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Judges on the Battlefield?
Judicial Observer Effects in US and UK National Security Policies

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Abstract

The relationship between law and war has evolved substantially over two centuries. One aspect of this evolution that merits further examination is legal accountability. Some international relations (IR) scholars maintain international law lacks meaningful influence without enforcement capabilities. But this critique of international law's capacity to deliver meaningful influence in state behavior is over simplified and overlooks substantial changes and efforts to expand the enforcement capacity of international law. In the last half-century, states have taken deliberate steps to expand court jurisdiction into warfare enhancing the capability to enforce international legal obligations and increase the likelihood of legal accountability. This dissertation is an empirical account of legal accountability in British and American national security policies in the post-9/11 conflicts in Afghanistan and Iraq.

How do the laws of war shape executive policies in armed conflict? This is the research question of this project. It is a fundamental question of international law and politics with strong academic and policy implications. The laws of war attempt to humanize war and limit repercussions to civilians and combatants; yet, empirically there is no consensus as to whether the laws of war accomplish this goal. My contribution to the debate is an empirical account of legal accountability in policy processes. Specifically, how does international and domestic judicial accountability influence national security regarding torture and targeted killing? I propose that to understand how international law affects national security policies researchers should consider how expansion of jurisdiction for judicial review has permeated the policy process.

I examine policies in the United States (US) and United Kingdom (UK) in the post 9/11 Afghanistan and Iraq conflicts. The scope is limited to the legal issues of torture and targeted killings; these represent well-established legal regimes in which the UK and US have the same obligations under the laws of war. Domestic and international courts had jurisdiction over the crimes of torture and targeted killings during the conflicts in Afghanistan and Iraq. This is a qualitative account using cross case comparison and process tracing using declassified primary sources and secondary sources, and interviews with elite military and political officials to understand how court jurisdiction influences military policies and strategies in war.

I adopt the foundations of a theoretical framework from Ashley Deeks of "judicial observer effects" which analyzes the role of legal accountability in domestic legal systems. As such, judicial observer effects are the impact on executive policy making of probable court consideration of a particular national security policy. This dissertation expands on this framework to include the multiple jurisdictions that have potential effects in national security affairs; I expand the analysis to account for domestic observer effects, international observer effects, and foreign observer effects in US and UK policies on torture and targeted killings.

The central findings of this thesis indicate that observer effects influence national security policies through two mechanisms. The first is executive branch inter-agency interaction and policy preferences. Executive agencies, or ministries, formulate policy preferences with differentiated perspectives on legal accountability for policy violations. The second mechanism is the institutional structure of coalitions. The conflicts in Afghanistan and Iraq operated in coalitions and military operations had to be coordinated around coalition partners diverse substantive legal obligations. Additionally, coalition operations also had to accommodate

partners' court jurisdiction(s). As such, through executive inter-agency interaction and coalition coordination, policymakers weighed the risk of legal accountability on policies regarding torture and unlawful targeting.

Fundamentally, judicial observer effects impact national security policies by defining the parameters of policymaking. The United States with lower levels of judicial observer effects had more flexibility to maneuver if confronted with legal or strategic uncertainty. The United Kingdom with higher levels of judicial observer effects had more restricted policy parameters and less flexibility to maneuver if confronted with legal or strategic uncertainty. The central contribution of this dissertation is judicial observer effects as one element that delineates the boundaries of acceptable national security policy.

Acknowledgements

The roots of this project began during my master's program with the Committee on International Relations at the University of Chicago. I took courses simultaneously in the law school on the laws of armed conflict and international security in international relations. As if on purpose, the two courses followed parallel curriculums in which, week by week, we discussed the same conflicts. Also as if on purpose, the courses operated within the limits of their discipline hardly acknowledging the existence of the other. The law course never mentioned politics, and politics course never mentioned law. From the beginning of the two courses, this struck me as odd; and as the weeks progressed, it struck me as problematic.

From the beginning of my PhD program at Northwestern, I was driven by this seeming lack of communication and collaboration between legal and political science research on war. However, as my time progressed, I found a niche of others that also found the gap between legal approaches and IR approaches and shared my vision for a research agenda of armed conflict that was more comprehensive and interdisciplinary. Some of the people I have met and others I still hope to meet, but their work has inspired me to keep going when my own research felt stuck, isolated, or irrelevant.

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And, finally, to my family. I never would have made it this far without their support. To Lola, Jerry, Tema, Gene, Stacy, Cindy, Ana, OJ, Miles, Dominic and Giuseppe – I am so grateful and happy to be your granddaughter, niece, cousin, and sister.

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For that reason, I dedicate this to you.

Acronyms

ACHPR	African Court on Human and Peoples' Rights
AFA	Armed Forces Act
API	Additional Protocol I
APII	Additional Protocol II
ATCSA	Anti-Terrorism, Crime and Security Act
AUMF	Authorization for the Use of Military Force
CAT	Convention Against Torture
CDS	Chief of Defence Staff
CENTCOM	Central Command
CIA	Central Intelligence Agency
CND	Campaign for Nuclear Disarmament
COE	Council of Europe
CPA	Coalition Provisional Authority
COIN	Counterinsurgency
DOD	Department of Defense
DOJ	Department of Justice
DOS	Department of State
DTA	Detainee Treatment Act
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIT	Enhanced Interrogation Technique
EPW	Enemy Prisoner of War
FCO	Foreign and Commonwealth Office
FM	Field Manual
GTMO	Guantanamo Bay
HUMINT	Human Intelligence
HRA	Human Rights Act
IACTHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross

IHL	International Humanitarian Law
IHRL	International Human Rights Law
ISAF	International Security Assistance Force
ISI	Inter-Services Intelligence
JAG	Judge Advocate General
JCS	Joint Chiefs of Staff
JSOC	Joint Special Operations Command
MCA	Military Commissions Act
MI5	Military Intelligence 5
MI6	Military Intelligence 6
MOD	Ministry of Defence
MON	Memo of Notification
NATO	North Atlantic Treaty Organization
NDAA	National Defense Authorization Act
NSC	National Security Council
NSC UK	National Security Council UK
OAS	Organization of American States
OEF	Operation Enduring Freedom
OIF	Operation Iraqi Freedom
OLC	Office of Legal Counsel
POW	Prisoner of War
ROE	Rules of Engagement
SCOTUS	Supreme Court of the United States
SIAC	Special Immigration Appeals Commission
SPA	Service Prosecuting Authority
UCMJ	Uniform Code of Military Justice
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States
WCA	War Crimes Act
WMD	Weapon of Mass Destruction

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Chapter 1. Introduction

Law is regarded as binding because it represents the sense of right of the community: it is an instrument of the common good. Law is regarded as binding because it is enforced by the strong arm of authority: it can be, and often is, oppressive.

Both these answers are true; and both of them are only half truths.

--E.H. Carr[1]

The relationship between law and war has evolved substantially over recent centuries. The laws of war as a system of rules to regulate the breakdown of cooperation and order has piqued scholarly interest for as long as the system has existed.[2] But in the last half century, there has been a vital shift toward legalization in nearly every facet of international politics; and the trend toward the legalization of warfare harbors important consequences – including the circumstances of resorting to war, the way war is executed, and the way war is understood or remembered after its conclusion.[3]

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[1] Edward Hallett Carr, *The Twenty Years' Crisis*, Macmillan (1946), pg. 177 (second edition.)
[2] The terms Laws of War, Laws of Armed Conflict (LOAC), and International Humanitarian Law (IHL) are used interchangeably. For an in-depth analysis of the history of the laws of war, see Alexander Gillespie, *A History of the Laws of War: The Customs and Laws of War with Regards to Combatants and Captives, Vol. I and II,* Hart Publishing (2011).
[3] See Judith Goldstein, et. al., "Introduction: Legalization and World Politics," *International Organization*, 54 (2000); Ian Hurd, "The Empire of International Legalism," *Ethics & International Affairs*, 32 (2018). For legalization and war, specifically, see Oona A. Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World,* Simon & Schuster (2017).

A significant and recent aspect of the legalization trend is enforcement. Some international relations (IR) scholars maintain international law lacks meaningful influence without enforcement capabilities.[4] Broadly, this argument contends that international law without legitimate enforcement power cannot compete with other fundamental features of the international system that compels and directs state behavior. But this critique of international law's capacity to deliver meaningful influence in state behavior is over simplified and overlooks substantial changes and efforts to expand the enforcement capacity of international law. In the last half-century, states have taken deliberate steps to expand court jurisdiction into warfare enhancing the capability to enforce international legal obligations and increase the likelihood of legal accountability.

One such step is the proliferation of international courts with jurisdiction over the conduct of military operations.[5] Modern militaries have well-established military justice systems; nevertheless, the creation of courts with the power to prosecute international crimes coupled with the expansion of some civilian courts to prosecute war crimes, warrants a closer examination of the role of legal accountability in modern warfare.

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[4] See for example, Stephen D. Krasner, "Realist Views of International Law," *Proceedings of the Annual Meeting (American Society of International Law)* (2002), "…for many if not all lawyers there is an obligation to obey international law. For political scientists this is an odd way of conceptualizing a set of agreements or practices for which there is no overarching authority capable of resolving conflicting interpretations… and no neutral third party with the legitimate right to punish violators." (265).

[5] For the rest of the dissertation, the term 'military operations' only refers to military operations in the context of an armed conflict. Military operations below the threshold of an armed conflict are beyond the scope of this study and subsequently not included in this analysis. Additionally, I often refer "national security policies" and "military policies" interchangeably. For both usages, the reference is to policies regarding torture and targeted killings. Other national security policies will be explicitly stated.

These steps to enhance enforcement and accountability were met with critics. Some contend that expanding court jurisdiction into military operations anywhere on the globe leaves soldiers in the theater of combat constantly worried about the possibility of litigation.[6] According to these critics, jurisdiction expansion, or what some called putting "judges on the battlefield," inherently restricts a soldier's capability to respond quickly and effectively to an immediate threat.[7] Similar to the critics of meaningful influence of international law, this is an overly simplistic critique that requires major assumptions about the role of law and its overwhelming impact on the conduct of operations.

This dissertation offers an empirical account of court jurisdiction in British and American military policies in Afghanistan and Iraq. It is one step toward resolving some inherent tensions in our current understandings of courts and warfare, and the impact of judicial oversight in modern conflicts.

How do the laws of war shape executive national security policies in an armed conflict? This is the core research question of this dissertation and is a fundamental question of international law and politics with significant academic and policy implications. The laws of war are products of a system that attempts to humanize war and limit repercussions to civilians and combatants; yet, empirically there is a mixed consensus of the laws of war accomplishing this

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[6] Tom Tugendhat and Laura Croft, "The Fog of Law: An Introduction to Legal Erosion of British Fighting Power," *Policy Exchange* (2013).
[7] Ibid.

goal.[8] Scholars and foreign policy practitioners have long grappled with the inherent challenges of the law-politics-war nexus, not the least of which is accessibility. Much of the relevant deliberations are closed-door and classified. Nevertheless, the conflicts post-9/11 produced a substantial amount of available information to the public in an effort to promote political and legal accountability and merits examination.

My contribution to the debate is an empirical account of legal accountability in national security policy processes.[9] Specifically, how does international and domestic judicial accountability influence national security policies regarding torture and targeted killing? This is the core empirical question of this project. I propose that to understand how international law affects national security, researchers should consider how expansion of potential judicial review in an armed conflict has permeated the policy process itself.[10] Rather than attempting to track the influence of law at the tactical level where individual soldiers operate in the fog of war, I argue the policy planning process is more appropriate for identifying the potential variation in legal accountability. As such, answering this research question offers a richer understanding of how international law and legal accountability operate in an armed conflict.[11]

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[8] See Ian Clark, Sebastian Kaempf, Christian Reus-Smit and Emily Tannock, "Crisis in the laws of war? Beyond compliance and effectiveness," *European Journal of International Relations*, vol. 24, 2, (2018); James Morrow, "When do states follow the laws of war?" *American Political Science Review* (2007); Janina Dill, *Legitimate Targets: Social Construction, International Law, and US bombing,* Cambridge University Press, 2014.

[9] Throughout this dissertation, the terms legal accountability and judicial oversight are used interchangeably.

10 This disentangles the role of Congress/Parliament and focuses exclusively on the actions of actors in the executive branch that have direct roles in the operations of armed conflict (this includes civilian leaders and the military).

[11] Tugendhat and Croft, (2013).

To answer this question, I examine policies in the United States (US) and United Kingdom (UK) in the post 9/11 Afghanistan and Iraq conflicts. The scope is limited to the legal issues of torture and targeted killing; these represent well-established legal regimes in which the UK and US have the same obligations. The conflicts in Afghanistan and Iraq occur at a moment in time when legal accountability is most likely because domestic and international courts have jurisdiction over military operations. Finally, the US and UK were the largest military contributors to operations in both conflicts; they are case studies for their similar legal and political qualities promoting their "special relationship," yet exhibit variation in levels of court jurisdiction over military operations.

The legal issues examined in this project are the prohibitions of torture and unlawful targeting; each of these issues represent well-entrenched legal regimes in which the US and UK are both prohibited from committing practices amounting to torture and unlawful targeting. Yet each of these issues are also the bedrock of controversial national security policies that are centerpieces of the 'war on terror.'

