “black letter” procedural details of the Charter’s text. That being said, the legal concerns that were raised regarding these details appear to have shaped the public justification that Attlee gave in Parliament with respect to Britain’s use of force in Korea, and the private explanation that Foreign Office officials provided to British diplomats abroad.

Perhaps because the US and UK’s response to North Korea’s attack might, as noted above, “appear to conflict with the strict letter of the Charter”, further legal analysis of the situation was ordered in the fall of 1950 and winter of 1951. The role of this analysis in the UK’s effort to create new collective security law will be described in the next section. For present purposes, it suffices to note that, like the Cabinet Ministers, UK Attorney General H.W. Shawcross and Lord Chancellor Viscount Jowitt were also aware of the way in which international law could help legitimate Britain’s use of force in Korea. As Shawcross remarked to Jowitt on 4 September 1950:

³⁷⁶ *Extract from the Conclusions of a Meeting of the Cabinet*, 4 July 1950, [CAB 128/18], doc. 11 in Yasamee & Hamilton 1991: 28.

³⁷⁷ HC Debs., Hansard, 5 July 1950, col. 495.

Of course, from one point of view it does not much matter what the law is: we are committed to a certain course of action and we must pursue it without any unduly nice argument about the legal position. But for the purpose of *rallying world opinion* it is I think important to show that the steps we take are firmly based on the rule of law and for our own domestic purposes ... it is essential to know on what view of the law we take our stand [emphasis added].³⁷⁸

In these remarks, note that Shawcross believes that, at least from one perspective, Britain's decision to provide political and military support to the UN operation in Korea must be pursued without excessive legal debate. However, he also thinks that, to help secure the support of the international community, Britain should demonstrate that its actions are firmly based on the rule of law.

A second example that suggests that, when the UK responded to the Korean crisis, international law helped permit and legitimate certain conduct that otherwise might not have been permitted is the fact that the UK ultimately supported the US decision to cross the 38th parallel in Korea in October 1950, and that it helped draft a General Assembly resolution aimed at providing UN support for this rollback policy. These British actions must be understood in light of the military and diplomatic context at the time. First, as noted earlier, by late September 1950, UN forces in Korea had managed to push back North Korea's army and recapture Seoul. As such, Prime Minister Attlee and Foreign Secretary Bevin knew that the US would soon be deciding whether UN forces would a) remain near the 38th parallel and thus simply restore the status quo broken by North Korea's original attack, or b) cross the parallel and seek to unify Korea by force.³⁷⁹ Consequently, the government had to determine what its policy on this issue would be. Second, like the military situation in Korea, the diplomatic landscape had also changed. In August, the

³⁷⁸ *Copy of Letter from the Attorney-General to the Lord Chancellor*, 4 Sept. 1950, Annex to *Legal Implications of the Korean Conflict*, 14 Sept. 1950, C.P. (50)207.

³⁷⁹ Yasamee & Hamilton 1991: xvii.

USSR had returned to the UN Security Council. In order to avoid the Soviet veto there, the US and its allies shifted much of their diplomatic efforts on Korea to the General Assembly, and explained this shift in part by referring to changing state practice on the issue of peace and security.³⁸⁰

In debating how the UK should respond to the altered military situation in Korea, Bevin dismissed warnings from Communist China³⁸¹ and impressed upon his Cabinet colleagues the need to move into North Korea. Otherwise, Bevin argued, “If [UN forces] stop at the 38th Parallel and leave North Korea as an entity Russia will virtually have triumphed and the whole United Nations effort will have been in vain”.³⁸² While more cautious than Bevin, Attlee nonetheless stated at a Cabinet meeting on 26 September that it “might well be necessary” for UN forces to enter North Korea for the purpose of restoring peace and order in the country as a whole, and of establishing an independent democratic government for all Korea.³⁸³ In contrast to Bevin and Attlee, the UK Defence Chiefs were more worried that crossing the parallel could lead to China intervening in the war.³⁸⁴ In the end, the Cabinet agreed with Bevin and Attlee’s views, although they stressed that any continuing British commitment should be as small as possible.³⁸⁵ Accordingly, while Bevin asked the US for assurances that operations would be limited to Korea, and that – consistent with one of the observable implications posited in the introduction chapter – there would be some gap between the passing of the Assembly resolution and the move across the parallel, he ultimately

³⁸⁰ The shift arguably contradicted Article 12 of the UN Charter, which states that while “the Security Council is exercising in respect of any dispute or situation the functions assigned to it ... the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests”. However, prior to the Korean crisis, the Assembly had addressed the long-term political aspects of the Palestine dispute while the Council had dealt with the short-term pacification of that dispute. Moreover, the Assembly was tasked to consider an UNCOK report which involved the issue of the independence and unification of Korea. This gave the US an opportunity to suggest informally that the Assembly consider additional issues related to the crisis. See Stairs 1974: 118.

³⁸¹ FC 1022/489, 26 Sept. 1950, in Yasamee & Hamilton 1991: 150, footnote 9.

³⁸² *Sir G. Jebb (New York) to Mr. Attlee*, 25 Sept. 1950, [FK 1022/344], doc. 54 in Yasamee & Hamilton 1991: 152.

³⁸³ *Extract from the Conclusions of a Meeting of the Cabinet*, 26 Sept. 1950, [CAB 128/19], doc. 55 in Yasamee & Hamilton 1991: 153.

³⁸⁴ See CAB 21/1985, 25 Sept. 1950, in Yasamee & Hamilton 1991: 148, footnote 4.

³⁸⁵ *Extract from the Conclusions of a Meeting of the Cabinet*, 26 Sept. 1950, [CAB 128/19], doc. 55 in Yasamee & Hamilton 1991: 155.

declined to take “the very heavy responsibility” of pressing them to stop the advance north altogether.³⁸⁶ The US readily gave assurances of a delay, although its troops crossed the parallel on 7 October, the same day the Eight-power resolution was passed by the General Assembly.

One of the reasons Bevin, Attlee and the other Cabinet members were prepared to accept the potential crossing of the 38th parallel by UN forces is because Britain had helped draft the Assembly resolution, and they thought it provided UN support for the crossing. In brief, the resolution came about as follows. In response to a suggestion made by India, Bevin prepared a plan for a statement of UN aims in Korea, including the establishment of a unified, independent, and democratic government in accordance with the Cairo declaration of 1943.³⁸⁷ This plan was approved by the UK Cabinet on 4 September, and by officials at the UN in talks leading up to the meeting of the General Assembly.³⁸⁸ By 22 September, the draft resolution recommended in part: “a) that all necessary steps be taken to promote conditions of stability and security throughout the whole of Korea, b) that when such conditions have been created new elections be held throughout the whole of Korea with a view to the establishment of a unified, independent and democratic government of all Korea”.³⁸⁹ Commenting on this draft, Bevin said to Attlee that the “really tricky thing is whether the United Nations forces are to go north of the 38th Parallel. Clearly they must do so if the unification of Korea is to be achieved. Our resolution seeks to cover this contingency, though admittedly in veiled terms in the first recommendation.”³⁹⁰ The “veiled terms” that Bevin was likely citing were the provisions that “all necessary steps” be taken to promote conditions of stability and security throughout Korea. When the final resolution was passed, however, the

³⁸⁶ Bevin acknowledged that “we were faced with a very difficult and somewhat delicate situation”, in which he was reluctant to interfere with US plans for fear of being blamed afterwards if a valuable military opportunity was lost. See Yasamee & Hamilton 1991: 171, footnote 7.

³⁸⁷ Yasamee & Hamilton 1991: xvi-xvii.

³⁸⁸ Ibid.

³⁸⁹ FK 1022/329, in Yasamee & Hamilton 1991: 147, footnote 2.

³⁹⁰ *Sir G. Jebb (New York) to Mr. Attlee*, 22 Sept. 1950, [FK 1022/328], doc. 52 in Yasamee & Hamilton 1991: 147.

language had been changed in negotiations so as to recommend that “all appropriate steps” be taken to ensure stability throughout Korea, and “all constituent acts” be taken, under the auspices of the UN, for the establishment of a unified, independent and democratic government.³⁹¹

In drafting and supporting this resolution, it is clear that Bevin and his colleagues aimed to provide UN support for the potential crossing of the 38th parallel. However, it is less clear whether they aimed to provide formal legal authorization for this action. On the one hand, in separate negotiations on the US-led “Uniting for Peace” resolution that was passed by the General Assembly on 3 November 1950, the government expressed *concern* about strengthening the Assembly at the expense of the Security Council, and relaxing Britain’s veto power there.³⁹² Further, at the Cabinet meeting on 26 September, noted above, Attorney-General Shawcross observed that “in strict law, the General Assembly was probably not entitled to make recommendations about Korea while the matter was still in the hands of the Security Council”.³⁹³ On the other hand, in a private discussion with Sir Roger Makins, Deputy Under-Secretary of State, on 5 October, Bevin remarked that “On legal grounds the view was ... that General MacArthur would be justified in crossing the 38th Parallel”.³⁹⁴ Moreover, at the Cabinet meeting on 26 September, Shawcross also “recognized ... that this was an occasion on which the action of the Assembly should be guided by the wishes of the great majority of the Member States”.³⁹⁵ Whether or not the 46 other states who voted for the

³⁹¹ The resolution was passed by a vote of 47 to five (Soviet bloc), with seven abstentions (India, Yugoslavia, and several Arab states). See Stairs 1974: 121-123.

³⁹² Yasamee & Hamilton 1991: xv.

³⁹³ *Extract from the Conclusions of a Meeting of the Cabinet*, 26 Sept. 1950, [CAB 128/19], doc. 55 in Yasamee & Hamilton 1991: 153-154.

³⁹⁴ Yasamee & Hamilton 1991: 171, footnote 7. Bevin did not specify whether this legal justification would stem from the General Assembly resolution that was about to be passed, or the original Security Council resolutions on the crisis.

³⁹⁵ *Extract from the Conclusions of a Meeting of the Cabinet*, 26 Sept. 1950, [CAB 128/19], doc. 55 in Yasamee & Hamilton 1991: 153-154.

resolution thought that UN forces would cross the 38th parallel, it remains the case that the Attlee Cabinet believed that Bevin's resolution "was designed to meet that situation".³⁹⁶

d) International law helped structure the development of new rules and legitimate practice

Finally, Britain's reaction to the Korean crisis suggests that, when states use force, international law helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice for states and other international actors. An important example of this phenomenon is the Security Council's novel response to North Korea's attack, and the efforts of UK leaders to justify and study this response, and to create new collective security law.

When the Security Council authorized UN member states to restore peace in Korea, it did so in a manner not anticipated by the drafters of the UN Charter in 1945. At that time, it was expected that member states would provide permanent military forces to the Council under Article 43 of the Charter.³⁹⁷ By June 1950, however, no such forces had been granted. Thus, following North Korea's attack that month, the Council authorized an *ad hoc* response that saw UN members provide their own forces towards a collective cause. The USSR, we saw Britain's Foreign Office note earlier, said this action was invalid. This criticism stemmed in large part from the absence of the Soviet representative at the Security Council when the initial resolutions on the Korean conflict were passed.³⁹⁸ In response to this concern, UK leaders argued that the Council's actions were a necessary reinterpretation of the Charter's text, and were consistent with altered state practice on the issue. As the Cabinet noted at a meeting on 4 July 1950:

³⁹⁶ *Extract from the Conclusions of a Meeting of the Cabinet*, 26 Sept. 1950, [CAB 128/19], doc. 55 in Yasamee & Hamilton 1991: 153-154. While the resolution did not authorize the use of force to achieve the UN's goals in Korea, MacDonald argues that it nevertheless "gave tacit approval to the crossing of the [38th] parallel, since its provisions could only be enforced in the north at the point of a bayonet" (1990: 30-31).

³⁹⁷ Franck 2002: 24-25.

³⁹⁸ Concerns were also raised over a) the absence of Communist China from the Security Council at the time, and b) as noted earlier in the text above, whether South Korea could rely on the self-defence provisions of the UN Charter.

Under Article 27 of the [UN] Charter decisions of the Security Council on matters other than procedural matters required the affirmative votes of seven members, including the concurring votes of the permanent members of the Council; and it was argued that the Council's resolution of 27th June was not valid since the representative of the Soviet Union, a permanent member, had not been present on that occasion.³⁹⁹

On the other hand, the Cabinet observed, "the Council had on previous occasions taken decisions despite the abstention of a permanent member; the Soviet Government had at least acquiesced in that procedure; and it was arguable that the written constitution of the Council was in process of modification by practice".⁴⁰⁰ Moreover, the Cabinet reasoned, "It was relevant to this argument that forty members of the United Nations had subsequently declared their support of the resolution passed by the Security Council".⁴⁰¹ Prime Minister Attlee drew on this thinking the next day when he updated Parliament on the UK's response to the Korean conflict. During his speech, he argued that "If a member of the Security Council, and in particular a permanent member, chooses to refrain from exercising its right of voting, not by failing to vote when present, but by refraining from attending the meeting at all, that member must be regarded as having deliberately abstained from voting."⁴⁰² In sum, the Cabinet's reasoning at its meeting on 4 July, and Attlee's explanation to Parliament the next day, suggest that, during the initial weeks of the Korean War, British leaders sought to alter existing understandings of a) Article 27 of the UN Charter and b) Security Council voting procedures in order to help develop and promote a new legal rule – i.e. that refraining from attending a Council vote is equivalent to abstaining from that vote – and new legitimate practice for

³⁹⁹ *Extract from the Conclusions of a Meeting of the Cabinet*, 4 July 1950, [CAB 128/18], doc. 11 in Yasamee & Hamilton 1991: 27.

⁴⁰⁰ *Ibid*: 27-28.

⁴⁰¹ *Extract from the Conclusions of a Meeting of the Cabinet*, 4 July 1950, [CAB 128/18], doc. 11 in Yasamee & Hamilton 1991: 27-28.

⁴⁰² HC Debs., Hansard, 5 July 1950, col. 491.

that international body. Further, these leaders aimed to strengthen their efforts by citing the continuing practice of the Council, and the supporting views of forty other states.

As the crisis in Korea progressed, UK leaders also, as noted earlier, ordered extensive and sophisticated legal analysis of the conflict. Moreover, as will be seen below, they consulted with other Commonwealth states and the US about the possibility and desirability of using the situation to create new collective security law. Further, leaders believed that, depending on how the conflict ultimately came to be understood by Britain and the international community, the UK might need to pass new legislation to address the domestic legal effects of such situations. For instance, reflecting on the issue of whether the military situation in Korea constituted a “war” or a “police action”, Attorney General Shawcross advised the Cabinet on 14 September 1950 that because the situation was so unprecedented, the UK would, to some extent, be “able to make new law about it and the position we take up must have significant political and legal consequences”.⁴⁰³ As Shawcross put it to Lord Chancellor Jowitt in an earlier letter on 4 September:

[W]e have in effect the law-making function of declaring what the law is, [and] it may be that the present is ... a proper and a useful opportunity of distinguishing between war as a private, and now illegal, contention between States seeking to settle their individual differences by force and collective action for restraining the aggressor and enforcing the law. Just as in the field of domestic law action which would, as between private citizens constitute an illegal assault may, when taken by the State, constitute a legal use of force, so we must elevate collective action on behalf of the [UN] to the dignity of a legal institution higher than war as traditionally waged between States.⁴⁰⁴

⁴⁰³ *Legal Implications of the Korean Conflict*, 14 Sept. 1950, C.P. (50)207.

⁴⁰⁴ *Ibid.*

While Shawcross acknowledged there were many obvious “difficulties” in this view which frankly involved “new law”, he also thought it may constitute “some progress” in international law.⁴⁰⁵

Perhaps because the foregoing argument was without clear precedent, Shawcross advised the Cabinet along more traditional lines. He stated that he and Jowitt agreed that “English laws apply to the present conflict as if it were a war in the ordinary sense”, and Jowitt further thought “the conflict is a war in the ordinary sense, both under municipal law and internationally”.⁴⁰⁶ This view contrasted with the position of US President Truman and Canadian Prime Minister Louis St. Laurent, who had both expressly announced that their countries were not at war but engaged in a “police operation” under the UN.⁴⁰⁷ In light of these declarations, Shawcross said he had, “although without much confidence”, enunciated the following proposition:

international law does now recognise a kind of twilight condition [i.e. between war and peace] in which collective enforcement action taken under the aegis of the United Nations does not constitute a war in the old sense, which was the settlement by force of arms of a contention between individual States. There is here no contention between individual States and North Korea; the contention is between the United Nations collectively and North Korea.⁴⁰⁸

Notwithstanding this proposition, Shawcross reiterated that “All this is ... frankly new law and we have to decide whether to create new law in this sense”.⁴⁰⁹ As such, it was “important” that the UK should agree if it can with the US and the Commonwealth countries.⁴¹⁰ To this end, he

⁴⁰⁵ *Legal Implications of the Korean Conflict*, 14 Sept. 1950, C.P. (50)207.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.* While Shawcross did not say so in his memorandum to the Cabinet, Jowitt’s view also contrasted with the 7th of July opinion from the UK Foreign Office, noted earlier in the text above.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*

recommended that “we should decide what in our view is the correct position to take up”, and “arrange for consultation at the highest possible level to see whether we can secure agreement”.⁴¹¹

The Cabinet discussed the above legal advice on 18 September.⁴¹² In light of this advice, it was decided that “the practical aspects” of the international status of the Korean conflict would be further examined by the Departments concerned, and that the relevant Ministers and officials would discuss the “legal and practical issues” involved with other Commonwealth countries and the US.⁴¹³ Summarizing the results of this further study, a memorandum written by Bevin on 11 December noted that the “strong political arguments” for avoiding saying that Britain is technically at war with North Korea were greatly reinforced by China’s intervention in the conflict that fall.⁴¹⁴ Moreover, the memo said, “the balance of practical advantage” lay in treating the situation as an international police operation.⁴¹⁵ Commenting on this memo at a Cabinet meeting on 2 January 1951, Shawcross noted that the position of people in Britain who traded with China “presented many legal difficulties”, and that “further investigation of the domestic implications of a decision to regard such conflicts as police operations might reveal the need for legislation empowering the King to declare ... that some or all of the consequences of being at war should follow the undertaking of police operations under the auspices of the United Nations.”⁴¹⁶ Accordingly, the Cabinet ordered further study of the issue, and asked for a report to be written on the required legislation.⁴¹⁷

In sum, the legal analysis and Cabinet decisions noted above indicate that, during the Korean crisis, Britain took the international legal status of the conflict very seriously, and consulted

⁴¹¹ *Legal Implications of the Korean Conflict*, 14 Sept. 1950, C.P. (50)207.

⁴¹² *Conclusions of a Meeting of the Cabinet*, 18 Sept. 1950, C.M. (50) 60th Conclusions.

⁴¹³ *Ibid.*

⁴¹⁴ *C.P.(50)307 on international status of Korean conflict*, 11 Dec. 1950, [CAB 129/43], calendar i to doc. 100, in Yasamee & Hamilton 1991: 281.

⁴¹⁵ *Ibid.*

⁴¹⁶ *Extracts from the Conclusions of a Meeting of the Cabinet*, 2 Jan. 1951, [CAB 128/19], doc. 100 in Yasamee & Hamilton 1991: 280-281.

⁴¹⁷ *Ibid.* An inter-departmental committee on the domestic aspects of the Korean conflict was constituted in February 1951, and a preliminary report was submitted to Cabinet on 20 March of that year.

with its allies about the possibility and desirability of using the situation to create new collective security law. Further, UK leaders believed that, depending on how the conflict ultimately came to be understood by Britain and the international community, new domestic law might also be needed.

One final point should be made. The UK's specific actions outlined above were of course part of a larger US-led effort to use the United Nations to help respond to North Korea's attack, and to create new collective security law. As will be seen in the next chapter, Canada also took a lead in this regard. In the language of IR theorists, these efforts were in many ways an "agent" story, in that key leaders such as Truman, Attlee and Canadian Foreign Minister Lester Pearson sought to develop and promote new legal rules and legitimate practice. However, the "structure" of international law was also important. Commenting on the historical and legal significance of the Security Council's response to the Korean crisis, Thomas Franck argues that the Council's authorization of action in its name by *ad hoc* national contingents represented a "creative adaption" of the Charter's text.⁴¹⁸ "Far from being paralyzed by the failure to realize the potential of Article 43", Franck argues, "the *system*, in actual practice ... developed new ways to deploy force to secure peace and resist aggression" [emphasis added].⁴¹⁹ More than sixty years later, as the 1991 Gulf War suggests, the Security Council continues to authorize *ad hoc* coalitions to restore international peace.⁴²⁰ This generally accepted practice, and its origins in the Korean War, offers evidence in support of the suggestion that, when states use force, international law helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice for states and other international actors.

⁴¹⁸ Franck 2002: 25.

⁴¹⁹ Ibid: 24.

⁴²⁰ Ibid: 24-25.

Second hypothesis: international law is understood as binding and distinct

The aspects of Britain's participation in the Korean War addressed above support this study's main argument about how international law influences the use of force by states. By contrast, the discourse and behaviour of UK leaders during the conflict offer mixed support for the hypothesis that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making. As will be seen below, leaders and officials tended to interpret the Security Council resolutions on the Korean crisis more in political and moral, rather than distinctly legal, terms. Moreover, while a key rule in the Third Geneva Convention on Prisoners of War (POWs) was seen in binding terms, the perceived requirements of this rule conflicted with other political and moral considerations at the time, and these factors appear to have ultimately exerted a greater impact on the government than the law at issue.

a) Britain's interpretation of the Security Council resolutions on the Korean crisis

As previously mentioned, the main substantive provisions of the UN Charter that were relevant to Britain's understanding of the Security Council resolutions on the Korean crisis were Articles 39, 41 and 42. During the vote for the second Council resolution on 27 June 1950, the Egyptian delegate, Mahmoud Fawzi, refused to participate because of "the previous laxities and delays in the action of the Security Council on several [other] aggressions".⁴²¹ In response, Gladwyn Jebb, Britain's UN delegate, expressed his disappointment at Egypt's decision and the reasons given for it. However, Jebb also conceded that, because the resolution "was only a

⁴²¹ As an example, Fawzi cited "the premeditated and savage attack and aggression of political world Zionism on the still bleeding innocent people of Palestine". Following Egypt's position at the vote of the Security Council on 27 June, other Arab states also declined to participate in the UN action in Korea, giving as the reason the failure of the Council to check "the aggression of Zionism". Quoted in Higgins 1970: 162-163.

recommendation, Egypt was free to make this decision if she so chose”.⁴²² By noting that the Security Council resolution was “only a recommendation”, Jebb was implying that it was not a “decision” under Articles 41 or 42 of the Charter. Importantly, this view was consistent with the advice that Jebb had received from the Foreign Office prior to the Council meeting on 27 June. In those telegrams, the FO gave arguments “both *legal* and on [the] basis of expediency, in favour of taking the view that the resolution ... was a recommendation under Article 39 and not action under Article 42” [emphasis added].⁴²³ Jebb’s position was also consistent with acting Foreign Secretary Younger’s comments, noted earlier, on the US draft of the third Council resolution. In those comments, recall, Younger stressed that “we are all agreed that we are now acting under the first half of Article 39 and this should be kept clear.”⁴²⁴

This view – i.e. that the Security Council’s resolutions on the Korean conflict stemmed from a recommendation and not a decision – would recur in the government’s analysis of the crisis. It suggests that, had the Council responded to the conflict by deciding to authorize measures under Articles 41 or 42 of the Charter, UK leaders would likely have believed that such action imposed legally binding obligations on UN members. However, because the Council had recommended action under Article 39, leaders thought this constituted only a political or moral request that member states were technically free to ignore. For instance, Attorney General Shawcross stated in a letter on 4 September 1950 that “the present operations [in Korea] are not the result of any direction by the United Nations”.⁴²⁵ This was because, Shawcross reasoned, “The Security Council refrained

⁴²² Quoted in Higgins 1970: 162-163.

⁴²³ The FO telegrams, dated 26-30 June, were entitled *Possible course of action under U.N. Charter in Korea*, [FK 1015/19, and FK 1022/42], doc. 10, calendar i, in Yasamee & Hamilton 1991: 26.

⁴²⁴ *Mr. Younger to Sir G. Jebb*, 2 July 1950, [UP 2113/4], doc. 10 in Yasamee & Hamilton 1991: 24-26.

⁴²⁵ *Copy of Letter from the Attorney-General to the Lord Chancellor*, 4 Sept. 1950, Annex to *Legal Implications of the Korean Conflict*, 14 Sept. 1950, C.P. (50)207.

from action under Articles 41 and 42, which would have given rise to obligations on the part of member Nations, and contented itself with making recommendations under Article 39”.⁴²⁶

These comments imply that – consistent with Jebb and Younger’s position – Shawcross believed that, had the Security Council responded to the Korean conflict under Articles 41 or 42 of the Charter, this would have imposed certain binding obligations on UN member states. However, because Shawcross also emphasizes that the Council did not act under Articles 41 or 42, and instead made recommendations under Article 39, one could infer that – as Jebb suggested at the Security Council on 27 June when Egypt abstained from voting on the second resolution – the Attorney General also thought that Article 39 does not give rise to obligations in the way that Articles 41 and 42 do. Moreover, inasmuch as the UK ultimately decided to argue that UN forces in Korea were acting on a recommendation under Article 39,⁴²⁷ then this suggests that Shawcross might have argued that Britain sent military support to the UN operation in Korea less because it was legally obligated to do so and more because of the political and moral considerations at issue.

b) Britain’s interpretation of Article 118 of the Geneva Convention on POWs

The provisions of the UN Charter described above are part of the *jus ad bellum*. Again, this body of international law governs the use of force by states, while the *jus in bello* – the international law of armed conflict – governs the conduct of states in war. As will be seen below, there is evidence that some British leaders and officials viewed a key *jus in bello* rule regarding POWs in distinctly binding terms. However, the perceived requirements of this rule conflicted with other political and moral considerations at the time, and these factors appear to have ultimately exerted a greater impact on the government than the law at issue.

⁴²⁶ Copy of Letter from the Attorney-General to the Lord Chancellor, 4 Sept. 1950, Annex to *Legal Implications of the Korean Conflict*, 14 Sept. 1950, C.P. (50)207.

⁴²⁷ Yasamee & Hamilton 1991: viii.

During the Korean War, the US and North Korea said that they would abide by the Geneva Conventions of 1949.⁴²⁸ A rule that became relevant during the conflict was Article 118 of the Third Geneva Convention on POWs. As noted in this study's introduction chapter, this provision requires that "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities".⁴²⁹ The language of the article is clear because, following World War II, the USSR held on to many of its POWs. As such, in arguing for Article 118, the US and its allies aimed to shed light on Moscow's behaviour and prevent such non-repatriation from occurring in future wars.⁴³⁰ However, the rule that was agreed to in 1949 had unintended effects less than one year later in the Korean conflict.

During the negotiations aimed at ending the war, it became known that some of the North Korean and Chinese soldiers who had been captured by the UN force did not want to be repatriated.⁴³¹ In response to this development, the communist delegation at the truce talks invoked Article 118, while the US proposed a new principle, "voluntary repatriation", which would allow POWs to be interviewed and choose where they would be sent.⁴³² In deciding how to respond to the US position, British leaders faced a dilemma. Under the political circumstances of the nascent

⁴²⁸ The US was an original signatory to the four Geneva Conventions in 1949. While America did not ratify the treaties until 1955, it announced at the beginning of the Korean War that it would apply these rules. Moreover, although neither North Korea nor China were signatories to the Geneva Conventions at the time of the Korean conflict, Pyongyang declared its intention to observe their rules in June 1950, and Beijing in July 1952. See US Department of the Army, *The United States Army in the Korean War*, v. 3, and Hermes 1966: 135-36. As for Britain, like the US, it too was an original signatory to the Geneva Conventions. While the UK did not ratify the treaties until 1957, UK Attorney General Shawcross noted on 4 Sept. 1950 that "It is not I think essential that, in order that [*jus in bello*] rules should be applicable, a formal state of war must exist. In the past it appears that, by tacit or express acceptance, the rules of war have been applied in civil wars, and the recent tendency, as illustrated by the Geneva Conventions of 1949 is to apply them to conflicts other than those which are international wars in the strict sense of the term ... [I]t might be proper for us, (and indeed for the [UN]) to declare that although the present hostilities, constituting the collective enforcement of international law and of the Charter, cannot be considered war in the old and strict sense of the term, His Majesty's Government are prepared and determined on the basis of reciprocity and for the duration of the conflict to apply in these hostilities the accepted rules of warfare [underline in original]". See *Copy of Letter from the Attorney-General to the Lord Chancellor*, 4 Sept. 1950, Annex to *Legal Implications of the Korean Conflict*, 14 Sept. 1950, C.P. (50)207.

⁴²⁹ Article 118, Third Geneva Convention relative to the Treatment of POWs.

⁴³⁰ *The United States Army in the Korean War*, footnote above.

⁴³¹ MacDonald 1989: 135.

⁴³² *Ibid.*

Cold War, with President Truman under domestic pressure to look strong in the fight against communism, it seemed unwise and unrealistic to forcefully send anti-communist POWs back to communist countries. Further, leaders believed it would be morally wrong for them to send men back to face possible punishment or death by what the West perceived to be oppressive regimes.⁴³³ For instance, UK Foreign Secretary Anthony Eden remarked in February 1952 that while the legal grounds for voluntary repatriation might be poor, this “doesn’t make me like the idea of sending these poor devils back to death or worse”.⁴³⁴ Going farther than Eden, Prime Minister Winston Churchill stressed one month later that the fate of the POWs in Korea involved considerations of “honour and humanity”, and that they could not be turned over for execution or imprisonment.⁴³⁵

And yet, notwithstanding the above political and moral concerns, Article 118 clearly stated that POWs shall be released and repatriated without delay after the cessation of active hostilities. To disregard this rule would have been inconsistent with Britain’s former position in 1949 and, leaders worried, could have threatened the safety of British and Commonwealth POWs, and set a dangerous precedent for future wars. Resonating with these concerns, the UK Foreign Office expressed considerable skepticism about America’s motives. As one official noted in January 1952, while there was an element of humanitarianism in the US approach, it was also strongly influenced by political and ideological factors.⁴³⁶ On 23 April, a paper was drafted for the Cabinet on the POW issue. Written by J.M. Addis of the FO’s Korea department, the paper argued “that if it should clearly come to the breaking-point our right course would be to accept an armistice at the cost of agreeing to the forcible repatriation of a number of Chinese and anti-Communist prisoners

⁴³³ MacDonald 1990: 73.

⁴³⁴ *Minute by Eden*: FK 1071/151, FO 371/99568, cited in MacDonald 1989: 145. As MacDonald notes, Churchill and Eden were likely influenced by their experience of the Yalta agreement of 1945. Under that treaty, Britain and the US agreed to repatriate all Soviet citizens in Western Europe at the end of the war. Rather than accept compulsory repatriation, however, many Russians committed suicide, and the people who were returned faced reprisals by the Soviet government.

⁴³⁵ *Minute by Churchill*, 25 March 1952: FK 1551/33, FO 371/99631, cited in MacDonald 1989: 145.

⁴³⁶ Cited in MacDonald 1990: 72.

... I also feel that the humanitarian argument, that we could not have it on our conscience to force prisoners to return to death or slavery, has been given too much importance”.⁴³⁷

The above suggests that, in deciding how to respond to America’s position on POWs during the negotiations aimed at resolving the Korean War, British leaders were faced with a situation where political and moral factors pointed in one direction – i.e. support the principle of voluntary repatriation – and international law pointed in another – i.e. implement Article 118. If theorizing and observing a distinct nature and effect of international law is possible in IR research, then this is arguably one such situation. Indeed, while Churchill rejected the FO’s view, Eden sympathized with it.⁴³⁸ Nonetheless, in the end, the government did not adopt the FO’s position and instead decided to support the American stand on POWs. Explaining the decision in a letter to Clement Attlee on 1 May 1952, Eden wrote that “it would in my view be repugnant to the sense of values of the free world to send these men home by force”.⁴³⁹

Conclusion

The aspects of Britain’s participation in the Korean War assessed in the preceding review offer evidence in support of this study’s main argument that, when states use military force abroad, international law helps define and shape their possible course of action, and the justifications that can be made for their behaviour. More specifically, these aspects help illustrate the four roles that international law can play in the use of force by states.

First, the fact that Britain decided to a) support the Security Council resolutions on the Korean crisis, and b) contribute significant naval, air and ground forces to the UN mission in Korea even though political and military leaders thought the country was not strategically important

⁴³⁷ *Paper on Prisoners of War prepared for Ministers*, by J.M. Addis, 23 April 1952, FO 371/99632, cited in Dockrill 1989: 106.

⁴³⁸ Dockrill 1989: 106, and MacDonald 1990: 73.

⁴³⁹ *Eden to Attlee*, 1 May 1952, FO 371/99572, cited in Dockrill 1989: 107.

suggests that international law can help constitute a state's identity and be used to reorient its political and military objectives. As we saw, Prime Minister Attlee felt a strong sense of obligation to the United Nations and the conflict in Korea, and there is evidence that this perception of obligation was partly comprised of and affected by Britain's formal membership in the UN as well as Attlee's belief in the international rule of law. While other UK leaders, such as the Defence Chiefs of Staff, did not feel the same sense of responsibility with respect to the UN and the Korean crisis, Attlee sought to reorient their thinking and explain the government's actions to the public by reaffirming the importance of a) responding to aggression, b) making the newly created world organization effective, and c) upholding the rule of law in world affairs.

Second, in addition to its constitutive effect, international law also had a regulative impact in the Korean War. The first example of this influence was Britain's non-participation in the US naval blockade of Taiwan. As we saw, there is evidence that this non-participation was shaped in part by a) the UK's understanding of the scope of the Security Council's resolutions on the Korean crisis, and b) the "special legal position", as acting Foreign Secretary Younger put it, that Britain was in regarding Taiwan and China. Again, it is important to note that the UK refused to allow its forces to participate in the Taiwan blockade notwithstanding the fact that some British officials thought that such participation might prove necessary if China attacked the disputed island. The second example of law's regulative role was Britain's use of the Security Council resolutions and other related international legal instruments to help constrain America's response to the crisis. As we saw, in the discussions leading up to the second and third Council resolutions, the UK was able to influence the US negotiating position and shape the outcome of the talks, and Britain's interpretation of the international legal factors at issue played a role in this regard. Britain also used its understanding of the Council resolutions, as well as other related instruments such as the Cairo Declaration of 1943, to help constrain America's behaviour with respect to Taiwan.

Third, when the UK responded to the Korean crisis, international law helped permit and legitimate certain political and military practices that otherwise might not have been permitted. The first example of this role was the fact that Britain intervened militarily in what was in many ways an ideologically divisive and extremely violent *civil* war, and justified this publicly and privately with reference to the Security Council resolutions on the crisis and the UN Charter's provisions on self-defence. The second example was the fact that the UK ultimately supported the US decision to cross the 38th parallel in Korea in October 1950, and that it helped draft a General Assembly resolution aimed at providing UN support for this policy of rollback.

Finally, Britain's reaction to the Korean crisis suggests that, when states use force, international law helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice for states and other international actors. An important example of this phenomenon, we saw, was the Security Council's novel response to North Korea's attack, and the efforts of UK leaders to justify and study this response, and to create new collective security law.

With respect to my second hypothesis, the discourse and behaviour of British leaders regarding the Korean conflict offer mixed support for the view that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making. On the one hand, we saw that UK leaders recognized that the use of military force in Korea and the treatment of enemy POWs were in part legal issues, in that they were governed by pre-existing rules in the UN Charter and Geneva Conventions. Moreover, leaders discussed the extent to which the UK was legally obligated to consider these rules when deciding whether and how to use force in Korea, and what policy to adopt regarding the repatriation of enemy POWs. Finally, leaders recognized that Britain's involvement in the US-led intervention in Korea was subject to international legal critique, and required legal justification at the domestic and international level. The foregoing details resonate with many of the relevant

observable implications posited in the introduction chapter, and suggest that UK leaders such as Prime Minister Attlee and Foreign Secretary Eden felt bound in part by international law.

On the other hand, insofar as the Security Council recommended (i.e. as opposed to decided) that assistance be provided to South Korea, we also saw that UK leaders and officials tended to interpret the Council's resolutions on the Korean crisis more in political and moral, rather than expressly binding, terms. By contrast, leaders and officials viewed a key POW obligation under the Third Geneva Convention, Article 118, in distinctly legal terms. However, the perceived requirements of this rule conflicted with other political and moral considerations at the time, and these factors appear to have ultimately exerted a greater impact on the UK than the law at issue.

Chapter 3: Canada and the Korean War

This chapter examines important aspects of Canada's participation in the Korean War with a view to better understanding how international law influenced this participation, and whether key leaders understood said law as a binding and distinct phenomenon. The aspects of Canada's participation that are assessed touch upon its policy and practice regarding: a) whether and how to be involved in the Korean crisis; b) the major international legal issues related to the conflict; and c) the treatment of captured enemy individuals.

The chapter is organized as follows. Keeping in mind the background to the Korean War described earlier, I first summarize the dominant scholarly views of why Canada participated in the conflict, and suggest how this study helps advance these views. The rest of the chapter then analyzes Canada's involvement in the war from the perspective of international law. By considering the key aspects of Canadian policy and practice noted above, I first analyze whether and how these aspects reflect the four roles that I theorize international law plays when states use force. Next, I analyze the extent to which Canadian policy-makers understood international law as a binding and distinct set of legal rules, and the degree to which the legal status of these rules impacted their decision-making. I do so by examining Canada's interpretation of the UN Security Council resolutions on the Korean crisis, and its understanding of Article 118 of the Third Geneva Convention on Prisoners of War (POWs). I conclude by summarizing my findings.

Throughout the chapter, I argue that Canada's participation in the Korean War offers evidence in support of this study's main thesis that, when states use military force abroad, international law helps define and shape their possible course of action, and the justifications that can be advanced for their behaviour. However, I also suggest that the discourse and actions of Canadian leaders during the conflict offer mixed support for the hypothesis that, when states use

force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making.

Why Canada participated in the Korean War

As with Britain's participation in the Korean War, Canada's extensive involvement in the conflict is not immediately easy to explain. As I elaborate later below, before and during the war, political and military leaders thought that Korea fell outside of Canada's direct national interest.⁴⁴⁰ In addition, many leaders were concerned about other potential theatres of conflict in the emerging Cold War – such as Europe and North America – and other related international commitments – such as the recently created North Atlantic Treaty Organization (NATO).⁴⁴¹ Domestically, in light of the fact that earlier wars in 1899, 1914 and 1939 had divided English and French Canadians, leaders worried that sending troops to Korea in 1950 could do the same, particularly if such forces fought in a Commonwealth unit under British command.⁴⁴² Moreover, as noted previously in the introduction chapter, following World War II Canada had demobilized much of its military and decreased its defence spending significantly in absolute and relative terms. By 1950, the Liberal government of Prime Minister Louis St. Laurent had hoped to continue focusing on socio-economic issues, and “was profoundly unhappy” about having to once again debate war policy and rearmament.⁴⁴³ Despite these considerations, however, Canada ultimately participated, at great cost,⁴⁴⁴ in the divisive and bloody conflict in far away Korea. By the time of the armistice in July 1953, nearly 27,000 Canadians – out of a country of 13.7 million people – had served in or

⁴⁴⁰ Wood 1966: 12.

⁴⁴¹ Wood 1966: ix.

⁴⁴² Bothwell 2007: 86.

⁴⁴³ Wood 1966: 21.

⁴⁴⁴ Canada suffered 1,588 casualties in the Korean War, with 516 killed in action or dead on active service (Bercuson 2004).

contributed to the war.⁴⁴⁵ This was the third largest foreign contribution to the UN force, after the US and Britain.

In explaining why Canada participated in the Korean War, a number of scholars emphasize the perceived threat of international communism, the belief that the USSR was ultimately behind North Korea's attack, and the view that Canada had to support the United States in its response to this attack.⁴⁴⁶ Other observers suggest that Canadian leaders saw the conflict as an exercise in collective security, in which it was essential to constrain US decisions by acting multilaterally through the United Nations.⁴⁴⁷ These differing accounts arguably reflect the fact that, in the years leading up to the Korean War, three different views of Canadian foreign policy had developed among government leaders and high-level civil servants.

First, influenced by the horrors of World War I and the perceived failures of the League of Nations, "isolationists" such as Prime Minister W.L. Mackenzie King were concerned more with domestic harmony than with world affairs, and believed that problems were best solved by people and not by formal international organizations.⁴⁴⁸ From this perspective, the task of Canadian foreign policy was three-fold:

to gain and maintain Canada's recognition as an independent unified nation bound to the Commonwealth only by ties of loyalty to the Crown; to support Great Britain and the Empire in bad days as well as in good, but to do so because it is in Canada's best interest; and finally to promote close friendship between Canada and the United States and thus a closer understanding between the United States and Great Britain.⁴⁴⁹

⁴⁴⁵ Bercuson 2004.

⁴⁴⁶ These factors are emphasized, to varying degrees, by Bercuson 2004, Bothwell 2007, and Teigrob 2009.

⁴⁴⁷ See e.g. Stairs 1974 and Donaghy 1995.

⁴⁴⁸ King's Under-Secretary of State for External Affairs from 1925-41, O.D. Skelton, was also quite isolationist in his outlook. See Chapnick 2005: 7-9. Chapnick's historical study refers to extensive archive materials which, due to space limitations, are not cited here in full.

⁴⁴⁹ Chapnick 2005: 7.

An example of such isolationist thinking is arguably Canada's refusal to participate in the Allied airlift response to the Berlin crisis of 1948-49,⁴⁵⁰ which was noted briefly in the prior chapter.

"Continentalists", by comparison, expanded on the third foreign policy objective quoted above – i.e. promoting relations between Canada and the US. This view was particularly aware that, following World War II, the US had displaced Britain as the most powerful Western state, and it tended to assume that cooperating with the USSR was unlikely. From this perspective, Canada's foreign policy was thus best pursued through closer military, political and economic cooperation with its southern neighbour. Examples of such thinking can arguably be found in Canada's support for the NATO defence pact of 1949, and its decision in 1950 to allow nuclear-armed American bombers to be stationed in Labrador.⁴⁵¹

While not denying the significance of the United States, "internationalists" such as Foreign Minister Lester Pearson, Defence Minister Brooke Claxton, and diplomat Escott Reid believed that global institutions like the United Nations were also important to Canada's post-war future.⁴⁵² From this perspective, Canada could best leverage its middle power status and pursue its interests by working multilaterally through the UN,⁴⁵³ and by acting as a moderating influence in the Western alliance.⁴⁵⁴ Examples of this internationalist outlook can be found in Canada's contributions to the founding of the UN – particularly from 1943-45⁴⁵⁵ – and its subsequent support for and participation in the organization leading up to and during the Korean War.⁴⁵⁶

The three foreign policy perspectives described above arose in the debates and decisions behind Canada's response to the Korean crisis. However, the evidence analyzed by this study offers

⁴⁵⁰ Teigrob 2009: 169.

⁴⁵¹ Donaghy 1996: xvii.

⁴⁵² See e.g. Pearson's memoirs, where he contrasts his international outlook with that of Mackenzie King (1972: 294).

⁴⁵³ Chapnick 2005: 4-6, 9.

⁴⁵⁴ Donaghy 1995.

⁴⁵⁵ Holmes 1982, and Chapnick 2005.

⁴⁵⁶ Despite King's worries, Canada accepted a non-permanent seat on the Security Council in 1947, and sent a judge to sit on the UN Palestine Commission. For other examples of Canada supporting the UN, see Thomson 1967: 217-21.

primary support for the internationalist perspective, and resonates with other investigations that, as noted earlier, find that Canadian leaders tended to see the conflict as an exercise in collective security against aggression, in which it was important to moderate the course of American decisions through multilateral diplomacy. Further, this study helps advance these investigations by focusing on the under-examined issue of what influence international law had in Canada's response, and how this law was viewed by leaders. As will be seen below, there is evidence that a perception of obligation under the UN Charter and Geneva Conventions affected the thinking and decisions of the government regarding the war, and the justifications that could be advanced for Canada's actions.

Following its decision to fight in Korea, Canada had two broad objectives in the war. First, Canada aimed to contribute to the UN response to the conflict. Second, it sought to limit the intensity, duration, and geographic scope of the hostilities.⁴⁵⁷ "In concrete terms", notes Dennis Stairs, "this meant (a) limiting the conduct of the war to the Korean peninsula; (b) making every effort to prevent the allies of North Korea – notably Communist China – from being driven by strategic or other considerations to participate in the hostilities; (c) ensuring in particular that the question of Formosa [Taiwan] did not become linked to the outcome of the conflict in Korea; and (d) concluding at the earliest possible opportunity a satisfactory cease-fire in the theatre".⁴⁵⁸ The main military problem for Canada, like Britain at the time, was how to support the goals of the UN without diverting scarce resources from areas perceived to be more vital to the country's strategic interests, such as North America and Europe. The primary political challenge for Canada was how to support the United States while also maintaining an independent foreign policy and domestic approval of the government's decisions.

⁴⁵⁷ Thomson 1967: 294, Stairs 1974: 93, and Donaghy 1996: xv.

⁴⁵⁸ Stairs 1974: 93.

The four roles of international law in Canada's use of force in Korea

Canada's participation in the Korean War offers evidence in support of this study's main thesis that, when states use force, international law helps define and shape their possible course of action, and the justifications that can be made for their behaviour. More specifically, Canada's participation illustrates the four roles that international law can play in the use of force: 1) it helps constitute the identities of the actors at issue; 2) it helps regulate the political and military practice of the actors at issue; 3) it permits and legitimates certain political and military practices that otherwise might not be permitted; and 4) it helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice. Below, I consider important aspects of Canadian policy and practice regarding the Korean crisis to demonstrate each role more fully.

a) International law helped constitute the identities of key Canadian leaders

The fact that Canada decided to a) join the United Nations Temporary Commission on Korea (UNTCOK) in 1948, b) support the Security Council resolutions on the Korean crisis in 1950, and c) contribute significant naval, air and ground forces to the UN mission in Korea even though political and military leaders thought the country was not strategically important, suggests that international law can help constitute a state's identity and be used to redefine its political and military objectives. As will be seen below, Prime Minister Louis St. Laurent, Defence Minister Brooke Claxton, and Foreign Minister Lester Pearson believed that Canada's formal membership in the UN carried corresponding obligations, including the duty to defend – by force if need be, and even in situations where Canada's own interests were not directly at stake – the principles of the UN Charter, the effectiveness of the UN organization, and the concept of collective security. While other leaders, such as former Prime Minister Mackenzie King, did not feel the same sense of responsibility regarding the UN and the Korean crisis, St. Laurent and Pearson sought to reorient

his thinking through legal interpretation of a relevant UN resolution. And it is this interpretation that ultimately led King to allow Canada to join UNTCOK. Following the government's decision to contribute to the UN military force in Korea two years later, St. Laurent, Pearson and Claxton continued to believe that Canada, as a middle power state that had helped create the UN, was now obligated to support the organization's collective "police action" against aggression.

The constitutive effect of international law can be seen first in the debate behind Canada's decision to join UNTCOK in 1948. As was noted in the previous chapter, after talks between the United States and the USSR proved fruitless, the former requested in September 1947 that the UN appoint a temporary commission on Korea to supervise an election in the area. Although protested by the USSR, the US request was passed by the General Assembly in November. In the committee debate prior to this passage, Canada's representative, J.A. Bradette, spoke briefly in support of the American proposal.⁴⁵⁹ When then Prime Minister Mackenzie King learned of Bradette's comments, however, he became irritated and told an aide "This United Nations is going to destroy us yet. Just imagine, *Bradette* making speeches about Korea!"⁴⁶⁰ Unknown to King at the time, this initial irritation would turn into a full blown Cabinet crisis. In brief, the reasons for this are as follows.

In its proposal to the UN, the US had listed Canada among its nominations for UNTCOK. Surprised by the request, the leader of Canada's delegation, Justice Minister J.L. Ilesley, reluctantly agreed on the advice of Lester Pearson, then Deputy Foreign Minister. In the absence of Mackenzie King, who was in Britain, Foreign Minister Louis St. Laurent approved Ilesley's decision. During a Cabinet meeting on 18 December 1947, St. Laurent then sought to appoint Canada's delegate to UNTCOK. In response, King "blew a gasket", and said he could not support the appointment.⁴⁶¹ It was a grave error, he warned, to embroil Canada in Asian affairs of which members of the

⁴⁵⁹ United Nations, GAOR (First Committee), A/C.1/SR.116, 258, 284, cited in Stairs 1974: 7.

⁴⁶⁰ Quoted in Stairs 1974: 7. Bradette was not regarded as an authority on foreign affairs.

⁴⁶¹ Notes, Brooke Claxton papers, VI, 1126, cited in Stairs 1974: 9.

government had no knowledge, and which involved the conflicting interests of great powers. War, he stressed, might well break out between the US and the USSR, and Canada could be drawn into such a conflict if it interfered with Soviet-American relations.⁴⁶²

St. Laurent, who was restraining “himself with noticeable difficulty”,⁴⁶³ stated that so long as Canada was a member of the United Nations, the government was obligated to accept such responsibilities. King replied that, except as a vehicle for Russian propaganda, the UN “counted for nothing so far as any help in the world was concerned”.⁴⁶⁴ The proper role of Canada, he added, “was not that of Sir Galahad to save the whole world unless we were in a position to do it.”⁴⁶⁵ Another meeting on 22 December failed to settle the issue, but highlighted the stark isolationist-internationalist divide in the Cabinet’s outlook.⁴⁶⁶ Commenting on this divide in his private papers, Defence Minister Brooke Claxton later wrote “that an organization for international cooperation in every part of the world could only function if the disinterested countries ... were willing to act as mediators ... and even judges regarding points in issue involving other countries”.⁴⁶⁷

The divergent views of the Cabinet members regarding the UNTCOK issue were so deeply held that King, Ilsley, St. Laurent and Claxton all threatened or considered resigning if their positions were not accepted.⁴⁶⁸ Ultimately, the situation was resolved by St. Laurent’s legal interpretation of the General Assembly resolution that had created the commission. This instrument stated that, to observe that representatives chosen in Korea’s election “are in fact duly elected by the Korean people”, UNTCOK would “be present in Korea, with right to travel, observe and consult

⁴⁶² Pickersgill & Foster 1970: 134. There is a (bizarre) theory that the Prime Minister’s angry reaction was attributable at least in part to an encounter he had with a London spiritualist while abroad, and a warning she gave from the late US President F.D. Roosevelt about an impending war in Asia. See Stairs 1974: 10.

⁴⁶³ Claxton notes, 1127, in Stairs 1974: 10.

⁴⁶⁴ Pickersgill & Foster 1970: 134-35.

⁴⁶⁵ Ibid.

⁴⁶⁶ King’s view was supported by Labour Minister Humphrey Mitchell, Agriculture Minister James Gardiner, and Senate leader Wishart Robertson. Other Cabinet leaders supported St. Laurent’s position.

⁴⁶⁷ Claxton notes, 1130-31, in Stairs 1974: 12.

⁴⁶⁸ Thomson 1967: 223-24, and Claxton notes, 1131-35, in Stairs 1974: 13.

throughout Korea”.⁴⁶⁹ In St. Laurent’s view, the resolution thus authorized the commission to supervise elections in the occupation zones of both the north and south, or none at all.⁴⁷⁰ And, since the USSR would likely refuse to cooperate, there was little risk that UNTCOK would have to take sides. When King noted that the US had implied that the commission might act in the south alone, St. Laurent assured him that his understanding of the resolution was that UNTCOK would act only if it could do so throughout Korea and with the consent of both occupation powers. On this basis, King agreed to Canada’s participation.⁴⁷¹

In sum, the above suggests that leaders took the wording of the UNTCOK resolution very seriously, and believed that a future event – in this case, the supervision of an election only in South Korea – was precluded by its terms. Further, Canada’s foreign policy was altered on this view of the resolution’s terms. Finally, in the debates behind this policy change, Canada’s perceived obligations to the UN were a site for a “communicative” struggle over the country’s legitimate identity and rightful behaviour.

The constitutive influence of international law can also be seen in Canada’s decision to support the Security Council resolutions on the Korean crisis in 1950, and to contribute significant naval, air and ground forces to the UN operation there even though Korea was not seen as strategically important.⁴⁷² Like their US and British counterparts, Canadian leaders were surprised by North Korea’s invasion of South Korea.⁴⁷³ They were also not immediately sure the Americans would actively intervene.⁴⁷⁴ After hearing news of the attack, now Prime Minister St. Laurent and

⁴⁶⁹ UN General Assembly Resolution 112 (II), of 14 Nov. 1947, in Farrar-Hockley 1990: 403-04.

⁴⁷⁰ Stairs 1974: 16.

⁴⁷¹ Ibid.

⁴⁷² As Pearson noted in an update to Canada’s embassies abroad, “the strategic consequences of the loss of Korea would not be serious”, as it “would not result in any substantial weakening of the forces now available to the anti-Communist world”. See *Telegram*, 28 June 1950, [DEA/50069-A-40], doc. 16 in Donaghy 1996: 31.

⁴⁷³ Stairs 1974: 33.

⁴⁷⁴ See Stairs 1974: 39; and comments made by Hume Wrong, Canada’s Ambassador to the US, to Lester Pearson on 27 June 1950, (*Telegram WA-1417*, 27 June 1950, [DEA/50069-A-40], doc. 13 in Donaghy 1996: 27).

Foreign Minister Pearson consulted together and agreed that the UN should be brought into the picture to restore order.⁴⁷⁵ However, they worried, since Canada's earlier plea for an international police force had fallen on deaf ears, "it was not immediately clear how the world organization could act effectively".⁴⁷⁶ While the US was the only country capable of providing effective military aid to South Korea, there was a concern that if America acted unilaterally, the war might turn into a global struggle between the Communists and the non-Communists.⁴⁷⁷

Accordingly, St. Laurent and Pearson were "pleased" when the Security Council was called into emergency session on 25 June.⁴⁷⁸ Speaking in Parliament the next day, Pearson expressed his hope "that as a result of the intervention of the United Nations some effective action may be possible ... to restore peace".⁴⁷⁹ North Korea's attack, he said, constituted "a breach of the peace" and "an action of unprovoked aggression". As such, he urged support of the Council's resolution on the matter.⁴⁸⁰ This instrument, recall, determined that North Korea's attack constituted "a breach of the peace", called for a cessation of the hostilities and the withdrawal of North Korean forces to the 38th parallel, and asked all member states to help the UN in the execution of the resolution. In the following days, Canada also expressed its support for the Council's second resolution.⁴⁸¹ This instrument, recall, recommended that UN members "furnish such assistance ... as may be necessary to repel the armed attack and to restore international peace and security in the area".

Canada's support for the Council's third resolution, by contrast, was more qualified. This resolution recommended that all UN members providing assistance make such provisions available

⁴⁷⁵ See *Extract from Memorandum from Secretary of State for External Affairs to Prime Minister*, 27 June and 4 July 1950, [PCO/Vol. 167], doc. 11 in Donaghy 1996: 22; Thomson 1967: 292; and Stairs 1974: 43.

⁴⁷⁶ Thomson 1967: 292.

⁴⁷⁷ See *ibid*, and the reflections of John Holmes, Canada's acting UN delegate during the Korean War, in Stairs 1974: 53.

⁴⁷⁸ Thomson 1967: 292.

⁴⁷⁹ HC Debs., Hansard, 26 June 1950, 4116-17.

⁴⁸⁰ HC Debs., 26 June 1950, 4116-17; and Thomson 1967: 292.

⁴⁸¹ HC Debs., 28 June 1950, 4251; and *Extract from a Memorandum from Secretary of State for External Affairs to Prime Minister*, 27 June and 4 July 1950, [PCO/Vol.167], doc. 31 in Donaghy 1996: 49.

to a unified command under the US. In the negotiations prior to the resolution, Pearson argued that references to “the United States” appeared too often in light of the UN character of the Korean operation [emphasis in original].⁴⁸² He also protested the repetition of the phrase “in the area”, worrying that it gave inadequate definition to the scope of UN operations and that it could be misinterpreted as including the US blockade of Taiwan.⁴⁸³ Notwithstanding these private concerns, though, Canada did not publicly criticize the resolution and, as will be seen more below, explicitly linked its military actions in Korea to the Security Council’s recommendations on the issue.

As was the case with Britain, although Canada’s backing of the Security Council resolutions was relatively forthcoming, its decision to send ground forces to Korea was less so. In response to the Council’s first two resolutions, the Cabinet initially agreed to send two Canadian military officers to the UN Commission on Korea.⁴⁸⁴ Following diplomatic inquiries from the US,⁴⁸⁵ and further debate, the Cabinet also agreed to send five long range air transport planes⁴⁸⁶ and three naval destroyers.⁴⁸⁷ These vessels, the government told the UN Secretary General, are “made available to the United Nations and appropriate action is being taken by the Canadian Government to place them at once under the operational control of the Commander-in-Chief of the forces made available by members of the United Nations for the defence of the Republic of Korea against the aggression committed by North Korean forces”.⁴⁸⁸

⁴⁸² See Pearson’s comments to Canada’s Ambassador in the US in *Telegram EX-1068*, 5 July 1950, [DEA/50069-A-40], doc. 33 in Donaghy 1996: 52.

⁴⁸³ See the comments made by Pearson’s deputy, A.D.P. Heeney, on his behalf, to John Holmes in *Telegram 327*, 5 July 1950, [DEA/50069-A-40], doc. 36 in Donaghy 1996: 55.

⁴⁸⁴ *Extract from Cabinet Conclusions*, 28 June 1950, [PCO], doc. 17 in Donaghy 1996: 33.

⁴⁸⁵ See the update provided by Canada’s Ambassador in the US to Pearson, *Telegram WA-1422*, 28 June 1950, [DEA/50069-A-40], doc. 19 in Donaghy 1996: 35.

⁴⁸⁶ *Secretary of State for External Affairs to Acting Permanent Delegate to United Nations, Telegram 360*, 21 July 1950, [DEA/50059-A-40], doc. 52 in Donaghy 1996: 89.

⁴⁸⁷ *Secretary of State for External Affairs to Permanent Delegate to United Nations, Telegram 343*, 12 July 1950, [DEA/50069-A-40], doc. 40 in Donaghy 1996: 60.

⁴⁸⁸ *Ibid*: 60-61.

As noted in the prior chapter, the military position of the UN force in Korea deteriorated during the summer of 1950, and concern grew in the US that it was the only Western state sacrificing its soldiers there. Consequently, US officials asked the UN Secretary General in mid July to appeal for ground forces, and pressured Canada to send troops.⁴⁸⁹ Like Britain at the time, Canada thus also faced a policy dilemma, in that the government's public commitment to the UN, its relationship with the US, and its belief in its world role as a middle power conflicted with the realities of a demobilized military, a concern for domestic political harmony and socio-economic development, and a worry that other international commitments and theatres of potential conflict should not be forgotten.

The government's initial reaction to this dilemma appears to have prioritized these latter concerns. As A.D.P. Heeney, Deputy Foreign Minister, argued in a memo on 18 July, "Serious as is the Korean situation, and important as it is that we should not fail in our responsibility as a member of the United Nations ... Western Europe is ... still the main theatre ... It is suggested therefore that any Canadian contribution should not be at the expense of our capacity to fulfill our responsibilities for the direct defence of Canada and under the North Atlantic Treaty".⁴⁹⁰ Consistent with this logic, the Defence Chiefs advised that Canada was not in a position to contribute ground forces in Korea.⁴⁹¹ In light of these concerns, St. Laurent announced on 19 July that, although Canada would increase its defence efforts, it would not send troops to Korea.⁴⁹² However, he added, if the Security Council recruited a voluntary force for service there – an idea that had been floated at the UN and endorsed by Pearson⁴⁹³ – Canada would immediately consider participating.

⁴⁸⁹ See Pearson's comments in *Extract from Cabinet Conclusions*, 19 July 1950, [PCO], doc. 80 in Donaghy 1996: 82; and the reflections of various former leaders and advisors in Stairs 1974: 74.

⁴⁹⁰ *Memorandum from Under-Secretary of State for External Affairs to Secretary of State for External Affairs*, 18 July 1950, [DEA/50069-A-40], doc. 45 in Donaghy 1996: 67.

⁴⁹¹ *Extract from Cabinet Conclusions*, 19 July 1950, [PCO], doc. 49 in Donaghy 1996: 81.

⁴⁹² Department of External Affairs, *Statements and Speeches*, no. 50/28.

⁴⁹³ *Extract from Cabinet Conclusions*, 19 July 1950, [PCO], doc. 49 in Donaghy 1996: 84.

Following St. Laurent's statement, no such international brigade was created. And a combination of internal and external factors ultimately led the government to alter its position and send soldiers to Korea. Domestically, most English language newspapers were critical of the government's announcement, and even the left-wing Cooperative Commonwealth Federation Party pressed for the dispatch of troops.⁴⁹⁴ Externally, a number of other states – including fellow Commonwealth countries Britain and Australia – decided to send ground forces, and the US and UK continued to ask about Canada doing the same.⁴⁹⁵ Importantly, Dennis Stairs notes that “all of the Canadian officials” he interviewed for his leading study on Canada and the Korean War “were agreed that American pressure was not a major consideration for Canadian decision-makers on this issue”, and that it was the appeal from the UN, not Washington, that had the most significant impact on leaders at the time.⁴⁹⁶ While it is possible that these men underreported the impact of the US, there is documentary evidence from that period to support their account.⁴⁹⁷ In any event, the net result of the above inputs was that the Cabinet decided in August to recruit and train an additional army brigade of about 10,000 men “for use in discharging Canadian obligations under United Nations or North Atlantic Treaty commitments”.⁴⁹⁸ In the months following this decision, recall, the military position of the UN force in Korea improved. As such, Canada sent only one battalion from its brigade to the peninsula in late November.⁴⁹⁹ It was initially thought that the rest of the force might then serve in Europe.⁵⁰⁰ After China intervened in the war, however, and the military

⁴⁹⁴ Stairs 1974: 83.

⁴⁹⁵ See *Memorandum from Secretary of State for External Affairs to Prime Minister*, 26 July 1950, [L.B.P./Vol.35], doc. 55 in Donaghy 1996: 92; and Wood 1966: 22-23.

⁴⁹⁶ This point, Stairs notes, was stressed especially by John Holmes, Lester Pearson, and A.D.P. Heeney (1974: 75).

⁴⁹⁷ As Pearson wrote to Canada's Ambassador in Washington on 20 July 1950, US officials have, “I suspect, been instructed by the State Department to make every effort to impress on us that we should send land forces to Korea, but they have not had much success. I do not need to tell you that we tend to react vigorously to pressure of this kind” (*Secretary of State for External Affairs to Ambassador in United States*, 20 July 1950, [L.B.P./Vol.35], doc. 50 in Donaghy 1996: 85).

⁴⁹⁸ *Extract from Cabinet Conclusions*, 2, 3 and 7 Aug. 1950, [PCO], doc. 62 in Donaghy 1996: 101.

⁴⁹⁹ *Extract from Cabinet Conclusions*, 15 Nov. 1950, [PCO], doc. 91 in Donaghy 1996: 147.

⁵⁰⁰ See Brooke Claxton's update to Parliament, in HC Debs., 5 Feb. 1951, 92.

situation changed again, fresh requests were made for troops. This led to a decision in February 1951 to send the whole brigade to Korea.⁵⁰¹

Canada supported the Security Council resolutions on the Korean conflict and contributed to the UN force there because it valued its relationship with the US⁵⁰² and Britain,⁵⁰³ and feared Soviet expansion.⁵⁰⁴ However, as the quote above suggests, Canada was also concerned with its perceived obligations under the UN Charter and the Council resolutions. As Pearson stressed in a memo to St. Laurent, since the outbreak of fighting in Korea, “We have made it abundantly clear in Washington that if Canada is to help, it must be help to the United Nations, fulfilling our obligations under the Charter, and *not* help to the United States” [emphasis in original].⁵⁰⁵ Consistent with this private description, St. Laurent announced to Parliament early in the crisis that Canadian “responsibility in this matter arises entirely from our membership in the United Nations and from our support of the [second] resolution of the Security Council”.⁵⁰⁶ Continuing, he added that:

Any participation by Canada in carrying out the foregoing resolution ... would not be participation in war against any state. It would be our part in collective police action under the control and authority of the [UN] for the purpose of restoring peace to an area where an aggression has occurred as determined under the Charter of the United Nations by the Security Council, which decision has been accepted by us. It is only in such circumstances that this country would be involved in action of this kind.⁵⁰⁷

⁵⁰¹ HC Debs., 21 Feb. 1951, 563. The brigade arrived in Korea in April 1951.

⁵⁰² See the comments of the Minister of Fisheries in *Extract from Cabinet Conclusions*, 27 July 1950, [PCO], doc. 56 in Donaghy 1996: 93.

⁵⁰³ See the comments of the Trade and Commerce Minister, C.D. Howe, in *ibid.*

⁵⁰⁴ See Pearson’s description of the “menace which faces us” in Korea, and “the necessity of defeating it there by United Nations action”, in *Memorandum from Secretary of State for External Affairs to Prime Minister*, 3 Aug. 1950, [L.B.P./Vol.35], doc. 63 in Donaghy 1996: 105.

⁵⁰⁵ *Extract from Memorandum from Secretary of State for External Affairs to Prime Minister*, 27 June and 4 July 1950, [PCO/Vol.167], doc. 31 in Donaghy 1996: 49-50.

⁵⁰⁶ HC Debs., 30 June 1950, 4459.

⁵⁰⁷ *Ibid.*

The above comments suggest that, like their British counterparts, Canada's highest political leaders believed that North Korea's attack constituted a formal act of aggression, and emphasized the importance of responding to this breach of the peace collectively through the United Nations. Unlike Britain, though, Canada went further and immediately portrayed the situation not as a war but as a "police action" authorized by the Security Council.

There is evidence that the support of St. Laurent, Pearson and Claxton for the UN prior to and during the Korean War, and their perception of obligation under the UN Charter and Security Council resolutions, were sincere and shaped in part by Canada's formal membership in, and contributions to, the organization. However, this evidence also indicates that these men perhaps valued this membership and these contributions more than other important Canadian leaders. Significantly for history, though, it was the former and not the latter who occupied Canada's highest positions of political leadership when the conflict in Korea broke out.

Prior to World War II and the founding of the UN in 1945, Canada had become familiar with the idea of an institutional structure to support international order as a member of the League of Nations.⁵⁰⁸ During the war, the US and UK led the post-conflict planning effort,⁵⁰⁹ and the government of Mackenzie King did not get seriously involved until 1943.⁵¹⁰ An obstacle at the time was that Deputy Foreign Minister, O.D. Skelton, shared King's "isolationist" outlook, and argued that Canada would not survive entrance into another European war.⁵¹¹ By implication, there was no reason to think comprehensively about the peace that might follow.⁵¹²

In response to this perceived lack of international leadership, organizations like the League of Nations Society and the Canadian Institute of International Affairs (CIIA) aimed to promote a

⁵⁰⁸ Keating 2013: 20. Membership in the League of Nations, it should be noted, was not universal. For instance, neither the US nor the USSR joined the organization.

⁵⁰⁹ The US and Britain were later joined by the USSR and China.

⁵¹⁰ Chapnick 2005: 3, and Keating 2013: 20.

⁵¹¹ Chapnick 2005: 9.

⁵¹² Stacey 1981: 269, and Granatstein 1982: 28-44.

greater awareness of global problems and the need for collective security.⁵¹³ One of the Society's affiliates and a CIIA leader was Brooke Claxton, who would later become Canada's Defence Minister during the Korean War. In the early 1940s, Claxton actively sought to redefine Canada's world role, and to link this re-conception to the soon-to-be created UN organization.⁵¹⁴ He also directed a campaign to assert Canada's independence from Britain.⁵¹⁵ During this period, other voices in Canada, such as key Conservative politicians, disagreed with Claxton's views, especially those on the Commonwealth.⁵¹⁶

While Canada was becoming more vocal about its independence and world role, it was also getting more formally involved in post-war planning. In this regard, two early UN bodies that Canada helped create were the UN Relief and Rehabilitation Administration (UNRRA), and the Food and Agriculture Organization (FAO). One of the main Canadian diplomats involved in the creation of these organizations was Lester Pearson. Pearson, who was posted in Washington at the time, was more "idealist" in his approach to the UN negotiations than some other Canadian officials, such as Deputy Foreign Minister Norman Robertson (who had replaced Skelton) and his assistant, Hume Wrong.⁵¹⁷ Whereas Robertson and Wrong tended to accept the domination of the great powers in the talks, Pearson saw these powers as part of the problem.⁵¹⁸ And he also saw a need for an effective collective security system. As he wrote to Robertson in February 1944, "we now know ... that there is no safety in a League of Nations which does not make adequate provision for peaceful change and police action against the aggressor".⁵¹⁹

⁵¹³ Chapknick 2005: 8.

⁵¹⁴ For a description of Claxton's efforts, see *ibid*: 9, 13, 18, 52-54.

⁵¹⁵ *Ibid*: 53-54.

⁵¹⁶ Howard Green, in *HC Debs.*, 9 July 1943, vol. 238, 4564; and John Diefenbaker, in *ibid*: 4593.

⁵¹⁷ Keating 2013: 22-24.

⁵¹⁸ Eayrs 1972: 154.

⁵¹⁹ Cited in Keating 2013: 28.

When the final draft of the UN Charter was negotiated in San Francisco in June 1945, Pearson attended the historic conference. Another Canadian who attended was then Justice Minister Louis St. Laurent. Following the signing of the Charter, St. Laurent asked Parliament to approve the document in October. He conceded that the Charter was a product of “compromise”, and that it included a great-power veto at the Security Council.⁵²⁰ Nonetheless, he stressed, it was a significant improvement from earlier versions, and Canada helped bring about some of these changes. After warning that no organization could succeed without the will of its members, St. Laurent concluded: “The Charter of the United Nations is a first step in the direction of that co-operation between nations which appears to be essential to the survival of civilization”.⁵²¹

Importantly, St. Laurent’s commitment to the United Nations continued after he became Foreign Minister. For instance, in an important speech from January 1947 that outlined the principles that should guide Canadian foreign policy in the post-war period, St. Laurent affirmed the significance of the rule of law, the “acceptance of international responsibility in keeping with our conception of our role in world affairs”, and support for international institutions.⁵²² As he stated, “If there is one conclusion that our common experience has led us to accept, it is that security for this country lies in the development of a firm structure of international organization”.⁵²³

Again, the above suggests that the support of St. Laurent, Pearson and Claxton for the United Nations leading up to and during the Korean War, and their perception of obligation under the UN Charter and the Security Council resolutions on Korea, were sincere and shaped in part by Canada’s formal membership in, and contributions to, the world organization. As acknowledged in the previous chapter, such support and perception by Western leaders were possible because a majority of UN member states were considered sympathetic to the US and its allies, and because the

⁵²⁰ St. Laurent, HC Debs., 16 Oct. 1945, vol. 246, 1185-1202.

⁵²¹ Ibid.

⁵²² The speech was made at the University of Toronto. See Mackenzie 1995: 149.

⁵²³ This quote is from Keating 2013: 20, and appears to be part of the same speech.

USSR was absent when the Council resolutions were passed. Consequently, one might be tempted to conclude that leaders like St. Laurent and US President Truman were only using the UN as a convenient tool in the Cold War, lending “cover” to the policy of containment. However, while it is important to recognize the political conditions under which the US and its allies were able to respond to the Korean crisis through the UN, one should not underestimate the degree to which key leaders saw UN involvement as providing more than just “cover” for the policy of containment. As Pearson noted in a letter to Hume Wrong, now Canada’s Ambassador to the US, in July 1950: “I think Washington has been sincere and praiseworthy in its efforts to work through and with the United Nations, but ... I [also] think that they should be very careful ... not to play into the hands of those communists and their friends who claim that the UN is merely a cover US policy in regard to Korea. No doubt they appreciate this in the State Department”.⁵²⁴

b) International law helped regulate the political and military practice of Canada and the US

In addition to its constitutive effect, international law also had a regulative influence during Canada’s involvement in the Korean crisis. Two examples of this impact are a) Canada’s non-participation in the US naval blockade of Taiwan, and b) Canada’s use of the General Assembly’s 1948 UNTCOK resolution and the Security Council’s resolutions on Korea to help constrain America’s response to the crisis.

Regarding the first example, recall that in the negotiations leading up to the Security Council’s third resolution on Korea, Lester Pearson protested the inclusion of the phrase “to restore international peace and security *in the area*” [emphasis added], and worried that it could be misinterpreted as including the US blockade of Taiwan. Further, when Canada later reported its

⁵²⁴ *Secretary of State for External Affairs to Ambassador in United States*, 20 July 1950, [L.B.P./Vol.35], doc. 50 in Donaghy 1996: 86.

naval contribution to the UN Secretary General, recall, it said that the vessels are “made available to the UN” under the operational control of the Commander-in-Chief “for the defence of the Republic of Korea”. There is evidence that these concerns about the geographic scope of the third Security Council resolution, as well as the formal authority of the UN force in Korea, were deeply felt by key leaders and helped define and shape Canada’s non-participation in the Taiwan blockade. For instance, commenting on a US draft of the third resolution, Deputy Foreign Minister A.D.P. Heeney wrote to John Holmes, Canada’s acting UN representative, on 5 July 1950 that:

We are nervous about the phrase ‘in the area of Korea’ and feel strongly that it should be replaced simply by ‘Korea’. You will be aware that on previous occasions the [US] Government has given a very broad interpretation to similar phrases which have included the formula, ‘in the area of’. We would not wish the resolution to contain anything which would suggest that we are in any way involved in the decision of the [US] Government to defend [Taiwan]. We regard the order of President Truman to the Seventh Fleet to prevent any attack on [Taiwan] as a decision taken by the [US] Government alone and on its own authority. It does not flow in any way from a decision by the United Nations. As a member of the [UN] we have a responsibility, pursuant to the resolutions of the Security Council of the 25th and 27th of June, to assist, so far as we are able, in the defence of Korea. We have no (repeat no) such responsibility to assist in the defence of [Taiwan].⁵²⁵

In expressing this view, Heeney and Pearson had two fears in mind: 1) that General MacArthur might use non-US naval forces meant for Korean operations instead for the Taiwan blockade; and

⁵²⁵ *Secretary of State for External Affairs to Acting Permanent Delegate to United Nations*, 5 July 1950, [DEA/50069-A-40], doc. 36 in Donaghy 1996: 55.

2) that a US vessel flying both the UN and American flags could be fired on by Communist China, thus leading to allegations that all UN members had been attacked.⁵²⁶

Although Pearson and Heeney had these fears, they and other officials later recalled in interviews that – like their UK counterparts – they also thought the Taiwan blockade “was well calculated to limit the scope of the hostilities, not only because it would place constraints upon the behaviour of the regime in Peking, but also because it would inhibit Chiang Kai-shek, who might otherwise be tempted to take advantage of the situation in order to renew active operations against the Chinese Communist forces”.⁵²⁷ Despite seeing the blockade in this positive strategic light, however, these leaders nonetheless refused to let Canadian forces participate, and explained this non-participation with reference to the international legal considerations they deemed relevant at the time. Speaking to Parliament on 31 August, Pearson said the government was “concerned solely with carrying out our United Nations obligations in Korea or elsewhere”, and these did not include anything that could be “interpreted as the restoration of the nationalist Chinese government to the mainland of China, or an intervention in [Taiwan]”.⁵²⁸ Accordingly, Pearson’s only specific injunction to Captain J.V. Brock, the commander of Canada’s naval contribution to Korea, was that he “be sure to avoid embroilment in any action involving [Taiwan]”.⁵²⁹ As such, during the next three years of the Korean War, Canada’s naval forces did not participate in the Taiwan blockade, and were limited to operations in Korea.⁵³⁰

Importantly, Canada’s concerns about Taiwan arose not just in its decision to send naval forces to Korea but also in its later decision to contribute ground troops. For instance, during meetings with US and UN officials in Washington and New York on 29 July, Pearson discussed the

⁵²⁶ *Secretary of State for External Affairs to Acting Permanent Delegate to United Nations*, 5 July 1950, [DEA/50069-A-40], doc. 36 in Donaghy 1996: 55.

⁵²⁷ Stairs 1974: 52.

⁵²⁸ HC Debs., 31 Aug. 1950, 90-97.

⁵²⁹ Stairs 1974: 70.

⁵³⁰ Thorgrimsson & Russell 1965.

conditions under which the government would be willing to send soldiers to Korea.⁵³¹ Among other things, he wanted guarantees that under no circumstances would the troops be involved in any way in the defence of Taiwan.⁵³² These assurances were given, and for the remainder of the war Canadian soldiers did not participate in the Taiwan blockade.

In addition to Canada's non-participation in the neutralization of Taiwan, another example of international law's regulative impact is Canada's use of the General Assembly's UNTCOK resolution and the Security Council's resolutions on Korea to help constrain America's response to the crisis. As noted earlier, Canada agreed to participate in UNTCOK based on the view that, under the General Assembly's resolution on the matter, the commission would act only if it could do so throughout Korea. As St. Laurent predicted, however, during the winter of 1948, Soviet authorities in North Korea refused to allow UNTCOK to operate there. In response, US officials argued for a new resolution that would allow the commission to "implement its programme ... in such parts of Korea as are accessible".⁵³³ Canada and Australia were the only two countries that maintained their opposition to this proposal.⁵³⁴ Part of Canada's concern, Pearson argued, was that supervising elections in the South alone would involve changes in the commission's terms of reference which were beyond the power of the Interim Committee of the General Assembly – the body overseeing UNTCOK – to decide.⁵³⁵ Doing so, he stressed, would be "unconstitutional".⁵³⁶ These arguments implied, Stairs usefully notes, that UNTCOK "was subject solely to the resolutions of the United Nations as a whole, and was completely independent of the American authorities".⁵³⁷

⁵³¹ See Pearson's update to Parliament, HC Debs., 4 Sept. 1950, 221-22.

⁵³² See HC Debs., 4 Sept. 1950, 221-22; and Wood 1965: 46-47. Pearson also wanted to ensure that the troops would not be used in combat before they were adequately trained.

⁵³³ Cited in Spencer 1967: 106.

⁵³⁴ Gordenker 1959: 70-71. The final vote on the resolution, which occurred on 26 February 1948, was 31 to 2 in favour, with 11 abstentions.

⁵³⁵ Stairs 1974: 21.

⁵³⁶ Ibid.

⁵³⁷ Ibid: 28.

When UNTCOK was instructed to supervise elections in South Korea, Canada's delegate, George Patterson, protested this instruction and withdrew from the commission's proceedings.⁵³⁸ These actions "infuriated" the American diplomats involved.⁵³⁹ By 23 March 1948, Patterson had been told to cooperate in the election observations.⁵⁴⁰ Publicly, though, Canadian leaders continued to express concern that the international legal authority for the elections be clearly understood, and that the independence of the UN in this matter be maintained. As St. Laurent stressed at the time, "the responsibility for running the elections [now] rests with the [US] military government authorities and any action towards the establishment of a government in Korea following the elections will not be on the strength of the resolution of the General Assembly but on the legal position of [these] ... authorities".⁵⁴¹

In addition to the General Assembly's UNTCOK resolution, Canada also drew upon the Security Council's resolutions on Korea to help constrain America's response to the crisis. Unlike Britain, Canada was not a member of the Security Council at the time of the conflict. As such, John Holmes, Canada's acting UN representative, attended but did not participate in the Council meetings on Korea. Nonetheless, in the informal discussions surrounding these meetings, Holmes consulted with UN officials and other state delegates.⁵⁴² Canada's Ambassador in Washington, Hume Wrong, also conveyed the government's views on these issues. There is evidence that US officials took these concerns seriously, and that US policy was modified in part to better reflect the views of America's allies. For instance, recall from the prior chapter that a draft of US President Truman's speech on 27 June stated that North Korea's attack had been launched by "centrally directed Communist Imperialism". Like his UK counterpart at the time, Pearson was "unhappy"

⁵³⁸ Stairs 1974: 22-23.

⁵³⁹ Ibid: 23.

⁵⁴⁰ Ibid: 24.

⁵⁴¹ St. Laurent in HC Debs., 22 March 1948, 2453.

⁵⁴² *Extract from Memorandum from Secretary of State for External Affairs to Prime Minister*, 27 June and 4 July 1950, [PCO/Vol. 167], doc. 31 in Donaghy 1996: 49.

with Truman's draft statement,⁵⁴³ and he told Wrong that the reference to "Communist imperialism" was "unnecessary".⁵⁴⁴ Wrong passed on Pearson's observations to US Counselor George Kennan. Kennan "was impressed by them and thought that the text should be modified accordingly".⁵⁴⁵ Reflecting such concerns, recall, the reference to "centrally directed Communist Imperialism" was removed from Truman's final statement.⁵⁴⁶

In addition to Truman's statement, Canada also sought to influence the wording of the third Security Council resolution on Korea. Again, this instrument recommended that UN members assisting South Korea make such provisions available to a unified command under the US. In the negotiations leading up to the resolution, recall, Pearson and Heeney expressed worries about the formal authority of the UN force in Korea, and the geographic scope of the initiative. These two concerns dominated Canada's diplomatic activity regarding the resolution. For instance, following the Council's first two resolutions, Truman approved a draft third proposal that would create a unified command in Korea and ask the US to name a commander.⁵⁴⁷ Worried that the proposal insufficiently linked the Korean operation to the UN organization, UN Secretary General Trygve Lie suggested that military operations be supervised by a "Committee on Coordination of Assistance for Korea".⁵⁴⁸ St. Laurent and Pearson, for their part, shared Lie's desire to "make it clear that the operations being conducted in Korea are under the authority of the [UN], exercised through a commander appointed by the [UN]".⁵⁴⁹ Accordingly, in their respective discussions with US and UK officials on the matter, Wrong and Holmes stressed the importance of "giving full and

⁵⁴³ *Extract from Memorandum from Secretary of State for External Affairs to Prime Minister*, 27 June and 4 July 1950, [PCO/Vol. 167], doc. 11 in Donaghy 1996: 23.

⁵⁴⁴ *Ibid.*: 22-23.

⁵⁴⁵ *Ibid.*: 23.

⁵⁴⁶ Although Canada had expressed a similar concern, Wrong said the rewording was "to accord with the wishes expressed by the [UK] Government" (*Ambassador in United States to Secretary of State for External Affairs*, 27 June 1950, [DEA/50069-A-40], doc. 12 in Donaghy 1996: 24).

⁵⁴⁷ Truman 1956: 394-95.

⁵⁴⁸ Lie 1954: 336, and Stairs 1974: 67.

⁵⁴⁹ *Extract from Memorandum from Secretary of State for External Affairs to Prime Minister*, 27 June and 4 July 1950, [PCO/Vol. 167], doc. 31 in Donaghy 1996: 49.

ostensible United Nations aegis to the operations against the North Koreans”.⁵⁵⁰ Although the US and Britain were “bending as far as possible” to do so,⁵⁵¹ strategic and US domestic legal considerations were pulling in the opposite direction.⁵⁵²

In response to this dilemma, Pearson and Heeney tried their hand at drafting the resolution in a way that they thought balanced the competing factors at issue.⁵⁵³ The operative parts of their draft read as follows: “The Security Council requests the United States to designate a commander ... of the forces made available by members of the [UN] *under the Security Council resolutions*; and, Recommends that all members providing forces under the said resolution place such forces under the [UN] commander” [emphasis added].⁵⁵⁴ Such wording, Pearson and Heeney believed, “would give to the Korean operations a genuine United Nations character”, while also not impinging “upon the rights of Congress or the freedom of action of MacArthur”.⁵⁵⁵ The US and UK replied in detail to Canada’s suggestion, but disagreed with much of its wording.⁵⁵⁶

In addition to the formal authority of the UN force in Korea, recall that Pearson and Heeney also expressed reservations about the geographic scope of the Security Council’s third resolution. Reflecting this concern, they proposed that the instrument include “a territorial demarcation of the area around Korea in which [US] forces and the forces of other members of the [UN] will be

⁵⁵⁰ *Acting Permanent Delegate to United Nations to Secretary of State for External Affairs*, 30 June 1950, [DEA/50069-A-40], doc. 23 in Donaghy 1996: 39.

⁵⁵¹ *Ibid.*

⁵⁵² Strategically, the idea of using the Military Staff Committee envisioned in the UN Charter was rejected because of potential interference by the USSR, and the option of a Security Council sub-committee was abandoned as ineffective. Legally, the Act covering US military participation in the UN only authorized forces made available under Article 43 of the Charter to operate as UN forces outside the authority of Congress. See *ibid.*; and *Ambassador in United States to Secretary of State for External Affairs*, 30 June 1950, [DEA/50069-A-40], doc. 24 in Donaghy 1996: 41.

⁵⁵³ *Secretary of State for External Affairs*, 1 July 1950, [DEA/50069-A-40], doc. 29 in Donaghy 1996: 46.

⁵⁵⁴ *Secretary of State for External Affairs to Ambassador in United States*, 1 July 1950, [DEA/50069-A-40], doc. 28 in Donaghy 1996: 45.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Memo by Secretary of State for External Affairs*, 3 July 1950, [DEA/50069-A-40], doc. 30 in Donaghy 1996: 47.

acting”.⁵⁵⁷ Such a demarcation, they noted, would “exclude the whole of Communist China from the area in which operations under the [UN] would be undertaken”.⁵⁵⁸ And this, in turn, would lessen the danger of UN members “becoming involved in incidents with Chinese forces outside Korea”, and establish “a framework in which the conflict in Korea might be localized”.⁵⁵⁹ In response, Wrong emphasized that the US considered the Taiwan blockade to be an American operation, and said it was too late in the negotiations to secure such an important change.⁵⁶⁰

Alongside its attempts to alter the US negotiating position on the Korean conflict, Canada also used its understanding of the Security Council resolutions to help constrain America’s conduct with respect to Taiwan and China. Regarding Taiwan, recall that Canadian leaders thought that the US blockade of the disputed island could lead to an expansion of hostilities in the area, and argued that the scope of the Council resolutions was limited to Korea. Reflecting these views, Hume Wrong repeatedly asked the US State Department in the summer of 1950 to make the separation of the Korean and Taiwan issues more explicit.⁵⁶¹ Acting on instructions from Ottawa, Wrong went so far as to suggest that a separate command be established for the Taiwan blockade.⁵⁶² As we saw in the previous chapter, Britain expressed similar worries to the US at the time, and based these concerns in part on its view of the Council resolutions and the Cairo Declaration of 1943. Following these expressions of concern from America’s allies, recall that President Truman made a second declaration on 19 July 1950. In this address to Congress, he affirmed his desire to ensure that Taiwan did “not become embroiled in hostilities disturbing to the peace of the Pacific and that all questions affecting [the island] be settled by peaceful means as envisaged in the [UN]

⁵⁵⁷ *Secretary of State for External Affairs to Ambassador in United States*, 6 July 1950, [DEA/50069-A-40], doc. 37 in Donaghy 1996: 57.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ambassador in United States to Secretary of State for External Affairs*, 6 July 1950, [DEA/50069-A-40], doc. 38 in Donaghy 1996: 58.

⁵⁶¹ Stairs 1974: 97.