This is a qualitative account using cross-case analysis and process tracing of declassified primary sources and secondary sources in addition to interviews with elite military and political officials to better understand how court jurisdiction influences military policies in war.

Some scholars have recognized the gap in our academic awareness of mechanisms through which the threat of judicial review motivates national security policymakers,

> Even more intriguing…is the possibility of further work examining the executive and how it responds to the courts, or fails to do so…understanding how both institutions think about and react to one another will ultimately be essential to understanding the operation of the judicial

> check…further theoretical and empirical investigation is needed to flesh out whether and under what conditions the executive anticipates judicial action.12

The tenets of this project certainly merit further study, and this dissertation is just one step toward that goal. Ultimately, understanding how a system of enforcement, international and domestic, impresses upon the policy process to influence how powerful states conduct an armed conflict has significant real-world consequences. The two issues I examine, torture and unlawful targeting, particularly policies of targeted killings, represent well-entrenched legal regimes, relevant to any study of the conflicts in Afghanistan and Iraq. Grasping how the proliferation of court jurisdiction in these conflicts furthers an academic discussion about the law-politics-war nexus; but also offers insight into how mechanisms of accountability function in the complex, and often covert, world of national security policy.

The central findings of this thesis indicate that the threat of legal accountability, or "judicial observer effects," influences military policies through two mechanisms. The first is executive branch inter-agency interaction and policy preferences. Executive agencies, or Ministries in the UK, formulate agency policy options that reflect different perspectives for legal accountability. The second mechanism is the institutional structure of multinational military operations. The conflicts in Afghanistan and Iraq were coalitions in which foreign partners had

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[12] Keith E. Whittington, *Judicial Checks on the President* in The Oxford Handbook of the American Presidency (2009), 661-2; see also Cass Sunstein, "Reviewing Agency Inaction After *Heckler v. Chaney*, University of Chicago Law Review (1985) ("It is important to keep in mind the fact, traditionally overlooked in discussions of judicial review of agency action, that the availability of review will often serve as an important constraint on regulators during the decision-making process long before review actually comes into play."), 656; Ashley Deeks, "The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference," *Fordham Law Review* 82 (2013), 831.

to coordinate partnered operations to accommodate diverse substantive legal obligations and diverse interpretations of those obligations. Coalition operations also had to accommodate partners' respective court jurisdictions. In each of these ways, policymakers weighed the risk of legal accountability on policies regarding torture and unlawful targeting. I will return to these findings in Chapter 4 and Chapter 5, respectively.

The rest of this chapter continues as follows. The first section disentangles legal accountability from other forms of accountability that could factor into national security policies. The second section describes relevant literature to situate this project in a broader multi-disciplinary debate. The third section explains the research design and methodology of the project. The fourth section offers a map for the rest of the dissertation.

1. Expanding Legal Accountability

There are many ways to hold political and military officials accountable. Indeed, accountability to the public is the bedrock of modern democratic governance.[13] Mechanisms of accountability, in some form, ensure that citizens maintain a degree of authority in public policy and are markers of good governance practices.[14] Accountability as a blanket term has, "come to stand as a general term for any mechanism that makes powerful institutions responsive to their particular publics."[15] This section disentangles political accountability from legal accountability.

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[13] See more from Mark Bovens, "Public Accountability" in *the Oxford Handbook of Public Management*, (2005).
[14] Ibid.
[15] Richard Mulgan, "Accountability: An Ever-Expanding Concept?" *Public Administration*, 78 (2003), pg. 8.

It explores how the rise of international criminal law and individual criminal responsibility has led to an enhanced role of legal accountability in political processes.

Political accountability is one of the hallmarks of modern democratic practice.[16] In political discourse, accountability has two sides. In the first, it is a normative concept that standardizes acceptable behavior for public actors.[17] In this sense, accountability is a positive political virtue or feature of officials. "Accountability, used in this more active sense of virtue, refers to substantive norms for the behavior of actors."[18] The other side of accountability, and the more common use of the term, is an arrangement in which a public actor is held to account in a forum.[19] This process typically involves an obligation to explain or justify conduct.[20] An accountability forum could refer to a myriad of outlets and actions, i.e. disciplinary action from superiors, answering questions from a journalist, facing public scrutiny or reelection.[21] These particular forums result in officials facing political sanctions from the public misconduct from the public for their misconduct. This project does not explore these forms of political

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[16] For more on political accountability generally, see Robert D. Behn, *Rethinking Democratic Accountability*, Brookings Institution Press, (2001); Monica Blagescu et.al., *Pathways to Accountability: The Global Accountability Framework*, One World Trust (2005); Magnus Bostrom and Christina Garsten, eds. *Organizing Transnational Accountability*, Elgar, (2008); Mark Bovens, "Analyzing and Assessing Accountability: A Conceptual Framework," *European Law Journal*, 13:4 (2007); Mark Bovens et.al., "Does Accountability Work? An Assessment Tool," *Public Administration*, 86:1 (2008); Michael Dowdle, ed., *Public Accountability: Designs, Dilemmas and Experiences*, Cambridge University Press (2006); Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies,* Palgrave, (2003); Anne-Marie Slaughter, "Disaggregated Sovereignty: Towards Public Accountability of Global Government Networks," *Government and Opposition*, 39:2 (2004).
[17] See Mark Bovens, "Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism," *West European Politics,* Vol. 33, No. 5 (2010).
[18] Ibid, pg. 949.
[19] Ibid, pg. 946.
[20] Ibid, pg. 951; Mulgan (2003).
[21] Bovens (2010).

accountability. Instead, I focus exclusively on legal accountability, in which actors may face criminal sanctions before a court of law.

Legal accountability is the requirement that actors "abide by formal rules and be prepared to justify their action in those terms in courts or quasi-judicial arenas."[22] For example, an actor could face criminal prosecutions or civil litigation for violations committed in an armed conflict. Civil and criminal law are different bodies of law with different forms of punishment; civil suits typically result in monetary compensation, whereas criminal prosecutions can result in incarceration. For the issues in this project, torture and targeting violations, they operate at the intersection of multiple bodies of law and, therefore, multiple court jurisdictions. For example, international human rights law (IHRL), IHL, and international criminal law (ICL) prohibit torture and inhumane or degrading treatment, and thus, the crime of torture falls under the jurisdiction of the International Criminal Court (ICC), the European Court of Human Rights (ECtHR), and domestic criminal and civil courts.[23] Therefore, this project includes civil and criminal courts in the analysis. Whether the distinction creates empirically different outcomes in policy processes merits further investigation.

The timing of the conflicts in Afghanistan and Iraq occur at a unique moment in the evolution of legal accountability and armed conflicts. The attacks of September 11, 2001

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[22] Ruth Grant and Robert Keohane, "Accountability and Abuses of Power in World Politics," *American Political Science Review* Vol. 99, No. 1 (2005), pg. 36.

[23] Chapter Two traces the evolution of torture prohibitions in US and UK domestic legal systems and international obligations. For an overview of how the crime of torture can be prosecuted in Europe, see European Center for Constitutional and Human Rights, "Torture in Europe: The Law and Practice" September 2012. https://www.ecchr.eu/fileadmin/Publikationen/Torture_in_Europe_2012-09.pdf.

triggered multinational military operations in both Afghanistan and Iraq and had a significant impact on the role of law in those conflicts.[24] Within the same context, the norm of individual responsibility was gaining traction. Trends toward domestic adjudication of human rights violations and establishing and international criminal court enshrining individual criminal responsibility led many to perceive legal accountability as the norm rather than the exception.[25] Kathryn Sikkink calls this phenomenon the justice cascade. "The justice cascade is a rapid and dramatic shift in the legitimacy of the norms of individual criminal accountability for human rights violations and an increase in actions (such as trials) on behalf of those norms."[26]

A fundamental underpinning of the justice cascade is that it is a global phenomenon; the norm of individual criminal accountability is a departure from an established practice that is, to varying degrees, evident beyond western democracies. One test for the justice cascade is whether it affects the world's most powerful countries. Sikkink argues that even in the face of an armed conflict, the US executive is not immune from the trend of individual criminal accountability. The Bush administration's application of memos authorizing interrogation techniques amounting to torture appear to contradict Sikkink's conclusion. However, Sikkink contends the very production of the memos attempting to offer a legal foundation for harsh and coercive interrogation techniques is itself an expression of the justice cascade. Simply put, if the US had

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[24] Military operations beyond Afghanistan and Iraq are beyond the scope of this project, though warrant further investigation. The empirical discussion of drone strikes deals with the often-discussed issue of borderless wars in region; though, largely to the extent that other theaters influence Afghanistan and Iraq.

[25] See Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics,* W. W. Norton & Company, (2011).

[26] Kathryn Sikkink and Hun Joon Kim, "The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations," *The Annual Review of Law and Social Science* (2013), pg. 268.

no concerns about legal accountability, then it would not have embedded controversial policies in a legal framework. The memos were an attempt to shield US officials from prosecution, putting aside the quality of the reasoning.[27] Whether or not Sikkink's observation captures the motivations of actors at the time, there is little doubt that the US torture program and the legal debates that followed it changed the global conversation about legal accountability and powerful states.

The UK also experienced changes for the role of legal accountability at the beginning of the twenty-first century. The year 2000 signaled a new era of military operations while both the Human Rights Act 1998 (HRA) and the International Criminal Court Act (2001), both landmark pieces of legislation, were about to enter into force. The HRA implemented civil and political rights from the European Convention of Human Rights (ECHR) into British law; and, as will become very important, made British courts available as a domestic remedy to British violations of the rights enshrined in the Convention. The International Criminal Court Act 2001 adopted the international crimes of the Rome Statute into British criminal law; effectively empowering British courts to prosecute war crimes committed abroad.[28]

This exposure of legal accountability in the British context generated significant backlash. One former Chief of the Defence Staff claimed the British armed forces "are under legal siege" and these developments will put "judges on the battlefield," implying that increasing

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[27] Sikkink (2011), pgs. 190-191.
[28] See William W. Burke-White, "The International Criminal Court and the Future of Legal Accountability," *ILSA Journal of International and Comparative Law*, no. 1 (2003).

legal accountability inherently impedes the military's ability to respond to immediate threats.[29] This concern represents the inherent tension in much of the literature of law and war and it is not easily resolved. Nevertheless, others have argued, this tension between battlefield effectiveness and strong rule of law may be based on faulty assumptions and are not (necessarily) mutually exclusive.[30]

The capacity for legal accountability for violations in an armed conflict is increasing. In both cases, the US and UK have updated the ability to prosecute war crimes and enhanced practices promoting individual criminal accountability. This study pivots the analysis to the effect of these changes. How did the legal accountability changes factor in to US and UK's next wars? The next section outlines the observer effects in national security policy making and the core findings of the dissertation.

2. Judicial Observer Effects in National Security Policies

In the US and UK, the executive branch is composed of numerous agencies (or ministries) that utilize their collective expertise to create measured and informed national security policies. Executive policymaking does not occur in a vacuum independent of the possibility or probability of litigation and "is highly attuned to potential court action."[31] Courts are one of many audiences of national security policies; but courts, specifically domestic courts

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[29] Lord Boyce, HL Debs July 14, 2005, vol 684, col 1236; see also Tugendhat and Croft (2013).
[30] Peter Rowe, *Legal Accountability and Britain's Wars 2000-2015*, Routledge, 2016.
[31] Deeks (2013), pg. 830.

in the US and UK, have the competency to strike down policies that violate domestic law, to compel the executive to alter policies into legal compliance or mandate new policies.[32] As such, courts are a critical audience in which the executive is attuned to.[33] The result of executive attention to potential court action is called the "judicial observer effect" and will be discussed, defined, and expanded in chapter two. But for now, judicial observer effects are the effects of potential judicial review on national security policies.

The core empirical finding of this dissertation is that judicial review does indeed factor in to national security policy making. The judicial observer effect is a delineation of national security policy space that effectively defines policy options and maneuverability in the face of legal uncertainty. States with higher degrees of judicial review, or domestic and international courts with jurisdiction over military policies, are more constrained in the policy space in which they can maneuver; conversely, states will with lower levels of judicial review, or limited courts with jurisdiction over military policies, are less constrained in their policy options which gives them a more maneuverability in uncertainty.

This finding is distinct from other academic perspectives in international relations and legal literatures. Some advocate that courts, particularly international courts, can have a deterrent effect on states and compel wartime policies and behavior to comply with legal obligations out of fear of prosecution. Another perspective is that courts, particularly domestic courts in western democracies, exhibit significant deference to the executive branch which needs to respond to

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[32] Deeks (2013), pg. 831.
[33] Ibid.

threats to national security swiftly and effectively. In these contexts, domestic courts are not afforded the competence of participating in national security policymaking, nor should they be. This dissertation argues for a more nuanced picture of judicial review and national security. Courts do not fully deter, nor do they fully defer. Instead, judicial review contributes to a delineation process that establishes boundaries of national security policymaking. These boundaries become most evident and significant when faced with legal uncertainties in an armed conflict, as will be illustrated in chapters 3 and 4. In the face of legal uncertainty, judicial review factors most heavily as states determine the limits of national security policies while mitigating the risks of litigation.