⁵⁶² *Ibid.*

Charter”.⁵⁶³ In light of this assurance, MacArthur’s visit to Taiwan on 31 July worried Lester Pearson, and he conveyed his concerns to Secretary of State Dean Acheson, Assistant Secretary for UN Affairs John Hickerson, and the US Ambassador in Ottawa.⁵⁶⁴ In these latter talks, Pearson stressed the “great danger” of linking UN policy in Korea with US policy on China, and the Ambassador said Truman and Acheson “were as worried about this matter as [Pearson] was”.⁵⁶⁵

Reflecting this shared concern, Truman sent an official to discuss the matter with MacArthur on 3 August. The official cited the worries of America’s allies regarding Taiwan, and stressed the “importance of maintaining UN unity among the friendly countries”.⁵⁶⁶ Following this meeting, Truman approved a military directive to MacArthur limiting US action in the defence of Taiwan.⁵⁶⁷ When MacArthur nonetheless went on to publicly stress the strategic importance of the island later that month, he was, as noted in the prior chapter, forced to withdraw his statement by Truman.

Finally, in addition to US conduct regarding Taiwan, Canada also used its understanding of the Security Council resolutions to help constrain American bombing policy with respect to China. Following China’s intervention in the Korean conflict in the autumn of 1950, an issue arose as to whether the UN force could engage aircraft and troops which were physically located above China’s border with North Korea but were nonetheless thought to be contributing to the war below. Initially, MacArthur reported to the UN that “our present mission is limited to the destruction of those forces now arrayed against us in North Korea”.⁵⁶⁸ Unconvinced by this assurance, Pearson and his deputy worried that MacArthur was perhaps “setting the stage for action against the Chinese

⁵⁶³ US Department of State, *Department of State Bulletin*, XXIII, 578, 31 July 1950, 166.

⁵⁶⁴ *Memorandum from Secretary of State for External Affairs to Prime Minister*, 14 August 1950, [L.S.L./Vol.234], doc. 65 in Donaghy 1996: 110.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ Truman 1956: 352.

⁵⁶⁷ *Ibid.*: 354.

⁵⁶⁸ Quoted in *Secretary of State for External Affairs to Chairman, Delegation to UN General Assembly*, 7 Nov. 1950, [DEA/50069-A-40], doc. 150 in Donaghy 1996: 223.

bases of troops and supply in Manchuria”.⁵⁶⁹ Regarding such “retaliatory strikes against Chinese bases in the rear”, they told Canada’s UN delegation that “we should insist that such action is not covered by the present [Security Council] resolution, and would require further authorization from the [UN]”.⁵⁷⁰ Consistent with this view, a new US-led resolution was proposed in the Security Council on 10 November. Although it sought to portray China as an aggressor, France insisted that the draft affirm that “the Chinese frontier with Korea is inviolate”.⁵⁷¹ In response, the US and UK sought to include a warning that if China’s action continued, the “Yalu River [border] would be crossed, by aircraft at least, to break up Chinese concentrations and supply bases in Manchuria”.⁵⁷² Without this warning, they worried, the UN “commander might have been *prevented* by [the] resolution from taking necessary military action beyond the Yalu River” [emphasis added].⁵⁷³

Ultimately, a different version of the resolution was passed by the General Assembly in February 1951, and the diplomatic debate over UN bombing policy regarding China unfolded mainly in private exchanges between the US and its allies. For instance, despite MacArthur’s report to the UN, and consistent with Pearson and Heeney’s doubts, the General had requested permission in early November to bomb air bases in China and to engage in “hot pursuit” of aircraft fleeing to this “privileged sanctuary” from Korea. In response, the US State Department and the Joint Chiefs of Staff agreed that it would be desirable to have UN approval for such a policy and, therefore, inquiries were made of all UN countries that had forces in Korea. Without exception, Truman recalls in his memoirs, they indicated strong opposition.⁵⁷⁴

⁵⁶⁹ Quoted in *Secretary of State for External Affairs to Chairman, Delegation to UN General Assembly*, 7 Nov. 1950, [DEA/50069-A-40], doc. 150 in Donaghy 1996: 223.

⁵⁷⁰ Ibid.

⁵⁷¹ *Chairman, Delegation to UN General Assembly, to Secretary of State for External Affairs*, 11 Nov. 1950, [DEA/50069-A-40], doc. 152 in Donaghy 1996: 227.

⁵⁷² *Chairman, Delegation to UN General Assembly, to Secretary of State for External Affairs*, 13 Nov. 1950, [DEA/50069-A-40], doc. 155 in Donaghy 1996: 231.

⁵⁷³ Ibid.

⁵⁷⁴ Truman 1956.

Canada was one such country that expressed this opposition.⁵⁷⁵ Although Canada's Chief of the General Staff, Charles Foulkes, strongly disagreed,⁵⁷⁶ Heeney told US officials that his government considered it important to wait until China had been warned that hot pursuit might be taken if hostile aircraft continued to use Chinese airspace.⁵⁷⁷ Elaborating on Canada's earlier position at the UN, and reflecting its view during the UNTCOK debate that UN action in Korea was subject only to the legal authority of that organization, Heeney said that while a case "could be made under international law that the [UN] Commander ... has the right to authorize [UN] aircraft to pursue attacking aircraft into Manchurian air space, [we] consider it most important that no military operations take place outside Korean borders without specific authority from the [UN]".⁵⁷⁸

The anger with which MacArthur recalls this issue in his memoirs suggests that allied protests such as Canada's were effective in helping to restrain UN bombing policy regarding China, at least initially.⁵⁷⁹ By June 1952, though, with peace negotiations stalled over the Prisoner of War issue, the US had authorized the bombing of power installations on the Yalu River, and Canada was neither consulted nor informed in advance.⁵⁸⁰ Furthermore, there is evidence that the rules against hot pursuit were often violated by US pilots and mid-level officers in the field.⁵⁸¹

As the latter points suggest, the role that Canada and its understanding of international law played in constraining the US prior to and during the Korean War should not be overstated. Indeed, insofar as the US was restrained, the impetus for this likely came more from domestic inputs, such as the acute policy disagreements that arose between Truman and MacArthur. Nonetheless,

⁵⁷⁵ Reid 1967-68: 584, and Stairs 1974: 137.

⁵⁷⁶ Stairs 1974: 137.

⁵⁷⁷ *Aide Memoire*, 16 Nov. 1950, [DEA/11073-40], doc. 158 in Donaghy 1996: 234-35.

⁵⁷⁸ Ibid: 235. Pearson repeated this view while speaking in Parliament on 26 April 1951.

⁵⁷⁹ See e.g. MacArthur's complaint that "step-by-step my weapons were being taken away from me" (1965: 415).

⁵⁸⁰ See draft "Memo for the UN Division, Korea-Collective Security", 28 April 1953, by Chester Ronning, Far Eastern Division (in Lee 1995: 219); and docs. 71-76 in Barry 1990: 78-85.

⁵⁸¹ See the informal reporting of such violations in *Charge d'Affaires in Japan to Under-Secretary of State for External Affairs*, 22 May 1952, [DEA/50069-A-40], doc. 54 in Barry 1990: 59. Some of the US pilots and officers went so far as to destroy combat films to hide the fact that action had occurred north of China's border (Mahurin 1962: 68-72, 83-89).

although Canada may have had less influence than Britain in this regard, it remains the case that the former expressed its concerns to the US about American policy in the Far East, and based these worries in part on the international legal considerations it deemed relevant at the time. The US took such concerns seriously, and US policy was modified in part to better reflect the views of America's allies. As Stueck notes, during the crisis, the UN "provided the setting for allied and neutral pressure on the [US], an institutional framework within which weaker nations could coordinate their efforts to influence the world's greatest power".⁵⁸² Similarly, Bloomfield argues that the cost to the US of involving the UN in its response to the conflict was that it gave countries like Canada a license to intervene in the decision-making process, and thus "to impose constraints on American policy-making, some of which seemed at the time irksome".⁵⁸³ Whatever perceived drawbacks such constraints had during the war, General Ridgway – the man who replaced MacArthur after Truman relieved him of his post – conceded later that they "also laid a restraining hand on military adventures that might have drawn us into deeper and deeper involvement in Asia".⁵⁸⁴

c) International law helped permit and legitimate Canada's political and military practice

There are two examples that suggest that, when Canada responded to the Korean crisis, international law helped permit and legitimate certain conduct that otherwise might not have been permitted. First, like Britain, Canada intervened militarily in what was in many respects an ideologically divisive and extremely violent *civil* war, and justified this publicly and privately with reference to the Security Council resolutions on the crisis and the UN Charter's provisions on collective security. Second, Canada, although more worried than the UK about the issue, ultimately

⁵⁸² Stueck 1995: 4.

⁵⁸³ Bloomfield 1960: 61. For this reason, some US officials, such as George Kennan, thought that responding to the Korean crisis through the United Nations was a mistake (Kennan 1967: 490).

⁵⁸⁴ Ridgway 1967: 230.

supported the American decision to cross the 38th parallel in Korea in October 1950, and voted for the General Assembly resolution that aimed to provide UN support for this crossing.

Regarding the first example, due to the majority interpretation of the Council resolutions on the Korean conflict, Canada thought it was allowed to intervene militarily in what was in many ways a civil war.⁵⁸⁵ Canadian military action in this conflict, as we saw Prime Minister St. Laurent and Foreign Minister Pearson emphasize earlier in public, was justified insofar as North Korea's original attack was denounced as aggression by the UN Security Council, and because Canada was acting pursuant to the Council's resolutions on the crisis. In addition to these statements, there is further evidence that international legal considerations were relevant to explaining Canada's use of force to the Canadian public.

For instance, recall that because previous wars had divided English and French Canadians, members of the St. Laurent government worried that sending troops to Korea could do the same, particularly if such forces fought under British command. In light of this concern, there are indications that St. Laurent and Pearson thought that the formal UN nature of the mission in Korea would help the government secure public support for Canada's participation in a conflict that otherwise might not be tolerated, particularly by French Canada. As Pearson remarked to Hume Wrong on 13 July 1950, "[A]s the situation deteriorates in the field, with Americans alone fighting, they will become somewhat impatient with formal insistence on the United Nations character of the operations. However, *if we are to keep this country united*, and if we are to limit our intervention to Korea alone, which is our only obligation in the present circumstances, we must continue to

⁵⁸⁵ On the internal aspect of the conflict, see Lester Pearson's observation early in the crisis that, although he thought South Korea was "an independent State with a government created by action of the [UN]", it "may be argued that the fighting now taking place is really a form of civil war, since the bulk of the combatants on both sides are undoubtedly Koreans" (*Secretary of State for External Affairs to All Missions Abroad*, 28 June 1950, [DEA/50069-A-40], doc. 16 in Donaghy 1996: 32); and the description by *La Presse*, a Quebec newspaper, of the crisis as "a local affair, a civil war" (in Stairs 1974: 58).

emphasize ... that we are participating solely in a United Nations operation and that that operation is solely for the defence of Korea” [emphasis added].⁵⁸⁶

In addition to the opinion of French Canada, there is evidence that members of the government were also worried about the international legal criticisms that might be made of America and Canada’s reaction to the conflict.⁵⁸⁷ In response to these potential criticisms, a legal defence was articulated by the government that a) emphasized the substantive validity of the Security Council’s actions, and b) explained the procedural shortcomings of these actions in light of the political realities of the nascent Cold War. One concern was that the second Council resolution of 27 June was passed almost 11 hours after President Truman made his statement to the press, and 24 hours after he committed US forces to the defence of South Korea.⁵⁸⁸ Anticipating this concern, and resonating with an observable implication posited in the introduction chapter, Pearson told Wrong early in the crisis that a US intervention “should be done *after* the matter had been discussed at the Security Council and appropriate action had been taken there through a resolution, which would bring such intervention within the terms of the [UN] Charter” [emphasis added].⁵⁸⁹

Perhaps because the commitment of US forces preceded the Security Council’s second resolution, however, Pearson highlighted the first resolution in his initial formal justification of this commitment. Speaking to Parliament on 28 June, he observed that the North Koreans had ignored the Security Council’s first resolution, and that the Council itself had been unable to take direct military action because the UN forces envisioned under Article 43 of the Charter had never been

⁵⁸⁶ *Secretary of State for External Affairs to Ambassador in United States, Telegram EX-1118*, 13 July 1950, [DEA/50069-A-40], doc. 41 in Donaghy 1996: 62.

⁵⁸⁷ For a discussion of some of these criticisms, see Warner 1951: 104.

⁵⁸⁸ *Ibid.* Regarding this concern, although Canada’s three main federal political parties generally endorsed the Security Council’s response to the Korean crisis, some supporters of the left-wing CCF party were critical of the US acting in advance of the UN. See Stairs 1974: 60.

⁵⁸⁹ *Extract from Memorandum from Secretary of State for External Affairs to Prime Minister*, 27 June and 4 July 1950, [PCO/Vol. 167], doc. 11 in Donaghy 1996: 22.

established.⁵⁹⁰ As a result, he said, if any steps were to be taken to deal with the crisis, they would have to be taken by individual Council members “acting within the terms of the Charter, but on their own initiative”. In the Korean case, the US had “recognized a special responsibility which it discharged with admirable dispatch and decisiveness”. Although the US “government has taken this step on its own authority”, Pearson continued, “it is acting not only in accordance with the spirit and letter of the Charter of the [UN], but also in pursuance of the [first] resolution which was adopted by the Security Council on Sunday. This resolution ... called on all members of the [UN] to render every assistance in regard to its execution”.⁵⁹¹ If further international authorization were required, he added, it had been provided by the second Council resolution, which recommended “that the members of the [UN] furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace in the area concerned”.⁵⁹²

Although Pearson’s explanation was well received by the politicians in Parliament, his senior advisers knew that its legal reasoning was somewhat tenuous.⁵⁹³ The account skirted the fact that: the first resolution of the Security Council had called only for a cease-fire and for the withdrawal of North Korean forces; the second resolution had been passed a day after the US decision to intervene had been made; and the USSR was absent when these resolutions were passed.⁵⁹⁴ Despite these potential criticisms, however, Pearson’s arguments were necessary, Stairs notes, “if the response to the North Korean invasion was to be *viewed* as having been collectively

⁵⁹⁰ HC Debs., 28 June 1950, 4251-52.

⁵⁹¹ Ibid.

⁵⁹² Ibid.

⁵⁹³ Stairs 1974: 48.

⁵⁹⁴ On the other hand, as Stairs notes, “it could also be argued that the Americans knew in advance from their diplomatic consultations with other Security Council members that the [second] 27 June resolution would be approved, and that accordingly they could proceed with their military deployments without worrying unduly about matters of form” (1974: 50). Warner, for instance, observes that the US delegation had assurances of support for a resolution specifically calling on UN members to give military assistance in repelling North Korea (1951: 104).

rather than unilaterally derived, and if American policy was to be brought within the United Nations arena” [emphasis added].⁵⁹⁵

Resonating with his initial explanation to Parliament, Pearson continued to defend the Security Council’s actions regarding Korea, and to justify Canada’s response in light of these actions. Speaking to a group of Canadian and American engineers in Toronto in mid-July, he stressed that the Council’s response had been supported by 53 states.⁵⁹⁶ These included “many countries, and Canada is one of them, who resent and repudiate the charge that in doing our duty to the international community, and to peace, we are merely following the orders of a single member of the [UN] which has particular interests to safeguard in Korea. This is not the case. The people of Canada know that it is not the case”.⁵⁹⁷ Canada’s position, Pearson explained, was “dictated by the necessity of supporting United Nations action”. That was, he said, “our only obligation”.⁵⁹⁸

Like Pearson, St. Laurent also referred to Canada’s international legal commitments to help legitimize the country’s military action in Korea to the Canadian public. Repeating the observations he made in Parliament on 30 June, noted earlier, the Prime Minister said in a national radio address on 7 August that the Korean operation was not a war but a “police action intended to prevent war by discouraging aggression”.⁵⁹⁹ Before this aggression, he explained, no definite plans existed for an international UN force, and Canada had not planned on maintaining an expeditionary force available for such operations. As such, he said, the current action in Korea was the UN’s “first effective attempt to organize an international force to stop aggression”. Canada, he noted, had provided three destroyers and a transport squadron to this effort, and was recruiting a special

⁵⁹⁵ Stairs 1974: 48.

⁵⁹⁶ Fraser, “Backstage at Ottawa”, *Maclean’s*, 1 Sept. 1950 at 4. For the text of Pearson’s address, see Department of External Affairs, *Statements and Speeches*, no. 50/26.

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid.

⁵⁹⁹ Department of External Affairs, *Canada and the Korean Crisis*, 31-35.

brigade to send if required. This brigade, St. Laurent stressed, was being recruited “for use in carrying out Canada’s obligations under the United Nations Charter or the North Atlantic Pact”.⁶⁰⁰

Again, the statements above suggest that international legal considerations were relevant to key members of the St. Laurent government when they explained Canada’s use of force in Korea to the Canadian public. And these explanations, it should be noted, appear to have helped secure public support for the UN action in Korea, at least among English Canadians.⁶⁰¹

A second example that suggests that, during the Korean crisis, international law helped permit and legitimate certain conduct that otherwise might not have been permitted is the fact that Canada – while more reluctant than Britain about the issue – publicly supported the US decision to cross the 38th parallel in October 1950, and voted for the General Assembly resolution that aimed to provide UN support for this crossing. As mentioned in the prior chapter, by late September 1950, UN forces in Korea had managed to push back North Korea’s army and recapture Seoul. As such, Canadian leaders knew that the US would soon be deciding whether UN forces would a) remain near the 38th parallel and thus simply restore the status quo, or b) cross the parallel and seek to unify Korea by force. As a result, the Cabinet had to determine what its policy on this issue would be. Recall also that, like the military situation in Korea, the diplomatic landscape had changed. In August, the USSR had returned to the UN Security Council. To avoid the Soviet veto there, the US and its allies shifted much of their diplomatic efforts on Korea to the General Assembly.

One challenge to developing a response to the altered military situation in Korea was that Canada’s prior policy on the 38th parallel had never been precisely defined. US official George Kennan had told Canada’s NATO Ambassador on 27 June that America’s goal in Korea was to

⁶⁰⁰ Department of External Affairs, *Canada and the Korean Crisis*, 31-35.

⁶⁰¹ Canada’s three main federal political parties and most English newspapers endorsed the UN intervention in Korea, and supported the government’s response or called on it to do more. Further, in a poll of public views on the Korean War released on 3 August 1950, 75 percent of respondents supported the US decision to send equipment and troops to Korea, 59 percent thought Canada should provide equipment, and 34 percent favoured sending troops (Stairs 1974: 87).

restore the status quo,⁶⁰² and the government initially assumed this to be true.⁶⁰³ Privately, however, Lester Pearson had doubts, and he conveyed these in a memo to the Prime Minister early in the crisis. Foreshadowing future events with remarkable accuracy, Pearson noted that one of the dangers of the hostilities in Korea was that the US action:

May prove decisive, and ... public opinion in that country will then insist that [UN] forces move beyond the 38th parallel and clean up the whole of the Korean situation. In that case, there may be an unhappy conflict between [US] and [UN] policy. The latter is pledged merely to defeat an aggression and not, as I understand it, to change the political situation in Korea. Of course, some such change is bound to take place, as a result of developments of the last week. I do not see how there can be a return to the *status quo*. Either the communists make good their claim to all of Korea, or the United Nations will have to do something to strengthen the position of democratic forces under a better government than that of Syngman Rhee.⁶⁰⁴

Despite these worries, Pearson continued to publicly explain as late as 31 August that Canada was helping the UN to “defeat” aggression.⁶⁰⁵ But he did not specify what that meant exactly in Korea.

Pearson’s memo to St. Laurent implied that, although returning to the status quo in Korea was unlikely, additional authorization was needed if the political situation was to be changed. By contrast, the US initially responded to their military gains in Korea by arguing that crossing the 38th parallel would be covered by the Security Council’s existing resolutions.⁶⁰⁶ These had, recall, recommended the restoration of “peace and security *in the area*”. Canada, we saw earlier, had protested this term, and worried that it inadequately defined the scope of UN operations in Korea.

⁶⁰² *Ambassador in United States to Secretary of State for External Affairs*, 27 June 1950, [DEA/50069-A-40], doc. 12 in Donaghy 1996: 24.

⁶⁰³ Stairs 1974: 116.

⁶⁰⁴ *Extract from a Memorandum from Secretary of State for External Affairs to Prime Minister*, 27 June and 4 July 1950, [PCO/Vol.167], doc. 31 in Donaghy 1996: 50.

⁶⁰⁵ See e.g. Pearson’s speech to Parliament on 31 August (HC Debs., 31 Aug. 1950, 95-96).

⁶⁰⁶ Stairs 1974: 119.

But if the existing resolutions provided ambiguous authority to cross the 38th parallel, senior officials at the Department of External Affairs also recognized that “it would be desirable to have some [UN] decision on this question in advance of this contingency”.⁶⁰⁷ Accordingly, it was decided that “an effort should be made to have the General Assembly pass a resolution ... restating its short-run and long-run objectives for Korea”.⁶⁰⁸ The UN’s immediate goals, Escott Reid noted, were the “Cessation of hostilities and withdrawal of North Korean armed forces to the 38th parallel”, and the “Restoration of international peace and security in the Korean area”.⁶⁰⁹ The long-run goals were the achievement of Korean independence and unity by the procedures outlined in earlier General Assembly resolutions.

While Canadian leaders and officials generally agreed on these goals, they were worried about pursuing them by force. As St. Laurent noted at a Cabinet meeting on 4 October, while the “British and Americans seemed convinced that, if the [UN] did not authorize General MacArthur to proceed beyond the 38th parallel, action taken so far by the [organization] might prove to have been futile”, they “apparently did not consider too seriously the possibility that Communist China and Soviet Russia might intervene directly”.⁶¹⁰ After discussing the issue with Cabinet Secretary Norman Robertson and Arthur Menzies, head of the Far-Eastern Division at External Affairs, Reid told Pearson that the three of them had similar concerns.⁶¹¹ In light of these worries, it was decided that the upcoming General Assembly resolution should “leave it open to the [UN] to take military action north of the 38th parallel if the North Koreans refused to sign an agreement pledging

⁶⁰⁷ See Escott Reid’s comments in *Secretary of State for External Affairs to Chairman, Delegation to UN General Assembly*, 26 Sept. 1950, [DEA/50069-A-40], doc. 103 in Donaghy 1996: 165.

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid.

⁶¹⁰ *Extract from Cabinet Conclusions*, 4 Oct. 1950, [PCO], doc. 106 in Donaghy 1996: 170.

⁶¹¹ *Secretary of State for External Affairs to Chairman, Delegation to UN General Assembly*, 28 Sept. 1950, [DEA/50069-A-40], doc. 105 in Donaghy 1996: 168.

cessation of hostilities”.⁶¹² Consistent with this policy, Reid rewrote the initial UK draft of the resolution. “Essentially”, he told Pearson, this rewrite “limits the [UN] to fulfillment of the Security Council resolutions”.⁶¹³ However, he added, the “reference to the restoration of international peace and security in the Korea area would *permit* the [UN] Commander to order punitive action against North Korea if the latter continued aggressive action against South Korea [emphasis added]”.⁶¹⁴

Like Canada, recall that Britain also wanted the Assembly resolution to cover “the contingency” of UN forces crossing the 38th parallel. Accordingly, although the UK’s initial draft was revised in negotiations at the UN, the final resolution recommended that “all appropriate steps” be taken to ensure stability throughout Korea, and “all constituent acts” be taken, under the UN, for the establishment of a unified, independent and democratic government. Contrary to Canada’s wishes, however, the resolution did not link the crossing of the 38th parallel to North Korea’s failure to stop fighting. This worried Canadian and Indian leaders. As St. Laurent stated at the Cabinet meeting noted above, “the Indian delegation [at the UN] had indicated that they could not support the Eight-Power resolution on the ground that it contemplated, or at least *permitted*, the penetration of UN forces beyond the 38th parallel and that this might in itself involve the risk of intervention by Communist China and Soviet Russia” [emphasis added].⁶¹⁵ In light of such concerns, St. Laurent suggested that the resolution be modified to address India’s position, and to require less than the “destruction or the unconditional surrender of North Korean forces”.⁶¹⁶ Pearson, though, was unable to secure such changes due to “the quick pace of events” at the UN.⁶¹⁷ Similarly, when he

⁶¹² *Secretary of State for External Affairs to Chairman, Delegation to UN General Assembly*, 28 Sept. 1950, [DEA/50069-A-40], doc. 105 in Donaghy 1996: 168.

⁶¹³ Ibid: 169.

⁶¹⁴ Ibid.

⁶¹⁵ *Extract from Cabinet Conclusions*, 4 Oct. 1950, [PCO], doc. 106 in Donaghy 1996: 169.

⁶¹⁶ The Cabinet approved St. Laurent’s suggestion. See *ibid*: 170.

⁶¹⁷ Stairs 1974: 123.

asked Dean Acheson to delay the resolution vote until contact was made with North Korea, Acheson was sympathetic but ultimately overruled by Truman and the US military.⁶¹⁸

Despite the private reservations of its leaders, Canada ultimately voted for the Assembly resolution,⁶¹⁹ and publicly acknowledged that the 38th parallel might have to be crossed. Outlining Canada's position at the UN on 27 September, Pearson said the "general objective" of the organization in Korea "should be to fulfill now the purposes which have repeatedly been stated at previous Assemblies – a united Korea, a free Korea".⁶²⁰ And this, he added, "should be achieved by [UN] action".⁶²¹ While Pearson sought to reassure China and reaffirm India's diplomatic role, he also said the UN "must assist the people of Korea to establish peace and order throughout their territory".⁶²² As such, he noted, "This is the time for the aggressors to cease fire ... If they do, it may not be necessary for [UN] forces in Korea ... to advance far beyond their present positions."⁶²³

In debating what their country's position on the Assembly resolution should be, it is clear that Canadian leaders and officials saw a need for additional UN authorization if the political situation in Korea was to be changed, and were aware that the resolution that was passed could be seen as permitting the crossing of the 38th parallel. However, it is less clear whether leaders and officials thought the resolution provided formal legal authorization for this action. On the one hand, during talks with US officials, Hume Wrong argued that the adoption of the resolution "would create a new position which in effect merged from the Assembly resolutions dealing with the unification of Korea adopted in 1947, 1948, and 1949 with the Security Council resolutions of June 25th and 27th, 1950, under which alone military action to repel the North Korean attack had been taken. This created *a new constitutional position* which the North Korean authorities ... should

⁶¹⁸ Pearson, comments to seminar on Canadian external relations, Carleton University, 16 Oct. 1972 (Stairs 1974: 124).

⁶¹⁹ Stairs 1974: 121-123.

⁶²⁰ Department of External Affairs, *Statements and Speeches*, 50/34.

⁶²¹ Ibid.

⁶²² Ibid.

⁶²³ Ibid.

have a chance to consider before [UN] troops moved into their territory” [emphasis added].⁶²⁴ On the other hand, we saw that Canada’s suggestion that North Korea be warned fell on deaf ears, and that Canadian leaders and officials, as Wrong’s comments indicate, granted formal priority to the prior Security Council resolutions on Korea. In any event, whether or not the 46 other states who voted for the Assembly resolution believed that UN forces would cross the 38th parallel, Canada’s government thought that the instrument could be seen as permitting this behaviour.

d) International law helped structure the development of new rules and legitimate practice

Finally, Canada’s reaction to the Korean crisis offers further evidence that, when states use force, international law helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice for states and other international actors. As noted in the previous chapter, a key example of this phenomenon is the Security Council’s novel response to North Korea’s attack. Like their UK counterparts, Canadian leaders sought to justify this response, and to use the situation to help create new collective security law.

Recall that when the Security Council authorized UN member states to restore peace in Korea, it did so in a manner not anticipated by the drafters of the UN Charter in 1945. At that time, it was expected that member states would provide permanent military forces to the Council under Article 43 of the Charter. By June 1950, though, no such forces had been granted. Thus, following North Korea’s attack that month, the Council authorized an *ad hoc* response that saw UN members provide their own forces towards a collective cause. This view, we saw, was often emphasized by Foreign Minister Pearson in his public speeches on the Korean crisis. For instance, recall that in his update to Parliament on 28 June, Pearson stated that North Korea had ignored the first Security

⁶²⁴ *Ambassador in United States to Secretary of State for External Affairs*, 5 Oct. 1950, [DEA/50069-A-40], doc. 110 in Donaghy 1996: 174.

Council resolution, and the Council itself had been unable to take direct military action because the UN forces envisioned under Article 43 had never been established. As a result, he said, if any steps were to be taken to deal with the crisis, they would have to be taken by individual Council members “acting within the terms of the Charter, but on their own initiative”. Further, recall that during his address to a group of engineers in July, Pearson linked this individual state “initiative” to a collective view by emphasizing that the Council’s novel response had been supported by 53 states.

Notwithstanding such justifications by America’s allies, we saw in the prior chapter that the USSR argued that the UN action in Korea was invalid. This criticism stemmed in part from the absence of the Soviet delegate at the Security Council when the initial resolutions on the Korean conflict were passed. In response to this concern, Canadian officials and leaders argued that the Council’s actions were a necessary reinterpretation of the Charter’s text, and were consistent with altered state practice on the issue. For example, commenting on the Council’s first resolution following North Korea’s attack, Douglas LePan, a diplomat in the UN division of the External Affairs Department, remarked that:

The [US] resolution was presented under Article 39 of the [UN] Charter ... [and] it was likely that the Soviets would protest [it] alleging that it is illegal under Article 27, which requires the affirmative vote of seven [Council] members, including the concurring votes of the permanent members. The Soviet Delegation absented itself from the meeting of June 25. Although in the past an *abstention* by a permanent member has not affected the capacity of the Security Council to take decisions on substantive questions, the Soviet Union may claim that its own *absence* on June 25 invalidates the resolution ... [emphasis in original].⁶²⁵

⁶²⁵ Extract from *Minutes of Meeting of Heads of Division*, 26 June 1950, [DEA/8508-40], doc. 10 in Donaghy 1996: 21.

Pearson responded to this concern in an update to Canada's embassies abroad. As he noted, "It will probably be argued by Soviet apologists that the resolution passed by the Security Council on the 25th of June is illegal because it was not passed with the concurring votes of all permanent members. In rebuttal, it could be urged that the practice by which an *abstention* of one of the permanent members has been construed to be equivalent to assent could be extended to cover as well the *absence* of a permanent member" [emphasis added].⁶²⁶

In sum, the above suggests that, during the early stages of the Korean War, Canada – like Britain – also sought to alter existing understandings of a) Article 27 of the UN Charter and b) Security Council voting procedures in order to help develop and promote a new legal rule – i.e. that refraining from attending a Council vote is equivalent to abstaining from that vote – and new legitimate practice for that international body. Further, Canada aimed to strengthen its position by citing the continuing practice of the Council, and the supporting views of 52 other states.

In addition to the foregoing efforts, Canadian leaders also used the Korean crisis to try to create a permanent volunteer UN brigade that would continue long after the conflict had been resolved.⁶²⁷ This might, they hoped, address the fact that the forces envisioned under Article 43 had never been made available. Although Canada was ultimately unsuccessful in establishing this brigade, the diplomatic discussions it had and the proposals it made were shaped by its interpretation of the relevant Charter provisions and state practice on the issue. For example, following the signing of the Charter in 1945, Canadian military leaders were asked to prepare for the possibility of Canada contributing forces to the UN under Article 43. By 1947, however, the St. Laurent government became frustrated by the USSR's use of its veto at the Council, and thought this continued behaviour would render the collective security provisions of the Charter

⁶²⁶ *Secretary of State for External Affairs to All Missions Abroad*, 28 June 1950, [DEA/50069-A-40], doc. 16 in Donaghy 1996: 32.

⁶²⁷ Donaghy 1995.

meaningless.⁶²⁸ Faced with this situation, St. Laurent and his advisers thought that an alternative was needed, either by revising the Charter or by using its articles which could not be vetoed.⁶²⁹ This desire to develop new legal rules and state practice helped lead to the creation of the NATO treaty in 1949,⁶³⁰ but it also animated Canada's reaction to the Korean crisis one year later.

Following the Security Council's response to the outbreak of hostilities in Korea, the office of the UN Secretary General received numerous offers of voluntary service by citizens of different countries.⁶³¹ In response, the office proposed the idea of creating a UN "Foreign Legion" comprised of individual volunteers or a UN "Division of organized national units".⁶³² According to Gerald Riddell, a Canadian official at the UN, the proposal initially received little encouragement in either form.⁶³³ Lester Pearson, though, mentioned the idea to St. Laurent. And, as we saw earlier, when the Prime Minister announced on 19 July that Canada would not send troops to Korea, he qualified this by adding that if the Security Council recruited a voluntary force for service there, Canada would immediately consider participating. St. Laurent's statement, Riddell noted, "brought [the idea back] to light".⁶³⁴ Further, he said, because the proposal "lacked any real sponsorship", there was a tendency at the UN "to suggest it is a Canadian idea".⁶³⁵

In advocating for this proposal, Pearson's analysis reflected the challenges and opportunities the Foreign Secretary saw in the relevant provisions of the UN Charter, and in the related practice of states. In a memo Pearson sent to the Prime Minister in early August, he noted that the "brigade would ... be the kind of help we would presumably have organized if we had been able to make a

⁶²⁸ Mackenzie 1995: 150.

⁶²⁹ Ibid.

⁶³⁰ Ibid.

⁶³¹ *Memorandum from Head, UN Division, to Secretary of State for External Affairs*, 28 July 1950, [L.B.P./Vol.35], doc. 57 in Donaghy 1996: 94.

⁶³² Ibid.

⁶³³ Ibid.

⁶³⁴ Ibid.

⁶³⁵ Ibid.

military agreement with the Security Council under Article 43”.⁶³⁶ In effect, Pearson wrote, this would mean that the Canadian army would include a brigade “specially trained for UN operations, as a contingent with other UN formations”.⁶³⁷ Apparently willing to sacrifice some of Canada’s sovereignty over the conditions under which it would use force, Pearson said the brigade:

underlines the fact that from now on we fight only as a result of UN decisions, and with other UN members as a Police Force to make such decisions effective and to restore peace. If Canada emphasized this principle in announcing its decision [to contribute to the brigade], *we might be initiating something new* in the way of backing up the United Nations which could have important consequences [emphasis added]. At the same time we would be basing one part of our small army on the Charter of the UN.⁶³⁸

Again, due to insufficient support from other states, Canada and the office of the UN Secretary General were ultimately unsuccessful in establishing a permanent voluntary UN brigade. Nonetheless, Pearson and St. Laurent’s efforts in this regard, along with the government’s related attempt to alter the understanding of Article 27 of the Charter, provide further evidence that when states use force, international law helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice.

Second hypothesis: international law is understood as binding and distinct

The aspects of Canada’s participation in the Korean War addressed above support this study’s argument about how international law influences the use of force by states. By contrast, the discourse and behaviour of Canadian leaders during the conflict offer mixed support for the

⁶³⁶ *Memorandum from Secretary of State for External Affairs to Prime Minister*, 3 Aug. 1950, [L.B.P./Vol.35], doc. 63 in Donaghy 1996: 106.

⁶³⁷ *Ibid.*

⁶³⁸ *Ibid.*

hypothesis that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making. As will be seen below, like their British counterparts, there is evidence that some Canadian leaders saw the Security Council resolutions on the Korean crisis more in political and moral, rather than distinctly legal, terms. Further, while Article 118 of the Third Geneva Convention on POWs – the important POW rule described in the prior chapter – was viewed in binding terms, the perceived requirements of this rule conflicted with other political and moral considerations at the time, and these factors appear to have ultimately exerted a greater impact on the government than the law at issue.

a) Canada's interpretation of the Security Council resolutions on the Korean crisis

Recall that, during the Korean crisis, UK leaders emphasized that the Security Council had “recommended” under Article 39 of the UN Charter – not “decided” under Articles 41 or 42 – that action be taken to assist South Korea. And this was associated with these leaders seeing the Council resolutions more in political and moral, rather than distinctly binding, terms. By contrast, there is less available evidence that Canadian leaders were as aware of, or concerned about, whether the Council had “recommended” or “decided” that help be provided to South Korea.⁶³⁹ There is evidence, however, that – like their UK counterparts – some Canadian leaders nonetheless also saw the Council resolutions more in political and moral, rather than distinctly binding, terms.

For instance, in the update he sent to Canada's embassies abroad on 28 June 1950, Pearson remarked that the legal disputes that could arise over the Security Council's first resolution on Korea “are perhaps immaterial when set beside the plain fact that the [US] has secured a condemnation of this Communist attack by all those members of the Security Council which were

⁶³⁹ See e.g. the documents in Donaghy 1996. Consistent with the conclusion that Canadian leaders appeared less aware of, or concerned about, whether the Security Council had “recommended” or “decided” that help be provided to South Korea, Lester Pearson referred to the Council's “decision” regarding Korea in a telegram in July 1950, and did not use the term “recommend”.

present (with the single exception of Yugoslavia, which abstained) and has thus obtained strong *moral* support for whatever military measures it feels able to take in Korea” [emphasis added].⁶⁴⁰

In addition to Pearson’s private comments, his public remarks indicate a similar understanding of the Security Council’s resolutions on Korea. For example, in his address to the group of engineers in July, noted earlier, Pearson stated that Canada’s position on Korea was “dictated by the necessity of supporting United Nations action”.⁶⁴¹ That was Canada’s “only obligation”, he said, and it was being discharged “from considerations both of *national honour* and *national safety*” [emphasis added].⁶⁴²

b) Canada’s interpretation of Article 118 of the Geneva Convention on POWs

In contrast to the way the Security Council resolutions were viewed, there is evidence that some Canadian leaders and officials understood Article 118 of the Geneva Convention on POWs in distinctly binding terms. However, the perceived requirements of this rule conflicted with other political and moral considerations at the time, and these factors appear to have ultimately exerted a greater impact on the government than the law at issue.

As noted in the last chapter, Article 118 states that “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”. During the negotiations aimed at ending the Korean War, however, it became known that some of the North Korean and Chinese soldiers who had been captured by the UN force did not want to be repatriated. In response to this development, the communist delegation at the truce talks invoked Article 118, while the US proposed a new principle, “voluntary repatriation”, which would allow POWs to be interviewed and choose where they would be sent. In deciding how to respond to the US position, Canadian leaders

⁶⁴⁰ *Secretary of State for External Affairs to All Missions Abroad*, 28 June 1950, [DEA/50069-A-40], doc. 16 in Donaghy 1996: 32.

⁶⁴¹ Cited in Stairs 1974: 73.

⁶⁴² Fraser “Backstage at Ottawa”, *Maclean’s*, 1 Sept. 1950, at 4.

faced the same dilemma as UK officials. Under the political circumstances of the nascent Cold War, it seemed unwise and unrealistic to forcefully send anti-communist POWs back to communist countries. Further, leaders understood the moral implications of sending men back to face possible punishment or death by what the West perceived to be oppressive regimes. For instance, in an update to Canada's Ambassador in Washington on 7 February 1952, Under-Secretary for External Affairs Dana Wilgress said that he and Pearson "appreciate the very strong arguments in favour of the [UN] demand for the voluntary repatriation of prisoners".⁶⁴³ There would, Wilgress noted, "be strong protests in this country against returning to the North Korean or Chinese authorities [POWs] whom we hold and who do not want to be returned because of their opposition to those communist regimes".⁶⁴⁴ Voluntary repatriation, he added, was an effort to be "humane" to these prisoners.⁶⁴⁵

And yet, notwithstanding the above political and moral concerns, Article 118 clearly stated that POWs shall be released and repatriated without delay after the cessation of active hostilities. To disregard this rule would have been inconsistent with Canada's former position in 1949 and, leaders worried, could have threatened the safety of UN prisoners in North Korea.⁶⁴⁶ It could also set a dangerous precedent for future wars. As Wilgress explained, the issue:

[I]s further complicated ... by the question [of] whether it is in the interest of the Western World to establish in Korea the precedent that [POWs] have the right to waive their right to repatriation. If this precedent is established by the Korean Armistice, the Soviet Union might in the event of a general war contend that any [POW] whom they hold had the right at any time during hostilities to request release from prison camp in lieu of eventual repatriation, and, having been released from camp, to enlist in the armed forces of Russia.⁶⁴⁷

⁶⁴³ *Extract from Telegram from Secretary of State for External Affairs to Ambassador in United States, 7 Feb. 1952, [DEA/50069-A-40], doc. 90 in Barry 1990: 100.*

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid.*

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *Ibid.*

With such a precedent, Wilgress and Pearson worried, allied POWs in a future war would be in “a position where the Soviet Government could, with some outward show of *legality*, intimidate them into waiving their right to repatriation” [emphasis added].⁶⁴⁸

Citing Article 118 and Article 7,⁶⁴⁹ Wilgress further noted that one of the principles of the Third Geneva Convention “is the unconditional release and repatriation of prisoners ... Presumably, the Western Powers had this principle embodied in the Convention because they considered that it would serve their interests in a general war. The [UN] proposal for the voluntary repatriation of [POWs] is, in the opinion of our Legal Division, *contrary* to these Articles” [emphasis added].⁶⁵⁰

The above suggests that, in deciding how to respond to America’s position on POWs during the Korean armistice negotiations, Canadian leaders were faced with a situation where political and moral factors pointed in one direction – i.e. support the principle of voluntary repatriation – and international law pointed in another – i.e. implement Article 118. As noted in the prior chapter, if theorizing and observing a distinct nature and effect of international law is possible in IR research, then this is arguably one such situation. Indeed, in arguing that the acceptance of voluntary repatriation could lead to a dangerous precedent, Wilgress and Pearson explicitly cited the current and future legality of this principle. Nonetheless, in the end, the government did not publicly ask the US to withdraw its demand for the voluntary repatriation of prisoners. Reflecting the difficulty of the issue, during the protracted peace negotiations that continued until July 1953, Pearson sought

⁶⁴⁸ *Extract from Telegram from Secretary of State for External Affairs to Ambassador in United States*, 7 Feb. 1952, [DEA/50069-A-40], doc. 90 in Barry 1990: 100.

⁶⁴⁹ Article 7 provides that POWs cannot renounce their rights.

⁶⁵⁰ “Most of the countries which have forces in Korea”, Wilgress added, “have not yet ratified this Convention and the Communist forces in Korea have not lived up to it. Our countries have, however, devoted considerable efforts to trying to conclude the Geneva (Red Cross) Humanitarian Conventions with the Soviet Union in the hope that if these Conventions are in force during a general war, they will at least do something to render less likely harsh and arbitrary treatment by the Russians of our prisoners. Our countries, therefore, have an interest in [preserving] the principles of these conventions” (*Extract from Telegram from Secretary of State for External Affairs to Ambassador in United States*, 7 Feb. 1952, [DEA/50069-A-40], doc. 90 in Barry 1990: 100).

to bridge the American position – which emphasized voluntary repatriation – with that of India’s – which was more consistent with the wording of Article 118.⁶⁵¹

Conclusion

The aspects of Canada’s participation in the Korean War assessed above support the argument that, when states use force, international law helps define and shape their possible course of action, and the justifications that can be made for their behaviour. More specifically, these aspects help illustrate the four roles that international law can play in the use of force by states.

First, the fact that Canada decided to a) join UNTCOK in 1948, b) support the Security Council resolutions on the Korean crisis in 1950, and c) contribute significant naval, air and ground forces to the UN mission in Korea even though the country was not seen as strategically important suggests that international law can help constitute a state’s identity and be used to redefine its political and military objectives. As we saw, Prime Minister St. Laurent, Defence Minister Claxton, and Foreign Minister Pearson believed that Canada’s formal membership in the UN carried corresponding obligations, including the duty to defend – by force if need be, and even in situations where Canada’s own interests were not directly at stake – the principles of the UN Charter, the effectiveness of the UN organization, and the concept of collective security. While other leaders, such as former Prime Minister Mackenzie King, did not feel the same sense of responsibility regarding the UN and the Korean crisis, St. Laurent and Pearson sought to reorient his thinking through legal interpretation of a relevant UN resolution. And it is this interpretation that ultimately led King to allow Canada to join UNTCOK. Following the government’s decision to contribute to the UN military force in Korea two years later, St. Laurent, Pearson and Claxton continued to

⁶⁵¹ In December 1952, Canada supported India’s resolution on Korea at the UN General Assembly. This instrument implicitly recognized Article 118. In April 1953, however, Canada also supported the US negotiating position, which was based in part on the principle of voluntary repatriation. See Lee 1995: 218.

believe that Canada, as a middle power state that had helped create the UN, was now obligated to support the organization's collective "police action" against aggression.

Second, in addition to its constitutive effect, international law also had a regulative impact on Canada's participation in the Korean War. The first example of this influence was Canada's non-participation in the US naval blockade of Taiwan. As we saw, there is evidence that this non-participation was shaped in part by Canada's understanding of the scope of the Security Council's resolutions on the Korean crisis. The second example of law's regulative role was Canada's use of the General Assembly's 1948 UNTCOK resolution and the Security Council's resolutions on Korea to help constrain America's response to the crisis. As we saw, in the discussions behind the election in South Korea in 1948 and the adoption of the third Security Council resolution in 1950, Canada sought to influence the US negotiating position and shape the outcome of the talks. And Canada's interpretation of the international legal factors at issue played a role in this regard. In addition, Canada used its understanding of the Security Council resolutions to help constrain America's conduct with respect to Taiwan and China.

Third, when Canada responded to the Korean crisis, international law helped permit and legitimate certain political and military practices that otherwise might not have been permitted. The first example of this role was the fact that Canada intervened militarily in what was in many ways an ideologically divisive and extremely violent *civil* war, and justified this publicly and privately with reference to the Security Council resolutions on the crisis and the UN Charter's provisions on collective security. The second example was that Canada – while more worried than Britain about the issue – ultimately supported the US decision to cross the 38th parallel in Korea in October 1950, and voted for the General Assembly resolution that aimed to provide UN support for this crossing.

Finally, Canada's reaction to the Korean crisis suggests that, when states use force, international law helps structure the process by which agents seek to develop and promote new legal

rules and legitimate practice for states and other international actors. An important example of this phenomenon, we saw, was the Security Council's novel response to North Korea's attack, and the efforts of Canadian leaders to justify this response and to create new collective security law.

With respect to this study's second hypothesis, the discourse and behaviour of Canadian leaders regarding the Korean conflict offer mixed support for the view that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making. On the one hand, we saw that leaders recognized that the use of military force in Korea and the treatment of enemy POWs were in part legal issues, in that they were governed by pre-existing rules in the UN Charter and Geneva Conventions. Moreover, leaders discussed the extent to which Canada was legally obligated to consider these rules when deciding whether and how to use force in Korea, and what policy to adopt regarding the repatriation of enemy POWs. Finally, leaders recognized that Canada's involvement in the US-led intervention in Korea was subject to international legal critique, and required legal justification at the domestic and international level. The preceding details resonate with many of the relevant observable implications posited in the introduction chapter, and suggest that Canadian leaders such as St. Laurent and Pearson felt bound in part by international law.

On the other hand, we also saw that some Canadian leaders interpreted the Security Council's resolutions on the Korean crisis more in political and moral, rather than expressly binding, terms. By contrast, a key POW obligation under the Third Geneva Convention, Article 118, was seen in distinctly legal terms. However, the perceived requirements of this rule conflicted with other political and moral considerations at the time, and these factors appear to have ultimately exerted a greater impact on Canada than the law at issue.

Chapter 4: Britain and the Afghanistan Conflict

Cognizant of the prior discussion of the Korean War, I now turn to a more contemporary conflict, namely the Afghanistan Conflict of 2001-present. This chapter examines important aspects of the United Kingdom's participation in this war with a view to better understanding how international law influenced this participation, and whether key leaders and officials understood said law as a binding and distinct phenomenon. The aspects of Britain's participation that are assessed touch upon its policy and practice regarding: a) whether and how to be involved in the military operations in Afghanistan following 9/11; b) the major international legal issues related to the conflict; and c) the treatment of captured enemy fighters.

The chapter is organized as follows. It begins by providing a brief background to the current hostilities in Afghanistan, and outlining the three main phases of Britain's involvement. Next, I summarize the existing literature on why Britain has participated in the Afghan war, and suggest how this study contributes to this growing body of work. The rest of the chapter then analyzes Britain's involvement in the conflict from the perspective of international law. By considering the key aspects of UK policy and practice noted above, I first analyze whether and how these aspects reflect the four roles of international law that were theorized in chapter one. Next, I analyze the extent to which UK policy-makers understood international law as a binding and distinct set of legal rules, and the degree to which the legal status of these rules impacted their decision-making. I do so by examining Britain's interpretation of its obligations and rights under the UN Charter and NATO treaty, and its commitments under relevant principles of international human rights law. I conclude by summarizing my findings.

Throughout the chapter, I argue that Britain's participation in the Afghanistan Conflict offers evidence in support of this study's main thesis that, when states use military force abroad,

international law helps define and shape their possible course of action, and the justifications that can be advanced for their behaviour. However, I also suggest that the discourse and actions of some of the key UK leaders and officials in power during the war offer mixed support for the hypothesis that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making.

Brief background to the Afghanistan Conflict

As is now infamously well known, on 11 September 2001, al Qaeda terrorists hijacked four passenger jets and intentionally crashed two of the planes into the World Trade Center in New York City, and a third into the Pentagon in Washington, D.C.⁶⁵² Nearly 3,000 people died in the attacks, including nationals from 77 countries.⁶⁵³ The overwhelming majority of the casualties were civilians. In response to these events, and the perception that the Taliban in Afghanistan were allowing al Qaeda to use their territory as a base of operation, US President George W. Bush declared that the attacks were an act of war and demanded in part that the Taliban deliver all al Qaeda leaders in their territory to the US.⁶⁵⁴ When the Taliban refused,⁶⁵⁵ the US – aided by Britain, Canada and other states – initiated military actions against Afghanistan on 7 October 2001.⁶⁵⁶ These actions, which included air strikes and operations by special forces, were part of Operation Enduring Freedom (OEF), the US-led response to international terrorism that is global in scope and currently ongoing.

⁶⁵² The hijackers had directed the fourth plane toward Washington, D.C., aiming to target either the Capital Building or the White House. However, passengers aboard the aircraft attempted to retake control of the plane, and it crashed into a field in rural Pennsylvania. Everyone on board was killed.

⁶⁵³ For a list of these countries, see: www.interpol.int/public/ICPO/speeches/20020911List77Countries.asp

⁶⁵⁴ US President George W. Bush, “Address to Congress”, 20 Sept. 2001.

⁶⁵⁵ From the late 1990s to the Fall of 2001, Taliban leader Mullah Omar consistently refused to hand over Osama Bin Laden to the US or Saudi Arabia. To do so, he argued, would be inconsistent with the Pashtun tribal code that forbade the betrayal of guests (Wright 2006: 267).

⁶⁵⁶ In total, 37 countries have contributed to the military mission in Afghanistan, and 60 countries have helped with development and reconstruction (Stein & Lang 2007: 285).

On 13 November 2001, local Northern Alliance ground forces captured Kabul, effectively ending Taliban rule.⁶⁵⁷ On 27 November, delegates from rival groups, excluding the Taliban, joined negotiations sponsored by the United Nations in Bonn, Germany, on the future of Afghanistan. These talks culminated in the Bonn Agreement of 5 December.⁶⁵⁸ Hamid Karzai, a Pashtun tribal leader, was chosen to lead an interim power-sharing council, the Afghan Transitional Authority (ATA), which took office in Kabul on 22 December. Karzai was appointed President of the ATA by the UN on 13 June 2002.⁶⁵⁹ He was formally elected President on 9 October 2004, and has retained the position until the present day. A second conference on Afghanistan was held in Bonn in December 2011.⁶⁶⁰

In addition to the US-led forces operating under OEF, an International Security Assistance Force (ISAF) has also been present in Afghanistan since early 2002. In December 2001, following negotiations led in part by Britain,⁶⁶¹ the UN Security Council passed Resolution 1386.⁶⁶² Reflecting a request from the Bonn Agreement, this resolution created ISAF and authorized it to use “all necessary measures”, including force, to assist the ATA in providing security in and around Kabul.⁶⁶³ ISAF’s mandate has been unanimously renewed by the Council every year since, and expanded to help provide security throughout Afghanistan.⁶⁶⁴ NATO assumed leadership of ISAF

⁶⁵⁷ Turner 2006: 81-82.

⁶⁵⁸ Agreement on Provisional Arrangements in Afghanistan pending the Re-establishment of Permanent Government Institutions (5 Dec. 2001), [UN Doc. S/2001/1154].

⁶⁵⁹ Karzai was appointed President after consultation with the Northern Alliance and a group of elected delegates known as the *Loya Jirga* (Turner 2006: 81-82).

⁶⁶⁰ Ahmed Rashid, “Afghan Peace At Stake in Bonn”, BBC News online, 4 Dec. 2011.

⁶⁶¹ Blair 2010: 361; and interview with Sir Nigel Sheinwald, London, 8 July 2013.

⁶⁶² UNSC Resolution 1386 (20 Dec. 2001), [UN Doc. S/RES/1386], *On the Situation in Afghanistan*.

⁶⁶³ Ibid; and NATO website, “About ISAF”.

⁶⁶⁴ Government of Canada, *Canada’s Mission in Afghanistan* (February 2007) at 3. The Security Council expanded ISAF’s mandate on 13 Oct. 2003, through Resolution 1510, [UN Doc. S/RES/1510].

in August 2003, in part as a result of lobbying efforts by Canada.⁶⁶⁵ The mission expanded in four stages, from December 2003 to October 2006.⁶⁶⁶

The three phases of Britain's military participation in the Afghanistan Conflict

Britain's military participation in the Afghanistan Conflict can be divided into three main phases. The initial phase took place between October 2001 and late 2002. It involved an incremental buildup of forces operating first under OEF and then the ISAF mandate. On 7 October 2001, Prime Minister Tony Blair confirmed that UK forces were engaged in the initial US-led military actions against Afghanistan.⁶⁶⁷ These included ground operations by special forces, missile strikes from Royal Navy submarines, and reconnaissance and refueling sorties by the Royal Air Force in support of the US.⁶⁶⁸ In early 2002, Britain offered to lead the ISAF force in Kabul. It initially sent 1,800 troops to the mission.⁶⁶⁹ The UK reduced this number to 400 after Turkey took command of ISAF in June 2002, but increased its contribution (at one point to 1,700 troops) to the ongoing US-led operations against the Taliban and al Qaeda.⁶⁷⁰

Although somewhat overshadowed by Britain's involvement in the Iraq War around the same time,⁶⁷¹ the country's second phase of military action in Afghanistan occurred between early 2003 and late 2005. It involved the UK leading a Provincial Reconstruction Team and contributing soldiers to ISAF after NATO took command of the operation in August 2003, and ISAF's mandate expanded to include the provision of security throughout Afghanistan.⁶⁷²

⁶⁶⁵ The stated aim of having NATO take responsibility for the ISAF mission was to overcome the challenges of finding new countries to lead the mission, and to provide a more permanent headquarters for coordinated operations. See NATO website, "About ISAF".

⁶⁶⁶ Ibid.

⁶⁶⁷ HM Government website, "UK Forces: Operations in Afghanistan".

⁶⁶⁸ Hansard, House of Commons Debates ["HC Debs."], 16 Oct. 2001, vol. 372, col. 1132.

⁶⁶⁹ HC Debs., 19 Dec. 2001, vol. 377, cols. 304-5; and HC Written Answers, 14 Jan. 2002, vol. 378, col. 51w.

⁶⁷⁰ HC Debs., 29 April 2002, vol. 384, col. 649; and HC Debs., 20 June 2002, vol. 387, col. 409.

⁶⁷¹ Clarke 2011: 14.

⁶⁷² HC Written Answers, 22 Oct. 2003, vol. 411, col. 588w.

The third phase of Britain's participation in the Afghanistan Conflict started in early 2006 and is scheduled to end in 2014. It has involved a significant number of UK forces being deployed to Helmand, a volatile province in southern Afghanistan, through a series of authorizations and extensions.⁶⁷³ In January 2006, then Defence Minister John Reid announced that 3,300 soldiers were being sent to Helmand as part of ISAF, bringing the total number of UK troops in the country to over 5,000.⁶⁷⁴ In response to escalating violence in Helmand, troop numbers there were increased to 4,500 six months later.⁶⁷⁵ Further troop increases were announced in February 2007 (bringing the total number of UK forces in Afghanistan to around 7,700),⁶⁷⁶ and in the spring of 2009 (bringing the overall figure to over 8,000).⁶⁷⁷ Despite indications by the Brown and Cameron governments that troop numbers would be maintained or decreased, levels actually peaked at over 10,000 by 2011.⁶⁷⁸ And, although Britain's combat role in Afghanistan is scheduled to end in 2014, troop numbers are planned to remain relatively high until then.⁶⁷⁹

Why Britain has participated in the Afghanistan Conflict

Like Britain's participation in the Korean War, the country's extensive and costly⁶⁸⁰ involvement in the still-ongoing Afghanistan Conflict is also not immediately easy to explain in

⁶⁷³ For a description and analysis of the initial decisions behind this third phase, see Clarke 2011.

⁶⁷⁴ HC Debs., 26 Jan. 2006, vol. 441, cols. 1531-3.

⁶⁷⁵ HC Debs., 10 July 2006, vol. 448, col. 1134.

⁶⁷⁶ HC Debs., 26 Feb. 2007, vol. 457, cols. 619-20.

⁶⁷⁷ HC Debs., 16 June 2008, vol. 477, col. 676.

⁶⁷⁸ See HM Government, *UK Policy in Afghanistan and Pakistan* (2009) at 18; and Clarke 2011: 7.

⁶⁷⁹ Clarke 2011: 7.

⁶⁸⁰ Britain's participation in the Afghan Conflict has resulted in the most difficult fighting UK forces have seen since the Korean War. As of May 2013, 444 soldiers had died in the conflict, and thousands more had been wounded. UK troop deaths in Afghanistan are much higher than those incurred in the Iraq War and the Falklands War. Research has also shown that, from around 2008 to 2010, the rate at which British soldiers were killed in Afghanistan was almost four times that of their US counterparts, and double the rate which is defined as "major combat". See "British dead and wounded in Afghanistan, month by month", *The Guardian* website, June 2013. Regarding the financial cost of the Afghan Conflict, the UK Ministry of Defence has estimated the cost thus far of conducting military operations in Afghanistan to be about £25 billion. Critics argue that the figure is closer to £37 billion, and will likely rise to £40 billion by 2020 (Ledwidge 2013).

strict national interest terms, narrowly conceived.⁶⁸¹ The two factors one might presume to be most relevant – i.e. Britain’s alliance with the US and its security concern regarding al Qaeda – may help explain why Britain initially used force in Afghanistan, but it is less clear why the UK military has remained in the country for so long, and why Britain has agreed to contribute to the difficult “nation building” and counter-insurgency efforts there.

Reflecting this empirical puzzle, much of the existing literature that addresses Britain’s involvement in the Afghan Conflict has focused on analyzing and criticizing the strategic coherence of this involvement,⁶⁸² or describing the experiences of UK forces on the ground.⁶⁸³ Another body of related work has assessed Britain’s adaptation to counter-insurgency operations in Helmand, and the implications of this process for the future of UK military doctrine.⁶⁸⁴ In comparison to the foregoing accounts, however, there is less research available that comprehensively outlines and analyzes the government decisions regarding the UK’s three phases of participation in the Afghan Conflict, and the foreign and domestic factors that have shaped those decisions. John Kampfner’s book, *Blair’s Wars*, draws on interviews with more than 40 current and former senior ministers, advisors, and civil servants, and usefully engages in some description and assessment of the UK’s first phase.⁶⁸⁵ Kampfner’s account suggests that Britain’s military involvement in Afghanistan – as well as four other recent conflicts, including the Iraq War – should be understood in light of the bold personality of former Prime Minister Tony Blair, and his ethical view that evils such as mass terrorism must be addressed and that foreign intervention is sometimes necessary to do so.⁶⁸⁶ It

⁶⁸¹ For an acknowledgement of this observation, see Kampfner 2004: ix. For a similar observation regarding Britain’s difficult military campaign in Helmand since 2006, see Clarke 2011: 29.

⁶⁸² See e.g. Fergusson 2008, Ledwidge 2011, Jermy 2011, Farrell 2011, and Bird & Marshall 2011.

⁶⁸³ See e.g. Bishop 2007, Terrill 2007, Tootal 2009, and Benitz 2011. See also BBC2, *Afghanistan: War Without End?*, 22 June 2011, and BBC2, *Afghanistan: The Battle for Helmand*, 29 June 2011.

⁶⁸⁴ See e.g. Farrell 2011, Griffin 2011, Egnell 2011, Catignani 2012, and Griffin 2013.

⁶⁸⁵ Kampfner 2004: 107-151.

⁶⁸⁶ Ibid: ix, 11, 110-11.

should also be understood, Kampfner suggests, in light of Blair's political belief that Britain must support the US.⁶⁸⁷

In addition, Michael Clarke's edited collection of essays, *The Afghan Papers*, also draws on interviews with former senior military, political and civil service personnel, and focuses on the initial decisions behind the third phase of the UK's involvement in the Afghan Conflict.⁶⁸⁸ One way of understanding these decisions, Clarke contends, is as a result of a) the political view among the US and its allies that al Qaeda and the Taliban must be denied any ungoverned space in Afghanistan from which future terrorist attacks could be launched, and b) the international "momentum" created by the involvement of NATO and the UN in the country following 9/11.⁶⁸⁹ "Having engaged with the need to 'do something' about Afghanistan in late 2001", Clarke notes, "the momentum of multinational action was very hard to escape. [By 2005, the] choice appeared to be to let the strategy fail, or engage more with it."⁶⁹⁰

In seeking to explain why Britain has participated in the Afghan Conflict, assessing whether primacy should ultimately be granted to internal factors, such as the particular psychology of Tony Blair, or external inputs, such as the international momentum associated with NATO's involvement in the war, will likely have to wait until more evidence becomes available. For instance, in contrast to Britain's participation in the Iraq War, the country's military involvement in Afghanistan has received significantly less official attention. Iraq has been the subject of five government inquiries, including the ambitious Chilcot Inquiry that was launched in 2009. No comparable investigation has been completed on the Afghan Conflict, although some oral evidence given at the Chilcot

⁶⁸⁷ Kampfner 2004: ix, 11, 110-11.

⁶⁸⁸ Clarke 2011.

⁶⁸⁹ Ibid: 10-12.

⁶⁹⁰ Ibid: 12.

Inquiry has addressed the topic.⁶⁹¹ Moreover, some reports have been released by government committees that discuss Britain's military involvement in Afghanistan,⁶⁹² and one of these reports has expressed concern about the way early decisions regarding this involvement appear to have been made.⁶⁹³ Finally, there are some domestic court cases that address the issue of Britain's policy and practice regarding Afghan detainees, and these cases make helpful reference to witness statements and documentary evidence on the issue.⁶⁹⁴

In light of the current state of the literature on Britain and the Afghan Conflict, and the evidence that is available, this chapter draws on the work that exists and seeks to contribute to the growing body of knowledge on this topic. Consistent with what one might presume, there is evidence that Britain's alliance with America and its security concern regarding al Qaeda are important to understanding the UK's military involvement in Afghanistan. However, *despite* this environment of US dominance and perceived security threats, there is also evidence that Britain's understanding of its rights and duties under the UN Charter and its obligations under relevant international human rights law have influenced the advice of officials and the decisions of leaders regarding the nature and scope of the UK's participation in the Afghan Conflict, and the justifications that could be made for its actions.

The four roles of international law in Britain's use of force in Afghanistan

Britain's involvement in the Afghanistan Conflict offers evidence in support of this study's main argument that, when states use force, international law helps define and shape their possible course of action, and the justifications that can be made for their behaviour. More specifically, this

⁶⁹¹ See e.g. the oral evidence given by Peter Ricketts (24 Nov. 2009), Jeremy Greenstock (27 Nov. 2009), and John Reid (3 Feb. 2010).

⁶⁹² See e.g. HM Government, *UK Policy in Afghanistan and Pakistan* (2009); and Public Administration Select Committee, *Who Does UK National Security?*, HC 435, 18 Oct. 2011, and HC 713, 28 Jan. 2011.

⁶⁹³ House of Commons Defence Committee, *Operations in Afghanistan*, HC 554, 17 July 2011, at paras. 28, 67.

⁶⁹⁴ See e.g. *R (Evans) v SS Defence*, [2010] EWHC 1445 (Admin).

involvement illustrates the four roles that international law can play in the use of force. Below, I consider important aspects of Britain's military participation in Afghanistan to demonstrate each role more fully.

a) International law helped constitute the identities of some UK leaders and officials

Like Clement Attlee during the Korean War, there is evidence that former Prime Minister Tony Blair felt a sense of obligation towards the conflict in Afghanistan that followed the events of 9/11. Unlike with Attlee, however, this perception of obligation appears to have been shaped less by Britain's formal membership in the United Nations and a belief in the international rule of law, and more by Blair's ethical views, noted earlier, that mass terrorism must be addressed and that foreign intervention in Afghanistan was needed to do so. More generally, though, during the three phases of Britain's military participation in the Afghanistan Conflict, there is evidence that the UK's perceived commitments to the UN and NATO helped constitute the identities of some UK leaders and government officials, and helped shape the way in which Britain's interests were interpreted and pursued. Further, as the Afghan war became more challenging and US military policy in the region became more controversial, these perceived commitments acted as a site for a "communicative" struggle over Britain's legitimate identity and rightful behaviour with respect to these developments.

The decisions behind phase one of Britain's participation in the conflict appear to have occurred in three stages. The first stage involved the decisions that led to the various force deployments in the fall of 2001, described earlier. Stage two involved the decision in late 2001 to lead and send ground troops to the UN-authorized ISAF mission in Kabul. After Turkey took command of ISAF in June 2002, the third stage involved the decision to contribute soldiers to the ongoing US-led operations against the Taliban and al Qaeda.

Regarding the first stage, Blair explains in his memoirs that he saw the events of 9/11 as a declaration of war on the US and “all of us who shared the same values”.⁶⁹⁵ President Bush, recall, also described 9/11 as an act of war. By contrast, we will see in the next chapter that Canadian leaders did not tend to describe 9/11 this way. To win the war against terrorism, Blair continues, “would not and does not require simply a military strategy to defeat an enemy that is fighting us. It requires a whole new geopolitical framework. It requires nation-building. It requires a myriad of interventions deep into the affairs of other nations. It requires above all a willingness to see the battle as existential and to see it through, to take the time, to spend the treasure, to shed the blood [...]”.⁶⁹⁶ These observations, it should be noted, generally resonate with the security and alliance concerns Alastair Campbell describes in his diary entries from the fall of 2001;⁶⁹⁷ the memoirs of Christopher Meyer, Britain’s Ambassador to the US at the time;⁶⁹⁸ and the reflections of Peter Ricketts, a former Political Director of the Foreign and Commonwealth Office, UK representative to NATO, and National Security Advisor to the Prime Minister.⁶⁹⁹ Similarly, Nigel Sheinwald – a former UK Representative to the EU, Foreign Advisor to the Prime Minister, and Ambassador to the US – says the core mission in Afghanistan has always been about security and “ensuring al Qaeda can’t operate [there]”.⁷⁰⁰

Blair’s observations above also reflect views he expressed in an important foreign policy speech in Chicago in April 1999, during NATO’s bombing campaign in Kosovo. In that speech,

⁶⁹⁵ Blair 2010: 345.

⁶⁹⁶ Ibid: 349.

⁶⁹⁷ Campbell 2008: 559-596. Campbell was Blair’s press secretary and a trusted advisor. At a meeting on the evening of 11 September 2001, Campbell noted that Blair stressed “the importance of a diplomatic strategy to support the US”, and said “it was vital that we worked up an international agenda that went beyond the US just hitting Afghanistan”.

⁶⁹⁸ Meyer 2005: 182-206.

⁶⁹⁹ Phone interview with Sir Peter Ricketts, 26 June 2013. The main reason Britain has fought in the Afghan Conflict, Ricketts says, is “a sense that we were all subject to the same terrorist threat of the al Qaeda group ... and therefore we needed to have a collective reaction”. This core reason, he thinks, has animated the thinking of the Blair, Brown and Cameron governments regarding Afghanistan, although different priorities have been emphasized at different times, such as development or counter-narcotics.

⁷⁰⁰ Interview with Sir Nigel Sheinwald, London, 8 July 2013. Unlike Blair, Sheinwald also says that, while Britain has pursued political and development goals in Afghanistan, “our aim was never grandiose nation-building”.

Blair argued that “We are all internationalists now, whether we like it or not. [...] We cannot turn our backs on conflicts and the violation of human rights within other countries if we still want to be secure”.⁷⁰¹ He also set out criteria for determining when intervening in the internal affairs of sovereign states was appropriate.⁷⁰² Unlike similar criteria on such matters,⁷⁰³ Blair did not stress the importance of having “right authorization” from the UN Security Council. Perhaps for this reason, members of the UK Foreign Office at the time, and particularly its legal team, were dismayed by Blair’s speech.⁷⁰⁴ Blair did, however, state that “If we want a world ruled by law and by international cooperation then we have to support the UN as its central pillar”, and argued for reforming the UN and its Security Council to make them work. Like his memoir reflections ten years later, Blair also stressed that intervening was only appropriate if the international community was “prepared for the long term ... [and would not] simply walk away once the fight was over”.⁷⁰⁵

Consistent with this latter criterion, there is evidence that, following 9/11, UK leaders recognized that Afghanistan would need to be secured and rebuilt, that the UN should play a role in this regard, and that Britain could take a lead in pursuing both objectives. For instance, in the lead-up to the initial military actions in Afghanistan in 2001, Blair and Foreign Secretary Jack Straw faced questions in Parliament from some Labour Party backbenchers who wanted confirmation that Britain was working with Secretary General Kofi Annan, and “that the UN’s role in the programme on which we are embarked will not be limited simply to organising humanitarian aid?”.⁷⁰⁶ These questions reflected the fact that, although members of the Labour Party supported George W. Bush

⁷⁰¹ Tony Blair, “Address to the Chicago Economic Club”, 22 April 1999.

⁷⁰² Professor Lawrence Freedman wrote much of the text on which Blair relied (Kampfner 2004: 52).

⁷⁰³ See e.g. the 2001 report by the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*.

⁷⁰⁴ Kampfner 2004: 53.

⁷⁰⁵ The other criteria were: “[A]re we sure of our case? ... [H]ave we exhausted all diplomatic options? ... [O]n the basis of a practical assessment of the situation, are there military operations we can sensibly and prudently undertake? ... And finally, do we have national interests involved?”

⁷⁰⁶ See Lynne Jones’ statements in Parliament, in HC Debs., 4 Oct. 2001, col. 691.

immediately following 9/11, this support was challenged by his subsequent “gun slinging ‘wanted: dead or alive’ declarations”.⁷⁰⁷ This tension in the foreign policy outlook of the Labour Party, recall, was also present during the Korean War. Again, it reflects a disagreement between party members who think Britain’s foreign and defence interests are best pursued by focusing on the country’s alliance with the US, and those who believe the UK should support international institutions like the UN.⁷⁰⁸ Following 9/11, Blair thought it was crucial that Britain stand “shoulder to shoulder” with the US.⁷⁰⁹ But he also indicates that he would have supported a military response in Afghanistan with or without the history of the Anglo-American relationship.⁷¹⁰

One challenge members of the Blair government faced in supporting the US following 9/11 was that their American counterparts appeared to be more focused on the initial military actions in Afghanistan than on the difficult security work and nation-building that would have to occur there afterwards.⁷¹¹ In contrast to this US approach, Blair told a Labour Party conference in early October 2001 that “We will not walk away from Afghanistan, as the outside world has done so many times before”.⁷¹² In the weeks that followed, Blair asked Britain’s permanent representative to the UN, Jeremy Greenstock, to put pressure on Lakhdar Brahimi, the UN special envoy tasked with finding a political solution for a post-Taliban Afghanistan. Blair wanted Brahimi to hold the UN meeting on the future of Afghanistan as soon as possible, although he later realized the diplomatic difficulty of this request.⁷¹³ Elaborating on his thinking during this period, Blair notes that “The UN under Kofi Annan’s guidance was being helpful and from the outset I was determined that they should help take the strain of the politics. Fortunately, in Lakhdar Brahimi they had a

⁷⁰⁷ Kampfner 2004: 122. Similarly, Chris Meyer notes that, following 9/11, “Some Labour Party backbenchers were getting restless about Blair’s aligning himself so unreservedly with a Republican President” (2005: 198).

⁷⁰⁸ Phythian 2007.

⁷⁰⁹ Blair 2010: 341.

⁷¹⁰ Clarke 2011: 83.

⁷¹¹ Kampfner 2004: 146, and Clarke 2011: 12-13.

⁷¹² Cited in Kampfner 2004: 146.

⁷¹³ Kampfner 2004: 142-144.

sensible interlocutor with the Afghans, one who was experienced and savy”.⁷¹⁴ Similarly, Peter Ricketts observes that the role of the UN was particularly significant at the beginning of the Afghan war.⁷¹⁵ And Nigel Sheinwald recalls that Britain supported the UN in this period, and was involved in the political settlement in Afghanistan as well as the UN-sponsored peace negotiations in Bonn.⁷¹⁶ Reflecting Blair’s “determination” noted above, Robert Cooper, a UK diplomat, was appointed as Britain’s special envoy on Afghanistan. Cooper was instructed to help Brahimi find a political solution in Afghanistan, and was even sent on a secret mission to meet the country’s exiled former king.⁷¹⁷

Following the Bonn conference, Britain took a lead in drafting and passing Security Council Resolution 1386 in December 2001.⁷¹⁸ This instrument, recall, created ISAF and authorized it to assist the Afghan Transitional Authority in providing security in and around Kabul. Initially, Blair wanted to commit 6,000 additional UK troops to support the continuing OEF operations to find Osama Bin Laden.⁷¹⁹ When this offer was declined, however, it was decided that Britain would lead the ISAF force in Kabul, and send 1,800 soldiers there. Commenting on the policy context at the time, Kampfner notes that “Some seventeen other countries also declared their willingness to participate [in ISAF], but Britain was very much in the lead. This was important to Blair, to ... show off the peacekeeping role of the military, even after 9/11.”⁷²⁰ Blair’s earlier wish was then partially fulfilled when, in April 2002, the UK announced that 1,700 troops would be sent to help the US flush out what was left of al Qaeda.⁷²¹

⁷¹⁴ Blair 2010: 358.

⁷¹⁵ Phone interview with Sir Peter Ricketts, 26 June 2013.

⁷¹⁶ Interview with Sir Nigel Sheinwald, London, 8 July 2013.

⁷¹⁷ Kampfner 2004: 142-145.

⁷¹⁸ As Nigel Sheinwald notes, “we were closely involved in [the Security Council resolution that created ISAF] – the UK was very much in the lead” (interview, London, 8 July 2013).

⁷¹⁹ Kampfner 2004: 145.

⁷²⁰ Ibid: 146.

⁷²¹ Defence Minister Geoff Hoon’s statements in Parliament on 29 April 2002, in HC Debs., vol. 384, col. 649.

Throughout this period, Britain's commitment to rebuilding Afghanistan conflicted with America's broader war on terror, and international law acted as a site of debate over how to respond to this conflict of priorities. For instance, the UK Foreign Office had originally wanted ISAF's UN-mandate to extend beyond Kabul, but this was rejected by the Pentagon.⁷²² Clare Short, Britain's Minister of Development at the time, complained to her Cabinet colleagues that the US was not taking the aid situation in Afghanistan seriously enough.⁷²³ This reflected the fact that US attention had already shifted, with talk in Washington now focusing on "phase two" in the war on terror – branching out to other states.⁷²⁴ This shift in attention could be seen when the US started transferring hundreds of alleged al Qaeda members from Afghanistan to Guantánamo Bay in the winter of 2002. The Bush administration refused to call these individuals Prisoners of War, and argued that the Geneva Conventions did not apply to them.⁷²⁵ The alleged mistreatment and harsh living conditions of these detainees came under extensive criticism, and the judicial basis for their indefinite internment was questioned.⁷²⁶ Reflecting these concerns, many Labour Members of Parliament in Britain at the time expressed horror at the US detention facility.⁷²⁷ Prime Minister Blair was embarrassed and frustrated by the issue, particularly because three UK citizens were among the individuals being held.⁷²⁸ He urged the US to employ more humane conditions at Guantánamo, but also said that the detainees would provide valuable intelligence.⁷²⁹

⁷²² US commander General Franks feared the new ISAF force would "confuse the battlefield" (Kampfner 2004: 146).

⁷²³ Ibid.

⁷²⁴ Ibid: 146-147. Chris Meyer notes that, "As to Iraq's possible complicity [in 9/11], there was no compelling evidence and strong skepticism on the British side. Blair urged Bush to focus to the exclusion of all else on the job in hand: Afghanistan, Al Qaeda and the Taliban" (2005: 191).

⁷²⁵ This initial position was challenged by, among other things, subsequent court proceedings in the US, including the Supreme Court's important 2006 decision in *Hamdan v. Rumsfeld*. In that case, it was held that the military commissions created by the Bush administration to try detainees at Guantánamo Bay violated the US Uniform Code of Military Justice and the four Geneva Conventions of 1949, specifically Common Article 3 of those treaties.

⁷²⁶ See e.g. Amnesty International, "United States of America: Guantánamo - An Icon of Lawlessness" (6 Jan. 2005).

⁷²⁷ Kampfner 2004: 149-50.

⁷²⁸ A Detainee Inquiry, described at the end of the next section below, was created in 2010 in part as a response to the controversy associated with the UK citizens who were detained at Guantánamo. It was never formally launched.

⁷²⁹ Kampfner 2004: 149-50.

In addition to the United Nations, there is evidence that Britain's membership in NATO was also relevant to the foreign policy outlook of some UK leaders and officials following 9/11. For instance, speaking to Parliament on 14 September 2001, Blair emphasized that "NATO has already, for the first time since it was founded in 1949, invoked [A]rticle 5 [of its treaty] and determined that this attack in America will be considered as an attack against the alliance as a whole".⁷³⁰ Elaborating on this point, Foreign Secretary Jack Straw told his Parliamentary colleagues that day that:

NATO has recognised the unprecedented nature of the threat. As we have heard, for the first time in the history of the alliance, it has invoked [A]rticle 5 of the Washington treaty, which states that an armed attack against one or more of the allies in Europe or North America shall be considered an attack against them all. There is no clearer signal that we could send to the perpetrators of these attacks than that they face a determined and united response by the international community.⁷³¹

Resonating with Blair and Straw's comments, Peter Hain, Minister for Europe at the Foreign and Commonwealth Office, remarked in a television interview at the time that:

We're a country, along with eighteen others, who are members of NATO. This is an attack on NATO, one of our members, we've taken a decision by invoking Article 5 of the NATO treaty, the first time that's happened since it was formed in 1949, to say we stand together in this.⁷³²

And, responding to potential accusations that the government was overly prioritizing the Anglo-American relationship, Defence Secretary Geoffrey Hoon told Parliament on 4 October that:

⁷³⁰ HC Debs., 14 Sept. 2001, vol. 372, col. 605. For Article 5 of the North Atlantic Treaty, see: www.nato.int

⁷³¹ HC Debs., 14 Sept. 2001, vol. 372, col. 619.

⁷³² Cited in Marston 2001: 679. Text provided by the FCO (Transcript 030/WfC/2001).

I want to make it clear that there have been a range of ... contacts, not only with the United States, but with other allies. NATO defence ministers met in Brussels last week to discuss how we can work together in our response to the threat of international terrorism. NATO has taken the unprecedented step of invoking [A]rticle 5 for the first time in its history, in recognition that the attack on the United States was an attack on all of us. Other allies, therefore, also stand by to assist the United States.⁷³³

Finally, in addition to Parliament and television, the significance of Article 5 of the NATO treaty being invoked was emphasized in debates that occurred in the House of Lords.⁷³⁴

Summing up the importance of the above references, General Robert Fry, former Director of Operations in the Ministry of Defence, and Desmond Bowen, a retired civil servant who worked in the Cabinet Office and Defence Ministry, have written that “NATO’s invocation of Article V of its founding treaty provided a broader context for the sense of collective threat and an *inalienable responsibility* to respond” [emphasis added].⁷³⁵ I discuss the invocation of Article 5 more in the next chapter, as it was considered particularly important by Canadian leaders.

Britain’s perceived commitments to the UN and NATO also arose during the second and third phases of its military activities in Afghanistan, and there is evidence that these commitments helped animate the foreign policy outlook of some leaders and officials in power during these phases. For instance, Britain’s second phase of military action in Afghanistan, recall, occurred from 2003-05. It involved the UK contributing to ISAF and leading a Provincial Reconstruction Team (PRT), a concept that Britain had helped to pioneer.⁷³⁶ As Peter Ricketts notes, the UK “was always a strong supporter of the PRT model for civil-military coordinated stabilization work” in

⁷³³ HC Debs., 4 Oct. 2001, vol. 372, col. 805.

⁷³⁴ See e.g. the comments made on 14 Sept. 2001 by Lord Williams of Mostyn, and Baroness Symons, Minister for Trade (HL Debs., vol. 627, cols. 4-5, 12, in Marston 2001: 679-80).

⁷³⁵ Fry and Bowen 2011: 68-67.

⁷³⁶ Clarke 2011: 11.

Afghanistan, and it “wanted to show that we’re willing to take a lead”.⁷³⁷ That is why, Ricketts says, Britain went to Mazar-e Sharif and other northern locations in those early years and set up PRTs – i.e. “to show how stabilization could be done”.⁷³⁸

Again, Britain’s second phase of military involvement in Afghanistan was overshadowed by its separate decision to participate in the US-led invasion of Iraq,⁷³⁹ and the international legal controversy associated with this decision.⁷⁴⁰ Some public discussion about this second phase, however, did occur. In response to questions by Parliamentarians about the UK’s future military plans in Afghanistan, the government wrote in October 2003 that “the UK-led [PRT] based in Mazar-e Sharif will [likely] increase slightly in size by the end of the year. This expansion is part of the planned evolution of the [PRT] and is *coincidental to UNSCR 1510*” [emphasis added].⁷⁴¹ Security Council Resolution 1510 was passed that month. It expanded ISAF’s mandate whereby the international force would help provide security throughout Afghanistan.

Britain’s third phase of military action in Afghanistan, recall, has taken place from 2006-present, and involved a significant number of UK forces being deployed to Helmand. Contrasting the difficult fighting of this phase with Britain’s earlier military activities in Afghanistan, a former Chief of the General Staff has expressed the view that Britain’s “original intention” in the country was “to support the UN’s ISAF mission”.⁷⁴² Consistent with this view, Defence Secretary John

⁷³⁷ Phone interview with Sir Peter Ricketts, 26 June 2013.

⁷³⁸ Ibid.

⁷³⁹ As Clarke notes, because operations in Iraq dominated the minds of leaders at the time, key military policy-makers, including military service chiefs, struggle to recall any occasions on which a genuine strategic discussion of Britain’s military activity in Afghanistan occurred (2011: 14).

⁷⁴⁰ For the views of leaders and officials on Britain’s participation in the Iraq War, and the international legal context of this participation, see the various oral and written evidence provided to the Chilcot Inquiry.

⁷⁴¹ HC Written Answers, 22 Oct. 2003, col. 589W.

⁷⁴² Cited in Clarke 2011: 81.

Reid – who ultimately authorized the initial deployment to Helmand and believed it was the “right thing” to do⁷⁴³ – told Parliament in January 2006 the following about this operation:

Just over four years ago, on 11 September 2001, we were given a brutal lesson in the consequences of leaving Afghanistan in the hands of the Taliban and the terrorists. Since then, we in this country have been at the forefront of the international effort, *under the auspices of the United Nations*, to defeat international terrorism, to free Afghanistan from the ruthless grip of the Taliban and to rid the country of the menace of the terrorists and the greed of the drug traffickers [emphasis added].⁷⁴⁴

To bring stability and security to Afghanistan, Reid continued:

[T]here is a clear role for the military: helping to create and to maintain a framework of security on which legitimate Afghan institutions can grow and thrive. NATO, through its leadership of the international security assistance force, itself under the auspices of the UN, has a major role to play in making that happen. Thanks to NATO’s leadership, ISAF has already expanded its activities to cover the north and west of Afghanistan, at the request of the democratically elected Afghan Government and with the authorisation of the United Nations.⁷⁴⁵

Consistent with Reid’s emphasis of NATO’s role, Peter Ricketts notes that Britain sent forces to Helmand “because the NATO strategic plan for Afghanistan envisaged gradually extending stabilization from province to province ... and we felt we should play our part in that”.⁷⁴⁶

⁷⁴³ For Reid’s reflections on the Helmand decision, see his oral evidence at the Chilcot Inquiry, 3 Feb. 2010, transcript at 55-59. For Reid’s view that it was the “right thing” to do, see the paper by Nick Beadle, who was the Private Secretary to Reid and his successor, Des Browne, from mid-2005 to mid-2007 (Beadle 2011: 74). Beadle’s recollection of this period “is that across Whitehall there was a sense of redemption to be found in the proposed Afghanistan deployment and a drift toward denial about Iraq” (2011: 79).

⁷⁴⁴ HC Debs., 26 Jan. 2006, col. 1529.

⁷⁴⁵ Ibid, col. 1530.

⁷⁴⁶ Phone interview with Sir Peter Ricketts, 26 June 2013.

More generally, Ricketts also says that one of the reasons UK forces have remained in Afghanistan is due to “a sense of solidarity with NATO”.⁷⁴⁷ Similarly, Nigel Sheinwald observes that, although Britain’s alliance with the US has affected its participation in the Afghan war, NATO has also been “an important factor”.⁷⁴⁸ Expressing views that can be linked back to Ernest Bevin’s support for the creation of NATO prior to the Korean War, noted in chapter two, Sheinwald points out that “Britain is a big supporter of NATO and wants it to continue. We have questions about the long-term survivability of NATO, but it is important to our foreign policy and defence policy. It has always been. We’ve always been team players as far as NATO is concerned.”⁷⁴⁹

In response to escalating violence in Helmand, recall, UK troop numbers there were increased to 4,500 in July 2006.⁷⁵⁰ The government was accused of failing to anticipate the difficult resistance UK forces would meet in the province.⁷⁵¹ Sheinwald thinks this accusation has been overblown, and notes that “we knew we would take casualties in Helmand” and that “there were going to be ... real fights involving the Taliban”.⁷⁵² There “was a very exhaustive effort in 2004-05”, he says, to plan “our Helmand operation, leading to the decision by our Cabinet in January 2006 to go ahead [with it]”.⁷⁵³ Commenting on the criticism at the time, Des Browne – John Reid’s

⁷⁴⁷ Phone interview with Sir Peter Ricketts, 26 June 2013.

⁷⁴⁸ Interview with Sir Nigel Sheinwald, London, 8 July 2013. Contextualizing the relative importance of the Anglo-American relationship, Sheinwald emphasizes that “the main reason we’re doing this is because we need a foreign policy and national security objective fulfilled in Afghanistan. We’re not ‘inventing’ the Afghan war in order to satisfy some abstract requirement to be nice to the Americans.”

⁷⁴⁹ Ibid.

⁷⁵⁰ For a military perspective on the initial UK operations in Helmand, and the tension between the reality of these operations and the political goals of the government, see Brigadier Ed Butler’s evidence to the House of Commons Defence Committee, *Operations in Afghanistan*, HC 554, July 2011, Ev. 103.