The effect of policy delineation occurs through two mechanisms. The first is through executive agency interaction. The numerous executive agencies that participate in national security policy making have varied perceptions of judicial review, and these diverse perspectives contribute to disparate, and at times conflicting, policy options for the state. For example, chapter three details how in the US, the CIA and DOD held different perceptions regarding the probability of judicial review. The intelligence community and armed forces are subject to different jurisdictions (civilian and military) and this difference played a role in the policy options the CIA and DOD advocated for. Taking an agency, or ministry, level perspective to the executive branch disaggregates the "executive" to capture variation among national security officials that actively participate in the policy deliberation, or policy setting, process.

The second mechanism is the institutional design of ad hoc coalitions. The conflicts in Afghanistan and Iraq were fought in ad hoc coalitions led by the United States, this required coordinated partnered operations to respect coalition partners' domestic and international legal

obligations and interpretations of those obligations. This coordination process, called coalition legal interoperability, also requires an awareness of coalition partner domestic and international jurisdictions. Legal interoperability requires states to coordinate operations while navigating partner nations' caveats (or conditions of participation in operations) and domestic national security policies. As the coalitions in Afghanistan and Iraq showed, when partner nations issue significant caveats to coalition operations, the lead nation must pick up the slack. For example, in Iraq, most coalition partners issued caveats regarding detention – only the US and UK operated detention facilities. This led complex arrangements of between partners of delegating territory and processing transfers of detainees, as chapter five will detail further.

The legal interoperability of ad hoc coalitions triggered judicial observer effects through two ways. First, British and American military and legal officials had to coordinate complex arrangements to achieve the strategic objective and minimize litigation risks on the armed forces. One example of this complexity was working partnered operations to mitigate American soldiers' exposure to European human rights jurisdictions. Because American and European troops often worked together, US officials at the Department of Defense and Department of State had to plan operations without subjecting Americans to human rights jurisdictions. Second, legal interoperability triggered observer effects through state responsibility. When working as partners, states may be held liable for the actions of another state in the same coalition under the law of state responsibility. This point was particularly significant for junior partners who were concerned their participating in the coalition could expose litigation for British and American

behavior, particularly regarding allegations of torture. Risks of legal accountability prompted rare instances of confrontation for "risky behavior" that jeopardized the entire coalition.[34]

The burgeoning academic literature and policy interest in international law and its role in war has discounted the role of courts in the policymaking process. The literature that does examine the threat of accountability in armed conflict tend to look to battlefield conduct and behavior as their indicators of deterrence or deference. But taking a step back to better capture courts at top level deliberations can offer valuable insight into legal accountability at the first step of executing a war. Using the US and UK as case studies offers an interesting and insightful glimpse into national security processes and how the British and American experiences in warfare are influenced by a rising presence of judicial review.

3. Map of Dissertation

The rest of the dissertation continues as follows. Chapter two presents the relevant literature, observer effect framework, and methodology of the dissertation. This chapter begins with a discussion of the legal and international relations literature that examines the role of courts in a national security context. Specifically, this review illustrates two extant perspectives for the role of courts in national security decision making. On the one hand, there is a substantial literature on the deterrent effect of international courts for combatants and governments. This camp argues accountability in an international court influences combatant compliance calculus –

[34] Chapter five discusses these confrontations regarding risky behavior and pressures from junior partners on US officials out of concern for state responsibility.

and thus, international courts have a significant role in encouraging combatant compliance with the rules of war. On the other hand, others argue that in a domestic context, the established practice of judicial deference to the executive on national security matters implies that domestic courts have minimal influence on the development of national security policies. This practice of deference, called the military deference doctrine, is firmly established in US and UK jurisprudence and the deference camp is skeptical of domestic judicial oversight as a compelling factor that will directly affect the process. Because each camp generally focuses on different levels of jurisdiction (international and domestic), they are not necessarily mutually exclusive; however, I would argue the tenets of their arguments are contradictory because the systems are not wholly independent. By way of a simplified example, if both deterrence and deference theorists were correct, the UK would create national security policies with heavy reliance on domestic deference but heavy concern for international adjudication. But this does not reflect British national security decision making and its relationship to legal obligations or judicial oversight.

Chapter two presents an expanded observer effect framework to better capture the relationship of judicial oversight and national security decision making. The chapter begins with an explanation of Ashley Deeks' original observer effect analysis and expands the boundaries of the framework to include international courts in the process. This section details different types of judicial observer effects and how to identify them in national security policy. Chapter two then concludes with the research design and methodology of the dissertation.

Chapter three presents the historical progression of courts in times of national security crisis and armed conflict. The goal of the chapter is to describe the evolution of the

judicialization of national security up to the point of the wars in Afghanistan and Iraq. This includes the expansion of court jurisdiction into military affairs over the twentieth century as norms of individual accountability changed the way we think about legal accountability in warfare. Chapter three also includes an overview of the landmark cases cementing military deference doctrine into US and UK precedent. The chapter concludes with a bird's eye view of the state of affairs at the inception of the conflicts.

Chapter four is the first empirical chapter of the dissertation and zooms into the national security decision making processes of the US and UK. It disaggregates the processes with an executive agency perspective of policymaking and illustrates that judicial oversight has different effects in agencies relevant for national security policymaking. Specifically, this chapter finds variation of judicial observer effects in the US (and UK counter-parts) Department of Defense, Department of State, and Intelligence agencies. Each agency perceived the likelihood of judicial oversight differently and this variation was one factor which resulted in different policy options from each agency.

Chapter five is the second empirical chapter and demonstrates the impact of judicial oversight in coalitional warfare. Both conflicts in Afghanistan and Iraq were multinational military operations which required partners with diverse international and domestic legal obligations and interpretations to operate together. This particular form of coalition interoperability, legal interoperability, resulted in complex arrangements of operations. Risks of legal accountability within the coalition, often for the behavior of other state partners, had a significant role in the execution of the coalition mandate. This chapter maintains that the institutional design of coalitions enhances judicial observer effects.

Finally, chapter six concludes with the empirical findings of the dissertation and an in-depth discussion of the theoretical implications. It further concludes with necessary next steps and avenues for future research.

Chapter 2. Literature, Theory, and Methodology

This chapter has three components. First, it presents a state of the relevant literature in international relations and international law to situate this dissertation within a multidisciplinary field. Second, it presents the judicial observer effect framework, expanding upon previous observer effect studies that were narrower in scope. In this chapter, I present a wider and comprehensive view of judicial observer effects to include international and foreign courts as potential motivating influences on national security decision making. Third, and finally, this chapter details the research the design of the dissertation, including the case selection and methodology.

1. State of the Literature

This study contributes to literatures in multiple disciplines, both substantively and empirically. This section describes the state of the literature to situate the central findings of this dissertation in a larger academic debate. Additionally, this section demonstrates how extant literature often misses critical links easily overlooked when complying with disciplinary practices. The aim is to demonstrate how common approaches yield conclusions that are pieces of a larger puzzle. This dissertation is situated at the intersection of multiple studies in an effort to capture the complexities of policymaking and merge legal analysis with analysis of the priorities associated with effective military operations.

The following four sub-sections outline the existing academic literatures. The first section details different strands within international legal scholarship and the multiple issues that overlap

with international relations scholarship. This also includes a section of empirical studies of the role of law in war from multiple disciplines. The second section details the court literature and how scholars have explored the effects of courts on policy making. This section discusses (a) deterrence of international courts and; (b) deference of domestic courts. Each framework offers important insight into how enforcement interacts with other competing priorities to inform military policy. The third and final section details how the dissertation interacts with the discussed literatures, merging them into an interdisciplinary approach to the research question.

1.1. International Law Approaches

International legal scholarship grapples with many of the same questions as international relations. The extent that states consider and comply with international legal norms "remains among the most perplexing questions…It challenges scholars of international law and international relations alike."[35] This section surveys significant frameworks from legal scholarship that seek to understand how international law functions in the international system.

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[35] Harold Hongju Koh, "Why Do Nations Obey International Law?" 106 *Yale Law Journal*, (1999) pg. 2599. For more on state compliance and international law, see Louis Henkin, *How Nations Behave*: *Law and Foreign Policy*, Columbia University Press, (1979); Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements,* Harvard University Press (1998); Thomas M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press (1990); Jack Goldsmith and Eric Posner, *The Limits of International Law*, Oxford University Press (2005); Abram Chayes and Antonia Handler Chayes, "On Compliance," *International Organization*, 42 (1993); Andrew Guzman, "A Compliance-Based Theory of International Law," *California Law Review* 90, (2002); Kenneth Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers," *Yale International Law Journal* 335 (1989); Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," in *The Handbook of International Relations* (Walter Carlsnaes et al. eds.,); Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," *The American Journal of International Law* 92 (1998).

Early reflections in the post-Second World War system were optimistic about new institutions and rules-based system that contrasted the strictly state-centric system. Where some IR scholars argued states inherently behave out of concerns for power, some international law advocates subscribed to Louis Henkin's observation that most nations obey most laws most of the time.[36]

1.1.1. International Law & the International System

Legal scholars, and more recently international relations scholars, have explored why states obey most of the rules most of the time.[37] As mentioned, the aftermath of the Second World War left the Allies to establish a new world order with a rules-based system.[38] However, the efficacy of this new order was quelled by the political gridlock of Cold War bipolarity. Institutions, especially the United Nations Security Council (UNSC), functioned on the promise of cooperation; veto power of the Soviet Union and United States rendered the UNSC a paralyzed institution on many issues of peace and security. After the fall of the Soviet Union, and the subsequent end of the cold war, the political paralysis of institutions lifted, and legal scholarship espoused a certain optimism about the future about international law and institutions.[39]

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[36] Henkin (1979).
[37] For a survey of compliance literature, see Scharf (2009); Andrew Guzman, *How International Law Works: A Rational Choice Theory*, Oxford University Press (2008); Raustiala and Slaughter (2002);
[38] Scharf (2009), pg. 52.
[39] Scharf (2009).

Four leading views dominated the compliance debate after the cold war, all of which reflect this newfound optimism of a unipolar system. The first view, the "instrumentalists," argued states complied with international law when compliance advanced state interests.[40] The second view, the "liberal internationalists," argued compliance depends on whether a state identifies as "liberal"; liberal states are more likely to comply with international law and more likely to cooperate with other liberal states.[41] The third view, "constructivists," argued international legal norms, values, and structure of international society can reshape state interests.[42] Finally, the fourth view is a different perspective of "institutionalist," in which compliance is a result of internalization of legal norms through judicial incorporation, legislative embodiment, and executive acceptance.[43] States foster compliance because violations create friction with negative consequences for a state's foreign policy goals.[44]

Just as the post-cold war international system was optimistic for the prospects of international institutions and law, the post 9/11 compliance discourse, and by extension legal scholarship, changed with the political context.[45] In the early days following the attacks of 9/11,

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[40] Scharf (2009); Koh 1996; Abbott (1989); In a departure from realist beginnings of this general view, these international relations scholars disaggregated the state into constitutive parts using game theory to model compliance and cooperation when faced with potentially competing state interests, Robert Keohane, "International Relations and International Law: Two Optics," Sherrill Lecture at Yale Law School (1996); Duncan Snidal, "Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes," *American Political Science Review* 79 (1989).
[41] Scharf (2009); Anne-Marie Slaughter, "International Law in a World of Liberal States," *European Journal of International Law* (1995).
[42] Scharf (2009); Peter J. Katzenstein, *The Culture of National Security: Norms and Identity in World Politics* (1996) pgs. 17-19; Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs,* Cambridge University Press (1989).
[43] Koh (1996); Scharf (2009).
[44] Koh (1996).
[45] See Scharf (2009) for more on the historical context to trends of international legal scholarship.

the Bush administration pushed back against some of the core premises of the compliance literature. John Bolton, Bush's Ambassador to the United Nations, said, "It is a big mistake for us to grant any validity to international law even when it may seem in our short term interest to do so – because over the long term, the goal of those who think that international law really means anything are those who want to constrict the United States."[46] It is easy to dismiss Bolton's comments as extreme, even for the administration. But the National Defense Strategy of 2005 compares the use of "judicial processes" to terrorism, and that both are "strategies of the weak" and jeopardize "our strength as a nation state."[47]

Some rational choice theorists argued that international law does not compel states into compliance.[48] Using game theory modeling, Jack Goldsmith and Eric Posner argued that when states do comply with international law, it is purely out of self-interest.[49] The argument rejects the premises and assumptions of the post-cold war compliance debate; state compliance with international legal norms, regardless of substantive issue, is not about morality, state identity, or internalization of norms. In fact, Goldsmith and Posner propose four models to explain state behavior that was considered "compliance." But Goldsmith and Posner argue that it wasn't

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[46] Samantha Power, "Boltonism," *The New Yorker*, March 21, 2005.
[47] Department of Defense, National Security Defense Strategy, 2005.
[48] Jack Goldsmith and Eric Posner, *The Limits of International Law*, Oxford University Press (2005).
[49] Ibid, pg. 225.

compliance at all; instead, models of coincidence,[50] coordination,[51] cooperation,[52] and coercion[53] better explained international law and state behavior. This generally skeptical view of international law as a motivating force in politics particularly resonated in the historical and political context at the time in Washington; nevertheless, this approach received substantial criticism and pushback for advancing a certain normative agenda,[54] ill-advised policy implications,[55] and biased methodology.[56]

The compliance literature is overarching in its aims and conclusions and necessarily lacks nuance and understanding. Some legal scholars pushed back against the trend to measure successful incorporation of international law in politics through compliance. Howse and Teitel argue, "looking at the aspirations of international law through the lens of rule compliance leads to inadequate scrutiny and understanding of the diverse complex purposes and projects that multiple actors impose and transpose on international legality, and especially a tendency to

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[50] Ibid, pg. 27. The coincidence model proposes that States follow international law when acting out of their own self-interest. State behavior happens to align with what international law requires.
[51] Ibid, pg. 12. The coordination model refers to arrangements between two or more states to follow a rule because it is convenient.
[52] Ibid, pg. 29. The cooperation model refers to states making arrangements that sacrifice short term interests for long term gains.
[53] Ibid, pg. 28. The coercion model refers to powerful states compelling weaker states to act out of the interest of the powerful state.
[54] See Margaret E. McGuinness, "Exploring the Limits of International Human Rights Law," *Georgia Journal of International and Contemporary Law*, 34 (2006).
[55] Mary Ellen O'Connell, *The Power and Purpose of International Law*, Oxford University Press (2011).
[56] Kenneth Anderson, "Remarks by an Idealist on the Realism of *The Limits of International Law*," *Georgia Journal of International and Contemporary Law*, 34, (2006); Daniel Bodansky, "International Law in Black and White," *Georgia Journal of International and Contemporary Law* 34 (2006); David M. Golove, "Leaving Customary International Law Where It Is: Goldsmith and Posner's, *Limits of International Law*," *Georgia Journal of International and Contemporary Law* 34 (2006).

oversimplify if not distort the relation of international law to politics."[57] This signaled a larger shift in the literature away from compliance and toward nuanced tools to assess the role of international law.