⁷⁵¹ Regarding this difficult resistance, a government minister at the time reportedly asked a fellow minister in exasperation: “How the hell did we get ourselves into this position? How did we go charging up the valley without it ever being put to cabinet?” (cited in Clarke 2011: 21). This “charge”, it should be noted, refers less to the initial government decision to deploy troops to Helmand, and more to a subsequent military decision in Afghanistan to move UK forces into offensive positions in the province.

⁷⁵² This was explicitly stated and understood during a key meeting with the UK Chiefs of Staff. Interview with Sir Nigel Sheinwald, London, 8 July 2013.

⁷⁵³ Ibid.

successor, who believed in the Helmand mission “even more so” than Reid⁷⁵⁴ – reaffirmed the distinct importance of the UN-authorized ISAF mission, and reiterated that Britain’s ultimate goal was the rebuilding of Afghanistan:

We have been accused of naivety by drawing a distinction between the ISAF – international security assistance force – mission to spread security and the US-led [OEF] mission focused on counter-terrorism. But that distinction is not naive at all. In both cases, soldiers will have to fight, but the nature of the ISAF mission reflects the fundamental fact that we will not reach a lasting peace by force alone; we will reach it when Afghanistan has changed and when the Government have been able to deliver such security, development and prosperity that the ordinary Afghans will no longer tolerate terrorists and criminals in their midst. That is why rebuilding is our mission.⁷⁵⁵

Endorsing Browne’s strategic goals in Afghanistan, Liam Fox, who would later become Defence Minister under the Cameron government, emphasized that one of the reasons Britain must succeed in the country is because “the reputation and cohesion of NATO is on the line”.⁷⁵⁶

Further troop increases, recall, were announced in February 2007 (bringing the total number of UK forces in Afghanistan to around 7,700), and in the spring of 2009 (bringing the overall figure to over 8,000). Explaining the first increase, Des Browne told Parliament that “we should understand what is at risk if we do not continue to live up to the *collective commitment* we have made to Afghanistan and its people” [emphasis added].⁷⁵⁷ Browne reaffirmed this commitment when explaining the second increase, stating that “Our forces ... are in Afghanistan *to fulfill a UN mandate*, to support the elected Government, to train and mentor the Afghan army and police, and

⁷⁵⁴ Beadle 2011: 74.

⁷⁵⁵ HC Debs., 10 July 2006, vol. 448, col. 1132.

⁷⁵⁶ Ibid, col. 1136.

⁷⁵⁷ HC Debs., 26 Feb. 2007, vol. 457, col. 619.

to give the Afghan people hope for the future. I believe, as I think do the majority of this House, that Afghanistan is a noble cause” [emphasis added].⁷⁵⁸

In conclusion, the above review has indicated that, like Clement Attlee during the Korean War, Prime Minister Blair felt a sense of obligation towards the conflict in Afghanistan that followed the events of 9/11. Unlike with Attlee, however, this perception of obligation appears to have been shaped less by Britain’s formal membership in the UN and a belief in the international rule of law, and more by Blair’s ethical views that international terrorism must be addressed and that foreign intervention in Afghanistan was needed to do so. More generally, though, during the three phases of Britain’s military participation in the Afghanistan Conflict, there is evidence that the UK’s perceived commitments to the UN and NATO helped constitute the identities of some UK leaders and government officials, and helped shape the way in which Britain’s interests were interpreted and pursued. Further, as the Afghan war became more challenging and US military policy in the region became more controversial, these perceived commitments acted as a site for a “communicative” struggle over Britain’s legitimate identity and rightful behaviour with respect to these developments.

b) International law helped regulate Britain’s political and military practice

In addition to its constitutive effect, international law has also had a regulative influence on Britain’s political and military practice regarding the Afghanistan Conflict. A key example of this impact is Britain’s policy and conduct regarding individuals captured in Afghanistan by UK forces and transferred to local authorities. The history of this issue is complex and still unfolding, and a

⁷⁵⁸ HC Debs., 16 June 2008, vol. 477, col. 676.

detailed consideration is beyond the scope of this study.⁷⁵⁹ For present purposes, it suffices to note that Britain's policy and conduct regarding Afghan detainees has been governed and controlled in part by its interpretation of a) Security Council Resolution 1386 of 20 December 2001, which created ISAF, and b) relevant basic principles of international human rights law, including the right to life and the prohibition on torture. This interpretation, moreover, has had a significant effect even though other material considerations – such as Britain's interest in gathering intelligence, preventing attacks, and cooperating with Afghan security and intelligence agencies – have arguably conflicted with some of its perceived requirements.

To understand the above arguments, one must understand the circumstances that led to Britain signing a Memorandum of Understanding (MoU) in April 2006 with Afghanistan concerning the transfer by UK forces of captured individuals to Afghan authorities. According to submissions made by the UK government in an important 2010 court case on the issue, *R (Evans) v SS Defence*, British policy in Afghanistan prior to this MoU “was to avoid detaining individuals, wherever possible”.⁷⁶⁰ Following the deployment of 3,500 UK troops to Helmand in 2006, however, it was thought that some captured individuals would likely have to be detained for reasons of force protection, intelligence gathering, and criminal investigations.⁷⁶¹

Three international legal obstacles stood in the way of expanding Britain's policy and practice regarding detainees. First, although UK forces in Afghanistan are authorized to kill or capture insurgents provided such forces comply with the laws of armed conflict (the *jus in bello*), the power of detention that stems from this authorization was seen as only extending to temporary

⁷⁵⁹ For a more detailed review, see *R (Evans) v. SS Defence*, [2010] EWHC 1445 (Admin). The 41,776 word decision dealt with an application by a peace activist to stop UK forces from transferring detainees to Afghan authorities due to an alleged risk of torture. This study has based much of its analysis of this issue on the evidence cited in this case.

⁷⁶⁰ *Evans* at paras. 92-93

⁷⁶¹ *Ibid.*

detention.⁷⁶² Second, and similarly, unlike comparable resolutions on Iraq at the time, Security Council Resolution 1386 on Afghanistan did not refer to detention. The instrument, recall, did authorize ISAF forces to use “all necessary measures” to fulfill their mandate. However, this was also interpreted as allowing only temporary detention. As the judges in the *Evans* case note, “Legal advice [prior to the MoU] confirmed that there was no basis upon which UK forces could legitimately intern such individuals [and] they must be transferred to the Afghan authorities”.⁷⁶³ Consistent with this view, the office of the UK Defence Secretary maintained in *Evans* that “In the absence of any express authorisation in the UN Security Council resolutions ... the UK has *no power* of indefinite internment” [emphasis added].⁷⁶⁴ Finally, there was a realization that transferring individuals might engage Britain’s obligations under the European Convention on Human Rights.⁷⁶⁵ Article 1 of the ECHR imposes an obligation to respect human rights, stating that “Parties shall secure to everyone within their jurisdiction the [treaty’s] rights and freedoms”. Article 2 protects the right to life, and Article 3 prohibits torture. In light of these provisions, UK officials involved in negotiating the MoU with Afghanistan have remarked “that it was structured to avoid the risk of a breach of the UK’s Convention obligations which might be applicable: key points were to *prohibit* the death penalty, to *prevent* the transfer of detainees to a third party, and to enable UK access to detainees transferred to the Afghan authorities” [emphasis added].⁷⁶⁶

In light of the above international legal considerations, and the perceived need for British forces in Helmand to detain and transfer captured individuals, UK Defence Secretary John Reid and his Afghan counterpart signed the MoU in April 2006.⁷⁶⁷ Reflecting the “key points” from the

⁷⁶² *Evans* at para. 17.

⁷⁶³ *Evans* at para. 93.

⁷⁶⁴ *Evans* at para. 17.

⁷⁶⁵ The text of the ECHR is available online: <http://human-rights-convention.org>

⁷⁶⁶ *Evans* at para. 94.

⁷⁶⁷ *Evans* at paras. 92-93. Reid is not mentioned by name in this section of the case, but he was Defence Secretary from 6 May 2005 until 5 May 2006.

ECHR noted above, the Memorandum had two main aims. First, it established the responsibilities, principles and procedures in the event of the transfer by UK forces to Afghan authorities of persons detained in Afghanistan.⁷⁶⁸ Second, it sought to “Ensure that Participants will observe the basic principles of international human rights law such as the right to life and the prohibition on torture and cruel, inhumane and degrading treatment pertaining to the treatment and transfer of persons by the UK [armed forces] to Afghan authorities”.⁷⁶⁹ By contrast, we will see in the next chapter that Canada’s detainee agreement with Afghanistan sought to ensure that transferred individuals would be treated in accordance not with international human rights law but with the Third Geneva Convention of 1949.

When news broke out in Canada in April 2007 that detainees transferred by Canadian forces had been mistreated by Afghan authorities, the UK decided that additional measures were necessary to ensure that those transferred by British forces were being treated properly.⁷⁷⁰ Reflecting this concern, an Exchange of Letters (EoL) occurred in September 2007 between Afghanistan, on the one hand, and Britain, the US, Canada, the Netherlands, Denmark and Norway on the other. The EoL aimed to establish a common approach of those parties regarding access to individuals detained by their forces and transferred to Afghan authorities.⁷⁷¹ It improved Britain’s MoU with Afghanistan by expressly allowing transferred detainees to be interviewed in private.⁷⁷²

In addition to the MoU and EoL, Britain’s policy regarding Afghan detainees has also reflected ISAF standard operating procedures. This is because, the judges in *Evans* note, the vast majority of UK forces in Afghanistan operate under the command of ISAF, and they are the only

⁷⁶⁸ *Evans* at para. 95.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ *Evans* at para. 107.

⁷⁷¹ *Evans* at para. 108.

⁷⁷² *Ibid.*

British forces involved in the capture and transfer of detainees.⁷⁷³ This implies that UK forces not operating under ISAF, such as those that may be part of OEF, do not capture or transfer detainees. Under ISAF procedures, a person may only be detained for ISAF force protection, self-defence, or for accomplishing the ISAF mission.⁷⁷⁴ Such persons should be detained for no longer than 96 hours, although this can be extended in certain circumstances. They must then be released or transferred to the Afghan authorities.⁷⁷⁵ The preferred reception body for ISAF detainees is the National Directorate of Security (NDS), Afghanistan's intelligence agency.⁷⁷⁶ In accordance with this instruction, between July 2006, when UK transfers began, and March 2010, the vast majority (410 of 418) of individuals detained by British forces were transferred to the NDS.⁷⁷⁷

Importantly, the ISAF procedures state that “[c]onsistent with international law, persons should not be transferred under any circumstances in which there is a risk that they be subjected to torture or other forms of ill treatment”.⁷⁷⁸ Reflecting ISAF's rules, the UK has developed detailed standard operating instructions on how to detain individuals, look after them in detention and, where appropriate, manage their onward transfer to the Afghan authorities.⁷⁷⁹ As with ISAF's procedures, Britain's policy – which has reportedly applied at all material times to UK operations in Afghanistan – states that detainees are not to be transferred into Afghan custody if there is a real

⁷⁷³ *Evans* at para. 14.

⁷⁷⁴ *Evans* at para. 19.

⁷⁷⁵ *Ibid.* The procedures also explain that the Government of Afghanistan has overall responsibility for the maintenance of law and order within the country, and that when transferring a detainee ISAF cannot seek to constrain the freedom of action of the Afghan authorities.

⁷⁷⁶ *Evans* at para. 43. This is reportedly to ensure common processing and tracking of the transferred detainee.

⁷⁷⁷ *Evans* at para. 48.

⁷⁷⁸ *Evans* at para. 19.

⁷⁷⁹ *Evans* at paras. 20, 43-48. As part of the UK's operating instructions, the International Committee of the Red Cross is to be informed of detainee transfers as soon as practicable, and the Afghanistan Independent Human Rights Commission should be informed where possible. This is to ensure that there is additional scrutiny and oversight of the assurances contained in Britain's MoU with Afghanistan regarding detainees (para. 47).

risk that they will suffer torture or serious mistreatment.⁷⁸⁰ This is set out clearly in a March 2010 written policy statement from then UK Defence Secretary Bob Ainsworth:

1.2 This Policy Statement, which is to be observed whenever UK Armed Forces undertake detention in an operational theatre reflects the importance which I attach to ensuring the humane treatment of those it is necessary to detain in the course of our operations. [...] 2.1 This policy applies across the MOD and the Armed Forces and to all detention activities undertaken in military theatres of operation. It sets out the minimum standards which must be applied. [...] 3.1 I require the Ministry of Defence and Armed Forces to: [...] (f) Ensure that Detained Persons are not transferred from UK custody to any nation where there is a real risk at the time of transfer that the Detained Person will suffer torture [or] serious mistreatment [...] ⁷⁸¹

If there are specific grounds to believe that a detainee may be mistreated by the Afghan authorities after transfer, Britain's standard operating instructions state that "such concerns should be raised with the legal advisor to UK forces and the Force Provost Marshal". ⁷⁸²

Despite the formal arrangements and policies noted above, however, critics have argued that transferees into Afghan custody have been and continue to be at real risk of torture or serious mistreatment and, therefore, that the practice of transfer has been and continues to be in breach of Britain's policy and unlawful.⁷⁸³ As evidence for this view, reference is often made to a) specific allegations by UK transferees,⁷⁸⁴ and b) relevant reports by UN agencies, the Afghanistan Independent Human Rights Commission, NGOs, and the UK's own Parliamentary Foreign Affairs Committee.⁷⁸⁵ Among other things, these reports document numerous cases of torture and

⁷⁸⁰ *Evans* at paras. 20-21.

⁷⁸¹ *Ibid.*

⁷⁸² *Evans* at para. 46. The staff of the Force Provost Marshal specialize in custody and detention.

⁷⁸³ See e.g. the claimant's allegations in *Evans* at para. 1.

⁷⁸⁴ *Evans* at paras. 187-226.

⁷⁸⁵ *Evans* at paras. 49-75.

mistreatment of Afghan prisoners, and allege that the NDS has a particularly poor record in this regard.⁷⁸⁶ Although the UK government has been aware of these reports, and accepts that some of the allegations may be credible, it argued in *Evans* that, notwithstanding this general background, “the specific circumstances relating to UK transferees are such as to ensure adequate safeguards for them”.⁷⁸⁷ Detention operations, the government further argued, are of “vital importance” to UK forces operating in Afghanistan, because they help such forces gather intelligence, protect themselves and local civilians from insurgent attacks, and assist the Afghan government in providing security and stability.⁷⁸⁸ If it were not possible to transfer detainees, there would be a “severe impact” on the counter-insurgency strategy, and the UK-Afghan relationship.⁷⁸⁹ In response to these two opposing positions, the court ultimately held in *Evans* that a) a moratorium on transfers to the NDS facility in Kabul imposed by UK officials should be maintained, and b) transfers to the NDS facilities in Kandahar and in Laskar Gah (the capital of Helmand) could continue if existing safeguards are strengthened by the observance of three additional conditions.⁷⁹⁰ I describe this moratorium and these safeguards later below.

The extent to which one concludes that UK forces in Afghanistan have met their international legal obligations regarding the transfer of detainees will turn mainly on the degree to which one thinks transferees face a risk of torture or serious mistreatment, and the evidence and threshold one believes is needed to establish this risk. It will also depend on whether one thinks the onus is on critics or the government to demonstrate or disprove this risk, and the efforts one thinks

⁷⁸⁶ *Evans* at paras. 49-75.

⁷⁸⁷ *Evans* at paras. 76, 310.

⁷⁸⁸ *Evans* at para. 23.

⁷⁸⁹ *Ibid.*

⁷⁹⁰ *Evans* at paras. 315-322. These conditions were: “(i) all transfers must be made on the express basis (spelling out the requirements of the MoU and EoL) that the UK monitoring team is to be given access to each transferee on a regular basis, with the opportunity for a private interview on each occasion; (ii) each transferee must in practice be visited and interviewed in private on a regular basis; and (iii) the UK must consider the immediate suspension of further transfers if full access is denied at any point without an obviously good reason (we have in mind circumstances such as a security alert) or if a transferee makes allegations of torture or serious mistreatment by NDS staff which cannot reasonably and rapidly be dismissed as unfounded” (para. 320).

Britain needs to make to guard against it. One challenge to drawing such conclusions, critics usefully note, has been the absence of sufficient information on the conditions and treatment of detainees, and on the legal framework and actual practices of the NDS.⁷⁹¹ Leaving these legal and factual issues aside, though, there is evidence that the UK has employed safeguards regarding transferred detainees, and changed its transfer practices in response to specific concerns. Further, as the above discussion of the *Evans* case suggests, these safeguards and altered practices have been shaped in part by a concern for Britain's perceived obligations under relevant basic principles of international human rights law.

For instance, the UK's approach to monitoring transferred detainees has improved over time, with an "enhanced awareness" of the importance of being able to visit such individuals privately.⁷⁹² This awareness is suggested by the earlier observation that, when it was decided in 2007 that additional measures were necessary to ensure that persons transferred by British forces were being treated properly, the EoL signed in September that year advanced the UK's MoU with Afghanistan by expressly allowing transferred detainees to be interviewed in private.

In addition, Britain has also responded to specific concerns by pressuring Afghan officials, investigating allegations of mistreatment, and stopping the transfer of individuals to some Afghan prisons. For example, in March 2007, the Attorney-General for England and Wales asked the head of the NDS about the state of an investigation into the disappearance of a detainee in Kandahar.⁷⁹³ In September that year, a UK transferee at NDS Laskhar Gah alleged that he had been ill-treated while in detention there. The allegation was investigated by UK personnel, and found to be unsubstantiated.⁷⁹⁴ In December 2008, Britain imposed a moratorium on transfers to NDS Kabul,

⁷⁹¹ *Evans* at para. 63.

⁷⁹² *Evans* at para. 319.

⁷⁹³ *Evans* at para. 118. The Attorney-General also raised the issue of human rights, and the legal basis for NDS activity and detentions.

⁷⁹⁴ *Evans* at para. 30.

the facility which acts as the investigating branch of the NDS. This was a result of the NDS refusing access to that facility for purposes of visiting transferees.⁷⁹⁵ When the NDS repeated its view in February 2009 that it had no direct obligation under the MoU, UK officials in Kabul advised challenging them at a senior level, and noted that the “NDS had to appreciate that UK cooperation with it was in danger, *because of legal pressures* in London” [emphasis added].⁷⁹⁶

In the spring of 2009, British personnel visited Pol-i-Charki prison, another facility in Kabul.⁷⁹⁷ These visits were aimed at checking on UK transferees who had been transferred on by the NDS without prior notification to British officials.⁷⁹⁸ A number of these transferees alleged that they had been ill-treated while in detention at NDS facilities in 2007-08. In response, Britain imposed an immediate moratorium on UK transfers to NDS Kandahar. (The moratorium on NDS Kabul was also still in place.) The moratorium on Kandahar was lifted in February 2010, but no further transfers were made in the following months.⁷⁹⁹ The UK has sought to establish a dedicated Detainee Oversight Team, which would be responsible for monitoring if transfers to NDS Kandahar resume.⁸⁰⁰ Between February and April 2010, the UK experienced substantial difficulties in gaining access to NDS Lashkar Gah in Helmand. Those difficulties were subsequently resolved, and transfers were resumed.⁸⁰¹

In the summer of 2011, NATO ordered that detainee transfers to certain Afghan prisons be stopped due to fears that prisoners were at risk of systematic torture.⁸⁰² Following this order, however, UK defence officials said the warnings did not apply to Helmand province, where most

⁷⁹⁵ Evans at para. 32.

⁷⁹⁶ Evans at para. 124.

⁷⁹⁷ In contrast to NDS Kabul, Pol-i-Charki reportedly comes under the authority of the Afghan Ministry of Justice.

⁷⁹⁸ Evans at para. 33.

⁷⁹⁹ Evans at para. 35.

⁸⁰⁰ Evans at para. 319.

⁸⁰¹ Evans at para. 37.

⁸⁰² Jeremy Kelly, “Nato stops sending prisoners to Afghan jails over torture fears”, *The Guardian*, 6 Sept. 2011.

UK troops are based.⁸⁰³ I discuss NATO's orders in 2011 more in the next chapter, as they were relevant to Canada's detainee policy.

In November 2012, Defence Secretary Philip Hammond banned the transfer of detainees due to fears that they would be abused.⁸⁰⁴ Following that decision, individuals captured by UK forces have reportedly been held at a temporary facility at Camp Bastion, Britain's main base in Afghanistan.⁸⁰⁵ This extended internment is noteworthy because a) it appears to challenge Britain's earlier position that UK forces are only authorized to detain people temporarily, and b) it resonates with the measures some critics suggest ISAF states may have to take to protect detainees from torture.⁸⁰⁶ In the winter of 2013, Britain then worked with Afghanistan to find a safe way to resume the transfer of detainees to the Afghan judicial system. The UK Ministry of Defence said in June that it was "satisfied it is safe" to restart the transfer of around 90 individuals.⁸⁰⁷ These detainees will be moved to the Afghan National Detention Facility in Parwan province, which, according to Hammond, has received "positive reports" from humanitarian organizations.⁸⁰⁸

In conclusion, it should be noted that, following the *Evans* case, there have been additional court challenges in Britain regarding the UK's policy and conduct with respect to Afghan detainees.⁸⁰⁹ It should also be noted that a Detainee Inquiry was created by the Cameron government in 2010, although this initiative was never formally launched, and it was not meant to focus on Afghan detainees.⁸¹⁰ Some of the court challenges have involved the individuals held at

⁸⁰³ Jeremy Kelly, "Nato stops sending prisoners to Afghan jails over torture fears", *The Guardian*, 6 Sept. 2011.

⁸⁰⁴ "Afghan detainees: UK to restart transfers this month", BBC News website, 6 June 2013.

⁸⁰⁵ Hammond argued that releasing such individuals could endanger UK troops (ibid).

⁸⁰⁶ See e.g. Byers 2007.

⁸⁰⁷ "Afghan detainees: UK to restart transfers this month", BBC News website, 6 June 2013.

⁸⁰⁸ Ibid.

⁸⁰⁹ "UK forces begin transfer of Afghan detainees", BBC News website, 28 June 2013.

⁸¹⁰ The Inquiry was created in response to concerns over Britain's possible role in the transfer and mistreatment of detainees held by other countries post 9/11. It was criticized for being too narrow in its terms of reference. Nigel Sheinwald notes that the Inquiry may be re-launched, and was delayed because there are still pending police investigations into some of its cases. Most of these cases, he emphasizes, are not about what happened within Afghanistan involving UK forces, but residual issues associated with British citizens who were captured in 2001 and

Camp Bastion, who have sought to have the lawfulness of their extended detainment assessed by British judges.⁸¹¹ Interestingly, these “habeus corpus” proceedings suggest that international legal rules may sometimes conflict – i.e. anti-torture rules that may require ISAF states to detain individuals for extended periods can clash with due process rules that, among other things, generally require that alleged criminals cannot be held for extended periods without charge, access to counsel, and review by a judge. Reflecting an apparent awareness of this tension, UK forces have given detainees telephone access to British lawyers.⁸¹² As of June 2013, additional transfer bans had been ordered by the courts, and the Ministry of Defence was seeking to transfer detainees that consented to such movement. This ongoing dialogue between the government and the judiciary about this issue further suggests that, through both an internal concern among leaders and officials about Britain’s international legal obligations, and an external review of government decisions by the courts, international law can help regulate the political and military practice of a state when it uses force abroad.

c) International law helped permit and legitimate Britain’s political and military practice

Britain’s participation in the Afghanistan Conflict also indicates that, when states use force, international law helps permit and legitimate certain political and military practices that otherwise might not be permitted. In response to the terrorist events of 9/11, the US and its allies, including the UK, attacked, invaded and occupied a sovereign state – i.e. Afghanistan – that had not technically attacked them. This response was significantly broader than prior US reactions to earlier terrorist attacks, such as the missile strikes in Sudan and Afghanistan ordered by President

sent to Guantánamo Bay, as well as Libyan cases. Regarding the Guantánamo cases, all but one individual, a UK resident, have returned to Britain (interview, London, 8 July 2013).

⁸¹¹ “UK forces begin transfer of Afghan detainees”, BBC News online, 28 June 2013.

⁸¹² Ibid.

Clinton after two American embassies were bombed in Africa in 1998.⁸¹³ The broad military response to 9/11 was also strategically different than the reaction some critics say the US and Britain should have focused on, such as addressing the threat posed by al Qaeda through increased intelligence and law-enforcement activity, and political negotiations with the Taliban.⁸¹⁴ Tony Blair acknowledges the validity of such views in his memoirs, but still ultimately believes that a military response to 9/11 was appropriate.⁸¹⁵ As will be seen below, there is evidence that international legal considerations were relevant to justifying and explaining Britain's role in the extensive military reaction to 9/11 to the UK public and the international community.

For example, in response to legal concerns expressed in Parliament about Britain's anticipated military reaction to 9/11 and the US-led operation that was about to start in Afghanistan, Foreign Secretary Jack Straw stated on 4 October 2001 that:

International law was mentioned by several Members who questioned ... the Prime Minister. I cannot emphasise enough that the actions that the United States, we and other partners in the international coalition have in contemplation are entirely within the framework of international law. The founding text of the United Nations, its charter, provides at [A]rticle 51 for the right of UN members to individual or collective self-defence when they come under armed attack.⁸¹⁶

Continuing, Straw added that:

⁸¹³ On 7 August 1998, US embassies in Kenya and Tanzania were bombed. Two-hundred and twenty-four people were killed, and al Qaeda terrorists were thought to be responsible. In response, the US launched missile strikes on Kabul, and a factory in Khartoum that was thought to be making nerve gas. It was later learned that the factory made pharmaceuticals, and the US was criticized for acting on questionable intelligence. See Kampfner 2004: 27-8.

⁸¹⁴ See e.g. Ledwidge 2013, and UK General Nick Carter's comments in June 2013 that the West could have struck a deal with the Taliban after they were removed from power in November 2001 ("We should have talked to Taliban' says top British officer in Afghanistan", *The Guardian* website, 28 June 2013).

⁸¹⁵ Blair 2010: 349.

⁸¹⁶ HC Debs., 4 Oct. 2001, vol. 372, col. 690.

The UN Security Council has passed two resolutions in the response to the crisis. The first, resolution 1368, states that those directly responsible for the attacks should be held to account, together with those who harbour them. The second, resolution 1373, focuses on two key areas: suppressing the financing of terrorists and denying them a safe haven from which to operate. That is the first time that a resolution has imposed an obligation on all states to respond to the global terrorist threat.⁸¹⁷

Consistent with Straw's comments, Prime Minister Blair – who thought that shaping world opinion was critical following 9/11⁸¹⁸ – made the following statement outside 10 Downing Street on 7 October:

I also want to say very directly to the British people why this matters so much to Britain. First, let us not forget that the attacks of September 11 represented the worst terrorist outrage against British citizens in our history. The murder of British citizens, whether it happened overseas or not, is an attack upon Britain. But even if no British citizen had died, we would be right to act. This atrocity was an attack on us all, on people of all faiths and people of none. We know the al-Qaeda network threatens Europe, including Britain, and indeed any nation throughout the world that does not share their fanatical views. So we have a direct interest in *acting in our self-defence* to protect British lives [emphasis added].⁸¹⁹

The next day in Parliament, Blair reaffirmed that “We believe that such action [in Afghanistan] is entirely justified under [A]rticle 51 in self-defence ... the UN Security Council has agreed that it is right that action should be taken, and Britain, the United States of America and the other allies are acting in accordance with the UN resolution and international law.”⁸²⁰

⁸¹⁷ HC Debs., 4 Oct. 2001, vol. 372, col. 690.

⁸¹⁸ Kampfner 2004: 118; Meyer 2005: 191; and Campbell 2008: 574.

⁸¹⁹ Cited in Marston 2001: 682 (text provided by the PMO).

⁸²⁰ HC Debs., 8 Oct. 2001, vol. 372, col. 821.

In the above statements, note that Straw and Blair focused on the doctrine of self-defence. Although they also cited the two Security Council resolutions that immediately followed 9/11 – which are described below – I will suggest in the next section that this reference was employed more as evidence of the broad support for the US-led action in Afghanistan and less as the international legal basis on which Britain claimed to be contributing to this action. Indeed, in a formal update to the Security Council on 7 October, UK diplomat Stewart Eldon reported that:

In accordance with Article 51 of the Charter of the United Nations, I wish on behalf of my Government to report that the United Kingdom of Great Britain and Northern Ireland has military assets engaged in operations against targets that we know to be involved in the operation of terror against the United States of America, the United Kingdom and other countries around the world, as part of a wider international effort. These forces have now been employed in exercise of the inherent right of individual and collective self-defence, recognized in Article 51, following the terrorist outrage of 11 September, to avert the continuing threat of attacks from the same source.⁸²¹

Consistent with this formal update, Defence Secretary Geoff Hoon told Parliament the next day that: “Under [A]rticle 51, any state is entitled to act in self-defence to protect its citizens and entitled to use proportionate force to achieve that. That is precisely the basis on which I have cited [A]rticle 51, and precisely the basis on which the [US] and the [UK] have acted.”⁸²²

Again, in the above statements, note that UK leaders and officials focused on the doctrine of self-defence and did not formally claim that Britain was using force in Afghanistan under the authority of the Security Council. Advancing the latter position would arguably have been possible

⁸²¹ Letter from the Charge d’affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council (7 Oct. 2001), UN Doc. S/2001/947 (2001).

⁸²² HC Debs., 8 Oct. 2001, vol. 372, col. 834-35.

considering that, as noted in part by Straw and Blair earlier above, following 9/11 the Council passed two resolutions which: a) condemned the terrorist attacks and regarded them as a threat to international peace and security; b) recognized the inherent right of individual or collective self-defence in accordance with the Charter; and c) reaffirmed the need to combat by all means, in accordance with the Charter, threats to international peace and security caused by terrorist acts.⁸²³ Significantly, however, after 9/11, the US did not focus on these resolutions or seek explicit authorization from the Security Council, and instead justified its military actions in Afghanistan as self-defence against a terrorist attack.⁸²⁴

The extent to which this US position impacted Britain's justification is unknown. While one might reasonably assume American influence in this regard, there is limited available evidence that UK leaders and their advisers were aware of the US position and its implications for Britain's stance. For example, when asked about this issue, Peter Ricketts emphasized the legal importance of the UN Security Council's resolutions regarding ISAF, and downplayed the significance of Britain's initial self-defence justification.⁸²⁵ We will see similar findings in the next chapter regarding the awareness of Canadian leaders about this issue. On the other hand, Nigel Sheinwald thinks Britain's initial justification makes sense because self-defence "was ultimately [the basis] all the way through ... the rationale was to prevent Afghanistan from once again being a base for international terrorism for which the UK and US would have been the target".⁸²⁶

In sum, the foregoing review suggests that international legal considerations were relevant to justifying and explaining the UK's role in the extensive military response to 9/11 to the UK public

⁸²³ See UNSC Resolution 1368 (12 Sept. 2001), [UN Doc. S/RES/1368], *Threats to International Peace and Security Caused by Terrorist Acts*; and UNSC Resolution 1373 (28 Sept. 2001), [UN Doc. S/RES/1373], *ibid*.

⁸²⁴ Letter Dated 7 Oct. 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/946 (2001). For an analysis of the US legal justification for the initial military actions in Afghanistan, see Byers 2002: 401-09.

⁸²⁵ Phone interview with Sir Peter Ricketts, 26 June 2013.

⁸²⁶ Interview with Sir Nigel Sheinwald, London, 8 July 2013.

and the international community. And this, in turn, supports the observation that, when states use force, international law helps permit and legitimate certain political and military practices that otherwise might not be permitted.

d) International law helped structure the development of new rules and legitimate practice

Finally, Britain's participation in the Afghanistan Conflict suggests that, when states use force, international law helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice for states and other international actors. Two examples highlight this phenomenon. The first is Britain's argument that it was using force in Afghanistan under the doctrine of self-defence, and the related change in the customary international law on this issue. The second example is the passing of Security Council Resolution 1373 in September 2001, which, as previously noted, required states to adopt new domestic measures to address international terrorism.

We saw above that, following 9/11, UK leaders and diplomats stated that British forces had been deployed to Afghanistan in exercise of the inherent right of self-defence recognized in Article 51 of the UN Charter. Repeating this view, recall that Foreign Secretary Jack Straw told Parliament on 4 October 2001 that the US-led action would be "entirely within the framework of international law". While this public statement may have been aimed at permitting and legitimating Britain's use of force in Afghanistan, it skirted a more complex legal reality, which I describe below. The extent to which this complexity was addressed by Britain's Legal Advisers and conveyed privately to political leaders at the time is difficult to assess with the evidence that is currently available.⁸²⁷ However, the public record does suggest that, during Britain's initial participation in the Afghan

⁸²⁷ Michael Wood, the Legal Adviser at the Foreign and Commonwealth Office in 2001, and his deputy at the time, Elizabeth Wilmshurst, declined to be interviewed by the author. Moreover, legal advice provided to government is not normally made public.

Conflict, UK officials and leaders were concerned about the existing views of states on the use of force in self-defence, and actively sought to ensure that these views recognized the international threat posed by non-state actors such as al Qaeda, and state actors such as the Taliban who aid or harbour them.

The argument that British forces had been deployed to Afghanistan in exercise of the right to self-defence recognized in Article 51 of the Charter is noteworthy from an international legal perspective for the following reasons. First, Article 51 states that nothing in the Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a UN member, until the Security Council has taken measures necessary to maintain international peace and security.⁸²⁸ Importantly, the concept of “armed attack” is not defined in Article 51, and the provision does not explicitly say whether the right of self-defence applies only to an “armed attack” by a state, or to armed attacks by states *and* non-state actors. Following 9/11, the US legal argument essentially suggested that, if a sufficient nexus exists between a non-state terrorist group and State A, an attack by the terrorist group on State B could constitute an “armed attack” for purposes of Article 51 of the Charter and/or the customary international law on self-defence, and State B could respond under that law.⁸²⁹ Further, while variations of this position had been advanced in the past, for instance by Israel and the US, they had not been accepted by the majority of states. Following 9/11, however, most states appear to have accepted – or at least not publicly

⁸²⁸ Article 51, UN Charter.

⁸²⁹ Technically, prior to 9/11, the use of force in self-defence by State B in this scenario was not prohibited by international law provided that, in addition to adhering to the principles of necessity and proportionality, the traditional criteria associated with such situations were met – i.e. 1) the terrorist attack was sufficiently serious and thus beyond a *de minimus* threshold, 2) the attack was attributable to the terrorists at issue, and 3) there was substantial involvement from State A in this regard. The key unsettled issue, however, was how *much* involvement from State A was required.

criticized – the US argument.⁸³⁰ Consequently, Western legal scholars generally believe that customary law changed accordingly.⁸³¹

Consistent with the above observations, there is evidence that Britain considered the events of 9/11 to constitute an armed attack. For instance, when discussing the upcoming US-led military action in Afghanistan, Foreign Secretary Straw stated in Parliament on 4 October 2001 that Article 51 of the UN Charter provides “for the right of UN members to ... self-defence when they come under *armed attack*” [emphasis added]. Following 9/11, Straw, Prime Minister Blair, and Defence Secretary Hoon all emphasized that NATO had invoked Article 5 of its treaty, which – as Straw paraphrased – provides that an “*armed attack* against one or more of the allies in Europe or North America shall be considered an attack against them all”. Britain, like other NATO members, voted in favour of this invocation following 9/11.⁸³² And the UK’s representative at NATO “was very closely involved” in Article 5 being declared.⁸³³ Reflecting the above comments and actions, recall that, in his statement outside 10 Downing Street on 7 October, Blair said “The murder of British citizens, whether it happened overseas or not, is an *attack* upon Britain” [emphasis added].

Having claimed that 9/11 constituted an armed attack, there is evidence that Britain also saw a need to demonstrate that this attack was attributable to al Qaeda. In the UK’s formal update to the Security Council on 7 October, mentioned earlier, Stewart Eldon reported that:

My Government presented information to the United Kingdom Parliament on 4 October which showed that Usama Bin Laden and his Al-Qaeda terrorist organization have the capability to execute major terrorist

⁸³⁰ By contrast, following NATO’s military actions in Kosovo in 1999, a large number of states publicly criticized what they believed to be an illegal use of military force. For an analysis of the legal significance of the absence of such clear criticism to the US justification for its initial military response to 9/11, see White 2009: 192-94.

⁸³¹ For scholars whose positions are generally consistent with this view, see: Byers 2002; Falk 2002; Dinstein 2005; Currie 2008; and Murphy 2009. For an argument that the use of force in Afghanistan in 2001 was lawful, but custom did not change, see Moir 2010. For critical perspectives on this use of force, see Boyle 2004 and Williamson 2009.

⁸³² Interview with Sir Nigel Sheinwald, London, 8 July 2013.

⁸³³ Ibid.

attacks, claimed credit for past attacks on United States targets, and have been engaged in a concerted campaign against the United States and its allies. One of their stated aims is the murder of United States citizens and attacks on the allies of the United States.⁸³⁴

Further resonating with the legal observations described earlier above, there is evidence that UK leaders and officials also felt a need to show that a sufficient nexus existed between the al Qaeda terrorists thought to be responsible for 9/11, on the one hand, and the Taliban regime of Afghanistan on the other. A week after 9/11, Blair and two of his advisors, Foreign Policy Advisor David Manning and Chief of Staff Jonathan Powell, were privately concerned about whether the Taliban could be held responsible for al Qaeda's actions.⁸³⁵ Apparently anticipating this concern, Jeremy Greenstock, Britain's UN representative, helped draft Security Council Resolution 1368 of 12 September 2001.⁸³⁶ In addition to the other key provisions described earlier, the instrument called "on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable" [emphasis in original].⁸³⁷ Consistent with this wording, Tony Blair told a Labour Party conference a few weeks later that the Taliban "aid and abet" Bin Laden.⁸³⁸ And, in Britain's update to the Security Council on 7 October, it was noted that the UK's contribution to the military action in Afghanistan "is directed against Usama Bin Laden's Al-Qaeda terrorist organization *and the Taliban regime that is supporting it*" [emphasis added].⁸³⁹

⁸³⁴ Letter from the UK Charge d'affaires to the Security Council, 7 Oct. 2001.

⁸³⁵ Kampfner 2004: 118-119.

⁸³⁶ Ibid: 115. Greenstock worked on the resolution with his French counterpart. He declined to be interviewed for this study.

⁸³⁷ See para. 3 of Resolution 1368.

⁸³⁸ Kampfner 2004: 122.

⁸³⁹ Letter from the UK Charge d'affaires to the Security Council, 7 Oct. 2001.

Finally, there is evidence that UK leaders and diplomats sought to emphasize that the majority of states supported the US-led action in Afghanistan following 9/11 and, by implication, the legal argument that justified this action. Further, apparently concerned that many states had often reacted negatively to prior US military actions, leaders such as Foreign Secretary Jack Straw stressed the legitimacy of the historically unprecedented response to 9/11. For instance, speaking in Brussels on 21 September 2001 at the end of an Extraordinary Meeting of the European Council, Straw stated in part that:

The meeting this evening of European Heads of Government and Foreign Ministers, and the conclusions which have been reached, are a further indication of the widening and deepening of the international coalition in support of the United States, and against the terrorism which we saw on 11 September. The conclusions make clear that not only are the European Union and Member States expressing their solidarity with the United States at its time of need, but there is *a clear recognition* in the conclusions about the *legitimacy* of any action – the word used is *riposte* – any military action which the United States takes in respect of the matters on 11 September and the action is needed to ensure that such threats do not take place again [emphasis added].⁸⁴⁰

Further stressing the support of the international community, we saw earlier that Straw reminded Parliament on 4 October 2001 that the Security Council had passed two resolutions in response to 9/11. Elaborating on this international support eight years later, Jeremy Greenstock told the Chilcot Inquiry in 2009 that:

It was extraordinary to me, given the divisions in the United Nations at the beginning of September 2001 and given the ... geopolitically natural resistance to the United States as the single superpower in some other

⁸⁴⁰ Cited in Marston 2001: 680-81 (text provided by the FCO).

parts of the world, given the United States's normally selective approach to the use of the United Nations for its own interests or for collective interests, that, once 9/11 had happened, there was virtually universal sympathy for the United States in the United Nations.⁸⁴¹

The symbols of that sympathy, Greenstock says, were the initial Security Council resolutions adopted in response to 9/11 – i.e. Resolutions 1368 and 1373. The former instrument, recall, was drafted and passed in part as a result of Greenstock's efforts. It, Greenstock notes, gave:

[E]xpress cover for the US to use military force in Afghanistan [while Resolution] 1373 set up a programme for all member states to take further measures to counter terrorism in their jurisdictions, with a sense of *creating international law* through a mandatory Security Council Resolution which was regarded by many UN member states as unprecedented up to that point. And yet not a single member of the Security Council argued about 1373 in any detail [emphasis added].⁸⁴²

In sum, Greenstock's comments and actions – along with those of Straw, Hoon and Blair noted earlier – indicate that, during Britain's initial participation in the Afghan war, officials and leaders were concerned about the existing views of states on the use of force in self-defence, and actively sought to ensure that these views recognized the international threat posed by non-state actors such as al Qaeda, and state actors such as the Taliban who aid or harbour them. Importantly, the above comments and actions resonate with the expanded conception of self-defence outlined in Britain's security policy following 9/11. The 2002 addendum to the Strategic Defence Review of

⁸⁴¹ Greenstock, Chilcot testimony, 27 Nov. 2009, transcript at 14-15.

⁸⁴² Ibid.

1998, for instance, “made clear that, in the British view, terrorism at home had to be addressed by forward defence in Central Asia or wherever the contingent threat emanated from”.⁸⁴³

In hindsight, it may seem that the nature, scale, and target of the 9/11 attacks made the applicability of the right to individual and collective self-defence recognized in Article 51 of the UN Charter logical and inevitable. However, it is important to remember that this provision was originally included in the Charter with the primary aim of addressing conventional attacks by a state against another state, and not a terrorist action by a non-state actor against the world’s only superpower.⁸⁴⁴ The fact that the right to self-defence recognized in Article 51 could be interpreted and applied to respond to the latter situation, and that most states appear to have accepted that the customary law on self-defence changed more generally, offers evidence in support of the observation that, when states use force, international law helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice.

Second hypothesis: international law is understood as a binding and distinct set of legal rules

The aspects of Britain’s participation in the Afghanistan Conflict assessed above support this study’s argument about how international law influences the use of force by states. By contrast, the discourse and actions of some of the key leaders and advisors in power during the war offer mixed support for the hypothesis that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decisions. As will be seen below, there is evidence that these leaders and advisors have viewed Britain’s obligations and rights under the UN Charter in legal terms, while they may have seen the country’s commitments under the NATO treaty more in political terms. Further, it appears that the

⁸⁴³ Fry and Bowen 2011: 68.

⁸⁴⁴ See the commentary on Article 51 in Simma 2012.

legal status of the UK's obligations and rights under the Charter has impacted the thinking and decisions of policy-makers regarding Afghanistan, but the same cannot be said of Britain's commitments under the NATO treaty. Finally, there is evidence that some leaders and advisors have understood Britain's international human rights obligations in binding terms. However, the country's criticized policy and practice regarding Afghan detainees, described earlier, indicates that the legal status of these obligations has perhaps had an uneven impact on the thinking and decisions of some policy-makers.

a) Britain's understanding of its obligations and rights under the UN Charter and NATO Treaty

In deciding how Britain would react to 9/11 and contribute to the US-led military action in Afghanistan, there is evidence that some key leaders and advisors have interpreted the UK's obligations and rights under the UN Charter in distinctly legal terms. For instance, recall that in response to concerns about Britain's anticipated military reaction to 9/11 and the US-led operation that was about to start in Afghanistan, Foreign Secretary Jack Straw told Parliament on 4 October 2001 that UN Security Council Resolution 1373 was "the first time that a resolution has *imposed an obligation* on all states to respond to the global terrorist threat" [emphasis added]. "For the first time in the history of the United Nations", Straw continued, this resolution "*mandates* member states – *they are not given an option* – to take a variety of actions to fight terrorism of all kinds" [emphasis added].⁸⁴⁵ This binding view of Resolution 1373 likely stemmed from the fact that its operative paragraphs stated that the Security Council, acting under Chapter 7 of the Charter, "*Decides* that all States shall" take the variety of actions noted by Straw above [emphasis in original].⁸⁴⁶ In addition to the word "shall", the word "decides" in the resolution is relevant

⁸⁴⁵ HC Debs., 4 Oct. 2001, vol. 372, col. 692.

⁸⁴⁶ Security Council Resolution 1373.

because, under Article 25 of the Charter, UN member states “agree to accept and carry out the *decisions* of the Security Council in accordance with the ... Charter” [emphasis added].⁸⁴⁷

If the binding view of Resolution 1373 stemmed from the inclusion of the term “decides”, this would be consistent with the way UK leaders understood the main Security Council resolution on the Korean War fifty years earlier. This instrument, recall, had “recommended” but not “decided” that states assist South Korea to repel North Korea’s attack. Consequently, leaders tended to see this as a non-binding request that UN member states were technically free to ignore. By contrast, Resolution 1373 employed the term “decides” and, again, this likely contributed to it being seen as binding. In response to this perceived obligation, Britain initiated a number of changes to its domestic anti-terrorism laws.⁸⁴⁸ It also, as I suggested earlier, cited Resolution 1373 as evidence of the international community’s support for the initial US-led military actions in Afghanistan and, by implication, the self-defence justification advanced for these actions.

In addition to Britain’s obligations under the UN Charter, there is evidence that the country’s rights under that treaty have also been interpreted in legal terms. As we saw earlier, in the fall of 2001, a number of UK leaders explained Britain’s initial use of force in Afghanistan to the British public and the international community by referencing the right to self-defence recognized in Article 51 of the UN Charter. Consistent with the legal complexities associated with this position, leaders appear to have considered the events of 9/11 to constitute an “armed attack” for purposes of Article 51, and sought to demonstrate that this attack was attributable to al Qaeda. Finally, leaders saw a need to show that a sufficient nexus existed between al Qaeda and the Taliban, and they emphasized that most states supported the US-led military response to 9/11.

⁸⁴⁷ Article 25, UN Charter.

⁸⁴⁸ See e.g. the *Anti-terrorism, Crime and Security Bill* introduced in Parliament on 12 Nov. 2001.

In contrast to the above interpretation of Britain's obligations and rights under the UN Charter, leaders and advisors may have understood the country's commitments under the NATO treaty more in political terms. On the one hand, John Kampfner reports that, during a key phone conversation between Tony Blair and George W. Bush in the initial days following 9/11, the view was expressed that "Support from NATO and the UN would provide *legal* and political weight for a military response" [emphasis added].⁸⁴⁹ Similarly, Chris Meyer, Britain's former Ambassador to the US, notes that "Blair and Bush were agreed on the importance of rapidly getting the UN and NATO four-square behind the United States in condemnation of the attacks: this would provide a *legal* and political framework for military action" [emphasis added].⁸⁵⁰

On the other hand, when asked whether Britain's obligations under Article 5 of the NATO treaty mattered to the UK's participation in the Afghanistan Conflict, Peter Ricketts indicates that these were not legal duties in the formal sense but alliance commitments.⁸⁵¹ Stressing the legal relevance of the UN Security Council resolutions pertaining to ISAF, Ricketts explains that:

The invocation of Article 5, requested by the Americans, hasn't ever been part of our legal basis for our actions [in Afghanistan] ... Article 5 doesn't in itself create a legal basis, it's an obligation to come to collective aid. And in fact the Americans never asked for any particular NATO assistance under Article 5, as far as I recall. So it has remained dormant ... If they had, we would have looked at what they asked [for], and tried to respond positively. But it's not part of our legal basis for being there. It is a reminder we have obligations in NATO, and one day they might be called on ... So [the invocation of Article 5] had a political value, but it didn't have a legal value, and it didn't actually affect the conduct of the operation.⁸⁵²

⁸⁴⁹ Kampfner 2004: 116.

⁸⁵⁰ Meyer 2005: 191.

⁸⁵¹ Phone interview with Sir Peter Ricketts, 26 June 2013.

⁸⁵² Ibid.

Similarly, Nigel Sheinwald observes that:

It's not that we were negative about the Article 5 declaration, we very much supported it ... Our Ambassador [to NATO] was very closely involved in it [being invoked]. But it wasn't going to be critical for us because I think the feeling in the UK was we were going to be politically supportive, going to be helping, more or less whatever happened ... The Article 5 [invocation] was helpful in drawing *political* attention to the issue, in showing a high degree of NATO unity and determination [emphasis added]. But it wasn't critical in getting the UK 'into the line'. We were there anyway.⁸⁵³

"Of course", Sheinwald adds, Afghanistan "then *became* a NATO operation ... and the reason NATO could get involved was because there was a solid legal basis, and a solid political basis, for what we were doing [emphasis in original]. Which was not the case with Iraq."⁸⁵⁴

In sum, the above indicates that, during the Afghan Conflict, some key UK leaders and advisers have understood Britain's obligations and rights under the UN Charter more in legal terms, and its commitments under the NATO treaty perhaps more in political terms. Further, it appears that the legal status of the UK's obligations and rights under the Charter has likely impacted the thinking and decisions of policy-makers regarding Afghanistan, while the same cannot be said of Britain's commitments under the NATO treaty.

b) Britain's interpretation of its obligations under international human rights law

We saw above that, in deciding how Britain would react to 9/11 and contribute to the US-led military action in Afghanistan, some key leaders and advisers have seen the UK's obligations and rights under the UN Charter more in legal terms, and its commitments under the NATO treaty

⁸⁵³ Interview with Sir Nigel Sheinwald, London, 8 July 2013.

⁸⁵⁴ Ibid. Another reason NATO could get involved in Afghanistan, Sheinwald says, is because Russia did not fundamentally oppose such involvement.

perhaps more in political terms. The international law that was seen this way is the *jus ad bellum*. This body of rules, recall, governs the use of force by states, while the *jus in bello* – the law of armed conflict – governs the conduct of states in war. The relationship between *jus in bello* rules, which apply in times of armed conflict, and international human rights law, which has historically applied in times of peace, is complex and beyond the scope of this study.⁸⁵⁵ It suffices to recall that, during Britain’s military presence in Afghanistan, officials have thought that, in addition to relevant *jus in bello* rules that likely apply, Britain’s commitments under the European Convention on Human Rights are potentially engaged by the country’s policy and practice regarding Afghan detainees. There is evidence that these ECHR rules have been seen in binding terms. However, Britain’s criticized policy and practice regarding detainees suggests that the legal status of these rules has perhaps had an uneven impact on the thinking and decisions of some policy-makers.

For instance, recall that UK officials involved in negotiating the 2006 Memorandum of Understanding with Afghanistan on detainees remarked “that it was structured to avoid the risk of a *breach* of the UK’s Convention *obligations* which might be applicable: key points were to prohibit the death penalty, to prevent the transfer of detainees to a third party, and to enable UK access to detainees transferred to the Afghan authorities” [emphasis added].⁸⁵⁶ Consistent with these remarks, we saw that one of the explicit aims of the MoU is to “Ensure that Participants will observe the basic principles of international human rights law such as the right to life and the prohibition on torture and cruel, inhumane and degrading treatment pertaining to the treatment and transfer of persons by the UK [armed forces] to Afghan authorities”. Accordingly, the MoU goes

⁸⁵⁵ For further analysis of the issue, see e.g. Droege 2007; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J., 9 July 2004.

⁸⁵⁶ *Evans* at para. 94.

on to provide that individuals arrested and detained by UK forces “are to be treated in accordance with *applicable* provisions of *international human rights law*” [emphasis added].⁸⁵⁷

Notwithstanding the above, however, we also saw that critics have argued that transferees into Afghan custody have been and continue to be at real risk of torture or serious mistreatment and, therefore, that the practice of transfer has been and continues to be in breach of Britain’s policy and unlawful. UK transferees and relevant reports, recall, have documented numerous cases of torture and mistreatment of Afghan prisoners, and alleged that the NDS has a particularly poor record in this regard. The British government, we saw, has been aware of these allegations, and UK officials themselves have been concerned by the NDS claim that the agency has no direct obligation under the MoU. Depending on the efforts one thinks Britain must take to protect against the risk that transferees may be tortured, these details leave open the possibility that the legal status of the ECHR rules prohibiting torture have had an uneven impact on the thinking and decisions of some policy-makers. Assessing this possibility will likely have to wait until more evidence becomes available.

For now, what is clear is that the UK has improved its safeguards regarding transferred detainees over time, and responded to specific concerns by pressuring Afghan officials, investigating allegations of abuse, stopping transfers to some prisons, and detaining some individuals for an extended period at Camp Bastion. These altered practices, recall, have been shaped in part by a concern for Britain’s perceived obligations under the ECHR, and it is equally possible that the legal status of these obligations has influenced the thinking and decisions of certain policy-makers. As Nigel Sheinwald notes, the issue of Afghan detainees was “exhaustively” reviewed “by our defence department and intelligence agencies. A huge amount of attention has been given to it. Whether the policy [we adopted] was right or wrong, it wasn’t without [extensive]

⁸⁵⁷ *Evans* at para. 96.

debate, care and involvement of our legal experts. The Attorney General was personally involved in all of those decisions”.⁸⁵⁸

Conclusion

The key aspects of Britain’s participation in the Afghanistan Conflict assessed above support this study’s argument that, when states use military force abroad, international law helps define and shape their possible course of action, and the justifications that can be advanced for their behaviour. More specifically, the preceding review helps to illustrate the four main roles that international law can play in the use of force by states.

First, like Clement Attlee during the Korean War, we saw that Prime Minister Tony Blair felt a sense of obligation towards the conflict in Afghanistan that followed the events of 9/11. Unlike with Attlee, however, this perception of obligation appears to have been shaped less by Britain’s formal membership in the UN and a belief in the international rule of law, and more by Blair’s ethical views that mass terrorism must be addressed and that foreign intervention in Afghanistan was needed to do so. More generally, though, during the three phases of Britain’s military participation in the Afghanistan Conflict, we saw that the UK’s perceived commitments to the UN and NATO helped constitute the identities of some leaders and officials, and helped shape the way in which Britain’s interests were interpreted and pursued. Further, as the Afghan war became more challenging and US military policy in the region became more controversial, these perceived commitments acted as a site for a “communicative” struggle over Britain’s legitimate identity and rightful behaviour with respect to these developments.

In addition to its constitutive effect, international law has also had a regulative influence on Britain’s political and military practice regarding the Afghanistan Conflict. A key example of this

⁸⁵⁸ Interview with Sir Nigel Sheinwald, London, 8 July 2013.

impact is Britain's policy and conduct with respect to individuals captured in Afghanistan by UK forces and transferred to local authorities. As we saw, there is evidence that Britain's policy and conduct regarding Afghan detainees has been governed and controlled in part by its interpretation of a) Security Council Resolution 1386, which created ISAF, and b) relevant basic principles of international human rights law, including the right to life and the ban on torture. This interpretation, further, has had a significant effect even though other material factors – such as the UK's interest in gathering intelligence, preventing attacks, and cooperating with Afghan security and intelligence agencies – have arguably conflicted with some of its perceived requirements.

Third, Britain's participation in the Afghanistan Conflict also indicates that, when states use force, international law helps permit and legitimate certain political and military practices that otherwise might not be permitted. Again, in response to the terrorist events of 9/11, the US and its allies, including the UK, attacked, invaded and occupied a sovereign state – i.e. Afghanistan – that had not technically attacked them. This response was significantly broader than prior US reactions to earlier terrorist attacks, and strategically different than the reaction some critics say the US and Britain should have employed. As we saw, there is evidence that international legal considerations were relevant to justifying and explaining Britain's role in this extensive military reaction to 9/11 to the UK public and the international community.

Finally, Britain's involvement in the Afghan Conflict suggests that, when states use force, international law helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice for states and other international actors. Two examples, we saw, highlight this phenomenon. The first is Britain's argument that it was using force in Afghanistan under the doctrine of self-defence, and the related change in the customary international law on this issue. The second example is the passing of Security Council Resolution 1373 in September 2001, which required states to adopt new domestic measures to address international terrorism.

Regarding this study's second hypothesis, the discourse and behaviour of some of the key UK leaders and advisors in power during the Afghanistan Conflict offer mixed support for the proposition that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making. On the one hand, we saw that key leaders and advisors have viewed Britain's obligations and rights under the UN Charter in legal terms. Foreign Secretary Jack Straw, for instance, told Parliament that UN Security Council Resolution 1373 "mandates member states – they are not given an option – to take a variety of actions to fight terrorism of all kinds". Moreover, leaders and advisors recognized that the use of military force in Afghanistan and the treatment of captured enemy individuals were in part legal issues, in that they were governed by pre-existing rules in the UN Charter, NATO treaty, and the European Convention on Human Rights. It also appears that leaders and advisors discussed the extent to which Britain was legally obligated to consider these rules when deciding whether and how to use force in Afghanistan, and what policy and practices to adopt regarding Afghan detainees. Finally, Straw, Prime Minister Tony Blair, Defence Minister Geoff Hoon, and Defence Minister Philip Hammond saw that Britain's actions in Afghanistan would require legal justification at the domestic and international level. The foregoing details resonate with many of the relevant observable implications posited in the introduction chapter, and suggest that UK leaders such as Straw felt bound in part by international law.

On the other hand, we also saw that key leaders and advisors have perhaps seen the country's commitments under the NATO treaty more in political terms. And, although the legal status of the UK's obligations and rights under the UN Charter appears to have impacted the thinking and decisions of policy-makers regarding Afghanistan, the same cannot be said of Britain's commitments under the NATO treaty. Finally, while leaders and advisors have understood Britain's international human rights obligations in binding terms, the country's criticized policy and

practice regarding Afghan detainees suggests that the legal status of these obligations has perhaps had an uneven impact on the thinking and decisions of some policy-makers.

Chapter 5: Canada and the Afghanistan Conflict

Cognizant of the previous chapter, I now examine Canada's participation in the Afghanistan Conflict. This chapter considers important aspects of this participation with a view to better understanding how international law influenced this participation, and whether key leaders understood said law as a binding and distinct phenomenon. The aspects of Canada's participation that are assessed touch upon its policy and practice regarding: a) whether and how to be involved in the military operations in Afghanistan following 9/11; b) the major international legal issues related to the conflict; and c) the treatment of captured enemy individuals.

The chapter is organized as follows. Keeping in mind the background to the war described earlier, I first outline the three main phases of Canada's involvement. Next, I summarize the dominant scholarly view of why Canada has participated in the conflict, and suggest how this study challenges and advances this view. The rest of the chapter then analyzes Canada's involvement in the conflict from the perspective of international law. By considering the key aspects of Canada's policy and practice noted above, I first examine whether and how these aspects reflect the four roles of international law that were theorized earlier. Next, I assess the extent to which Canadian policy-makers understood international law as a binding and distinct set of legal rules, and the degree to which the legal status of these rules impacted their decision-making. I do so by analyzing Canada's interpretation of its obligations under the NATO treaty and UN Charter, and its commitments under the Geneva Convention on Prisoners of War (POWs). I conclude by summarizing my findings.

Throughout the chapter, I argue that Canada's participation in the Afghanistan Conflict offers evidence in support of this study's main thesis that, when states use military force abroad, international law helps define and shape their possible course of action, and the justifications that can be advanced for their behaviour. However, I also suggest that the discourse and actions of some

of the key Canadian leaders in power during the war offer mixed support for the hypothesis that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making.

The three phases of Canada's military participation in the Afghanistan Conflict

As with Britain, Canada's military participation in the Afghanistan Conflict can be divided into three main phases. The initial phase, which occurred under the US-led Operation Enduring Freedom (OEF), took place between September 2001 and the summer of 2002. It involved an incremental buildup of forces. First, on 28 September 2001, more than 100 members of Canada's military serving on exchange programs with the US and other allies were authorized to participate in any operations conducted by their host units in response to al Qaeda's attacks on 9/11.⁸⁵⁹ Next, on 8 October, Canada announced it would deploy six naval ships⁸⁶⁰ and six planes⁸⁶¹ to the region. It also said that special forces would be sent to contribute to the overall effort.⁸⁶² Finally, in early 2002, Canada decided to contribute around 800 regular ground troops to Kandahar, a volatile province in the south of Afghanistan, to serve with the US army.⁸⁶³ This deployment was Canada's first combat mission since the Korean War. The soldiers arrived in theatre on 22 February 2002, and stayed for six months.⁸⁶⁴

Canada's second phase of military action in Afghanistan occurred between August 2003 and December 2005, and involved Canada sending around 2,000 soldiers to Kabul and taking command

⁸⁵⁹ This authorization was made by Defence Minister Art Eggleton. See "Speaking Notes" for Press conference, Ottawa, 8 Oct. 2001.

⁸⁶⁰ Ibid, and Stein & Lang 2007: 10-11.

⁸⁶¹ Three Hercules, one Airbus, and two Aurora maritime patrol aircraft were deployed to conduct surveillance and airlift support in the region. See "Speaking Notes", footnote above.

⁸⁶² These special forces, known as Joint Task Force 2 (JTF2), had been requested. While Eggleton did not say so at the time, about forty commandos were deployed to southern Afghanistan in December 2001. They helped US and British forces in the initial ground war against Taliban and al Qaeda forces. See Daniel Leblanc, "Elite JTF2 Goes into Kandahar War Zone", *The Globe and Mail*, 20 Dec. 2001, at p. A1.

⁸⁶³ Stein & Lang 2007: 18, and Granatstein 2011: 420. Transport planes were also sent to support the soldiers.

⁸⁶⁴ For descriptions of this deployment from the perspective of a military historian, see Granatstein 2011: 420-21.

of the International Security Assistance Force (ISAF) there in February 2004.⁸⁶⁵ As part of the decisions behind this phase, it was agreed that Canada would lead ISAF for one year, and that in order to find a replacement for Canada afterwards, Defence Minister John McCallum would lobby for NATO to take over the mission. As will be discussed later below, the dominant view is that the Cabinet of Liberal Prime Minister Jean Chrétien decided in favour of the ISAF operation mainly because it allowed Canada to support the US in its “War on Terror” without having to support its controversial war in Iraq.⁸⁶⁶ However, this study’s findings challenge this view and suggest instead that Chrétien, McCallum and Foreign Minister Bill Graham were motivated more by a belief that the UN-authorized ISAF mission was legitimate and more consistent with Canada’s national identity as a peacekeeper, and that the integrity of NATO was at stake.

The third phase of Canada’s military participation in the Afghanistan Conflict took place from February 2006 to July 2011, and involved a significant number of Canadian forces being redeployed to Kandahar through a series of authorizations and extensions.⁸⁶⁷ This phase began when, in May 2005, Liberal Prime Minister Paul Martin and his Cabinet approved a five-point plan proposed by then Chief of the Defence Staff (CDS), Rick Hillier. Among other things, this plan involved the deployment for one year, beginning in February 2006, of about 1,000 ground troops to conduct stabilization and combat operations in the province.⁸⁶⁸ In May 2006, at the request of newly elected Conservative Prime Minister Stephen Harper, Parliament voted to extend Canada’s combat mission in Kandahar by another two years, until 2009. Following an independent review of

⁸⁶⁵ Stein & Lang 2007: 73. For a description of this second phase, see Granatstein 2011: 422-25.

⁸⁶⁶ Variations of this view are articulated by Stein & Lang 2007: 71-3; Nossal 2010: 123; Granatstein 2011: 422; and Hillier 2009: 263.

⁸⁶⁷ For a description of this third phase, see Granatstein 2011: 430-41.

⁸⁶⁸ For the other elements of the plan, see Stein & Lang 2007: 182-84.

the issue in 2008,⁸⁶⁹ Parliament then extended the mission again until 2011.⁸⁷⁰ In July of that year, Canada ended its combat operation in Kandahar, and began a new non-combat role in Kabul.⁸⁷¹

Why Canada has participated in the Afghanistan Conflict

Like Canada's participation in the Korean War, the country's extensive and costly⁸⁷² involvement in the Afghanistan Conflict is also not immediately easy to explain in strict national interest terms, narrowly conceived. As with Britain, the two factors one might presume to be most relevant – i.e. Canada's alliance with the US and its security concern regarding al Qaeda – may help explain why Canada initially used force in Afghanistan, but it is less clear why the Canadian military has remained in the country for so long, and why Canada has agreed to contribute to the difficult “nation building” and counter-insurgency efforts there.⁸⁷³

Reflecting this empirical puzzle, scholarly opinion on why Canada has participated militarily in the Afghanistan Conflict is divided and evolving.⁸⁷⁴ This is likely because the war is

⁸⁶⁹ The review, entitled the *Independent Panel on Canada's Future Role in Afghanistan*, was released in January 2008.

⁸⁷⁰ Parliament voted in February 2008. See Government of Canada, “History of Canada's Engagement in Afghanistan 2001–2012”.

⁸⁷¹ This non-combat role aims to focus on development, diplomacy, humanitarian assistance, and the training of local police and security forces. It is scheduled to end in 2014. See *ibid*.

⁸⁷² Around 40,000 Canadians have served in Afghanistan (13,000 more than served in or contributed to the Korean War). Like Britain, Canada's participation in the Afghan Conflict has resulted in the most difficult fighting Canadian forces have seen since Korea. Since 2002, 158 soldiers have been killed in Afghanistan, and over 2,000 troops have been wounded. Further, during some of the most violent periods of the war, Canada has suffered more casualties as a proportion of total force size than the US or any other NATO country. See: “Over 2,000 Canadians were wounded in Afghan mission: report”, *National Post*, 1 Feb. 2012; “In the line of duty: Canada's casualties”, CBC News website, 31 Oct. 2011; and Canadian Centre for Policy Alternatives, “Canada's Fallen: Understanding Canadian Military Deaths in Afghanistan” (Ottawa, Sept. 2006). Estimates of the financial cost of Canada fighting in Afghanistan range from \$11 billion to over \$18 billion. See: Government of Canada, “Cost of the Afghanistan Mission: 2001-2011”; and “Afghan mission could cost up to \$18.1 billion”, CBC News, 9 Oct. 2008. Finally, Canada's extensive involvement in Afghanistan has also resulted in opportunity costs, in that the country's strategic ability to contribute to other military or peacekeeping initiatives has been seriously constrained (see e.g. McDonough 2008: 649).

⁸⁷³ On Canada's approach to peacebuilding and counter-insurgency in Afghanistan, see Travers & Owen 2008.

⁸⁷⁴ For instance, see: Stein & Lang 2007: 261 (who emphasize, as noted above in the text, the Canada-US relationship); Windsor, Charters & Wilson 2008: 10 (who stress the perceived need to rebuild Afghanistan and advance global security); Charbonneau & Parent 2010: 87-8 (who situate Canada's participation within a larger US-led hegemonic global order); Bratt 2011: 316-17, 326 (who cites the perception that 9/11 was an attack on the Western world, the support of the US, UN and NATO for the initial invasion, and the desire to improve US-Canada relations and rebuild Canada's military); and Granatstein 2011: 442 (who stresses the importance of nation-building in Afghanistan).

relatively recent and still ongoing, as well as the fact that both Liberal and Conservative governments have decided to use force in the conflict, and the justifications for these decisions have changed over time.⁸⁷⁵ An often cited account on the subject, by Janice Gross Stein and Eugene Lang, argues that the main reason Canada has taken military action in Afghanistan is to show support for the United States in its “War on Terror”, and that “Canada’s military missions [in Afghanistan] were largely, if not exclusively, determined on the basis of Ottawa’s relationship with the United States”.⁸⁷⁶ Similarly, Duane Bratt argues that one of the two reasons Canada has remained in Afghanistan is to support the Canada-US relationship.⁸⁷⁷ Underlying the argument of Stein, Lang, and Bratt are the implicit observations that, in the post 9/11 era, Canada’s economic, security, and political links with America have been so important that leaders of different ideological orientation have all believed that Canada should contribute militarily to America’s global fight against terrorism, and that Afghanistan is a key theatre of that fight.⁸⁷⁸

Canada’s relationship with the US is undoubtedly crucial to understanding Canadian decision-making regarding the Afghanistan Conflict. However, other important domestic and international factors have also animated such decision-making, including considerations that have clearly run *against* the perceived wishes of the US during the war. For instance, there is evidence that public opinion in Canada – including the public’s interpretation of the relevant tenets of international law, and its view of the administration of US President George W. Bush – has affected

⁸⁷⁵ As Jean-Christophe Boucher observes, the rationales for Canada’s Afghan mission have undergone “notable shifts”, and have cited various nationalist, altruistic and international motivations (2009: 718, 721).

⁸⁷⁶ Stein & Lang 2007: 20, 261.

⁸⁷⁷ As Bratt notes, the 9/11 attacks may explain why Canada *initially* went to Afghanistan but they do not explain the subsequent decisions to *stay* in the country for a decade, and the government’s stated aims in Afghanistan do not adequately explain the extent of Canada’s unprecedented military commitment there. “Afghanistan”, Bratt argues, “was being used to advance two additional foreign policy goals: 1) supporting the Canada-US relationship; and 2) rebuilding the Canadian military” (2011: 318).

⁸⁷⁸ For example, economically, the US is Canada’s largest trading partner. In terms of security, cooperation between America and Canada is demonstrated by NORAD (a bi-national aerospace defence arrangement established in 1958), the NATO alliance, and military exchange programs between the two countries. Politically, the two countries cooperate at both the national and sub-national levels of government.

the discourse and action of the governments in power during the conflict. This effect is suggested by Canada's non-participation in the US-led invasion of Iraq and in America's Ballistic Missile Defence program. Further, and most importantly for this study, there is evidence that Canada's perception of its rights under the UN Charter and its obligations under the NATO treaty and Geneva Conventions have influenced the decisions of leaders regarding Canada's involvement in the Afghanistan Conflict, and the justifications that could be made for its behaviour.

The four roles of international law in Canada's use of force in Afghanistan

Canada's participation in the Afghanistan Conflict offers evidence in support of this study's main argument that, when states use force, international law helps define and shape their possible course of action, and the justifications that can be made for their behaviour. More specifically, this participation illustrates the four roles that international law can play in the use of force: 1) it helps constitute the identities of the actors at issue; 2) it helps regulate the political and military practice of the actors at issue; 3) it permits and legitimates certain political and military practices that otherwise might not be permitted; and 4) it helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice. Below, I consider important aspects of Canada's military involvement in Afghanistan to demonstrate each role more fully.

a) International law helped constitute the identities of key Canadian leaders

As was the case with Louis St. Laurent, Lester Pearson and Brooke Claxton during the Korean War, there is evidence that, in the debate and decisions behind the three phases of Canada's military actions in Afghanistan, international law has helped constitute the identities of key leaders, and shaped the way in which Canada's interests were interpreted and pursued.

For example, the decisions behind phase one of Canada's participation in the Afghan Conflict occurred in two stages. The first stage involved the decisions that led to the various force deployments in the fall of 2001, noted earlier above. The second stage involved the decision in January 2002 to send regular ground troops to Kandahar. Regarding the first stage, Canada's perceived obligations under the NATO treaty and its rights under the UN Charter animated the thinking and values of Defence Minister Art Eggleton, Prime Minister Jean Chrétien, Chief of the Defence Staff (CDS) Ray Henault, and Foreign Minister Bill Graham. Such commitments, we will see below, meant that following 9/11, these leaders thought Canada was obligated to support the US and NATO in the global fight against terrorism, and to participate militarily in this fight. An unstated assumption behind this view is that Canada is the kind of state that honours its prior international commitments, and takes action in this regard when necessary.

Reflecting on why Canada originally decided to participate in the Afghanistan Conflict, Art Eggleton, Canada's Defence Minister from 1997 to early 2002, acknowledges the relevance of the Canada-US relationship but ultimately grants more importance to Canada's commitment under Article 5 of the NATO treaty.⁸⁷⁹ Article 5, recall, provides that an armed attack on one NATO member is an attack on all and, thus, if an attack occurs, each member, in exercise of the right to self-defence recognized in Article 51 of the UN Charter, will assist the member attacked by taking action, including force, to restore the peace of the North Atlantic area.⁸⁸⁰ And Article 51, recall

⁸⁷⁹ Interview with Art Eggleton, Toronto, 19 Sept. 2011. As Eggleton puts it, while "there's no doubt" that in the back of leaders' minds at the time was the importance of the Canada-US relationship, "it's a little more fundamental than that. Remember we're part of the NATO alliance."

⁸⁸⁰ In full, Article 5 provides that "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." Importantly, Article 5 does not provide,

further, states that nothing in the UN Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a UN member, until the Security Council has taken measures necessary to maintain international peace and security.⁸⁸¹ We saw in the previous chapter that, following 9/11, the North Atlantic Council (NAC) decided to invoke Article 5 of the NATO treaty. And when this provision was declared, Eggleton notes, “we had an obligation. It could have worked the same if the attack was on ... any other member of the alliance.”⁸⁸² The essence of what Canada did, he explains, “was to acquit ourselves of our obligations under the NATO treaty.”⁸⁸³

Other Canadian leaders echo Eggleton’s views. In his memoirs, Jean Chrétien, Canada’s Prime Minister from 1993 to late 2003, observes proudly that following 9/11:

Canada had been the first to talk about the use of NATO’s Article 5 ... and in October 2001 we joined our NATO and Afghani allies in an operation led by the United States and Great Britain to go after al Qaeda in Afghanistan. Not only was this a multilateral undertaking in keeping with our commitment to NATO, but it made sense, because the fundamentalist Taliban government was undoubtedly in league with Osama bin Laden and his terrorist training camps.⁸⁸⁴

Whether or not Canada was “the first” to discuss the use of Article 5 following 9/11, it is true that David Wright, Canada’s Ambassador to NATO at the time, took a lead in this regard, and that he chaired the meeting of the NAC on 12 September 2001 where the likely applicability of Article 5

contrary to the questionable legal interpretation of some Canadian political scientists (e.g. Bratt 2011: 317), that NATO members are obliged to provide assistance “by all means necessary”.

⁸⁸¹ Moreover, Article 51 goes on to state, “Measures taken by Members in the exercise of this right of self-defence 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.”

⁸⁸² Interview with Art Eggleton, Toronto, 19 Sept. 2011.

⁸⁸³ Ibid.

⁸⁸⁴ Chrétien 2008: 304.

was first formally discussed.⁸⁸⁵ Present at this meeting were Eggleton and General Ray Henault, Canada's CDS at the time.⁸⁸⁶ Reflecting on the values that animated Canada's thinking at the NAC meeting, and the country's subsequent military response to 9/11, Henault notes that these were:

The recognition that [9/11] had been an atrocity perpetrated on the international community. Not just on the US ... [Canada's thinking] really did lean towards our relationship with our NATO partners, with our Asia-Pacific partners, because all had lost or potentially lost people in the attacks. So it was very much a Canada-US issue, but also a multinational issue. And it was important that Canada's response be seen as demonstrating that solidarity with the US, but also [that it was] a responsible international citizen. And that influenced the thinking of the Prime Minister, I can assure you. There was no hesitation on his part, in terms of building a capable, measured, and appropriate response.⁸⁸⁷

Other Canadian decision-makers who were not at the NAC meeting were also concerned with Canada's NATO commitments. As Bill Graham, chair of the Parliamentary Foreign Affairs Committee in the fall of 2001 and Foreign Minister from January 2002 to July 2004, states: "The reason we went [to Afghanistan] in the first place is that it was an Article 5 of NATO obligation ... this was the first time Article 5 had ever been invoked."⁸⁸⁸ Pointing out that it would have been "inconceivable" for Canada not to have rallied to the US after 9/11 and Article 5 being declared, Graham adds that "a great deal of the discussions we had in the Foreign Affairs Department around Afghanistan dealt with the integrity of NATO, and our NATO obligations".⁸⁸⁹

⁸⁸⁵ Interview with Art Eggleton, Toronto, 19 Sept. 2011; and interview with Ray Henault, London, 28 Nov. 2011. While there was a belief among NATO members that an attack had been perpetrated on one of its members, the American Ambassador to the Alliance, Nick Burns, stressed that, before Article 5 was formally invoked, the US wanted to be sure that 9/11 was an external and not an internal incident.

⁸⁸⁶ On 11 Sept. 2001, Eggleton and Henault were in Bulgaria and Hungary, respectively. The following day, they flew to Brussels to attend the NAC meeting with Wright.

⁸⁸⁷ Interview with Ray Henault, London, 28 Nov. 2011.

⁸⁸⁸ Interview with Bill Graham, Toronto, 12 Sept. 2011.

⁸⁸⁹ Ibid.

Following Canada's initial military contributions in the fall of 2001, some leaders, such as Deputy Prime Minister John Manley,⁸⁹⁰ felt that the country had to do more to support the US.⁸⁹¹ There is evidence that the interpretation and pursuit of this objective was shaped by the government's preference for the UN-authorized ISAF mission in Kabul over the US-led OEF operation in Kandahar. For instance, agreeing that one of Canada's concerns was how to show its support for the US, and for the implementation of the NATO treaty, Eggleton describes the policy context at the time as follows. On the one hand, US forces were moving into Kandahar, where the Taliban and al Qaeda had a strong presence, while on the other, the European countries were considering a largely peace enforcement role in Kabul under ISAF. As a result, the question became: "Where did Canada, as the only other North American member of NATO, fit into all this?"⁸⁹²

Initially, the government appears to have thought that the best "fit" for Canada was a peace enforcement role in Kabul. For example, following Canada's initial military contributions in the Fall of 2001, Eggleton spoke with UK Defence Minister Geoff Hoon about Canada participating in ISAF.⁸⁹³ This mission, Eggleton was quoted in newspapers at the time as saying, was "not an offensive mission, not a front-line mission. This is a stabilization mission to assist in opening corridors for humanitarian assistance".⁸⁹⁴ Further, he added, "These people are not intended to go in under a full-conflict situation. And if it ever came to full conflict, they'd probably be taken

⁸⁹⁰ Manley was Foreign Minister from October 2000 to January 2002, and Deputy Prime Minister from January 2002 to December 2003.

⁸⁹¹ This was due to the following observations. In the mid-1990s, in an effort to reduce Canada's deficit, the Chrétien government made significant cuts to the country's defence budget. As a result, many US military leaders reportedly thought Canada was inadequately contributing to the security of the North American continent. Following 9/11, the government wanted to improve Canada's stature in the US regarding defence and security issues. Consequently, after NATO invoked Article 5 of the Alliance treaty, members of the Cabinet, such as Manley, who were "continentalist" in their thinking felt that Canada had to do more to demonstrate its support for the US. See Stein & Lang 2007: 14.

⁸⁹² Interview with Art Eggleton, Toronto, 19 Sept. 2011.

⁸⁹³ Ibid.

⁸⁹⁴ Art Eggleton, cited by Sheldon Alberts, "Six Months and Out for Our Troops: Ottawa: Analysts Warn of Losses", *National Post*, 16 Nov. 2001, at A1.

out”.⁸⁹⁵ By emphasizing the anticipated humanitarian nature of ISAF, Eggleton was likely seeking to portray it as more consistent with the peacekeeping operations that Canadians had become familiar with in the latter half of the twentieth century.⁸⁹⁶ And the reason Eggleton likely sought to portray ISAF this way is because, in addition to wanting to show Canada’s solidarity with the US following 9/11, the Chrétien government also wanted to ensure that any such support was acceptable to the Canadian public,⁸⁹⁷ and resonated with the public’s understanding of Canada’s role in international affairs.⁸⁹⁸ In the end, though, Canada did not participate in the ISAF mission and, as noted earlier, instead contributed to the US-led operation in Kandahar.⁸⁹⁹

Canada’s second phase of military action in Afghanistan, recall, occurred from 2003-05, and involved Canada sending soldiers to Kabul and taking command of the ISAF mission there in early 2004. The decisions behind this phase took place in the winter and spring of 2003. As with the first phase, there is evidence that, in the debate and decisions behind phase two, Canada’s perceived commitments to the UN and NATO helped constitute the identities of key leaders at the time. Moreover, while the dominant scholarly view is that the government decided in favour of the ISAF operation mainly because it allowed Canada to support the US in its “War on Terror” without having to support its controversial war in Iraq,⁹⁰⁰ this study’s findings suggest that political leaders were motivated more by a belief that the UN-authorized ISAF mission was legitimate and more

⁸⁹⁵ Art Eggleton, cited by Brian Laghi, “Eggleton Plays Down Combat Role for Troops”, *The Globe and Mail*, 16 Nov. 2001, at A1.

⁸⁹⁶ Since 1948, over 120,000 Canadians have served in almost 50 different UN peacekeeping operations ranging from truce observance to the supervision of elections in the Middle East, Asia, Europe, Africa, and Central and South America. See Rudderham 2008; and UN Association in Canada, “The Canadian Contribution to UN Peacekeeping”.

⁸⁹⁷ Stein and Lang label these two ambitions the “core political goals” of the government following 9/11. And the ISAF mission, they note, appealed to the Chrétien Cabinet because it allowed leaders to appear independent and somewhat distant from Washington, while at the same time demonstrating solidarity with the US (2007: 16).

⁸⁹⁸ As Claire Turenne-Sjolander argues, in an effort to strengthen Canada’s national identity and manage public opinion, the peacekeeping “frame” has often been used to explain Canada’s military presence in Afghanistan (2011).

⁸⁹⁹ There are differing accounts for this shift in policy. The main reasons appear to have been Britain’s opposition to Canada participating in ISAF, and America’s request for support in Kandahar (Stein & Lang 2007: 16-19; and interview with Art Eggleton, Toronto, 19 Sept. 2011).

⁹⁰⁰ Again, variations of this view are articulated by: Stein & Lang 2007: 71-3; Nossal 2010: 123; Granatstein 2011: 422; and Hillier 2009: 263.

consistent with Canada's national identity as a peacekeeper, and that the integrity of NATO was at stake.

For instance, describing why his government decided that Canada would lead the ISAF operation in Kabul, Jean Chrétien notes in his memoirs that:

Towards the end of [2002], NATO began seeking someone willing and able to assume command of [ISAF] ... In January 2003, while responsibility for ISAF was passing from the UN to NATO, I instructed John McCallum ... to inform his US counterpart, Donald Rumsfeld, that we were willing to take over from the Germans and the Dutch at the conclusion of their term in August. Even though the commitment would require on our part many more troops and a lot more money, we were going to get our soldiers into a more secure place where their assignment was closer to traditional peacekeeping.⁹⁰¹

Reflecting on his thinking at the time, John McCallum, who was Defence Minister from June 2002 to December 2003, explains that:

I thought it would be a good thing ... for Canada to play a major role in Kabul, in ISAF. And I thought it would be a good thing for us to be the leader of it for a year, or two. So I just pushed for that. And we got it. I wasn't doing that to appease Rumsfeld. That might have been a positive side benefit, if you like, but I just thought that it was the right thing for Canada to do. And obviously the Americans agreed. But my motive was not to sort of 'make up' for saying no to Iraq. My motive was that I thought that this was the appropriate thing for the Canadian military to do.⁹⁰²

⁹⁰¹ Chrétien 2008: 305. In contrast to Chrétien's account, NATO states that the Alliance assumed leadership of ISAF in August, not January, 2003. See NATO's website, "About ISAF". For a detailed description of the ISAF decision, see Stein & Lang 2007: 41-49.

⁹⁰² Interview with John McCallum, Ottawa, 20 Sept. 2011.

Similarly, then CDS Ray Henault recalls that, while the key concern at the time, in his view, was how to support the US and the broader campaign against terrorism, the decision to lead the ISAF mission in Kabul was made not to “dodge a bullet” on the Iraq issue but because the mission was thought to be the best way to support this campaign.⁹⁰³ While the decision was “obviously ... seen that way”, he adds, the Iraq issue “wasn’t the overriding [reason]”.⁹⁰⁴

Like McCallum and Henault, Bill Graham, who was Foreign Minister at the time of Canada’s decision to lead ISAF, also downplays the impact of the Iraq War on the thinking and choices of the government with respect to Afghanistan. As he explains, arguing “that the only reason that we went to Afghanistan was to satisfy the Americans because we didn’t go to Iraq, I mean that is far too bold ... life is not that simple, it never is”.⁹⁰⁵ Noting that “of course” a concern for not participating in the Iraq War was “a factor” behind Canada’s second phase of military participation in the Afghanistan Conflict, Graham suggests that three other considerations were also relevant.⁹⁰⁶ First, there was “the integrity of NATO”.⁹⁰⁷ Second, there was a desire to support the implementation of the Bonn accords.⁹⁰⁸ These were, recall, the UN-sponsored agreements of December 2001 that aimed to chart Afghanistan’s future and the international community’s role in this regard. Finally, there was a concern for Canada’s international reputation, because it had supported the internationalization of the issues in Afghanistan, and the government wanted to show that it was “a team player” in this regard.⁹⁰⁹ As Graham explains:

⁹⁰³ Interview with Ray Henault, London, 28 Nov. 2011.

⁹⁰⁴ Ibid.

⁹⁰⁵ Interview with Bill Graham, Toronto, 12 Sept. 2011.

⁹⁰⁶ Ibid.

⁹⁰⁷ Ibid. Contextualizing Canada’s decision to lead the ISAF mission in Kabul, and participate in the Afghanistan Conflict more generally, within a broader concern for NATO, Graham notes that, since the Cold War, the Alliance has been “a very important foreign policy instrument for Canada, and a really important part of our security structure”. Further, he adds, “there is a tremendous recognition of the need to reinforce NATO and make sure it’s working, and Canada’s role in it, etc.”

⁹⁰⁸ Ibid.

⁹⁰⁹ Ibid.

[T]his was an area where the UN had come around, and we were going to rebuild Afghanistan ... One of the elements of that is that we had to have security. So, do we step up for part of this security? Yeah, we did. Did it help us with the Americans, because they were glad we did it? For sure. Were there all sorts of other reasons for doing it? There were. We might well have done it [i.e. lead ISAF] even if we had *had* troops in Iraq [emphasis in original]. So that would be my answer to the whole thing.⁹¹⁰

Canada's third phase of military action in Afghanistan, recall, took place from 2006-11, and involved a significant number of Canadian forces being redeployed to Kandahar. Again, the initial decision behind this phase occurred in May 2005, when the Cabinet of Liberal Prime Minister Paul Martin (who had replaced Jean Chrétien) approved a plan proposed by CDS Rick Hillier (who had replaced Ray Henault). Like the first and second phases, there is evidence that, during the initial decisions behind phase three, Canada's perceived commitments to NATO helped constitute the identities of leaders at the time, and shaped the way in which Canada's interests were interpreted and pursued. For instance, when asked why Canada has participated in the Afghanistan Conflict, Martin discounts the idea that the primary reason has been to show support for the US and its war against terrorism, and stresses the importance of helping Afghanistan as a "failing state", and ensuring that Canada had "a seat at the table" as the international community responded to a post 9/11 world.⁹¹¹

Elaborating on this latter concern, Martin notes in his memoirs that: in contrast to the tragedy of the Iraq War, Canada was "in Afghanistan for the right reasons and, having been part of displacing the Taliban regime, we continued to have a duty to help construct something sturdy to replace it".⁹¹² That duty, he stresses, was something shared by the NATO allies, and Canada's

⁹¹⁰ Interview with Bill Graham, Toronto, 12 Sept. 2011.

⁹¹¹ Phone interview with Paul Martin, 16 Sept. 2011.