Capturing how international law functions, and varies, across states and issue areas is a fundamental shortcoming of the state behavior and legal compliance perspective. System-level theories necessarily forfeit contextualization and deeper understandings of issue area specificities. For international law and war, there is a specific relationship which may differ greatly from trade, human rights, or other international legal regimes.

1.1.2. International Law & National Security Policy

This section examines legal literature regarding international law and national security policies. There is particular emphasis on empirical studies and insider accounts of crisis decision making and political processes to provide the context and nuance specific to domestic national security concerns.

A national security policy is a domestic framework intended to protect the security of state and its citizens. National security policies are regulated by a patchwork of international and domestic law; examples of national security policies that fall under these regulations include,

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[57] Robert Howse and Ruti Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters," *Global Policy*, 1 (2010).

inter alia, military technology, intelligence policy or practice, military operations, terrorism, or nuclear security.[58]

Abram Chayes' insider account about the Kennedy administration's policy deliberations of the Cuban Missile Crisis illustrated international law in the policy process.[59] The account demonstrated how, in times of crisis, legal norms may compete with more urgent strategic considerations.

According to Chayes, the Cuban Missile Crisis offers four conclusions about the role of law in national security decision making. First, the law is not self-activating. The role of the lawyer in these deliberations is necessary for the inclusion of international law. This may seem intuitive, but in military decision making the inclusion of lawyers, and by extension legal analysis, in military decision making is a relatively new phenomenon. Lawyers were not always "at the table" with the express purpose of informing policy; previously, the role of legal advisers was ad hoc and only to answer specific legal questions.[60] Chayes' insight suggested that during the Cuban Missile Crisis, if the legal adviser had not been present and advocated for certain

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[58] For more on international/national security law, see Rosa Ehrenreich Brooks, "War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror," *University of Pennsylvania Law Review* 153 No. 2, (2004); Kim Lane Scheppele, "The International Standardization of National Security Law," *Journal of National Security Law and Policy*, 4 no. 2 (2010). For national security law of the United States generally, see Stephen Dycus, *National Security Law*, Wolters Kluwer Law & Business, 4th ed. 2007.

[59] Abram Chayes, *The Cuban Missile Crisis: International Crisis and the Role of Law*, Oxford University Press (1974).

[60] For more on the striking increase of lawyers in military decision making, see Doyle Hodges, *Let Slip the Laws of War! Legalism, Legitimacy, and Civil-Military Relations*, PhD Diss. Princeton University (2018).

policy outcomes, international law as a motivating force would not permeate the policy process.[61]

Second, the law is one factor that determines the policy options available, "dividing the universe of choices into the permissible and impermissible."[62] Legal obligations can function as a sorting mechanism for policy options depending on how risky, or ambiguous, they are.

Third, the legal justification for national security policies are complex. Chayes warns scholars (and the public) not to conflate legal justifications as an overall defense for a policy that is clearly motivated by other factors. It is incorrect to assume that the purpose of a policy and its justification are independent from each other. "There is a continuous feedback between the knowledge that a government will be called upon to justify its action and the kind of action to be chosen."[63]

Fourth, decisions must account for the international organizational setting where they are taking place. International institutions and international law are not easily separable since the institutions are themselves constituted of legalistic modes of procedure. The consequences on the larger international organizational space is a feature in national security decision making.[64] Simply put, states do not make decisions in a vacuum and the institutional implications (in Chayes' analysis, the Organization for American States [OAS]) can influence the policy options in crisis decision making.

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[61] Chayes (1974), pg. 102.
[62] Chayes (1974), pg. 102
[63] Chayes (1974), pg. 103.
[64] Chayes (1974), pg. 105.

Chayes' account of the Cuban Missile Crisis is a landmark contribution to understanding how international law functions in the field of national security policy. Empirical studies advance our understandings of how international law, the laws of armed conflict specifically, functions within context.[65]

1.1.3. Empirical Studies on the Role of Law in State Conduct

Qualitative studies investigate the mechanisms by which state compliance with legal norms occur.[66] To begin with, this section details three significant international relations empirical studies at the core of this project's research questions. James Morrow's study evaluates what role of IHL in the course and conduct of an armed conflict. He explores how norms of IHL create strategic expectations about how states fight wars.[67] He argues that strategic expectations create a fixed standard of acceptable behavior and separates "those states willing to observe that standard from those who are not." Using game theory under multiple conditions, Morrow finds that reciprocity strongly enforces the laws of war. His findings argue that it is IHL as a set of norms, and whether both states engaged in hostilities have ratified IHL treaties, that impact an actor's behavior on the battlefield, independent of enforcement.

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[65] Notable examples of empirical studies on national security are Michael P. Scharf, "International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate," *Cardozo Law Review* 31 (2009); Laura A. Dickinson, "Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance," *The American Journal of International Law*, 104 (2010); for quantitative studies, see Julian Ku and Jide Kzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?" *Washington University Law Review* 84 (2006); Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?" 111 *Yale Law Journal* (2002).
[66] Laura A. Dickinson, *Empirical Approaches to International Law*, Ashgate (2007).
[67] James Morrow, *Order Within Anarchy: The Laws of War as an International Institution*, Cambridge University Press (2014).

Janina Dill also evaluates the role of IHL in the conduct of war. Dill uses the logics of 'sufficiency' and 'efficiency' as the framework of military decision-making.[68] The 'logic of sufficiency' refers to target selection based on what will damage enemy military capabilities in one-step. The 'logic of efficiency' refers to target selection that will harm the combatant's military capabilities in three steps or fewer. Dill's finding is that US targeting practices have shifted from a logic of sufficiency to one of efficiency, which is counter-intuitive to the increased legal presence since the war in Vietnam. The overall conclusion is that international law does have an empirical effect on US targeting practices but does not make war normatively acceptable in the 21st century.

Travers McLeod also has the same starting point but examines IHL at the center of an evolving counterinsurgency (COIN) doctrine and practices in both Iraq and Afghanistan.[69] McLeod finds that, "international law matters much more than is often assumed and much more than scholars and practitioners have previously been able to claim." He argues that the influence of IHL in US COIN doctrine can be traced through three pathways. The first is through IHL's ideational influence, through which "deference to the rule of law implicates specific rules of international law directly or indirectly." The second pathway is through IHL's legitimacy, which refers to the way IHL is used to articulate and demonstrate legitimacy. And finally, IHL's mandatory impact, which is largely seen through its interaction with domestic law and domestic

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[68] Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing*, Cambridge University Press (2014).
[69] Travers McLeod, *Rule of Law in War: International Law and United States Counterinsurgency in Iraq and Afghanistan*, Oxford University Press, 2014.

institutions. McLeod explores these pathways through the drafting and implementation of Field Manual 3-24, *Counterinsurgency* (FM 3-24), which reversed US policy on counterinsurgency.

All of these international relations empirical studies started with the same research question, but each study answers the question in a different way. However, none of these studies include legal accountability as a motivating force in the conduct or policymaking of an armed conflict. Morrow is the exception; he does not find enforcement to have much empirical value in state behavior. But there are a few key differences between his study and this research project. First, his study only examines inter-state conflicts; whereas this dissertation only examines asymmetrical conflicts. Second, his study looks exclusively at IHL treaties. This dissertation broadens to the laws applicable to extraterritorial military operations which includes other bodies of law and enforcement, notably international human rights law. Third, Morrow's dependent variable is compliance with IHL treaties; this does not capture the complications of policy setting and implementation, which is the focus of this study.

National security legal scholarship has produced important empirical studies that should be highlighted. One study by Michael Scharf interviewed ten former State Department legal advisers to understand how the Legal Adviser of the State Department, a position considered the authority on international law and US obligations, perceives the role of international law in national security policymaking.[70] The central finding is that international law was a powerful

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[70] Scharf (2009) pgs. 62-75. The interview data is based on a small day-long workshop with ten former State Department legal advisers. The discussion centered around five questions: (1) Did the Legal Advisers perceive international law to be binding? (2) Are international legal rules ever clear enough to constrain policy preferences? (3) Does the Legal Adviser have a duty to oppose proposed actions that conflict with international law? (4) How

motivating force for these policymakers, even compelled some policymakers to "forego the use of force or other policy preferences in order to comply with international law."[71] The value of this study is the comprehensive viewpoints of State Department legal advisers and their perceptions about the role and value of international law within national security decision making procedures. The limitation of this study is that the State Department legal adviser is one actor among many involved in the procedures.

Scharf's case study is the Bush administrations employment of torture as an interrogation tool. He argues the Bush administration's legal team handling most of the legal analysis, also called the "war cabinet," did not follow established protocol, excluding key legal actors from their deliberations, such as the State Department legal adviser and the National Security Council Chief Counsel; the two positions created to be the authority of US international and national security law.[72] The case study concludes the exclusion of the State Department legal adviser "demonstrated that important bureaucratic players perceived the Torture Convention, Geneva Conventions, and customary international law as applicable and binding."[73] Yet, again, this conclusion is only a piece of a larger puzzle. The approach of this dissertation expands on Scharf's study by expanding the set of relevant actors in national security procedures, including State Department, Department of Defense, and, to a lesser extent, intelligence agencies.

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influential is the advice of the legal adviser? (5) Do the legal advisers view international law as a helpful or a hindrance?

[71] Scharf (2009), pg. 97.

[72] The "war cabinet" consisted of White House Counsel Alberto Gonzales, Vice President's Counsel David Addington, Pentagon Chief Counsel Jim Haynes, and Deputy head of the Office of Legal Counsel in Department of Justice, John Yoo. (Scharf, pg. 82).

[73] Scharf (2009), pg. 94.

Capturing variation in perspectives about international law, and by extension legal accountability, is a core contribution to this literature.

Another empirical study from Laura Dickinson examines how US military lawyers, the JAG Corps, have internalized core values of international law in military operations, particularly respect for human rights and limits on the use of force.[74] Using organizational theory lens, Dickinson argues within the organization of the US military, JAG officers are "the compliance unit within the military."[75] Based on interviews with over twenty JAG officers from Afghanistan and Iraq, Dickinson finds that judge advocates are present at all stages of the law and, help devise the rules of engagement and train troops in those rules…at the same time their ongoing advice to commanders and commanders' staff on the battlefield appears to make the legal rules they seek to enforce more salient throughout the organization. The lawyers report that they frame the rules in a way that describes them as supporting the broader goals of the organization: military effectiveness.[76]

Dickinson's central finding supports Scharf's conclusions, that "the presence of lawyers on the battlefield can – at least sometimes – produce military decisions that are more likely to comply with international legal norms."[77] Dickinson's study offers a rare glimpse into how law functions in operational theaters of war, where JAG officers are core agents advocating for legal compliance with military commanders. The shortcoming of this study is, again, risking

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[74] Dickinson (2010), pg. 3.
[75] Dickinson (2010), pg. 15.
[76] Ibid.
[77] Ibid, pg. 3.

confirmation bias. The JAG corps is tasked with ensuring legal compliance; thus, expanding the analysis to decision-makers that are tasked with broader responsibilities could provide insight into a larger range of operations in the military.

These studies show mechanisms for state compliance confirm Chayes' first conclusion on the role of law in national security decision making, legal advisers activate the role of international law. Legal advisers are compliance agents advocating for military policies, and encouraging conduct, consistent with legal norms. This is intuitive – by definition, the expectation and duty of legal advisers is to offer direct legal advice in the formulation of policy. Legal empirical studies tend to stay in the legal adviser's office, or legal advisers on the battlefield, to capture the role of law. The issue with this is that national security decision making includes many actors across multiple departments. Not every national security policy maker has the duty to activate legal obligations into policy formulation; however, legal accountability is relevant to all actors, regardless of legal background or knowledge. As such, this study goes beyond these empirical studies by including other actors that are critical to the processes of national security policymaking in the US and UK.