⁹¹² Martin 2009: 391.

responsibility was to “play our part, not to shoulder any and all burdens that might come our way”.⁹¹³ As Scott Reid, Martin’s Director of Communications in 2005 and one of his most trusted advisers, observes, “The Prime Minister felt that Canada, as a member of NATO, had an obligation to stand with the alliance in Afghanistan, but his interest in Afghanistan ended there”.⁹¹⁴ Consistent with Reid’s observation, Martin explains that:

My view of the Afghanistan mission was that it needed to fit within our overall foreign and defence priorities. I understood that this was more a peacemaking than a peacekeeping mission, as were many others I expected us to be called upon to perform: in Haiti, and Darfur, and perhaps in the Middle East. That’s why I sought and received General Hillier’s assurance that our role in Afghanistan would not compromise what I felt could be an increasing role in other theatres, and most certainly in Darfur.⁹¹⁵

In sum, the thinking and decisions behind Canada’s three phases of participation in the Afghanistan Conflict outlined above support the proposition that, when states use force, international law helps constitute the identities of the leaders at issue, and shapes the way in which a state’s interests are interpreted and pursued. Further, the discourse and actions of leaders reviewed above also suggest that, consistent with the observations of constructivist theory,⁹¹⁶ a country’s

⁹¹³ As Martin stresses in his memoirs and when queried on the issue, when he approved the Kandahar mission, he did so under the condition that it would be for one year. His earlier experience with NATO’s Secretary-General, whereby Canada was asked repeatedly to keep its troops in Kabul because a replacement could not be found, convinced Martin that a short-term time limit was needed if Canada was to retain flexibility for its forces and maximize its leverage with the Alliance (Martin 2009: 392, 395; and phone interview with Paul Martin, 16 Sept. 2011).

⁹¹⁴ Cited in Stein & Lang 2007: 192.

⁹¹⁵ Martin 2009: 392. Martin sought Hillier’s assurance in part because he was very concerned about the crimes against humanity that were reportedly occurring in Darfur, and he thought that helping address the Darfur crisis was a better fit for Canada than fighting in Afghanistan. Reflecting Martin’s concern for Darfur, Canada’s Ambassador to the UN, Allan Rock, helped guide the passage of a resolution by the UN General Assembly on the “Responsibility to Protect”. (Phone interview with Paul Martin, 16 Sept. 2011; Stein & Lang 2007: 180; and Bill Schiller, “The Road to Kandahar”, *The Toronto Star*, 8 Sept. 2006.)

⁹¹⁶ Reus-Smit 2004.

perceived relationship to international law can be a site for “communicative” struggles over legitimate state identity and rightful behaviour.

b) International law helped regulate Canada’s political and military practice

In addition to its constitutive effect, international law has also had a regulative influence on Canada’s political and military practice regarding the Afghanistan Conflict. Two examples demonstrate this influence. First, when the Chrétien government decided that Canada would lead a naval group, Task Force 151, as part of Operation Enduring Freedom (OEF), its understanding of the legal circumstances at issue helped constrain the nature and scope of the force deployed with this group. Second, there is evidence that Canada’s policy and conduct regarding Afghan detainees has been governed and controlled in part by its interpretation of its obligations under the Third Geneva Convention on Prisoners of War (POWs). However, these perceived obligations appear to have had a stronger impact on members of the Liberal governments of Jean Chrétien and Paul Martin than on those of the Conservative government of Stephen Harper.

Regarding the first example, the decision to lead TF 151 came about as follows. In February 2003, CDS Ray Henault told Defence Minister John McCallum that Canada had a chance to lead a multinational naval force, which would include US ships as well as those of other states not yet committed to an invasion of Iraq.⁹¹⁷ The task force, known as TF 151, would support OEF. However, McCallum was advised, Canada’s navy would travel farther up into the Persian Gulf, close to Iraq’s territorial waters. Over the coming weeks, it became clear that TF 151 would be “double-hatted” – i.e. it would support OEF but would also likely provide some yet to be defined

⁹¹⁷ Reflecting on why he and his deputy, Greg Maddison, thought Canada should participate in TF 151, Henault says that: “[W]e felt strongly that it was important that we remain in Task Force 151, without being engaged in or seen to be a part of the operation for Iraq. Because we still saw Task Force 151 as an important component of the campaign against terrorism. And whether it was preventing arms shipments to Iraq, countering terrorist activity, or [enforcing] arms embargoes, we felt that it was still important that we stay engaged in the Persian Gulf” (interview with Ray Henault, London, 28 Nov. 2011).

support to Operation Iraqi Freedom (OIF) once the Iraq invasion began.⁹¹⁸ By the end of February, it also became increasingly apparent that Jean Chrétien was likely going to decide against Canada participating in the invasion.⁹¹⁹ In response to these seemingly contradictory developments, two different views on TF 151 evolved. On the one hand, senior officials in the Department of Foreign Affairs, Foreign Minister Bill Graham, and Deputy Prime Minister John Manley were generally in favour of Canada leading TF 151, and tended to justify this as a way of supporting the US and OEF. On the other hand, military leaders in the Defence Department, including Henault and deputy CDS Greg Maddison, were now generally against Canada leading TF 151 if it was not going to also participate in the Iraq War, as doing so would be unfeasible militarily and too confusing operationally.⁹²⁰ Not wanting Canada to be seen to be leaving the Persian Gulf at a critical time, Chrétien ultimately favoured the first view.⁹²¹ As such, it was decided that Canada would remain the leader of TF 151 but only support OEF, and the navy was asked to implement this policy.⁹²²

The advice and debate behind the TF 151 decision suggest that leaders interpreted the international legal considerations at issue in ways that best fit with other political and military objectives at the time, such as supporting the US and the international campaign against terrorism. However, this advice and debate also indicate that the legal considerations at issue helped regulate the actions of leaders in Canada, and the decisions of the task force commander in the Persian Gulf. For instance, in the lead-up to the TF 151 decision, the Judge Advocate General (JAG), Jerry Pitzul, was of the view that if the task force protected ships involved in the invasion of Iraq, then Canada

⁹¹⁸ Stein & Lang 2007: 80.

⁹¹⁹ Ibid: 82.

⁹²⁰ Ibid: 80-5.

⁹²¹ Ibid: 85.

⁹²² Ibid.

might legally become a belligerent or a party to the conflict.⁹²³ Consequently, then Defence Minister John McCallum recalls that:

[W]e worked very closely with the JAG, the legal people, to do everything we could to ensure that we were not belligerents. And I remember having long conversations with our counterpart in New Zealand, my counterpart in France ... both of whom had ships in the area, as we did. And both of whom did not want to be associated with the Iraq War. And so we had discussions to make sure that that was in fact the case.⁹²⁴

When asked what role, if any, Canada's legal advisers played in the decision-making process at the time, McCallum responds that "they helped us to do the right things, to ... maximize our ability to isolate ourselves [from the Iraq War]. The lawyers advised as to what particular things we had to do to do that".⁹²⁵

Bill Graham's account generally resonates with that of McCallum, except in one respect. While Jerry Pitzul, the JAG at Defence, believed that if TF 151 protected ships involved in the invasion of Iraq, then Canada might legally become a party to the conflict, Graham is not sure that Colleen Swords, the Legal Adviser at Foreign Affairs, was of that opinion.⁹²⁶ "Our view", Graham notes, "was the naval operation dated from the original mission to restrain the Taliban and control al-Qaeda, and that therefore this was a legitimate presence in the Gulf for a different purpose [than the Iraq campaign]".⁹²⁷ Emphasizing that the legal opinions on the TF 151 issue were part of the decision-making process, and that they mattered to his thinking at the time, Graham cites the following example whereby Canada's understanding of the legal circumstances constrained the

⁹²³ Interview with Bill Graham, Toronto, 12 Sept. 2011; interview with John McCallum, Ottawa, 20 Sept. 2011; and Stein & Lang 2007: 82.

⁹²⁴ Interview with John McCallum, Ottawa, 20 Sept. 2011.

⁹²⁵ Ibid.

⁹²⁶ Interview with Bill Graham, Toronto, 12 Sept. 2011.

⁹²⁷ Quoted in Stein & Lang 2007: 80.

nature and scope of the force deployed with TF 151. As part of the discussions surrounding the task force issue, a decision had to be made regarding whether, in addition to Canada's naval contribution, Canadian fighter aircraft would also be deployed to help with the interdiction work of TF 151.⁹²⁸ As Graham explains:

It was decided not to do that, because [the aircraft] would have been too closely ... integrated into what was going on in Iraq itself. There was a distinct recognition that [the aircraft] might be drawn into the Iraq War, in a way that wasn't intended. But there was also a distinct order that [they] were to continue doing their job of interdiction in Afghanistan, and they were not to be part of Iraq.⁹²⁹

In addition to influencing political leaders in Canada, there is evidence that the legal considerations associated with the TF 151 issue also impacted the thinking and decisions of Canada's commander of the task force in the Persian Gulf, Commodore Roger Girouard. As indicated in part earlier above, following Chrétien's decision that Canada would remain the leader of TF 151 but only support OEF, Girouard was given the difficult job of implementing this policy on the water. The naval commanders of other countries which were also contributing to TF 151 – such as the Netherlands, New Zealand, and France – had been instructed not to operate their ships in the entrance to the Persian Gulf, or to engage Iraqi vessels.⁹³⁰ By contrast, Girouard's interpretation of the legal constraints applicable to his command appeared to be less geographic and more related to particular tasks. As he explained in a newspaper article on 9 April 2003:

I've been given a box by the chief of the defence staff. I've coloured an awful lot of that box and there's no doubt in my mind that there are times when I've come really, really, really close to the edge of the line, but I

⁹²⁸ Interview with Bill Graham, Toronto, 12 Sept. 2011.

⁹²⁹ Ibid.

⁹³⁰ Stein & Lang 2007: 86.

haven't gone over. It was explained to me very succinctly, as I represent Canada now, where I should not be going. That has had its challenges. I was asked to do something and I assessed what the situation was and I told them that I could not do that, that I felt it fell into the ... Operation Iraqi Freedom rubric. They thought about that for a little bit and they agreed and at that point, an American asset took up a particular job.⁹³¹

Girouard's comments suggest that, as the commander of TF 151 at the time, interpreting which tasks fell under OEF and which supported OIF was likely very difficult. As John McCallum notes, we will likely never know with certainty whether Canada's contribution to TF 151 engaged in activity related to the Iraq War.⁹³² Nonetheless, Gerouard's comments also indicate that Canada's interpretation of the legal considerations related to TF 151 were relevant to Gerouard's thinking at the time, and that he did his best to align his decisions with these considerations.

In addition to TF 151, Canada's policy and conduct regarding individuals captured in Afghanistan by Canadian forces and transferred to US and local authorities further demonstrate the regulative impact of international law. As with Britain, the history of this issue is complex and still unfolding, and a detailed consideration is beyond the scope of this study.⁹³³ For present purposes, it suffices to note that Canada's policy and actions regarding Afghan detainees have been governed and controlled in part by its interpretation of its obligations under the Geneva Convention on POWs. These perceived obligations, however, appear to have had a stronger impact on members of

⁹³¹ Quoted in Allan Thompson, "Sailors Would Not Hand Over Iraqis", *Toronto Star*, 9 April 2003 at A12.

⁹³² Interview with John McCallum, Ottawa, 20 Sept. 2011.

⁹³³ For further review of this issue, see: Hendin 2007; Stein & Lang 2007; Forcese 2010; *Amnesty International Canada et al v. Attorney General of Canada et al*, 2008 FC 162; *Amnesty International Canada et al v. Attorney General of Canada et al*, 2008 FC 336; and the Military Police Complaints Commission's *Final Report* of June 2012. The court cases involved Amnesty International and the BC Civil Liberties Association challenging the government's policy and practice of transferring Afghan detainees to local authorities due to an alleged risk of torture. The MPCC report dealt with a related complaint by these NGOs that certain Military Police failed to investigate such transfers.

the Liberal governments of Jean Chrétien and Paul Martin than on those of the Conservative government of Stephen Harper.

To understand the above arguments, one must understand the circumstances that led to the signing of Canada's detainee transfer arrangements with Afghanistan in December 2005 and May 2007,⁹³⁴ and with the US in November 2011.⁹³⁵ Following the 2005 decision to redeploy troops to Kandahar, an issue arose with respect to Canada's policy and practice regarding captured individuals. Since the Canadian Forces (CF) had first arrived in Afghanistan, Canada's position was that it did not hold on to suspected Taliban and al Qaeda fighters that it captured.⁹³⁶ This was because, military leaders had told the government since 2002, the CF had no expertise or capability to run prisons, and the cost of building them was prohibitive.⁹³⁷ In addition, as the government explained in a set of important 2008 court cases on the issue, *Amnesty International Canada et al v. Attorney General of Canada et al*, "Canada has no legal authority to establish or run a long-term detention facility in Afghanistan", and the CF "have not been authorized to detain [individuals] for the long term, either by the Government of Canada or by ISAF commanders ... nor [by] the Government of Afghanistan".⁹³⁸ This legal position, recall, is similar to Britain's view on the matter. Unlike the UK, however, the Canadian government did not specify in the *Amnesty* cases whether the perceived lack of authority for long-term detention ultimately stems from Canada's understanding of relevant *jus in bello* rules and/or UN Security Council Resolution 1386 that created ISAF.

⁹³⁴ See Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, 19 Dec. 2005 [2005 Detainee Arrangement]; and Arrangement for the Transfer of Detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan, 3 May 2007 [2007 Detainee Arrangement].

⁹³⁵ Arrangement between the Government of Canada and the Government of the United States of America concerning the transfer of persons between the Canadian Forces and the U.S. Forces in Afghanistan, 18 Nov. 2011 [2011 Detainee Arrangement].

⁹³⁶ Stein & Lang 2007: 246.

⁹³⁷ Interview with Bill Graham, Toronto, 12 Sept. 2011; and Stein & Lang 2007: 246.

⁹³⁸ *Amnesty*, 2008 FC 336, at para. 85.

Consistent with Canada's position on this issue, individuals captured by the CF in the early years of the Afghan Conflict were transferred to US authorities or, in some cases, to the Afghans.⁹³⁹ Once transferred to the US, however, many of these individuals were sent to Guantánamo Bay. Since 2002, recall, a growing list of critics alleged that detainees at Guantánamo were subjected to cruel and inhumane treatment and interrogation techniques, and that some of these techniques amounted to torture.⁹⁴⁰ The reporting of prisoner abuse at Abu Ghraib in Iraq in 2004 led to further concern over US practice regarding captured enemy fighters.⁹⁴¹

In light of these developments, Bill Graham, who was Defence Minister from mid 2004 to early 2006 under the Martin government,⁹⁴² became concerned about the CF transferring detainees to US and Afghan authorities.⁹⁴³ As a response, Graham – an international lawyer with a strong interest in the *jus in bello* – and Rick Hillier, the new CDS, decided to negotiate a bilateral detainee transfer arrangement with Afghanistan in 2005. This arrangement aimed to establish the standards and procedures to be followed in the event that the CF transferred a captured individual to Afghan authorities.⁹⁴⁴ While Britain's detainee agreement sought to ensure that transferees are treated in accordance with relevant international human rights law, Canada's arrangement aimed to ensure that they are treated “in accordance with the standards set out in the Third Geneva Convention [on POWs]”.⁹⁴⁵ If there is any doubt as to whether a detainee is a POW, Canada's arrangement continues, they are nonetheless to be treated “humanely, at all times and under all circumstances, in a manner consistent with the rights and protections of the Third Geneva Convention”.⁹⁴⁶ The

⁹³⁹ Government of Canada, “Canadian Forces Release Statistics on Afghanistan Detainees”, Feb. 2013.

⁹⁴⁰ See e.g. the European Parliament's 2004 Resolution on Guantánamo; UN Commission on Human Rights, “2006 UN Report on Guantánamo”; and Amnesty International, “Cruel and Inhuman: Conditions of Isolation for Detainees at Guantánamo Bay” (5 April 2007).

⁹⁴¹ Interview with Bill Graham, Toronto, 12 Sept. 2011.

⁹⁴² Graham was moved from Foreign Affairs to the Ministry of Defence.

⁹⁴³ Interview with Bill Graham, Toronto, 12 Sept. 2011; and Stein & Lang 2007: 247.

⁹⁴⁴ 2005 Detainee Arrangement.

⁹⁴⁵ Ibid, at para. 3.

⁹⁴⁶ Ibid, at para. 8.

arrangement also prohibits the death penalty for Canadian-transferred detainees,⁹⁴⁷ and outlines other procedural requirements.⁹⁴⁸ The reference to the Geneva Convention in the agreement likely reflects a view among Canadian leaders and officials that the *jus in bello* is the most relevant body of international law that applies to Canada's policy and practice regarding Afghan detainees.⁹⁴⁹ That being said, however, the CF also acknowledged in the *Amnesty* cases that Canada's "international obligations" regarding detainees "include obligations under the Convention Against Torture", which is an international human rights treaty.⁹⁵⁰

Commenting on the impetus behind the 2005 transfer arrangement, Bill Graham says that the reason he argued strenuously for a coherent detainee strategy was because he saw the need to justify what Canada was doing in Afghanistan "on the highest grounds of behaviour", and "consistent with international legal standards".⁹⁵¹ From a political perspective, he could see that, if not managed properly, the issue was going to be a huge problem.⁹⁵² By contrast, Stein and Lang argue that Graham's concerns "were not widely shared among civilian and military officials and lawyers in the Department of National Defence, where officials thought of the detainee issue as a nuisance, an obsession of the political class rather than a serious issue".⁹⁵³ Ray Henault, former CDS, remembers things differently. He says that "from the very outset, Jerry Pitzul [the JAG] was very concerned about the whole detainee issue. And he was the one who made it very clear that

⁹⁴⁷ 2005 Detainee Arrangement, at para. 12.

⁹⁴⁸ The International Committee of the Red Cross has the right to visit detainees, and the organization is to be notified if an individual is transferred (para. 10). Accurate records are to be maintained regarding detainees, and Canada and Afghanistan commit to cooperating with the Afghan Independent Human Rights Commission (paras. 7 and 11).

⁹⁴⁹ Consistent with this interpretation, in the *Amnesty* cases, the government did not argue that international human rights law was most relevant to Canada's policy and practice regarding Afghan detainees, and instead referred mainly to the Geneva Convention on POWs. It also argued that Canada's constitutional bill of human rights does not apply to the transfer of Afghan detainees by Canadian forces.

⁹⁵⁰ *Amnesty*, 2008 FC 162, at para. 115.

⁹⁵¹ Interview with Bill Graham, Toronto, 12 Sept. 2011.

⁹⁵² *Ibid.*

⁹⁵³ Stein & Lang 2007: 247.

what we should be doing at the very least is establishing a tracking mechanism for detainees, so that we protect them and ensure they're being treated in accordance with the Geneva Conventions".⁹⁵⁴

Resonating with the concerns emphasized by Henault, Canada signed additional bilateral arrangements with Afghanistan in the lead-up to the Kandahar deployment, and these agreements further stressed the importance of both states' international legal obligations regarding captured individuals. For instance, a technical arrangement between the two countries signed just before the detainee agreement in December 2005 provides that:

Canadian personnel may need to use force (including deadly force) to ensure the accomplishment of their operational objectives [and] the safety of the deployed force ... Such measures could include ... the detention of persons ... Detainees would be afforded the same treatment as Prisoners of War. Detainees would be transferred to Afghan authorities in a manner consistent with international law and subject to negotiated assurances regarding their treatment and transfer.⁹⁵⁵

Similarly, Canada's status of forces arrangement with Afghanistan, which is annexed to the technical arrangement, reaffirms that the Canadian government will take measures to ensure that all Canadian personnel "will respect international law and will refrain from activities not compatible with the nature of their operations or their status in Afghanistan".⁹⁵⁶ Moreover, it states, "[i]n giving effect to the Arrangements, the Participants will at all times act in a manner consistent with their obligations under international law".⁹⁵⁷

Reflecting the external arrangements above, Theatre Standing Orders 321A and 321, a series of internal orders to Canadian soldiers and Military Police regarding Afghan detainees, provides

⁹⁵⁴ Interview with Ray Henault, London, 28 Nov. 2011.

⁹⁵⁵ Technical Arrangement between the Government of Canada and the Government of the Islamic Republic of Afghanistan, 18 Dec. 2005, cited in *Amnesty*, 2008 FC 336, at para. 47.

⁹⁵⁶ Article 1.2, Status of Forces Arrangement, cited in *Amnesty*, 2008 FC 336, at para. 50.

⁹⁵⁷ Article 1.4, *ibid*, at para. 51.

explicit direction for the treatment and handling of detainees, the procedure for transfer to Afghan authorities, and information to be maintained during the transfer process.⁹⁵⁸ Under these orders, the CF commander in theatre decides whether a detainee should be retained, released, or transferred.⁹⁵⁹ During the combat phase of Canada's mission in Afghanistan, individuals captured by the CF were held at a temporary detention facility at Kandahar Airfield (a NATO base and the headquarters for Canada's former operations in Kandahar province).⁹⁶⁰ Between 2001 and 2011, when Canada's combat mission ended, 1,073 individuals were reportedly detained by the CF.⁹⁶¹ Of this total, 579 detainees (54%) were transferred to US or Afghan authorities, 488 (45%) were released by the CF, and 6 (0.6%) died from wounds incurred prior to capture.⁹⁶² While in Canadian custody, the TSO orders require that detainees be "treated fairly and humanely" in accordance with "applicable international law and CF Doctrine".⁹⁶³

As noted in the introduction chapter, we might expect a state like Canada with a) less resources per area and per capita of the Afghan population, and b) more casualties relative to their allies, to be more likely to use disproportionate force and less likely to be tolerant of fighters who have killed their soldiers. Contrary to such expectations, however, there is limited publicly available evidence to suggest that CF members have mistreated captured individuals in Afghanistan.⁹⁶⁴ Indeed, as an official publication on the issue stresses, "In accordance with their obligations under international humanitarian law the Canadian Forces ... treat all detainees

⁹⁵⁸ Military Police Complaints Commission's [MPCC] *Final Report* of June 2012, at xiv.

⁹⁵⁹ *Amnesty*, 2008 FC 336, at para. 56.

⁹⁶⁰ *Ibid* at para. 57.

⁹⁶¹ This total is based on yearly figures listed in Government of Canada, "Canadian Forces Release Statistics on Afghanistan Detainees", Feb. 2013.

⁹⁶² *Ibid*.

⁹⁶³ *Amnesty*, 2008 FC 336, at para. 59.

⁹⁶⁴ Although Canadian soldiers appear to have generally treated detainees humanely, Ahmadshah Malgarai, an Afghan-Canadian who served as an interpreter for Canada's military, told a Parliamentary committee in April 2010 that he came across evidence that Canadian soldiers killed an innocent Afghan teenager in 2007 and then tried to cover it up. The Canadian Forces responded by saying they would investigate these "grave accusations". See Steven Chase, "Military vows to probe 'grave' detainee accusations", *The Globe and Mail*, updated 23 Aug. 2012.

humanely”.⁹⁶⁵ The “standards of protection afforded by the Third Geneva Convention”, the publication continues, include the provision of “food, shelter and necessary medical attention”.⁹⁶⁶

Further demonstrating restraint where it might not be expected, the CF have reportedly transferred captured suspected Taliban fighters to Afghan authorities even though some of these individuals were known to have killed Canadian soldiers,⁹⁶⁷ and one could argue that Canada should prosecute these fighters for their actions. This policy may be due in part to a view that combatants cannot be prosecuted for lawfully killing another combatant in war.⁹⁶⁸ If so, this would suggest that – consistent with one of the observable implications posited in the introduction chapter – some Canadian leaders and officials may believe in the reciprocal and equal application of *jus in bello* rules vis-à-vis captured suspected Taliban fighters.⁹⁶⁹

As per NATO and ISAF policy, persons detained by the CF are to be transferred or released within 96 hours of their capture.⁹⁷⁰ The CF, however, have held people for longer periods due to medical, administrative and security reasons. The decision to do so is made by a high-level CF commander with input from other government departments.⁹⁷¹ Before transferring someone into US or Afghan custody, the CF must be satisfied that there are no substantial grounds for believing

⁹⁶⁵ Government of Canada, “Canadian Forces Release Statistics on Afghanistan Detainees”, Feb. 2013.

⁹⁶⁶ Ibid.

⁹⁶⁷ As journalist Neil Macdonald reports from his interviews with two anonymous Canadian intelligence officials, on “several occasions” Canadian forces transferred captured Afghan prisoners to “their own government” even though Canada knew they “had a role in the killing or wounding of Canadian soldiers”. See “The questions we are not asking”, CBC News, 25 Nov. 2009.

⁹⁶⁸ Indeed, Macdonald argues that the reason for this transfer practice is “Because Canada, unlike the US, scrupulously follows international law” [emphasis added] (ibid).

⁹⁶⁹ While some Canadian leaders and officials may believe in the reciprocal and equal application of *jus in bello* rules vis-à-vis captured suspected Taliban fighters, the same might not be true with respect to captured suspected al Qaeda fighters, whose legal status is a source of greater controversy. See Byers 2002.

⁹⁷⁰ Amnesty, 2008 FC 336, at para. 61.

⁹⁷¹ Government of Canada, “Canadian Forces Release Statistics on Afghanistan Detainees”, Feb. 2013.

that there is a real risk that they would be in danger of being tortured or mistreated.⁹⁷² The government has maintained that if this standard is not met, a transfer will not take place.⁹⁷³

Despite the formal arrangements, orders and policies described above, the *Globe and Mail* reported in April 2007 that detainees transferred by the CF had been mistreated and abused by Afghan officials.⁹⁷⁴ Following the “considerable media attention” generated by this article,⁹⁷⁵ the Harper government concluded a second detainee transfer arrangement with Afghanistan in May of that year.⁹⁷⁶ Supplementing the first arrangement, this agreement aimed to provide Canadian officials and the Afghan Independent Human Rights Commission (AIHRC) with unrestricted and private access to Canadian-transferred detainees.⁹⁷⁷ To facilitate such access, these detainees are to be held in a limited number of detention facilities.⁹⁷⁸ Afghan authorities are responsible for treating such individuals in accordance with Afghanistan’s international human rights obligations, including the prohibition on torture.⁹⁷⁹ They are to notify the CF when a detainee is transferred, sentenced or released, and Canada can refuse follow-on transfers to a third country.⁹⁸⁰ Alleged mistreatment is to be reported to Canada, investigated and, where appropriate, prosecuted.⁹⁸¹

As with Britain, critics have argued that the formal detainee arrangements between Canada and Afghanistan do not provide adequate substantive or procedural safeguards to ensure that individuals transferred to Afghan authorities, as well as those who may be transferred on to third countries, are not exposed to a substantial risk of torture.⁹⁸² Moreover, it has been suggested, no

⁹⁷² *Amnesty*, 2008 FC 336, at para. 64.

⁹⁷³ *Ibid*, at para. 65.

⁹⁷⁴ Graeme Smith, “From Canadian custody into cruel hands”, *The Globe and Mail*, 23 April 2007.

⁹⁷⁵ MPCC’s *Final Report* of June 2012, at xvi.

⁹⁷⁶ 2007 Detainee Arrangement.

⁹⁷⁷ *Ibid*, paras. 1, 2, 8 and 9.

⁹⁷⁸ *Ibid*, para. 7. By February 2013, there were seven facilities where detainees could be held (Government of Canada, “Canadian Forces Release Statistics on Afghanistan Detainees”, Feb. 2013).

⁹⁷⁹ 2007 Detainee Arrangement, para. 4.

⁹⁸⁰ *Ibid*, paras. 3 and 5.

⁹⁸¹ *Ibid*, paras. 3 and 10.

⁹⁸² *Amnesty*, 2008 FC 336, at para. 7.

amount of post-transfer monitoring will suffice to protect detainees.⁹⁸³ To support these views, reference is often made to a) specific allegations by Canadian transferees and other detainees,⁹⁸⁴ and b) relevant reports by UN agencies, the AIHRC, Canada's own government agencies, and a former justice of Canada's Supreme Court.⁹⁸⁵ Again, these reports document, among other things, numerous cases of torture and mistreatment of Afghan prisoners, and allege that Afghanistan's National Directorate of Security (NDS) – which has reportedly received many Canadian-transferred detainees – has a particularly poor record in this regard.⁹⁸⁶

In light of this evidence, two NGOs argued in the *Amnesty* cases that the government should be ordered to stop detainee transfers until adequate safeguards are implemented, and that Canada's constitutional bill of rights, the *Charter of Rights and Freedoms*, applies to individuals detained by the CF in Afghanistan.⁹⁸⁷ These NGOs also contended in a related public interest investigation by the Military Police Complaints Commission (MPCC) that certain Military Police failed to investigate Canada's commanders in Afghanistan for directing the transfer of detainees to Afghan authorities in the face of a known risk of torture, and despite compelling first-hand reports that previous CF detainees were tortured by those authorities.⁹⁸⁸ In the *Amnesty* cases, the court found that "The evidence adduced by the applicants clearly establishes the existence of very real concerns as to the effectiveness of the steps that have been taken thus far to ensure that detainees transferred by the Canadian Forces to the custody of Afghan authorities are not mistreated".⁹⁸⁹ However, because transfers had already been ceased temporarily, and it was not known "what safeguards may have been put in place" when they resumed, the court did not order the government to stop such

⁹⁸³ *Amnesty*, 2008 FC 162, at para. 42.

⁹⁸⁴ *Ibid*, at paras. 85-101.

⁹⁸⁵ *Ibid*, at paras. 102-106.

⁹⁸⁶ *Ibid*, at paras. 106-107.

⁹⁸⁷ *Amnesty*, 2008 FC 336, at paras. 7-12.

⁹⁸⁸ MPCC's *Final Report* of June 2012, at xi.

⁹⁸⁹ *Amnesty*, 2008 FC 336, at para. 2.

transfers.⁹⁹⁰ It also found that detainees held by the CF in Afghanistan do not have *Charter* rights, although they do have rights under the Afghan Constitution and the *jus in bello*.⁹⁹¹ The MPCC, for its part, found the allegations against the MPs to be unsubstantiated.⁹⁹² But it also found there was a lack of continuity of knowledge, and problems with accountability and information sharing within the Military Police, that should be improved for future missions.⁹⁹³

In the 2010 British *Evans* case, recall, the court held that: a) the moratorium on transfers to the NDS facility in Kabul imposed by UK officials should be maintained; and b) transfers to the NDS facilities in Kandahar and Laskar Gah could continue if existing safeguards are strengthened by the observance of three additional conditions.⁹⁹⁴ By contrast, the court in the 2008 *Amnesty* cases *declined* to: a) order that the existing temporary ban on transfers be maintained until certain conditions are met; b) distinguish adequately between Afghanistan's different detention facilities, and the different alleged human rights records associated with these facilities; or c) specify what safeguards had to be implemented before transfers could resume. This variance in the two rulings may reflect the fact that additional evidence about Afghan detainees had become available by 2010. But it also suggests that Canadian judges may defer more to government than UK judges regarding executive decisions and issues of "high-policy" such as war.

As with Britain, the extent to which one concludes that Canadian forces in Afghanistan have met their international legal obligations regarding the transfer of detainees will turn mainly on the degree to which one thinks transferees face a risk of torture or serious mistreatment, and the evidence and threshold one believes is needed to establish this risk. It will also depend on whether

⁹⁹⁰ *Amnesty*, 2008 FC 162, at paras. 3-6.

⁹⁹¹ *Amnesty*, 2008 FC 336, at para. 2. This decision was upheld on appeal. See *Amnesty International Canada et al v. Attorney General of Canada et al*, 2008 FCA 401.

⁹⁹² MPCC's *Final Report* of June 2012, at xii-xiii.

⁹⁹³ *Ibid.*

⁹⁹⁴ *Evans* at paras. 315-322.

one thinks the onus is on critics or the government to demonstrate or disprove this risk, and the efforts one thinks Canada needs to make to guard against it.

One challenge to drawing such conclusions, however, has been the absence of sufficient publicly available information on Canada's policy and practice regarding Afghan detainees. For instance, in the face of renewed public concern over the detainee issue, the Harper government shut down Parliament in December 2009.⁹⁹⁵ A key effect of this prorogation is that it suspended the work of a Parliamentary committee that was examining Canada's treatment of Afghan detainees. Prior to this suspension, Richard Colvin, a former senior diplomat with Canada's mission in Afghanistan, had told the committee that all detainees transferred by the CF were likely tortured by Afghan officials.⁹⁹⁶ Canada was taking six times as many detainees as Britain, Colvin said, and 20 times as many as the Netherlands. Unlike the British and Dutch, however, Colvin claimed that: Canada did not monitor prisoner conditions; took days, weeks or months to notify the ICRC; kept poor records; and the CF leadership concealed this behind "walls of secrecy" to prevent scrutiny.⁹⁹⁷ If Canada did not want detainees to be tortured, Colvin had told an interagency meeting in Ottawa in March 2007, then they should not be transferred to the NDS.⁹⁹⁸

The government responded to the above claims by criticizing Colvin's credibility.⁹⁹⁹ Further, when Colvin agreed in 2009 to cooperate with the MPCC detainee investigation, noted earlier, the government sought to block this cooperation by invoking national security concerns.¹⁰⁰⁰ More generally, as the MPCC observed in its final report of June 2012, rather than cooperating with

⁹⁹⁵ Daniel LeBlanc, "Harper to shut down Parliament", *The Globe and Mail*, 30 Dec. 2009.

⁹⁹⁶ "All Afghan detainees likely tortured: diplomat", CBC News, 18 Nov. 2009.

⁹⁹⁷ Ibid.

⁹⁹⁸ MPCC's *Final Report* of June 2012, at xvii.

⁹⁹⁹ "All Afghan detainees likely tortured: diplomat", CBC News, 18 Nov. 2009.

¹⁰⁰⁰ "Government trying to muzzle diplomat: lawyer", CBC News, 6 Oct. 2009.

the Commission and respecting the intent of Parliament, the government instead caused extensive delays and costly obstacles that were “largely unnecessary and avoidable”.¹⁰⁰¹

Resonating with Colvin’s accusations, another former official, Cory Anderson, claimed in the spring of 2010 that, despite implications to the contrary, Conservative Cabinet members such as Defence Minister Peter MacKay had been briefed about the concerns regarding Afghan detainees.¹⁰⁰² Moreover, one of the many documents withheld by the government from the Parliamentary committee examining detainees confirmed that former CDS Rick Hillier and another Canadian military leader, Lieutenant-General Michel Gauthier, received legal advice about the issue in May 2007. This widely distributed memo, from then Judge Advocate General Ken Watkin, warned that: “Military commanders who know, or are criminally negligent in failing to know, that a transferred detainee would be subjected to ... abuse have the obligation to take all necessary and reasonable measures within their power to prevent or repress the commission of such abuse. They may also be subject to criminal liability for failing to submit the matter to competent authorities for investigation and prosecution”.¹⁰⁰³

If members of the Harper government have been genuinely concerned about Canada’s international legal obligations regarding Afghan detainees, and about ensuring that adequate public information is available on the issue, it is unclear why warnings from relevant officials would apparently be ignored, why a Parliamentary committee examining detainees should be suspended through the arguably anti-democratic practice of prorogation, or why government lawyers would be allowed to adopt such an obstructive and antagonistic approach to the MPCC’s public interest investigation. These unanswered questions leave the impression that other leaders, such as former

¹⁰⁰¹ For a description of these numerous delays and costly obstacles, see the MPCC’s *Final Report* of June 2012, at xxx-xxxi and 505-521.

¹⁰⁰² “MacKay knew of Afghan detainee concerns: diplomat”, CBC News, 31 March 2010.

¹⁰⁰³ Cited in Richard J. Brennan, “Military Told to Heed Abuse Claims”, *Toronto Star*, 25 February 2010.

Liberal Cabinet member Bill Graham, have been more committed to ensuring that Canada is seen as trying to meet its international legal obligations regarding Afghan detainees.

On the other hand, it is also the case that, during the tenure of both the Liberal and Conservative governments, Canada has employed safeguards regarding transferred detainees, and changed its transfer practices in response to specific concerns. For instance, like Britain, Canada's approach to monitoring transferred detainees has improved over time. This is suggested by the earlier observation that, when the second detainee arrangement was signed in 2007, it aimed to provide Canadian officials and the AIHRC with unrestricted and private access to Canadian-transferred detainees. From May 2007, when Canada's monitoring of detainees began, to February 2013, the most recent date for which figures are available, Canadian officials – most of whom are from the Department of Foreign Affairs – have conducted more than 430 visits to detention facilities in Kandahar, Kabul, and Parwan (a province north of Kabul).¹⁰⁰⁴ These visits are part of a larger effort by Canada and other ISAF countries to help build Afghanistan's security, justice and corrections sectors.¹⁰⁰⁵

Canada has also responded to specific concerns by stopping detainee transfers for certain periods of time, and investigating allegations of abuse. For example, following the report by the *Globe and Mail* in April 2007 that individuals transferred by the CF had been abused by Afghan authorities, transfers were temporarily halted.¹⁰⁰⁶ Once the second detainee agreement was negotiated, however, and the new monitoring regime was established, the relevant Canadian military leaders at the time – Lieutenant-General Michel Gauthier, noted earlier, and Major-General Tim Grant – decided that transfers could resume on 19 May. This restructuring of the transfer

¹⁰⁰⁴ Government of Canada, "Canadian Forces Release Statistics on Afghanistan Detainees", Feb. 2013. It is not clear how many of the 430 visits by Canadian officials have been conducted in private.

¹⁰⁰⁵ Ibid.

¹⁰⁰⁶ MPCC's *Final Report* of June 2012, at xiv.

regime, Grant told the MPCC, was led by himself, his deputy, and people from Foreign Affairs.¹⁰⁰⁷ “The legal test by which ... Grant worked”, the MPCC noted, “when deciding to transfer detainees, was that a transfer could only occur where there were not substantial grounds for believing there was a real risk the detainee would face subsequent abuse or mistreatment. In this regard, he had a lawyer providing him advice”.¹⁰⁰⁸

Site visits by Canada between May 2007 and November 2007 revealed several allegations of mistreatment and torture of Canadian-transferred detainees.¹⁰⁰⁹ Officials from Foreign Affairs reportedly investigated some of these allegations.¹⁰¹⁰ During one visit, on 5 November, to an NDS facility in Kandahar City, a detainee revealed a large bruise on his back, and said he had been beaten with electrical wires and a rubber hose.¹⁰¹¹ These items were then found in the interview room.¹⁰¹² “It was as a consequence of the receipt of this complaint”, the court noted in the *Amnesty* cases, that a “decision was made by the Deputy Commander of Task Force Afghanistan to suspend further detainee transfers until such time as the [CF] was satisfied it could do so in accordance with its international legal obligations”.¹⁰¹³ Transfers were not resumed, the MPCC noted, “until late February/early March 2008, following the implementation of additional measures, including a significant increase in frequency of visits, an RCMP-led training program for NDS officers, [the] purchase of video cameras for NDS interviews, and evidence that one of the persons responsible for the November 5, 2007 torture allegation was relieved of his duties”.¹⁰¹⁴ Detainee transfers were temporarily stopped again on three occasions in 2009.¹⁰¹⁵

¹⁰⁰⁷ MPCC’s *Final Report* of June 2012, at xx.

¹⁰⁰⁸ *Ibid*, at xxi.

¹⁰⁰⁹ *Ibid*, at xiv.

¹⁰¹⁰ *Ibid*, at xxii.

¹⁰¹¹ *Amnesty*, 2008 FC 162, at paras. 95-98.

¹⁰¹² *Ibid*, at para. 97.

¹⁰¹³ *Ibid*, at para. 101.

¹⁰¹⁴ MPCC’s *Final Report* of June 2012, at xxii.

¹⁰¹⁵ Government of Canada, “Canadian Forces Release Statistics on Afghanistan Detainees”, Feb. 2013.

In July 2011, NATO's southern command in Afghanistan released a broad directive that ordered all units to stop transferring detainees to the NDS and various Afghan police forces.¹⁰¹⁶ This directive pre-empted a particularly critical UN report, released publicly in October 2011, which said prisoners handed over by international forces were subjected to "systematic" torture by Afghan interrogators.¹⁰¹⁷ The report portrayed prisoner abuse by Afghan officials on a scale far wider than previously thought.¹⁰¹⁸ Consistent with NATO's order, General Walt Natynczyk, Canada's Chief of the Defence Staff, wrote in a briefing note to Defence Minister Peter MacKay on 15 July 2011 that he "deemed it was appropriate [for] Canadian-captured detainees to be redirected to another facility".¹⁰¹⁹ The CF quietly stopped transferring detainees that month, and diplomats began negotiations to send prisoners to a US detention facility in Parwan.¹⁰²⁰ These negotiations eventually culminated in Canada signing a third detainee transfer arrangement with the US in November 2011.¹⁰²¹ Although Canada's combat mission in Kandahar ended in mid 2011, it was thought that such an agreement "made sense" in the unlikely event that members of Canada's training mission captured detainees in Kabul.¹⁰²² Operating alongside the first and second arrangements, the third agreement allows Canadian officials to monitor detention facilities, conduct interviews, and assess the conditions under which individuals are detained and treated.¹⁰²³

The Harper government did not publicly acknowledge the change in Canada's transfer policy until almost six months after detainee handovers were stopped.¹⁰²⁴ Explaining this change, the Department of Defence said in June 2012 that prisoner transfers were halted just before the

¹⁰¹⁶ Murray Brewster, "NATO order last year ended Canadian transfer of Taliban prisoners to Afghans", The Canadian Press, 11 June 2012.

¹⁰¹⁷ UN Assistance Mission in Afghanistan, *Treatment of Conflict-Related Detainees in Afghan Custody*, Oct. 2011.

¹⁰¹⁸ Joshua Partlow and Sayed Salahuddin, "Afghan detainees tortured in prison, U.N. says", *Washington Post*, 10 Oct. 2011.

¹⁰¹⁹ Brewster, 11 June 2012.

¹⁰²⁰ Ibid. The facility in Parwan is now operated by Afghanistan.

¹⁰²¹ 2011 Detainee Arrangement.

¹⁰²² Government of Canada, "Canadian Forces Release Statistics on Afghanistan Detainees", Feb. 2013.

¹⁰²³ Ibid.

¹⁰²⁴ Brewster, 11 June 2012.

NATO directive was issued. “In early July 2011”, a spokesperson noted, “information concerning the possible mistreatment of Afghan detainees, not Canadian-transferred detainees, raised the Canadian chain of command’s concern”, and “We ceased transfers as a result”.¹⁰²⁵ Commenting on this stoppage, Paul Champ, a lawyer representing the NGOs in the *Amnesty* cases, says that the “Harper government fought us in court and in commissions for five years throughout the duration of [Canada’s combat] mission to maintain the right to continue transfers to Afghan authorities and to argue that there was not a risk of torture”.¹⁰²⁶ However, he says, the fact that NATO ordered transfers to be stopped “affirms everything we’ve been saying all along. It contradicts what Canada had been saying all along about the risk of torture”.¹⁰²⁷ Perhaps surprisingly, Champ thinks it may have been the US, which was skeptical of the transfer policies of Canada, Britain and the Netherlands, which pushed NATO to have one position on detainees.

In conclusion, the above section indicates that international law has had a regulative influence on Canada’s political and military practice regarding the Afghanistan Conflict. First, as we saw, when the Chrétien government decided that Canada would lead Task Force 151 as part of OEF, its understanding of the legal circumstances at issue helped constrain the nature and scope of the force deployed with this naval group. Second, there is evidence that Canada’s policy and conduct regarding Afghan detainees has been governed and controlled in part by its interpretation of its obligations under the Geneva Convention on POWs. However, these perceived obligations appear to have had a stronger impact on members of the Liberal governments of Jean Chrétien and Paul Martin than on those of the Conservative government of Stephen Harper.

¹⁰²⁵ Brewster, 11 June 2012.

¹⁰²⁶ Ibid.