1.2. Courts Literature

In recent years, literature on legal accountability has incorporated more interdisciplinary approaches to understand the functions of courts in international politics.[78] International relations

[78] For example, see Karen Alter, Emilie Hafner-Burton, and Laurence R. Helfer "Theorizing the Judicialization of International Relations," *International Studies Quarterly*, 64 (2019).

and legal scholars have grappled with the proliferation of international courts and the "accountability revolution" to understand the consequences of an increasingly judicialized international system.[79]

This subsection surveys literature examining the function of judicial systems in national security and armed conflicts. I organize the relevant debate into two over-arching frameworks. The first is the deterrence framework; scholars in this framework argue the threat of accountability can alter combatant behavior towards compliance and greater assessments of risks of legal violations.[80] The second framework is the deference framework; scholars from this perspective focus on government inter-branch dynamics and argue the judicial branch has little impact on executive national security policy making because of national security deference doctrines. Fundamentally, these two frameworks examine different decision-making processes and interactions; yet, the core consideration is the same as this dissertation. Each framework argues that courts (whether domestic or international) has a particular function in the course of an armed conflict and pursuit of national security. I will discuss each in turn.

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[79] See for example Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton University Press (2014); Sikkink (2011); on the "accountability revolution," see Sriram (2003) which surveys the rise of prosecutions, particularly through the exercise of universal jurisdiction, while exploring the negative implications of an expanding system of accountability.

[80] See section 2.3.1. for a discussion of this literature; see broadly Jo and Simmons, "Can the ICC Deter Atrocity?" *International Organization*, Vol. 70, No. 3 (2016); Jacqueline R. McAllister, "Deterring Wartime Atrocities: Hard Lessons from the Yugoslav Tribunal," *International Security*, 2020.

1.2.1. Deterrence Framework

After the Second World War, the creation of the Nuremberg and Tokyo trials was pivotal to the evolution of international criminal law and individual responsibility.[81] International criminal tribunals (ICTs) became a useful tool for holding individuals accountable for heinous crimes and advancing justice. As the nature of warfare changed from inter-state to intra-state (or civil wars) ad hoc international criminal tribunals became a vital feature of legal accountability. States created ICTs for conflicts in the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, East Timor, Lebanon, Bosnia, and Kosovo. The ad hoc tribunals signaled an important step towards setting global standards for legal accountability; but ultimately, ad hoc tribunals proved costly and unsustainable, eventually leading to a permanent international criminal court to prosecute the most egregious crimes.[82] The deterrence debate among international legal scholars is rooted in whether the threat of legal accountability influences government regimes and insurgency groups to alter behavior in favor of legal compliance.

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[81] See Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press (2012); David Cohen and Yuma Totani, *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence*, Cambridge University Press, (2020).

[82] For more on war crimes tribunals, see Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press (2002); William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press (2012); Richard J. Goldstone, "Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals," 28 *New York University Journal of International Law and Politics* (1996). Establishing international criminal tribunals can occur under the UN Security Council, or domestically. The mandates for many of these ICTs were limited temporally and geographically. Typically, the tribunals only had competence to review crimes committed within the context of the armed conflict and only for the time the armed conflict occurred.

Skeptics of deterrence fundamentally argue that risks of legal accountability cannot compete with strategic priorities and are unlikely to compel combatants to change behavior.[83] Further, skeptics contend even if the risk of legal accountability was taken into consideration, the resources necessary to secure prosecutorial support and gather evidence in an ongoing conflict are extremely challenging; this may negate any deterrent effect of the court because combatants to conclude that prosecution is unlikely in light of these challenges.[84]

Proponents of international courts' deterrent capability find empirical evidence of changed behavior when ICTs have prosecutorial support to prosecute war criminals.[85] One such study examines the International Criminal Tribunal for the Former Yugoslavia (ICTY) and finds evidence that ICTs are most likely to deter combatants when three conditions are present– prosecutorial support, combatant reliance on liberal constituencies for support, and centralized combatant groups.[86] First, prosecutorial support comes from third parties (i.e. states, nongovernmental organizations, inter-governmental organizations) in the form of evidence,

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[83] McAllister (2020), 85. See also, Tom J. Farer, "Restraining the Barbarians: Can International Criminal Law Help?" *Human Rights Quarterly*, Vol. 22, No. 1, 2000; James F. Alexander, "The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact," *Villanova Law Review*, Vol. 54, No. 1, 2009; Kate Cronin-Furman, "Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity," *International Journal of Transitional Justice*, Vol. 7, No. 3, 2013; David Mendeloff, "Punish or Persuade? The Compellence Logic of International Criminal Court Intervention in Cases of Ongoing Civilian Violence," *International Studies Review*, Vol. 20, No.3, 2017.

[84] See especially Mendeloff, (2017).

[85] Hyeran Jo and Beth Simmons, "Can the International Criminal Court Deter Atrocity?" *International Organization*, Vol. 70, No. 3 (2016); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (2011); Courtney Hillebrecht, "The Deterrent Effects of the International Criminal Court: Evidence from Libya," *International Interactions*, Vol. 42, No. 4 (2016); Benjamin J. Appel, "In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?" *Journal of Conflict Resolution* (2018); McAllister (2020).

[86] McAllister, 92 (2020).

information, access to a crime scene, witnesses or suspects.[87] Second, combatants need access to resources (such as recruits, funding, weapons, recognition, or access to black markets). Some combatants rely on liberal constituencies for assistance in acquiring these resources; and that support is often conditioned on adopting other ideals espoused by liberal constituencies, such as respect for human rights and legalist norms.[88] The final condition, group centralization, is achieved when the chain of command is consolidated in a few elite commanders that weigh the costs and benefits of compliance with legal norms.[89] According to McAllister, if these three conditions are present in an armed conflict, there is a higher likelihood of court deterrence.

These findings contribute a framework for operationalizing how legal accountability can calibrate decision-making; and that there are observable deterrent effects when these conditions reinforce each other increasing weight of accountability on combatants. Although the study exclusively examines the deterrent effect of the ICTY, McAllister argues the findings are relevant for examining conflicts under ICC jurisdiction for three reasons. First, low-intensity conflicts (where she found deterrent effects for some combatants) are more common than larger civil wars or counter-insurgency campaigns. Second, the three deterrent conditions are present in many ongoing civil conflicts. And third, McAllister's findings are consistent with other empirical studies regarding the deterrent effect of the ICC.

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[87] Ibid.
[88] McAllister, 95.
[89] McAllister, 97. See also Jeremy M. Weinstein, *Inside Rebellion: The Politics Of Insurgent Violence*, Cambridge University Press, 2006; and Bangerter, "Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not,"

Skeptics of ICC deterrent effects argue the ICC is, at best, ineffectual and, at worst, risks conflict escalation and endangering civilian populations.[90] Some argue peace negotiations can be adversely impacted, or prolonged, when the prospect of prosecution is on the horizon. Snyder and Vinjamuri argue that ICC jurisdiction, and international prosecutions generally, can discourage strategic bargaining and block the use of amnesties as a way to usher peaceful resolutions to the conflict.[91] Amnesties can offer more attractive exit strategies and incentivize de-escalation in a conflict.[92] Others argue, "the ICC could initiate prosecutions that aggravate bloody political conflicts and prolong political instability in the affected regions."[93] The skeptics of deterrence go further than simply arguing that court jurisdiction does not grip policymakers, as we will see in the deference framework below; but rather, legal accountability incentivizes combatants to fight to the end and reject bargaining negotiations and peaceful resolutions. In short, the ICC may make war longer and worse.

Others disagree with this pessimistic role for the ICC. They argue that State Parties to the Rome Statute typically have better track records of respect for human rights,[94] that incorporating

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[90] See Jack Goldsmith and Stephen Krasner, "The Limits of Idealism," *Daedalus* 132, 1 (2003); Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28,3 (2003-4); Julian Ku and Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities? *Washington University Law Review* 84, 4 (2006); Cronin-Furman (2013) finds ICC deterrence is weak without severe punishment and low probabilities of capture.

[91] Snyder and Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security*, 2003.

[92] For a related argument on exile, see Daniel Krcmaric, "The Justice Dilemma: International Criminal Accountability, Mass Atrocities, and Civil Conflict," Ph.D. Dissertation, Duke University, 2015; see also Alyssa K. Prorok, "The (In)compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination," *International Organization*, Vol. 71, No.2, 2017; Ku and Nzelibe (2006).

[93] Goldsmith and Krasner, "The Limits of Idealism" *Daedalus*, Vol. 132, No.1., pg. 55.

[94] Appel, "In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?" (2016)

international crimes into domestic criminal codes encourages greater compliance from State Parties,[95] or that the creation of the ICC can deter atrocities at the margins through making amnesties a less likely option for conflict resolution.[96]

One empirical study on ICC deterrence argues there are two forms of deterrence – prosecutorial deterrence (compliance out of fear of anticipated legal sanctions) and social deterrence (extra-legal social costs of violation).[97] Jo and Simmons expect "the ICC may have varying effects on different categories of actors, depending on (1) their exposure to the risk of prosecution, and (2) the importance they attach – or the vulnerability they believe they have – to the social costs of criminal law violation."[98] Using a large-*n* quantitative analysis[99] Jo and Simmons find positive evidence of ICC deterrence in ongoing conflicts, and increased risks for combatants. They conclude the ICC contributes directly to prosecutorial deterrence through the *proprio motu* powers of the prosecutor. The independence, and thus a degree of uncertainty, of the prosecutor directly impacts combatants. The ICC indirectly encourages lawful behavior by promoting domestic adoption of international crimes in criminal codes and bolstering prosecutorial capacity. The ICC additionally deters through mobilization of the international community and domestic civil society in demanding justice for atrocities against civilians.[100]

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[95] Jo and Simmons (2016); see also Geoff Dancy and Florencia Montal, "Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions," *American Journal of International Law*, Vol. 111, No. 3, July 2017.
[96] Michael Gilligan, "Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime," *International Organization*, Vol. 60, No. 4 (2006).
[97] Jo and Simmons (2016).
[98] Jo and Simmons, (2016) pg. 452.
[99] Discussion of the research design begins pg. 455.
[100] Jo and Simmons, 469.

This brief overview of the deterrence debate offers an important perspective for this dissertation; essentially, empirical research finds correlations and mechanisms for operationalizing deterrence effects on combatants and finds that accountability ultimately has a positive effect on the conduct of an armed conflict. Importantly, the deterrence debate largely centers on international courts as a forcing mechanism in influencing state (and non-state) behavior. The next section shifts the focus to examine how domestic courts operate as a counterpart to the executive branch and the, historically, wide flexibility afforded the executive in war-making capabilities. Scholars in this perspective offer a perspective on the role of courts in wartime policies that is opposite from the deterrence research.

1.2.2. Deference Framework

Historically, domestic courts have averted strong judicial review regarding national security policies in the US and UK.[101] One reason for this is primary jurisdiction for the military is the military justice system. But even for legal questions related to armed conflict, domestic courts have had a minimal role. Domestic courts in the US and UK have exercised wide deference to executive judgement when confronting a threat to national security.[102]

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[101] A more in-depth discussion of case law in the United States and United Kingdom establishing the doctrine of military deference is in Chapter 2.

[102] See Jack Goldsmith, *The Terror Presidency* (2007) for an in-depth analysis of court behavior in the context of the global war on terror; see also Benjamin Wittes, *Law and the Long War: the Future of Justice in the Age of Terror,* Penguin (2008); Stephen I. Vladeck, *The Passive Aggressive Virtues* 111 *Columbia Law Review Sidebar* (2011) where he argues that courts have been "decidedly unwilling to engage the substance of counterterrorism policy," 125. For a larger discussion of US judiciary in the checks and balance system, see Keith E. Whittington, "Judicial Checks on the President," *The Oxford Handbook of the American Presidency* (2009).

Deference proponents argue that domestic courts do not have prominent influence on decision makers for two reasons: the established practice of deference with relation to executive military policy, and the primary jurisdiction of the military justice system.[103] Deference is rooted in the recognition that courts should, "assign varying degrees of weight to the judgment of the elected branches, out of respect for their superior competence, expertise and/or democratic legitimacy."[104] Or, with regard to court behavior on similar questions in a non-military context, "...the military deference doctrine requires that a court considering certain constitutional challenges to military legislation perform a more lenient constitutional review than would be appropriate if the challenged legislation were in a civilian context."[105] Sometimes this is also accompanied by a lack of legal understanding. As Jack Goldsmith stated, "What the law required was uncertain at best in 2002, and if anything, it favored the government."[106]

John Ip offers two vital reasons Courts defer to political and military competencies of the executive branch. First, it is "not constitutionally appropriate for the judiciary to deal with such issues, and that proper recourse in such a policy-driven area lies with the political branches."[107] The second issue is more practical, that "courts may lack the information needed to determine

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[103] For a comprehensive assessment on deference in executive military policy, see Ashley S. Deeks, "The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference," *Fordham Law Review* 82, no. 2 (2013); for a larger discussion about deference to the executive in wartime, see Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*, Oxford University Press (2010).
[104] Aileen Kavanagh, Constitutional Review Under the UK Human Rights Act (2009)
[105] John F. O'Connor, "The Origins and Application of the Military Deference Doctrine," *Georgia Law Review* 35 (2000), pg. 161.
[106] Goldsmith (2002), pg. 166.
[107] John Ip, "The Supreme Court and the House of Lords in the War on Terror: *Inter Arma Silent Leges?"* 19 *Michigan State Journal of International* Law 19, 1 (2010), pg. 3.

the case and face difficulties with maintaining the secrecy of sensitive information given the adversarial process."[108]

Some scholars celebrate judicial deference in the context of national security concerns.[109] They argue that the courts are structurally inefficient to adjudicate national security concerns or the executive's military strategy. Justice Clarence Thomas expressed this sentiment in his dissent of *Hamdan v. Rumsfeld* stating,

> The plurality's evident belief that *it* is qualified to pass on the 'military necessity' of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered… the President's decision to try Hamdan before a military commission…is entitled to a *heavy measure of deference.*[110]

Eric Posner and Adrian Vermeule argue in favor of executive entitlements to deference because the courts are less likely to strike the right balance between individual liberties and security.[111] They argue, "judicial review of the security-liberty tradeoffs that government makes during emergencies is affirmatively harmful."[112] As such, the executive should be afforded maximum flexibility necessary to strike the appropriate balance between collective security and individual liberty specific to the situation.

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[108] Ip (2010), pg. 4.
[109] See Posner and Vermuele (2010).
[110] *Emphasis added. Hamdan v. Rumsfeld* 548 U.S. 557, 678-80 (Thomas, J., dissenting).
[111] Posner and Vermeule.(2010).
[112] Ibid, pg. 20.

Proponents of judicial deference rely on a bedrock of two separation of power values– effectiveness and democratic accountability – and have three core conclusions.[113] First, the executive must remain flexible and unburdened when defending the country against dire threats. Second, the executive has unparalleled expertise in confronting national security threats. Third, the executive is uniquely positioned to act quickly with access to secret intelligence.[114] For deference scholars, the institutional competence of the Court is not designed to appropriately handle issues of national security or military decision making.

Critics of judicial deference argue that it is imperative for courts to be involved in national security decision making processes.[115] Critics argue that the purpose of separation of powers is to ensure that one branch does not assume too much power. As Flaherty says, "most often opposing accountability and energy is balance among the three branches, especially those designed to prevent tyrannical accretions of power."[116] Especially during times of crisis, some believe the executive can be especially prone to rash decision making, or "serious forms of lawlessness," and adherence to rule of law becomes imperative to minimizing intrusions on liberty.[117]

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[113] See Deeks (2016), 882; see also Deborah N. Pearlstein, "Form and Function in the National Security Constitution," Connecticut Law Review, 41 (2009). Although these works are focused on American system, these values are applicable to democratic systems.
[114] See Deeks, 882; see also Posner and Vermeule; Posner and Sunstein pg. 1176; and Michael P. Van Alstine, "The Judicial Power and Treaty Delegation," *California Law Review* 90 (2002).
[115] See Deeks, pgs 883-884 for a synopsis of this position; see also Neal Kumar Katyal, "Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within," *Yale Law Journal* (2006); Martin S. Flaherty, "Judicial Foreign Relations Authority After 9/11," *New York Law School Law Review*, 119, (2011).
[116] Flaherty (2011), 1741.
[117] See Cass Sunstein, "Judging National Security Post-9/11," *Sup. CT. REV. 269* (2008)

In one substantial pushback to deference theorists, Ashley Deeks presented a framework of the "observer effect" to account for the probability and threat of judicial review over US national security policies. Deeks argues,

> One of the core tenets of national security doctrine is that courts play a deeply modest role in shaping and adjudicating the executive's national security decisions […] Against this backdrop of limited judicial involvement in its security policy, the executive is highly attuned to potential court action. When the executive faces a credible threat of litigation or the pendency of one or more specific cases, it often alters the affected national security policies in ways that render them more rights protective.[118]

Deeks calls this phenomenon the "observer effect," and argues the observer effect functions as a motivating force in executive decision making for national security policy. Deference theorists lack a theoretical account for the observer effect as a force embedded within the policy process itself and, Deeks argues, therefore overlook in their analysis. Deeks argues the observer effect induces strong incentives for the executive to alter policies that have a high probability of judicial consideration. For this dissertation, I adopt the observer effect framework and expand its scope to include international and foreign court jurisdiction as additional observer effects on national security policymaking. Deeks' observer effect framework offers useful parameters for examining the role of legal accountability in national security policymaking; but her original analysis is limited to the US executive. This dissertation broadens the scope to capture the full range of legal accountability on British and American national security decision-

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[118] Ashley S. Deeks, "The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference," *Fordham Law Review* 82, no. 2 (2013), pgs. 829-830.

makers. Section 2.3 is a detailed description of Deeks' original contribution and the theoretical framework of this project.

In sum, the deference literature is critical for its examination of the relationship between the judicial and executive branches, and their sphere of influence. Nevertheless, empirical testing in the deference literature is minimal, a contribution this dissertation aims to fulfill.

1.2.3. Conclusions of Literature Review

This section offers a wide overview of relevant substantive and methodological studies across international relations and international law in an effort to situate this dissertation at the intersection of multiple literatures.

International legal scholars with a view towards the international system measure state compliance as a pulse on the success and incorporation of international law in political processes. But this approach omits nuance and variation in compliance that requires contextual analysis and empirical study. The empirical studies within the field of national security law find political legal advisers and military lawyers as critical compliance units within national security structures. The shortcomings of these studies are the limited scope to legal advisers and lawyers at the exclusion of other national security decision makers who, in some cases, have a consequential role and influence in the processes. The impact of international law on these actors, such as senior military commanders or political officials, is critically missing from extant research.

Finally, on the role of courts in an armed conflict, a survey of the literature details two existing approaches. Each approach, deterrence and deference, aims to identify whether and how

courts (the literature discusses both international and domestic) influence political decisions or processes. The deterrence framework broadly argues that the threat of prosecution alters the risk calculation of combatants to incentivize compliance with legal norms. At the other side of the spectrum, deference theorists contend the threat of prosecution does not hold significant influence over senior decision makers because established judicial practice defers to the executive on national security questions. Importantly, the literature of deterrence and deference is not necessarily in conversation with each other. The literatures exist in different theoretical contexts; however, I suggest they converge on the core concern of this dissertation – how international and domestic courts influence national security policies in an armed conflict. The next section outlines my approach and contribution to this literature.

1.3. Dissertation Framework: Judicial Observer Effects

This dissertation contributes to this literature with an empirical study of judicial oversight influencing policymakers in creating policies regarding the use of torture and targeting policies. Using Deeks' observer effect framework as a starting point, I advance an expanded observer effect framework to account for threat of judicial review in courts outside domestic jurisdiction.

The observer effect phenomenon has its roots in the natural sciences. In physics, an 'observer effect' is the change that is made because of the act of observing.[119] Similarly, in

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[119] Deeks (2013), pg. 830; see also Weizmann Institute of Science. "Quantum Theory Demonstrated: Observation Affects Reality" *Scientific Daily* (1998).

psychology, "some experts believe that individuals alter their performance or behavior when they know that someone else is observing them."[120]

Likely, multiple types of observer effects influence policymakers, such as media observer effects, public observer effects, or international political observer effects.[121] In this dissertation, I exclusively examine judicial observer effects. Judicial observer effects are "*the impact on executive policy setting of pending or probable court consideration of a specific national security policy.*"[122] Judicial observer effects occur at the policy-setting phase, when policymakers identify national security objectives and determine or design the best policy and/or strategy to achieve that objective. Critically, judicial observer effects occur before judicial review. Thus, "the observer effect is distinct from the executive's response to court orders that require the executive to make specific changes to a specific policy."[123]

Deeks' analysis of the observer effect is limited to the US executive branch. However, the US executive does not make national security decisions in isolation of international and foreign consequences. I argue that judicial observer effects should be expanded to account for non-domestic court jurisdiction that may have the same, or similar, impact on executive decision making.

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[120] Deeks (2013), pg. 830; see also Linda. N. Jewell, "Contemporary Industrial and Organizational Psychology" Wadsworth Publishing (1998).
[121] Different types of observer effects in national security policy making merit further research but are outside the scope of this analysis.
[122] Deeks (2013), pgs. 833-834. [emphasis added.]
[123] Deeks (2013), pg. 834.

I argue there are three categories of judicial observer effects: domestic observer effects, international observer effects, and foreign observer effects. *Domestic observer effects* refer to the impact of potential judicial review in domestic courts. The relationship between the executive and judicial branch is dynamic and calibrates over time to account for flexibility that may be necessary for the executive to confront emerging threats, while simultaneously checking the executive's potential abuse of power and authority. For the US case, domestic observer effects are likely more present than international or foreign observer effects; this is due to an American reluctance to join many international courts. Domestic observer effects will also be highly dependent on the court practice of military deference. If a court has an established practice of rejecting review of national security questions, there is likely to be minimal observer effects.

International observer effects refer to how the likelihood of review by an international tribunal influences policy makers. This refers to any international (or regional) court with jurisdiction over the crimes of torture and targeting violations; thus, it includes the ICC and ECtHR. Because the UK is a member of the ICC and ECtHR, international observer effects are more likely to be present in the British case. However, I would not expect international observer effects to be as active as domestic observer effects for two reasons. First, the ICC empowers domestic courts as the first forum of accountability. The ICC only investigates violations of the Rome Statute if domestic courts are unwilling or unable to prosecute those responsible; thus, domestic courts are the primary jurisdiction. The second reason is the executive branch and judicial branch have an iterative relationship, meaning domestic observer effects are the default and most predictable to executive policymakers.

The *foreign observer effect* is the impact of potential review in a foreign national jurisdiction. Significantly, this does not include an international tribunal – as this would fall under international observer effects. This refers explicitly to potential litigation in the domestic jurisdiction of a foreign state. This could occur in two ways. First, through universal jurisdiction; in which states claim jurisdiction over the most egregious crimes, including torture, regardless of where the crime was committed or the accused nationality.[124] Cases of universal jurisdiction are rare and thus are not likely to be strong forcing mechanisms for policymakers. The second pathway is when government officials that are worried for domestic judicial review compel another foreign state to change policies in a direction toward greater compliance with international standards in an effort to quell a growing threat. This is also a rare occurrence; however, coalitional warfare is likely to heighten foreign observer effects. Multinational military operations, including Afghanistan and Iraq, require extensive coordination for coalition partners' diverse legal obligations and levels of court jurisdiction.

Deeks argues observer effects lead to the executive branch to 'alter, disclose, and improve,' those policies before courts actually review them. I argue observer effects occur on a spectrum. Observer effects are "strong" when the executive branch *disregards* or *alters* a policy when judicial review is considered too risky. To dispose of a policy is akin to the claims made by deterrence theorists; and to alter a policy refers to substantive changes to a policy considered too

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[124] For an in-depth explanation of universal jurisdiction and how foreign courts have affected the way criminal accountability is understood, see Chandra Lekha Sriram, "Revolutions in Accountability: New Approaches to Past Abuses," *American University International Law Review*, 19, no. 2 (2003).

risky in the light of judicial oversight. Observer effects are "weak" when risk of judicial review *informs* and *adjusts* a policy. It does not compel the executive to abandon a policy, or to change substantive components, but to incorporate minor adjustments to safeguard the executive in the case of judicial review. Importantly, the observer effect is still present whether it is a strong or weak influence on executive policy. If observer effects are not present, then the risk of judicial review has no role in changing policy. Table 1 describes the degrees of observer effects.

No Observer Effects	Weak Observer Effects	Strong Observer Effects
No policy changes out of risk of judicial review	Policies are informed or adjusted out of risk of judicial review	Policies are abandoned or substantively altered out of risk of judicial review

Table 1. Degrees of Judicial Observer Effects

Dividing judicial observer effects into different types of observer effects (domestic, international, foreign) allows for layering observer effects. A state with domestic and international court jurisdiction over military operations could be experiencing layered observer effects in which both domestic observer effects and international observer effects influence national security policies. I argue that national security policies created in layered observer effects will be more constrained less maneuverable in legal uncertainty than policies created in the absence of layered observer effects. As such, the UK has more legally constrained and limitations because the UK military operations fall under the jurisdiction of domestic and international courts. Layered jurisdiction increases the likelihood that at least one of the observer effects will be strong, as opposed to weak. In other words, since the UK has both domestic and international possibility for judicial review, either international or domestic observer effects are

likely to be strong. I do not predict that international and domestic observer effects will both be weak in the UK. Based on this framework, Table 2 represents my prediction for observer effects in the US and UK.

	Domestic Observer Effect	International Observer Effect	Foreign Observer Effect
UNITED STATES	Strong	None	Weak
UNITED KINGDOM	Strong	Strong	None/Weak

Table 2. Predictions of Judicial Observer Effects

These predictions are based on the existence of court jurisdiction over military operations in each case. In the US, domestic courts, including military courts, are the only courts with the capability of judicial review of US military policy; as such, I predict domestic observer effects will alter US national security policy. The prevalence of military deference doctrine[125] in domestic courts may prevent strong domestic observer effects in US national security policy, but as I discuss later, there are instances in the history of military deference where the court reviewed military policies, which could inject enough uncertainty into the executive to allow for strong observer effects. I predict foreign observer effects to be present because operations in Afghanistan and Iraq were multinational military operations, or coalitions. I argue, and illustrate in Chapter 4, the design of coalitional warfare increases foreign observer effects on US policy.