¹⁰²⁷ Ibid.

c) International law helped permit and legitimate Canada's political and military practice

Canada's military actions in Afghanistan also indicate that, when states use force, international law helps permit and legitimate certain political and military practices that otherwise might not be permitted. As noted in the previous chapter, in response to the terrorist events of 9/11, the US and its allies, including Canada, attacked, invaded and occupied a sovereign state – i.e. Afghanistan – that had not technically attacked them. Again, this response was significantly broader than prior US reactions to earlier terrorist attacks. The broad military response to 9/11 was also strategically different than the reaction some critics say the US and its allies should have focused on, such as addressing the threat posed by al Qaeda through increased intelligence and law-enforcement activity, and political negotiations with the Taliban. As will be seen below, international legal considerations were relevant to justifying and explaining Canada's role in the extensive military reaction to 9/11 to the international community and the Canadian public. Further, there is evidence that leaders received legal advice about this role, and this advice helped define and shape the government's account of its use of force in Afghanistan.

For example, on 24 October 2001, Canada sent a letter to the President of the UN Security Council reporting that, further to NATO's invocation of Article 5 of the Alliance treaty, it would be joining with the US in deploying military forces into Afghanistan in the exercise of its inherent right of self-defence.¹⁰²⁸ Consistent with this view, Defence Minister Art Eggleton stated in a key address to Parliament on 19 November of that same year that:

Six weeks ago, I announced the first of our contributions to the military effort aimed at eliminating the continuing terrorist threat posed by the Al Qa'ida organization, its supporters and followers, including the Taliban. In doing so Canada is acting within, and with the support of, the UN Charter. Article 51 of the

¹⁰²⁸ See Security Council doc. S/2001/1005, cited in *Amnesty*, 2008 FC 336, at para. 25.

Charter preserves the inherent right of individual and collective self-defence. Security Council Resolutions 1368 and 1373 have expressly reaffirmed this right in the context of the tragic events of September 11th. Canada has informed the Security Council that our international military response to terrorism is to collectively exercise the right of self-defence with our allies against the Taliban and Al Qa'ida.¹⁰²⁹

In this statement, note that, like his British counterparts, Eggleton focused on the doctrine of self-defence and did not report that Canada was using force in Afghanistan under the authority of the Security Council.¹⁰³⁰ Again, advancing the latter claim would arguably have been possible considering that, as noted in part by Eggleton above, following 9/11 the Council passed Resolutions 1368 and 1373 which: a) condemned the terrorist attacks and regarded them as a threat to international peace and security; b) recognized the inherent right of individual or collective self-defence in accordance with the Charter; and c) reaffirmed the need to combat by all means, in accordance with the Charter, threats to international peace and security caused by terrorist acts.¹⁰³¹ Significantly, however, recall that after 9/11, the US did not focus on these resolutions or seek explicit authorization from the Security Council, and instead justified its military actions in Afghanistan as self-defence against a terrorist attack.

As with Britain, the extent to which this US position impacted Canada's justification is unknown. One might reasonably assume American influence in this regard. However, there is limited available evidence that Canadian decision-makers were aware of the US position or its implications for Canada's stance. For instance, no leader or advisor interviewed for this study

¹⁰²⁹ See Department of National Defence, "MND Statement in the House of Commons", Ottawa, 19 Nov. 2001.

¹⁰³⁰ This point is ignored by some scholars, who suggest instead that Canada was using force in Afghanistan in 2001 under the authority of the UN Security Council (Hendin 2007: 159, Bratt 2011).

¹⁰³¹ See UNSC Resolution 1368 (12 Sept. 2001), [UN Doc. S/RES/1368], *Threats to International Peace and Security Caused by Terrorist Acts*; and UNSC Resolution 1373 (28 Sept. 2001), [UN Doc. S/RES/1373], *ibid*.

mentioned the US position or its impact on Canada's stance.¹⁰³² However, there is evidence that the legal context of al Qaeda's attack and Canada's subsequent military response were analyzed and discussed, that this analysis was provided to leaders, and that it helped define and shape Canada's account of its use of force in Afghanistan. For instance, reflecting on the role played by Jerry Pitzul, the JAG, in the fall of 2001, then CDS Ray Henault notes that:

Jerry was in my office probably every other day, if not every day, talking about Afghanistan, and talking about the legal context of what we were doing and how we were doing it. So, this whole question of international law, and the law of self-def[ence] ... the laws of armed conflict, the context of collective self-defence, all of those kinds of things were discussed multiple times. And that was all very much the basis for what we were doing.¹⁰³³

As a result, Henault emphasizes that:

Any decision that I took in terms of force deployment or the application of force, rules of engagement, any of those kinds of things were reviewed, endorsed and recommended to me by the lawyers. Nothing was done without insuring, before we took action, that we were in compliance with law, in all its forms. So, it was a really important part of our overall make-up.¹⁰³⁴

¹⁰³² Interview with Eugene Lang, Ottawa, 8 Sept. 2011; interview with Bill Graham, Toronto, 12 Sept. 2011; phone interview with Paul Martin, 16 Sept. 2011; interview with Art Eggleton, Toronto, 19 Sept. 2011; interview with John McCallum, Ottawa, 20 Sept. 2011; and interview with Ray Henault, London, 28 Nov. 2011.

¹⁰³³ Interview with Ray Henault, London, 28 Nov. 2011.

¹⁰³⁴ Ibid.

Significantly, Henault adds that, consistent with the JAG's statutory mandate to advise both the Armed Forces and the Defence Department, Pitzul gave the same kinds of advisory comments to Henault and Defence Minister Eggleton, and that Pitzul was often in Eggleton's office.¹⁰³⁵

There are two examples that suggest Pitzul's legal advice helped shape Canada's account of its use of force in Afghanistan. The first is that, contrary to the way some US and UK leaders described 9/11, Canada's military response to 9/11 was portrayed not as a "war" but as a "campaign" against terrorism. The second example is Canada's stated commitment to abide by the international law of armed conflict – the *jus in bello* – in Afghanistan. Regarding the first example, during the fall of 2001, Henault recalls that Pitzul came to speak with him on more than one occasion, saying "Remember General, this is not a war, this is a *campaign* against terrorism" [emphasis in original].¹⁰³⁶ As a result, Henault says, "we used to have to be very careful how we actually spelled that out, and that [distinction] was something that we made very forcefully understood by people".¹⁰³⁷ To understand these comments, recall that, following 9/11, US President George W. Bush and UK Prime Minister Tony Blair labeled al Qaeda's attack as an act of war, and described the military response in Afghanistan as part of a broader "War on Terror". By contrast, Henault's reflections indicate that Canada's JAG did not believe that "war" was the most legally appropriate term to describe Canada's use of force in Afghanistan or the broader US-led response to terrorism more generally. And, importantly, this view was reflected in Canada's official statements at the time. For instance, speaking at a key press conference in October 2001,¹⁰³⁸

¹⁰³⁵ Interview with Ray Henault, London, 28 Nov. 2011. As Henault notes, in accordance with Canada's *National Defence Act*, the JAG is the legal adviser to the Armed Forces and the Department of National Defence (and, thus, to the Defence Minister).

¹⁰³⁶ Interview with Ray Henault, London, 28 Nov. 2011.

¹⁰³⁷ Ibid.

¹⁰³⁸ This is the press conference where, as noted earlier in the text above, Eggleton announced that Canada would be contributing special forces as well as naval and air assets to the US-led military response to 9/11.

Eggleton did not use the word “war” and instead employed the term “campaign” to describe the US-led response to 9/11, and Canada’s military contribution to this response.¹⁰³⁹

Regarding the second example, in the fall of 2001, Henault recalls that Pitzul made it very clear that Canada’s military response to 9/11 “was all in accordance with international law as we understood it” and that, notwithstanding the fact that this was not a war but a campaign against terrorism, “the laws of armed combat would likely be applied when we did go into operations [in Afghanistan]”.¹⁰⁴⁰ Consistent with this legal opinion, in his address to Parliament on 19 November 2001, noted earlier, Eggleton stated that the actions of Canadian Forces operating in Afghanistan “will fully accord with the laws of Armed Conflict and Canadian Rules of Engagement”.¹⁰⁴¹

d) International law helped structure the development of new rules and legitimate practice

Finally, Canada’s participation in the Afghanistan Conflict provides further evidence that, when states use force, international law helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice for states and other international actors. An important example of this phenomenon is Canada’s support for NATO’s declaration of Article 5 in response to the 9/11 attacks, and the related change in the customary international law on self-defence.

We saw earlier above that, following 9/11, David Wright, Canada’s Ambassador to NATO, chaired the NAC meeting where the likely applicability of Article 5 of the NATO treaty was first formally discussed. Moreover, recall, Wright took a lead in arguing for Article 5 to be invoked. Following NATO’s declaration of this provision, we further saw that Canadian leaders and diplomats explained in different public forums that Canada was using force in Afghanistan under

¹⁰³⁹ In a press statement consisting of 816 words, Eggleton used the term “campaign” seven different times. See “Speaking Notes” for Press conference, Ottawa, 8 Oct. 2001.

¹⁰⁴⁰ Interview with Ray Henault, London, 28 Nov. 2011.

¹⁰⁴¹ See Department of National Defence, “MND Statement in the House of Commons”, Ottawa, 19 Nov. 2001.

the right to self-defence recognized in Article 51 of the UN Charter. Again, these arguments are noteworthy from an international legal perspective because the concept of “armed attack” is not defined in Article 5 of the NATO treaty or Article 51 of the Charter, and the provisions do not explicitly say whether the right of self-defence applies only to an “armed attack” by a state, or to armed attacks by states *and* non-state actors. Following 9/11, recall, the US legal argument essentially suggested that, if a sufficient nexus exists between a non-state terrorist group and State A, an attack by the terrorist group on State B could constitute an “armed attack” for purposes of Article 51 of the Charter and/or the customary international law on self-defence, and State B could respond under that law. Further, while variations of this position had been advanced in the past, they had not been accepted by the majority of states. Following 9/11, however, most states appear to have accepted – or at least not publicly criticized – the US argument. Consequently, we saw earlier, Western legal scholars generally believe that customary law changed accordingly.

In hindsight, it may seem that the nature, scale, and target of the 9/11 attacks made the applicability of Article 5 of the NATO treaty logical and inevitable. However, it is important to remember that this provision was drafted primarily in fear of a land invasion by the USSR against Europe during the Cold War, and not a terrorist attack by non-state actors against the US in 2001. The fact that Article 5 could be interpreted and applied to respond to the latter event, and that most states appear to have accepted that the customary law on self-defence changed more generally, offers evidence in support of the observation that, when states use force, international law helps structure the process by which new legal rules and legitimate practice are developed and promoted.

Second hypothesis: international law is understood as a binding and distinct set of legal rules

The aspects of Canada's participation in the Afghanistan Conflict assessed above support this study's thesis about how international law influences the use of force by states. By contrast, the discourse and actions of some of the key leaders in power during the war offer mixed support for the hypothesis that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decisions. As will be seen below, there is evidence that these leaders have tended to view Canada's obligations under the NATO treaty and the UN Charter more in political and moral, rather than expressly legal, terms. By contrast, some leaders, such as Bill Graham and former CDS Ray Henault, appear to have understood the rules of the Geneva Convention on POWs in binding terms. However, Canada's criticized policy and practice regarding Afghan detainees, described earlier, suggests that the legal status of these rules has perhaps had an uneven impact on the thinking and decisions of other policy-makers.

a) Canada's understanding of the NATO treaty and UN Charter

When deciding whether and how to participate in the Afghanistan Conflict, there is evidence that some key leaders have interpreted Canada's obligations under the NATO treaty and UN Charter more in political and moral, rather than distinctly legal, terms. For instance, on the one hand, Paul Martin observes in his memoirs that:

September 11 was simply an attack on our way of life. ... When the Americans decided to respond to the attack from al-Qaeda with a mission to root out its bases in Afghanistan, and its basis of support among the Taliban, their response was understandable and reasonable. As members of NATO, which is after all a self-

defence pact, we had a *moral if not a legal duty* to support them [emphasis added]. We also had self-interest in doing so.¹⁰⁴²

On the other hand, when asked to reflect on the extent to which Canada's NATO's obligations mattered to its policy on Afghanistan, Martin notes: "Well they clearly mattered. I mean, we had a treaty commitment. And ... treaty commitments are commitments that you are *honour bound* to live up to" [emphasis added].¹⁰⁴³ If Martin's comments implicitly suggest that leaders saw Canada's NATO treaty obligations in primarily non-legal terms, Bill Graham's reflections explicitly do so. Responding to the issue of how leaders interpreted Canada's commitments under Article 5 of the NATO treaty following 9/11, Graham states: "I don't know the answer to that question. I wasn't in Cabinet [yet] ... I don't know whether Mr. Chrétien saw it as a legal obligation, or a political commitment. I imagine that politics would have trumped the legal, to be quite frank with you. But I don't know."¹⁰⁴⁴

Like the comments of Martin and Graham, John McCallum's reflections also suggest that leaders may have viewed Canada's commitments to the United Nations and the UN Charter more in non-legal terms. For instance, responding to the question of how leaders understood these commitments at the time of his tenure as Defence Minister, and why the legitimacy of UN-approval matters to Canada when it uses force, McCallum explains that:

I think it reflects tradition within the Liberal party, certainly since Lester Pearson, who was a major player within the United Nations. It is a view, perhaps starting with Pearson, within the Liberal party that war is a very serious matter. And you can't just have countries off on their own [deciding unilaterally to use force]. There's an international governance mechanism which is what we have bought into with the United Nations.

¹⁰⁴² Martin 2009: 390-91.

¹⁰⁴³ Phone interview with Paul Martin, 16 Sept. 2011.

¹⁰⁴⁴ Interview with Bill Graham, Toronto, 12 Sept. 2011.

And that is to legitimate war, you should have the agreement of the United Nations. I guess it's almost like a gospel. I'm not even sure that people in the Liberal party ask themselves very often why [UN authorization is needed to use force]. But I think it is a long and strong tradition, at least within our party.¹⁰⁴⁵

In sum, McCallum's comments indicate that, during the Afghanistan Conflict, some leaders saw Canada's commitments to the United Nations and the UN Charter as a reflection of historical or political tradition within the Liberal party of Canada. And this, in turn, offers evidence against the observation that, when states use force, decision-makers view international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making.

b) Canada's interpretation of the Geneva Convention on POWs

We saw above that, when deciding whether and how to participate in the Afghanistan Conflict, some key leaders have seen Canada's obligations under the NATO treaty and UN Charter more in political and moral, rather than distinctly legal, terms. The international law that was seen this way is the *jus ad bellum*. Again, this body of rules governs the use of force by states, while the *jus in bello* – the international law of armed conflict – governs the conduct of states in war. As will be seen below, there is evidence that some leaders, such as Bill Graham and Ray Henault, have understood the *jus in bello* rules of the Geneva Convention on POWs in binding terms. However, Canada's criticized policy and practice regarding Afghan detainees suggests that the legal status of these rules has perhaps had an uneven impact on the thinking and decisions of other policy-makers.

For instance, recall that after Bill Graham became concerned about the Canadian Forces' practice of transferring detainees to US and Afghan authorities, he helped initiate Canada's first detainee arrangement with Afghanistan in 2005. Again, this arrangement aimed to ensure that

¹⁰⁴⁵ Interview with John McCallum, Ottawa, 20 Sept. 2011.

transferred persons are treated “in accordance with the standards set out in the Third Geneva Convention [on POWs]”. Consistent with other acknowledgments of Canada’s international legal obligations regarding detainees, noted earlier in the discussion of the *Amnesty* cases and MPCC investigation, paragraph ten of the first detainee arrangement states that “*Recognizing their obligations pursuant to international law* to assure that detainees continue to receive humane treatment and protections to the standards set out in the Third Geneva Convention, the Participants, upon transferring a detainee, will notify the [ICRC]” [emphasis added].¹⁰⁴⁶ Reflecting this recognition, recall further that Graham said the reason he argued strenuously for a coherent detainee strategy was because he saw the need to justify what Canada was doing in Afghanistan “on the highest grounds of behaviour”, and “consistent with international legal standards”.

Ray Henault’s views on this issue resonate with Graham’s actions and comments. For instance, when asked how the Geneva Conventions were interpreted during his tenure as CDS, Henault remarks that:

It seems to me that, over time, it became very clear to people that the laws of armed combat were inviolate, the Geneva Conventions were inviolate ... The fact that the rules of engagement needed to be applied with your best judgment [did not change the fact that] by the same token, if you violated the rules of engagement, you needed to know that you may have to suffer the consequences of that.¹⁰⁴⁷

Notwithstanding Graham and Henault’s reflections, however, we also saw that critics have argued that the formal detainee arrangements between Canada and Afghanistan do not provide adequate substantive or procedural safeguards to ensure that individuals transferred to Afghan authorities are not exposed to a substantial risk of torture. Moreover, it was suggested, no amount

¹⁰⁴⁶ 2005 Detainee Arrangement.

¹⁰⁴⁷ Interview with Ray Henault, London, 28 Nov. 2011.

of post-transfer monitoring will suffice to protect detainees. This view, critics argued, was ultimately proven correct by NATO's order in July 2011 that units stop transferring detainees to certain Afghan authorities. Prior to this order, recall, Canadian transferees and relevant reports had documented numerous cases of torture and mistreatment of Afghan prisoners, and alleged that the NDS has a particularly poor record in this regard. Members of the Harper government, we saw, were apparently warned of these risks by relevant officials. Moreover, rather than support the work of the Parliamentary committee on detainees or cooperate with the MPCC investigation on the issue, this government instead suspended the work of the committee through prorogation and caused extensive delays and costly obstacles to the work of the MPCC. Depending on the efforts one thinks Canada must take to protect against the risk that transferees may be tortured, these details leave open the possibility that the legal status of the Geneva Convention on POWs has had an uneven impact on the thinking and decisions of some policy-makers. Assessing this possibility will likely have to wait until more evidence becomes available.

For now, though, it must also be acknowledged that, as noted earlier, during the tenure of both the Liberal and Conservative governments, Canada has employed safeguards regarding transferred detainees, and changed its transfer practices in response to specific concerns. As we saw, Canada's approach to monitoring transferred detainees has improved over time, and some of the impetus for these changes has reportedly come from military commanders in Afghanistan and Foreign Affairs officials. In addition, Canada has also responded to specific concerns by stopping detainee transfers for certain periods of time, and investigating allegations of abuse. It is equally possible that these altered practices have been shaped in part by a concern for Canada's perceived obligations under the Geneva Convention on POWs, and that the legal status of these obligations has influenced the thinking and decisions of those individuals involved in bringing about these altered practices.

Conclusion

The aspects of Canada's participation in the Afghanistan Conflict assessed above support this study's argument that, when states use military force abroad, international law helps define and shape their possible course of action, and the justifications that can be advanced for their behaviour. More specifically, these aspects help illustrate the four roles that international law can play in the use of force by states.

First, as was the case with Louis St. Laurent, Lester Pearson and Brooke Claxton during the Korean War, we saw that, in the debate and decisions behind the three phases of Canada's military actions in Afghanistan, international law has helped constitute the identities of key leaders, and shaped the way in which Canada's interests were interpreted and pursued. Regarding the first phase, we saw that Canada's perceived obligations under the NATO treaty and its rights under the UN Charter animated the thinking and values of Defence Minister Art Eggleton, Prime Minister Jean Chrétien, CDS Ray Henault, and Foreign Minister Bill Graham. Such commitments meant that, following 9/11, these leaders thought Canada was obligated to support the US and NATO in the global fight against terrorism, and to participate militarily in this fight. An unstated assumption behind this view is that Canada is the kind of state that honours its prior international commitments, and takes action in this regard when necessary. Moreover, in the debate and decisions behind phase two, Canada's perceived commitments to the UN and NATO continued to help constitute the identities of leaders at the time. While the dominant view is that the government decided in favour of the ISAF operation mainly because it allowed Canada to support the US in its "War on Terror" without having to support its controversial war in Iraq, this study finds that political leaders were motivated more by a belief that the UN-authorized ISAF mission was legitimate and more consistent with Canada's identity as a peacekeeper, and that the integrity of NATO was at stake. Finally, we saw that during the initial decisions behind phase three, Canada's perceived

commitments to NATO helped constitute the outlook of Prime Minister Paul Martin, and shaped the way in which he interpreted and pursued the country's national interests.

Second, in addition to its constitutive effect, international law has also had a regulative influence on Canada's political and military practice regarding the Afghanistan Conflict. Two examples demonstrated this influence. First, when the Chrétien government decided that Canada would lead naval Task Force 151 as part of Operation Enduring Freedom, we saw that its understanding of the legal circumstances at issue helped constrain the nature and scope of the force deployed with this group. Second, there is evidence that Canada's policy and conduct regarding Afghan detainees has been governed and controlled in part by its interpretation of its obligations under the Geneva Convention on POWs. However, these perceived obligations appear to have had a stronger impact on members of the Liberal governments of Jean Chrétien and Paul Martin than on those of the Conservative government of Stephen Harper.

Third, Canada's military actions in Afghanistan also indicate that, when states use force, international law helps permit and legitimate certain political and military practices that otherwise might not be permitted. As we saw, in response to the terrorist events of 9/11, the US and its allies, including Canada, attacked, invaded and occupied a sovereign state – i.e. Afghanistan – that had not technically attacked them. This response was significantly broader than prior US reactions to earlier terrorist attacks, and strategically different than the reaction some critics say the US and its allies should have employed. As we saw, international legal considerations were relevant to justifying and explaining Canada's role in the extensive military reaction to 9/11 to the international community and the Canadian public. Furthermore, leaders received legal advice about this role, and there is evidence that this advice helped define and shape the government's account of its use of force in Afghanistan.

Finally, Canada's participation in the Afghanistan Conflict suggests that, when states use force, international law helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice for states and other international actors. An important example of this phenomenon, we saw, was Canada's support for NATO's declaration of Article 5 in response to the 9/11 attacks, and the related change in the customary international law on self-defence.

Regarding this study's second hypothesis, the discourse and behaviour of some of the key Canadian leaders in power during the Afghanistan Conflict offer mixed support for the proposition that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making. On the one hand, we saw that leaders recognized that the use of military force in Afghanistan and the treatment of captured enemy individuals were in part legal issues, in that they were governed by pre-existing rules in the UN Charter, NATO treaty, and Geneva Conventions. Moreover, it appears that leaders discussed the extent to which Canada was legally obligated to consider these rules when deciding whether and how to use force in Afghanistan, and what policy and practices to adopt regarding Afghan detainees. Further, Canada's practice of transferring detainees even though some of these individuals were reportedly known to have killed Canadian soldiers indicates that some leaders or officials may have seen the need to apply relevant *jus in bello* rules reciprocally and equally. Finally, former CDS Ray Henault recognized that violating these rules could lead to "consequences", and Defence Minister Art Eggleton and Foreign Minister Bill Graham saw that Canada's actions would require legal justification at the domestic and international level. The foregoing details resonate with many of the relevant observable implications posited in the introduction chapter, and suggest that Canadian leaders such as Graham felt bound in part by international law.

On the other hand, we also saw that some key leaders have tended to interpret Canada's obligations under the NATO treaty and the UN Charter more in political and moral, rather than expressly legal, terms. By contrast, there is evidence that the rules of the Geneva Convention on POWs have been seen in binding terms. However, Canada's criticized policy and practice regarding Afghan detainees suggests that the legal status of these rules has perhaps had an uneven impact on the thinking and decisions of some policy-makers.

Conclusion

Summary of Findings

This thesis examined important aspects of Britain and Canada's participation in the Korean War of 1950-53 and the Afghanistan Conflict of 2001-present with a view to better understanding how international law influenced this participation, and whether key leaders and officials understood said law as a binding and distinct phenomenon. It drew on constructivist International Relations (IR) theory and "interactional" International Law (IL) theory, and employed a method of historical reconstruction and process tracing. I argued that, contrary to what realism might predict, international law helped define and shape each state's possible course of action in the wars, and the justifications that could be made for their behaviour. More specifically, Britain and Canada's involvement in the conflicts suggests that, when states use force, international law can play four broad roles: 1) it helps constitute the identities of the actors at issue; 2) it helps regulate the political and military practice of the actors at issue; 3) it permits and legitimates certain political and military practices that otherwise might not be permitted; and 4) it helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice.

First, the fact that Britain and Canada decided to support the Security Council resolutions on the Korean crisis, and contribute significant naval, air and ground forces to the UN mission in Korea even though political and military leaders thought the country was not strategically important, suggests that international law can help constitute a state's identity and be used to reorient its political and military objectives. As we saw, UK Prime Minister Clement Attlee, and Canadian Prime Minister Louis St. Laurent, Foreign Minister Lester Pearson, and Defence Minister Brooke Claxton all felt a strong sense of obligation to the United Nations and the conflict in Korea. This perception of obligation, moreover, was partly comprised of and affected by Britain and

Canada's formal membership in the UN, as well as these leaders' belief in the principles of the UN Charter and the idea of collective security. While other leaders, such as the UK Defence Chiefs and former Canadian Prime Minister W.L. Mackenzie King, did not feel the same sense of responsibility regarding the UN and the Korean crisis, Attlee, St. Laurent, Pearson and Claxton sought to reorient such thinking and explain their government's respective actions to the public by reaffirming the importance of responding to aggression, making the newly created world organization effective, and upholding the rule of law in world affairs.

Like Attlee during the Korean War, we also saw that UK Prime Minister Tony Blair felt a sense of obligation towards the conflict in Afghanistan that followed the events of 9/11. Unlike with Attlee, however, this perception of obligation appears to have been shaped less by Britain's formal membership in the UN and a belief in the international rule of law, and more by Blair's ethical views that mass terrorism must be addressed and that foreign intervention in Afghanistan was needed to do so. More generally, though, during the three phases of Britain's military participation in the Afghanistan Conflict, the UK's perceived commitments to the UN and NATO helped constitute the identities of some leaders and officials, and helped shape the way in which Britain's interests were interpreted and pursued. Further, as the Afghan war became more challenging and US military policy in the region became more controversial, these perceived commitments acted as a site for a "communicative" struggle over Britain's legitimate identity and rightful behaviour with respect to these developments.

Similarly, in the debate and decisions behind the three phases of Canada's military actions in Afghanistan, international law helped constitute the identities of key leaders, and shaped the way in which Canada's interests were interpreted and pursued. Regarding the first phase, Canada's perceived obligations under the NATO treaty and its rights under the UN Charter animated the thinking and values of Defence Minister Art Eggleton, Prime Minister Jean Chrétien, Chief of the

Defence Staff Ray Henault, and Foreign Minister Bill Graham. Such commitments meant that, following 9/11, these leaders thought Canada was obligated to support the US and NATO in the global fight against terrorism, and to participate militarily in this fight. An unstated assumption behind this view is that Canada is the kind of state that honours its prior international commitments, and takes action in this regard when necessary. Moreover, in the debate and decisions behind phase two, Canada's perceived commitments to the UN and NATO continued to help constitute the identities of leaders at the time. Although the dominant view is that the government decided in favour of the ISAF operation mainly because it allowed Canada to support the US in its "War on Terror" without having to support its controversial war in Iraq, this study found that political leaders were motivated more by a belief that the UN-authorized ISAF mission was legitimate and more consistent with Canada's identity as a peacekeeper, and that the integrity of NATO was at stake. Finally, during the initial decisions behind phase three, Canada's perceived commitments to NATO helped constitute the outlook of Prime Minister Paul Martin, and shaped the way in which he interpreted and pursued the country's national interests.

Britain and Canada's involvement in the Korean War and the Afghanistan Conflict also suggests that international law can have a regulative impact when states use force. We saw two examples of this impact during the Korean War. First, Britain and Canada's non-participation in the US naval blockade of Taiwan was shaped in part by their understanding of the scope of the Security Council's resolutions on the Korean crisis, and the "special legal position" that Britain was in regarding Taiwan and China. Second, Britain and Canada used the Council resolutions and other related international legal instruments to help constrain America's response to the crisis. As we saw, in the discussions leading up to the Council resolutions, both states sought to influence the US negotiating position and shape the outcome of the talks, and their interpretation of the international legal factors at issue played a role in this regard. Britain and Canada also used their understanding

of the Council resolutions, as well as other related instruments such as the Cairo Declaration of 1943, to help constrain America's behaviour with respect to Taiwan and China.

We saw two further examples of the regulative role of international law during the Afghanistan Conflict. First, when the Chrétien government decided in 2003 that Canada would lead naval Task Force 151 as part of Operation Enduring Freedom, its understanding of the legal circumstances at issue helped constrain the nature and scope of the force deployed with this group. Second, Britain and Canada's policy and conduct regarding Afghan detainees have been governed and controlled in part by their interpretation of: Security Council Resolution 1386, which created ISAF; relevant basic principles of international human rights law; and their obligations under the Geneva Convention on Prisoners of War. These interpretations, furthermore, have had a significant effect even though other material factors – such as Britain and Canada's interest in gathering intelligence, preventing attacks, and cooperating with Afghan security and intelligence agencies – have arguably conflicted with some of their perceived requirements.

When Britain and Canada responded to the Korean crisis and the 9/11 attacks, international law also helped permit and legitimate certain political and military practices that otherwise might not have been permitted. We saw two examples of this phenomenon during the Korean War. First, Britain and Canada intervened militarily in what was in many ways an ideologically divisive and extremely violent *civil* war, and justified this publicly and privately with reference to the Security Council resolutions on the crisis and the UN Charter's provisions on self-defence and collective security. Second, Britain and, to a lesser extent, Canada ultimately supported the US decision to cross the 38th parallel in Korea in October 1950. Moreover, Britain helped draft the General Assembly resolution that aimed to provide UN support for this policy of rollback, and Canada voted for this resolution.

Similarly, in response to the terrorist events of 9/11, the US and its allies, including Britain and Canada, attacked, invaded and occupied a sovereign state – i.e. Afghanistan – that had not technically attacked them. This response was significantly broader than prior US reactions to earlier terrorist attacks, and strategically different than the reaction some critics say the US and its allies should have employed. As we saw, international legal considerations were relevant to justifying and explaining Britain and Canada's role in this extensive military reaction to 9/11 to members of the public and the international community.

Finally, Britain and Canada's participation in the Korean War and Afghanistan Conflict indicates that, when states use force, international law helps structure the process by which agents seek to develop and promote new legal rules and legitimate practice for states and other international actors. An important example of this role, we saw, was the Security Council's novel response to North Korea's attack, and the efforts of UK and Canadian leaders to justify and study this response, and to create new collective security law. Similarly, following 9/11, leaders and officials argued that Britain and Canada were using force in Afghanistan under the doctrine of self-defence, and most states appear to have accepted that the customary law on this issue changed. Britain also stressed the importance of the Security Council passing Resolution 1373 in September 2001, which required states to adopt new domestic measures to address international terrorism.

Regarding this study's second hypothesis, we saw that, contrary to what IL scholars might predict, the discourse and actions of British and Canadian leaders and officials during the Korean War and Afghanistan Conflict offer mixed support for the proposition that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules impacts their decision-making. During the Korean War, British and Canadian leaders recognized that the use of military force in Korea and the treatment of enemy POWs were in part legal issues, in that they were governed by pre-existing rules in the UN Charter and the Geneva

Conventions. Moreover, leaders discussed the extent to which Britain and Canada were legally obligated to consider these rules when deciding whether and how to use force in Korea, and what policy to adopt regarding the repatriation of enemy POWs. Finally, leaders recognized that Britain and Canada's involvement in the US-led intervention in Korea was subject to international legal critique, and required legal justification at the domestic and international level.

Similarly, during the Afghanistan Conflict, key UK leaders and advisors viewed Britain's obligations and rights under the UN Charter in legal terms, and the legal status of these obligations and rights appears to have impacted the thinking and decisions of policy-makers. Moreover, leaders and officials in Britain and Canada recognized that the use of military force in Afghanistan and the treatment of captured enemy individuals were in part legal issues, in that they were governed by pre-existing rules in the UN Charter, NATO treaty, the European Convention on Human Rights, and the Geneva Conventions. It also appears that leaders and officials discussed the extent to which Britain and Canada were legally obligated to consider these rules when deciding whether and how to use force in Afghanistan, and what policy and practices to adopt regarding Afghan detainees. Furthermore, Canada's practice of transferring detainees even though some of these individuals were reportedly known to have killed Canadian soldiers indicates that some leaders or officials may have seen the need to apply relevant *jus in bello* rules reciprocally and equally. Finally, former CDS Ray Henault recognized that violating these rules could lead to "consequences", and Canadian Cabinet Ministers Art Eggleton and Bill Graham, and UK leaders Jack Straw, Tony Blair, Geoff Hoon, and Philip Hammond saw that Canada and Britain's actions would require legal justification at the domestic and international level.

The foregoing details from the Korean War and the Afghan Conflict resonate with many of the relevant observable implications posited in the introduction chapter. They suggest that UK leaders such as Clement Attlee, Anthony Eden, and Jack Straw, and Canadian leaders such as Louis

St. Laurent, Lester Pearson, and Bill Graham, felt bound in part by international law. And this, in turn, responds to Andrew Hurrell's query noted in the introduction, and suggests that the individual policy-makers acting on behalf of states *are* capable of feeling a sense of legal obligation when they make decisions regarding the use of force.

On the other hand, insofar as the Security Council "recommended" (i.e. as opposed to "decided") that assistance be provided to South Korea, we saw that UK leaders and officials tended to interpret the Council's resolutions on the Korean crisis more in political and moral, rather than expressly binding, terms. Canadian leaders, by comparison, did not seem as concerned about whether the Council had "recommended" or "decided" that help be provided to South Korea. Nonetheless, some of these leaders also viewed the Council resolutions more in political and moral terms. By contrast, a key POW obligation in the Third Geneva Convention, Article 118, was seen by British and Canadian leaders in distinctly legal terms. However, the perceived requirements of this rule conflicted with other political and moral considerations at the time, and these factors appear to have ultimately exerted a greater impact on Britain and Canada than the law at issue.

Similarly, during the Afghan Conflict, key UK and Canadian leaders and advisors have seen Britain and Canada's commitments under the NATO treaty more in political terms. Thus it cannot be inferred that the legal status of these commitments impacted the thinking or decisions of policy-makers. Further, unlike their British counterparts, Canadian leaders have tended to interpret Canada's obligations under the UN Charter more in political and moral, rather than expressly legal, terms. By contrast, UK leaders and advisors have understood Britain's international human rights obligations in binding terms, and Canadian leaders and officials have viewed the rules of the Geneva Convention on POWs in a similar way. However, the criticized policy and practice of Britain and Canada regarding Afghan detainees suggest that the legal status of these obligations and rules has perhaps had an uneven impact on the thinking and decisions of some policy-makers.

Significance of Findings for Theory and Research

There are several reasons why my findings are significant for existing theory and research in the fields of IR and IL. And these reasons highlight future investigations that could stem from and build on the work of this thesis.

First, insofar as this study demonstrated that international law played a role in situations where realists argue that states should be purely interested in maintaining their relative power position – i.e. in decisions about when and how to use military force – then this further supports other IR and IL studies that have sought to show that the relationship between international law and the use of force by states is more complex than realism might suggest, and that law can have an important impact in state decisions regarding war.¹⁰⁴⁸ Future research, however, could examine other cases, and assess whether realist predictions about international law are more accurate. For instance, although this thesis argued that international law influenced Britain's participation in the Korean War and Afghan Conflict, law may have had less impact on the UK's colonial conflicts in Kenya¹⁰⁴⁹ and Malaysia during the 1950s, and on Britain's involvement in the Iraq War of 2003. In contrast to Korea, the colonial crises were likely seen as falling directly within Britain's national interest. If so, this would support the realist idea that, the greater the national interest at stake, the less influence international law will have if it conflicts with such interest. Iraq, by comparison, would perhaps offer a more interesting case: Tony Blair led Britain to war there without explicit authorization from the Security Council, but it is not clear that he did so solely because of security concerns or the Anglo-American alliance.¹⁰⁵⁰ Further, despite US pressure, Canada refused to participate in the Iraq War, and it did so in large part because of the lack of UN authorization.¹⁰⁵¹

¹⁰⁴⁸ See e.g. Hoyt 1961, Chayes 1974, Byers 2002, Wheeler 2004, and Brunnée & Toope 2010.

¹⁰⁴⁹ During the Mau Mau uprising in Kenya, the abuse and torture of the local population was “widespread, amounting to a systematic pattern of state policy” (Anderson 2012: 700).

¹⁰⁵⁰ See e.g. Blair 2010, and the various written and oral evidence of the Chilcot Inquiry.

¹⁰⁵¹ Chrétien 2008, and interview with Bill Graham, Toronto, 12 Sept. 2011.

Second, to the extent that this thesis outlined the four main roles that international law plays when states use force, then this helps advance existing IR research that seeks to go beyond a) demonstrating *that* normative factors matter in world politics and can affect state behaviour, to b) specifying *how* such factors matter.¹⁰⁵² For example, although constructivist research has often focused on the constitutive effects of normative factors,¹⁰⁵³ and some constructivist and neo-liberal institutionalist work has considered the constraining impact of such factors,¹⁰⁵⁴ this study showed that these factors can have two additional effects – i.e. they can permit and legitimate certain political and military practices that otherwise might not be permitted, and they can help structure the process by which agents seek to develop and promote new rules and legitimate practice. The second of these two additional influences, I would suggest, has been comparatively understudied in IR research to date, and is a fruitful area for further interdisciplinary work.¹⁰⁵⁵

Moreover, and related to the above, by outlining the four roles that international law can play in the use of force by states, this thesis provides additional evidence against realist and rationalist perspectives that grant law with only weak or functional influence in world politics. Future research could analyze *why* international law plays these four roles. For instance, employing the “interactional” perspective of Jutta Brunnée and Stephen Toope, one could examine whether there were shared understandings of the principles behind the *jus ad bellum* and *jus in bello* rules that arose in this study, particularly following World War II. One could then assess the extent to which a) these rules meet Lon Fuller’s eight criteria of legality, and b) British and Canadian leaders participated in the creation, maintenance and evolution of the rules. We saw some evidence in this study, for example, that these leaders were involved in the initial drafting and subsequent

¹⁰⁵² See e.g. Tannenwald 2007 and Hurd 2007.

¹⁰⁵³ See e.g. Kratochwil 2000 and Price 2008.

¹⁰⁵⁴ See e.g. Goldstein & Keohane 1993, Price 1997, and Tannenwald 2007.

¹⁰⁵⁵ For an IL study that analyzes the processes by which modern international law is made, see Boyle & Chinkin 2007.

interpretation of some of the key rules contained in the UN Charter and Geneva Conventions. But more work on these issues is needed.

Third, my findings are significant for IR and IL debates regarding the concept of legitimacy, and the historical extent to which this concept has mattered to states when they use force. For instance, it has been observed that international law is now increasingly at the center of debate over, and justification for, armed conflict. Again, as David Kennedy argues, when states use force, law has become the mark of legitimacy, and legitimacy has become the currency of power.¹⁰⁵⁶ This thesis, however, found that Britain and Canada were concerned with the legitimacy of their uses of force back in 1950, and explained their actions – both in public and in private – with extensive reference to the international legal principles that they thought were relevant at the time. This, in turn, suggests that research on the concept of legitimacy, and its relationship to international law, should include greater historical analysis of this concept and this relationship.

Fourth, insofar as this study found that international law had an important impact on Britain and Canada's participation in the Korean War and the Afghan Conflict, and outlined the roles that law played in both of these wars, it is difficult to conclude that the influence of law has changed significantly over time for these two states. This observation challenges a working premise noted in the introduction, and may surprise some readers. However, as we saw, the constitutive effect of international law was arguably stronger for Clement Attlee during the Korean War than it was for Tony Blair during the Afghan Conflict. Further, the constitutive and regulative influence of law was significant for Canadian leaders Louis St. Laurent and Lester Pearson during the Korean War, but it is less clear that the government of Stephen Harper has been as concerned about Canada's international legal obligations during the Afghan Conflict. Future research could examine why this

¹⁰⁵⁶ Kennedy 2005 and 2006.

kind of variance occurs, whether it occurs with other states, and whether law's influence has changed in ways not observed by this study.

Fifth, insofar as this study found that international law had an important impact on Britain and Canada's participation in the Korean War and Afghan Conflict, and outlined the roles that law played for both of these states in these wars, it is also difficult to conclude that law had a greater or different influence on Canada – a less powerful state – than it did on Britain. In other words, one cannot infer from these findings that law's influence on the use of force varies significantly with the relative material capabilities of a state. And this, in turn, offers further evidence against the idea, noted in the introduction, that powerful states are not constrained by international law when they use force, and the notion that law plays a different role for less powerful states in such matters.

Sixth, inasmuch as this thesis found that a number of state leaders interpreted *jus ad bellum* rules more in political and moral terms, and *jus in bello* rules more in legal terms, then this variance suggests that some branches of international law may be seen as binding and distinct phenomena, while other branches may not. This variance also indicates that the legal status of rules may matter less for decisions leading up to war, and more for decisions during it. This, in turn, challenges the common assumption that legal considerations tend to receive low priority in war.¹⁰⁵⁷ Further work, such as James Morrow's research on the traits and impact of POW treaties,¹⁰⁵⁸ could be done to subject this assumption to conceptual clarification and empirical assessment.

Seventh, in response to Martha Finnemore's query noted in the introduction, this thesis found that, in some circumstances, policy-makers *do* know and *do* care about the legal status of the rules they consider relevant to their decision-making. We saw this when UK leaders and officials discussed, in great detail, whether the Security Council had "recommended" or "decided" under

¹⁰⁵⁷ See e.g. Hoyt 1961: 67.

¹⁰⁵⁸ Morrow 2001 and 2007.

Article 39 of the UN Charter that assistance be provided to South Korea following North Korea's attack. We also saw this when UK leaders and officials recognized that Britain's international human rights obligations were potentially engaged by its policy and practice regarding Afghan detainees, and when Canadian leaders and officials recognized that Canada's obligations under the Third Geneva Convention on POWs were similarly engaged by this issue. This gives us reason to think that, in Finnemore's words, "legalness" can matter in compliance with norms. Future research, however, could assess more comprehensively why and under what conditions policy-makers do and do not care about the legal status of the rules they deem relevant to their decisions.

Finally, a number of observers posit that obligation is law's defining feature.¹⁰⁵⁹ This thesis sought in part to subject this assumption to empirical inquiry. Admittedly, the origin and operation of the concept of obligation are, at best, hard to observe or, at worst, a "mystery".¹⁰⁶⁰ Further, although a sense of obligation may be the main reason states tend to comply with international law, it is also likely one of a few reasons why they do so.¹⁰⁶¹ Finally, in addition to obligation, law may have other distinct institutional traits or effects.¹⁰⁶² As seen in the discussion of Afghan detainees, courts and legal advisors may affect the way leaders view international law, and the impact that law has. Perhaps consistent with the above reflections, the discourse and actions of Canadian and UK leaders during the Korean War and Afghan Conflict offer mixed support for the hypothesis that, when states use force, policy-makers understand international law as a binding and distinct set of legal rules, and the legal status of these rules influences their decision-making. In sum, again, my findings indicate that while international law can play important roles in world politics and the use of force by states, it is unclear whether these effects are attributable to an obligatory quality in law.

¹⁰⁵⁹ See e.g. Byers 1999, Reus-Smit 2003, and Brunnée & Toope 2010.

¹⁰⁶⁰ Koskenniemi 2011. Perhaps for this reason, IL scholars studying customary international law have traditionally focused on examining state practice, and not whether such practice resulted from a felt sense of legal obligation.

¹⁰⁶¹ Reus-Smit 2003. The other reasons likely include reputation concerns and, for some regimes, formal sanctioning.

¹⁰⁶² I thank Andrew Hurrell for this observation.

What is clear, though, is that during both the Korean War and Afghan Conflict, international law helped define and shape Britain and Canada's possible course of action in the wars, and the justifications that could be made for their conduct. This influence, moreover, was seen in the four different roles that international law played in each conflict. And law played these roles, recall, despite an environment of US dominance and perceived security threats. Finally, it is also clear that some key UK and Canadian leaders felt bound in part by international law during the two wars. For these reasons, we may conclude that international law is not at the "vanishing point" of law, but instead can be a significant factor in world affairs, including in the use of military force by states.

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