[125] A judicial practice in which the courts reject review over military policies because competency lies with political branches of government. Military deference doctrines in the US and UK will be discussed at length in Chapter 2.

The US is the lead-nation in each coalition, which entails a responsibility of coordinating partnered military operations; I argue this increases foreign observer effects on the United States. International observer effects and foreign observer effects are not likely to factor into US national security policy.

UK participates in regional and global mechanisms of accountability; the European Court of Human Rights and the International Criminal Court as international observer effects.[126] I predict the presence of both levels of jurisdiction will lead to strong domestic and international observer effects. Significantly, the UK has variation in types of courts, both human rights and criminal court jurisdiction. This could enhance observer effects on British national security policies because two regimes of accountability could increase the likelihood of review in at least one legal area. The issues I examine specifically co-exist in the laws of armed conflict and human rights law; suggesting violations of those rules exposes the British executive to multiple sources of judicial review. This is most likely to lead to restricted national security policies in the UK. In contrast to the US, the UK is not the lead-nation of the coalitions; and as such, I do not anticipate foreign observer effects to be present in British national security policies.

Deeks' framework of the observer effect in US national security policy is a useful starting point, but this dissertation expands that framework to capture more variation; that is, more courts that could have a role in national security decision making, the different degrees to which those

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[126] For this dissertation, I put regional and international courts with jurisdiction over military operations under the "international observer effect" category.

courts impact policy, and how levels of jurisdiction can overlap to create a more constrained approach to national security policy making.

1.3.1. How Observer Effects Occur

A critical aim of this project is not to simply determine whether judicial observer effects occur, but how they occur. Deeks' framework offers a cycle consisting of three necessary conditions that allow observer effects to operate in national security policy. I offer three similar, yet different, permissive conditions that I argue are necessary for observer effects to permeate national security policymaking.

Deeks argues three elements drives judicial observer effect, (1) a triggering event; (2) robust jurisdictional or substantive uncertainty; and (3) the likelihood of recurring scenarios. The first element, a triggering event, refers to a litigation-related activity (or the "filing of a nonfrivolous case"[127]) that occurs when judicial review on security issues had been dormant, or inactive. Deeks contends the observer effect will be strongest when "the executive's approach to policy is being challenged in the triggering case, as well as to future (or other preexisting) executive policies in the vicinity of that triggering case."[128] The triggering litigation begins a new cycle in which the observer effect is initiated and subsequently executive policies operate

[127] Deeks, 835.
[128] Deeks, 836.

within the restrictions of its review. Eventually, according to Deeks, the executive will become more aggressive in policy choices until litigation triggers the cycle anew.[129]

The second element is jurisdictional and substantive uncertainty. The triggering litigation, "forces the executive to take into account the possibility of future judicial oversight over related policies, even as it remains unclear whether the court actually will end up reviewing a particular policy on the merits, and, if it does, whether the court will uphold, strike down, or modify that policy."[130] If the executive is unsure whether a court will conclude it has jurisdiction over the case, there is jurisdictional uncertainty. If the executive is unsure which law governs the issue in question, or there is little precedent to guide the courts in its judgement.[131] The observer effect is strongest when both forms of uncertainty are present, but even the presence of one will result in a less intense observer effect.

The final element is the prospect of future litigation. Deeks argues the observer effect will be stronger if the executive anticipates iterative litigation over the same, or at least related, issue. Once judicial involvement has created a pattern, the executive has secured the observer effect on for the dispute in question. On the other hand, if the executive does not anticipate future litigation on an issue, then there is unlikely to be an observer effect.

Within the framework of this dissertation, I depart from Deeks on the first and third point of the cycle. Deeks' first component is triggering litigation. It may well be the case that

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[129] Deeks, 837.
[130] Deeks, 838.
[131] Ibid.

'nonfrivolous litigation' is one way to initiate observer effects, but I argue it is not the only way. Observer effects could also be triggered by non-judicial events; such as uncertainty in the conditions or contexts of the conflict; novel legal questions can require top decision makers to deliberate a cohesive policy in response.

Deeks' second component of the sequence is jurisdictional and substantive uncertainty, and I agree that both jurisdictional and substantive uncertainty are vital to the operation of observer effects. Within my framework, this uncertainty can occur within one, or more, of the layers of jurisdiction. Jurisdiction or substantive uncertainty could exist at the domestic, international, or foreign levels to initiate the corresponding observer effect.

I also depart from Deeks' third component – iterative litigation. Deeks claims this third component occurs when the executive believes there is a high likelihood of future litigation on an issue, or a related issue. If there is a high likelihood of future litigation, observer effects are most likely to be present. I agree with Deeks' overarching point that the final component in the cycle of observer effects looks to the future, but in a larger process of policy risk calculation. This risk calculation could include prospects of repeated litigation, as Deeks' suggests, but it could additionally include a larger political and strategic calculation of risk. I argue that policy makers consideration of alliances, military strategy, and reputation are influenced by observer effects. Risk calculation is separate from jurisdictional and substantive uncertainty. For example, there could be substantive uncertainty for a particular policy, but without an assessment of probable litigation and political and/or strategic consequences, observer effects could not impact national security policies. As such, it is not simply the probability of iterative litigation that launches observer effects. The empirical chapters show that broader calculations of risk are part

of the process that triggers judicial observer effects. Figure One below illustrates the three conditions that are necessary for observer effects to occur.

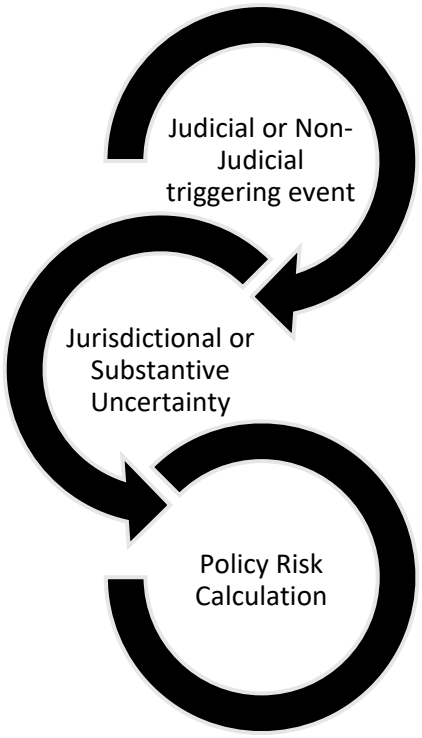

Figure 1. Necessary Conditions for Judicial Observer Effects

Deeks' assessment of the observer effect cycle is limited in its institutional scope. While not stated explicitly, the underlying assumption in Deeks' analysis is that judicial observer effects are naturally limited to legal processes and actors – such as legal advisers – because the mechanisms in her framework are entirely legal in scope. To reiterate a central tenet of this research project, national security policies do not occur in any one particular vacuum; and legal accountability is a relevant issue for all actors involved. As such, I argue observer effects enter

national security policy through specific institutional mechanisms. The first is the inter-agency interaction of the executive branch.[132] In addition to legal departments reviewing and informing policy, multiple agencies, or ministries, fall within the scope of national security policy; including, *inter alia*, military services, foreign policy and diplomatic missions, and intelligence services. Chapter Three contains a detailed empirical account of inter-agency interaction in the US and UK as a mechanism which enhanced judicial observer effects in the policy process.

The second mechanism to enhance judicial observer effects is the institutional design of coalitional warfare.[133] This mechanism is specific to the wars in Afghanistan and Iraq, as these conflicts were multinational military operations.[134] In a multinational coalition, military operations must be coordinated around the legal obligations of each contributing state. Chapter Four dives into the coalitions in Afghanistan and Iraq and demonstrates how variation of court jurisdiction among coalition partners enhanced observer effects on US and UK policies.

In sum, the framework for this dissertation builds on Deeks' original contribution and expands the parameters to capture a broader assessment of judicial observer effects. National security decision making occurs in a context that requires multidimensional decision making including legal, political and strategic; and judicial observer effects are components of each of

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[132] Inter-agency interactions are the subject of Chapter 3. This chapter demonstrates how this mechanism allowed for observer effects to permeate national security policy making in Afghanistan and Iraq.
[133] Coalitional warfare and observer effects is the subject of Chapter 4. It analyzes the coalitions in Afghanistan and Iraq and how variation in court jurisdiction influenced US and, to a lesser extent, UK policies.
[134] Future research is necessary to investigate observer effects in non-coalition conflicts.

these dimensions. Broadening the scope of analysis for judicial observer effects will increase our understanding of how courts, broadly, influence modern warfare.

1.3.2. Preview of Central Findings

The parameters of this analysis are limited to judicial observer effects regarding policies of torture and targeted killings in Afghanistan and Iraq. Within these scope conditions, my central finding is that observer effects influence national security policy to varying degrees.

The US and UK exhibited variation in strong/weak observer effects on different issues. Torture policies had weak observer effects; targeting protocols had weak-to-strong observer effects. Table 3 illustrates central findings. The initial predictions (Table 2) which was based solely on the presence of jurisdiction was correct in some areas and incorrect for others.

	Domestic Observer Effect	**International Observer Effect**	**Foreign Observer Effect**
UNITED STATES	Weak	None	Weak/Strong
UNITED KINGDOM	Strong	Weak/Strong	None

Table 3. Central Findings

A significant take-away from this dissertation is that the two mechanisms for judicial observer effects, inter-action interaction and coalitional warfare, did not simply inform or alter the substance of national security policies. Within these mechanisms, court jurisdiction corresponded to constrained, or permissive, policy parameters. The UK, with multiple layers of judicial oversight, experienced policy setting in more constrained and bounded policy space, with minimal ability to maneuver policies in uncertainty. The US, with fewer layers of judicial

oversight, experienced a more permissive policy space and more ability to maneuver policies in uncertainty.

Therefore, judicial observer effects delineate the national security policy space; higher layers of observer effects delineated a more constrained space to maneuver in uncertainty, and lower layers of observer effects delineated a more permissive space with more ability to maneuver in uncertainty. Chapter 5 describes the empirical and theoretical findings of this dissertation in greater detail.

2. Research Design and Methodology

The goal of this project is to offer a comprehensive answer to complex questions that marries legal analysis with strategic considerations in the theater of war. As such, in this project I aim to capture this inherent complexity by including multiple cases, multiple legal issues, a diversity of actors inside national security decision making. The rest of this chapter explains and justifies methodological choices.

2.1. Case Selection

This section explains the selection of the United States and United Kingdom as case studies, Afghanistan and Iraq as conflicts, and torture and targeting as empirical domains. The US and UK function as cases which are most similar case comparisons, participated in the same military operations, and have the same legal obligations regarding the prohibition of torture and prohibition of unlawful targeting.

2.1.1. State Selection

This project examines military policies of the US and UK as a most-similar comparative study. The US and UK are the two largest military contributors to the conflicts in Afghanistan and Iraq, each has common law systems, and cultural similarities promoting their "special relationship," yet exhibit significant variation in court jurisdiction over military operations. The US has domestic jurisdiction over military operations whereas the UK has domestic, regional, and international jurisdiction.

The UK observes the jurisdiction of multiple international and regional courts, including the International Criminal Court (ICC), the International Court of Justice (ICJ), The European Court on Human Rights (ECtHR). In a speech from 2013, a UK official stated, "it remains the case that Britain stands alone among the Permanent Members of the United Nations Security Council in accepting the compulsory jurisdiction of the Court [ICJ]."[135] British executive decision makers have increasingly taken international law into their policy deliberations.[136] "If a domestic decision-maker *does* decide to take an international obligation into account, he must also identify such obligation correctly, or his/her decision may be open to successful review. We are increasingly faced with claims for such review."[137] Court jurisdiction at multiple levels (domestic, regional, international) leads to greater outlets for potential litigation.[138]

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[135] https://www.gov.uk/government/speeches/britain-and-the-international-rule-of-law.
[136] See speech by Lord Mance at King's College London "International Law in the UK Supreme Court" February 13, 2017, accessible at https://www.supremecourt.uk/docs/speech-170213.pdf.
[137] Ibid, Pg. 5, para. 11(c). [Emphasis in original.]
[138] For an argument about how increasing jurisdiction and possibility of litigation affects the British military, see Tom Tugendhat and Laura Croft, "The Fog of Law: Legal Erosion of the British Armed Force," *Policy Exchange* (2013).

The issues of torture and targeting violations by the British Armed Forces (BAF) fall within the jurisdiction of domestic courts, according to the Geneva Conventions and Convention Against Torture.[139] However, the period before the Iraq War included significant domestic legislation that changed how IHL is prosecuted in the UK. For example, the Human Rights Act (1998) which incorporates the rights of the ECHR into domestic British law,[140] and the International Criminal Courts Act of 2001 allowed for courts martial to prosecute war crimes.[141] Furthermore, Parliament introduced the Armed Forces Act of 2006 (AFA). Key changes in the AFA is the creation of a Service Prosecuting Authority (SPA), which determines whether to prosecute and prosecutes in most cases at court martial. The AFA also placed all branches of the BAF under one common system of military law, replacing the old model where each branch had its own legal code.

In contrast, the US is not subject to the compulsory jurisdiction of any international court with jurisdiction over extraterritorial military operations. The US has historically only supported international criminal law when its application is on non-American actors and activities.[142] They strongly supported the establishment of international criminal tribunals for mass atrocities

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[139] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287; UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465

[140] *United Kingdom: Human Rights Act 1998* [United Kingdom of Great Britain and Northern Ireland], 9 November 1998. *Ireland v United Kingdom* (1978) 5310/71, Series A no 25, [1978] ECHR 1

[141] International Criminal Courts Act of 2001, http://www.legislation.gov.uk/ukpga/2001/17/contents.

[142] See Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* 2000; David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics,* 2014.

including Nuremberg and Tokyo, and the ICTY and ICTR, among others.[143] Yet the US refused the jurisdiction of the ICC and negotiated over 100 bilateral agreements that protect Americans from being submitted to the ICC. The historical pattern is US support for international judicial enforcement except in instances where US heads of state or military personnel are at risk of international prosecution.

The US has criminalized both torture and unlawful targeting in the domestic criminal codes. Pertinent treaties to US international obligations, specifically the Geneva Conventions and the Convention Against Torture, are incorporated through the War Crimes Act (WCA) and the Anti-Torture Statute.[144] The WCA criminalizes grave breaches of Common Article 3 of the Geneva Conventions.[145] The Anti-Torture Statute was passed by Congress after the U.S. ratified

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[143] For more on this see Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, (2002); see also William Schabas "United States Hostility toward the International Criminal Court: It's All About the Security Council" *European Journal of International Law*, Vol. 15, No. 4, (2004).

[144] 18 U.S.C. § 2441; 18 U.S.C. § 2340

[145] Common Article 3 states:
In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
(2) The wounded and sick shall be collected and cared for.
https://ihl-databases.icrc.org/ihl/WebART/375-590006

the CAT. This legislation makes torture a felony and "permits the criminal prosecution of alleged tortures in federal courts in specified circumstances."[146]

Certainly, there are drawbacks to analyzing the US and UK as case studies, and I want to acknowledge three in particular. First, the scope is limited to western democracies and, thus, the findings are limited.[147] This is not a drawback on the choice of case studies, necessarily, but a drawback in the broader applicability of the analysis. The second drawback is, arguably, also one of the strongest reasons for their comparison. The "special relationship" indicates particular similarities useful for the analysis, but also indicates cooperation and a certain influence over foreign policy issues. It is well known, and detailed in the chapters to come, the US and UK consult each other on policy objectives and cooperate on national security issues. I do not believe the entrenched cooperation will influence the observer effect analysis because national security policymakers are unlikely to jeopardize judicial review for the sake of good relations with another state. Third, and finally, the US and UK have vastly different military capabilities and contributions to the coalitions in Afghanistan and Iraq. This could affect the observer effect analysis; the findings of the analysis could also result from the US contributing the vast majority of military capacity. The policies could be out of military need rather than legal considerations. I

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[146] U.S. Code 18, Chapter 113C, 1994.

[147] This is a drawback for many qualitative studies that prioritize depth and context of analysis rather than breadth and generalizability. Future research merits applying the judicial observer effect framework to other states and conflicts.

tried to account for this disparity by choosing legal issues that are not necessarily reliant on resources or capacity.[148]

In sum, the US and UK exhibit significant variation in layers of observer effects; but are similar in political, legal, and cultural ways that could have an external influence on an analysis of observer effects. To be sure, no two states are identical. But the US and UK represent the most-similar case comparisons to understand observer effects.

2.1.2. Legal Issue Selection

I chose the issues of torture and targeting as the empirical terrain of this dissertation for three reasons. First, they are well entrenched legal regimes. Torture and unlawful targeting are both prohibited in international legal instruments and domestic statutory law; as such, there is little ambiguity about whether a policy advocating for these issues are lawful.[149] Second, the US and UK have the same obligations regarding torture and unlawful killings under the laws of armed conflict and international human rights law. Differences arise regarding the European Convention of Human Rights and the ability to enforce both domestic and human rights law, but this is captured in the observer effects analysis. And third, British and American policies and practices regarding torture and unlawful targeting, operationalized as targeted killing policies,

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[148] The one caveat to this is the discussion on drone campaigns and targeted killing policies. I will address this limitation in Chapter 3 and Chapter 4. Military capacity and contribution as an alternative explanation is further discussed in Chapter 5.

[149] As will be discussed, interpretations of the legal requirements are at issue and a central theme in the empirical analysis.

were the most controversial features of the conflicts in the 'global war on terror.' Furthermore, a critical feature of these policies (from multiple administrations) is legal uncertainty; each policy operated at the fringes of legal uncertainty. The Bush administration authorized a program of "enhanced interrogation techniques" for intelligence and military detention facilities, bypassing the legal prohibition of torture by employing a new interpretation of what constitutes torture.[150] The role of the UK in the US torture program, or their complicity and knowledge of the program, is a subject of much debate and will be discussed below. The UK military has also faced allegations of detainee mistreatment in their own detention facilities, especially in Iraq.[151]

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[150] This is discussed at length in the chapters below. US Congress investigated many of the players involved in the Bush administration authorizing "torture memos" in which the administration's interpretation of the threshold of pain which constitutes torture was heightened to "organ failure or death." The Senate Intelligence Committee released a report, known as the "Torture Report" which acknowledged CIA practices as amounting to torture under US legal obligations. See the Senate Select Committee on Intelligence, "Report on Torture: The CIA's Detention and Interrogation Program," (2015). On the US Military and the use of abusive interrogation techniques, multiple internal investigations occurred when pictures from Abu Ghraib showed prisoners being abused. The Inspector General of the US Army conducted a "Detainee Operations Inspection" in July 2004 which investigated US conduct. Additional investigations occurred in the US Army, but one report is particularly important to highlight. A UCMJ 15-6 investigation, "An investigation into FBI allegations of Detainee abuse at Guantanamo Bay, Cuba, Detention Facility," released in June 2005. Reporting on US torture practices is vast but reporting by Jane Mayer for The New Yorker is particularly thorough in both facts and legal uncertainty. For example, see Jane Mayer, "A Deadly Interrogation: Can the CIA Legally Kill a Person?" The New Yorker, November 2005; Jane Mayer, "Outsourcing Torture: The Secret History of America's 'extraordinary rendition' program, The New Yorker, February 2005.

[151] See the reporting of Ian Cobain, who closely followed British operations and accusations of mistreatment in Afghanistan and Iraq. Much of his reporting culminated in his book on the history of British torture and its employment in Iraq and Afghanistan. See Ian Cobain, *Cruel Britannia: A Secret History of Torture*, (2012). Critically, his central revelation is that the British military has an established history -- from The Troubles to decolonization, and into modern British military operations – of using torture as an interrogation tool. The UK has also faced substantial litigation for the use of torture – including the European Court of Human Rights which ruled in *Ireland v. United Kingdom* that the "five techniques" [wall-standing, hooding, noise manipulation, and deprivations of food and sleep] did not amount to torture, but instead cruel and inhumane treatment, a violation of Article 3 of the European Convention of Human Rights. Human Rights organizations have utilized multiple international fora to hold the British military accountable for the use of torture in Afghanistan and Iraq. One report, "The UK's Implementation of the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment," was submitted in 2019 by *Redress*, a London-based human rights organization. Redress calls this report the "Shadow Report" and submitted to the United National Committee against Torture. https://redress.org/wp-content/uploads/2019/05/UK-Implementation-of-UNCAT_REDRESS_March2019_Web.pdf.

Targeted killing policies, also called the 'drone program,' was one of the most controversial aspects of the Obama administration's national security strategy. Similar to the Bush-era 'torture program' the 'drone program' operated at the fringes of legality; the policy prompted substantial pushback and concern from the public that the drone program was operating outside conventional battlefields, amounting to major human rights violations.[152] The UK did not (officially) have a targeted killing policy, or drone program. However, multiple Parliamentary inquiries into British activities in the US drone program found that the British were instrumental, and even embedded, in the US drone program.

Other legal issues in the war on terror could have been suitable for an observer effects analysis. The issue of detention was pertinent for policymakers, and detention policies triggered substantive and jurisdictional uncertainty for both the US and UK.[153] The detention policies are certainly relevant for any analysis of the torture program; but in this dissertation, it is only discussed tangentially. Another controversial policy that would have been appropriate for this analysis is the extraordinary rendition program. Similar to the detention policy, extraordinary

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Additionally, the European Center for Constitutional and Human Rights, jointly with other human rights organizations, filed a submission with the International Criminal Court claiming the UK committed war crimes in Iraq. https://www.ecchr.eu/en/case/war-crimes-by-uk-forces-in-iraq/

[152] This program is discussed in more detail below. For an in-depth analysis of the Obama Administration, see Charlie Savage, *Power Wars: The Relentless Rise of Presidential Authority and Secrecy*, Little, Brown and Company (2015).

[153] The issue of detention came up repeatedly in interviews with senior military officials and senior administration officials. A closer examination of detention within the observer effects framework would be a valuable contribution to both international relations and legal scholarship.

rendition is relevant and addressed as it is necessary for the analysis of torture and targeted killing programs.[154]

The rest of this section briefly describes the sources of domestic and international law prohibiting torture and unlawful targeting for the US and UK.

2.1.2.1. Prohibition of Torture

Torture is prohibited in multiple international instruments and, in the US and UK, in domestic statutory law. This prohibition applies both in times of war and peace. In the context of an armed conflict, the prohibition applies in international armed conflicts and non-international armed conflicts. The International Tribunal for the Former Yugoslavia (ICTY) suggested the prohibition of torture amounts to a norm of *jus cogens*, or a principle of international law from which no state can derogate.[155]

Common Article 3 of the Geneva Conventions prohibit "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture."[156] When the Geneva

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[154] For insightful analysis into the extraordinary rendition program and international law, see Margaret L. Satterthwaite, "Rendered Meaningless: Extraordinary Rendition and the Rule of Law," *George Washington Law Review*, 75, (2006); Michael V. Sage, "The Exploitation of Legal Loopholes in the Name of National Security," *California Western International Law Journal*, 37, (2006).

[155] *See Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T10, Trial Chamber, Judgement, December 10, 1998; see also Ian D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension*, Intersentia (2001); Erika de Wet, "The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law," *European Journal of International Law* Vol. 15, No. 1 (2004).

[156] International Committee of the Red Cross (ICRC) Geneva Convention (I-IV), Common Art. 3(a), August 1949. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp

Conventions entered into force, British and American military manuals were updated to reflect rules, regulations, and protections enshrined in the Geneva Conventions.[157]

The US and UK are also signatories of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, commonly known as the Convention Against Torture (CAT).[158] The definition of torture was clarified in the Convention Against Torture (CAT) which went into effect in 1984. Article I of the CAT defines torture as,

> ...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.[159]

Article 4 of CAT requires signatories to criminalize torture in domestic law. In the US, this was achieved through the Anti-torture Statute and War Crimes Act, which adopt a definition of torture in domestic criminal codes, effectively prohibiting torture under US law.[160]

After the attacks of 9/11, the US had a flurry of legislation and executive orders dealing with the issue of torture. Significantly, the Office of Legal Counsel (OLC) in the Justice Department responded to inquiries from the Central Intelligence Agency (CIA) regarding lawful

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[157] This change occurred in 1956.
[158] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465. The CAT entered into force for the United Kingdom in December 1988 and the United States in October 1994.
[159] Ibid.
[160] 18 U.S.C. Sec. 2340-2340 A is known as the "anti-torture statute." See also The War Crimes Act, 18 U.S.C. Sec. 2441.

interrogation practices.[161] The memo, later part of a series of memos called the "torture memos," by OLC legal counsel John Yoo concluded,

> Torture is defined in and proscribed by Sections 2340-2340A covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder…Because the acts inflicting torture are extreme, there is a significant range of acts that though they may constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.[162]

As OLC memos are binding on the executive branch, this interpretation of the threshold of torture as 'death or organ failure' held major consequences for intelligence and military interrogators.[163] Legally, these memos sparked a series of executive and legislative actions briefly sketched below.

After photos leaked detailing abuse of detainees in American prisons around the globe, Congress passed the Detainee Treatment Act (DTA) in 2005. The DTA effectively made the interrogation practices approved in the Army Field Manual the only methods interrogators were allowed to use in questioning those held in US custody. However, in 2006, the following year, a new version of the AFM was approved which deleted stress positions and sleep manipulation as prohibited techniques, even though those practices had been prohibited in every version of the AFM since 1956.[164]

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[161] James Risen, *State of War: The Secret History of the CIA and the Bush Administration*, Free Press (2006).
[162] Memorandum for Alberto R. Gonzales Counsel to the President, "Re: Standards of Conduct for Interrogation under 18 U.S.C. Sec. 2340-2340A, from the Office of Legal Counsel. August 1, 2002.
[163] The practical consequences are discussed in Chapter 3 and Chapter 4.
[164] See Human Rights First, https://www.humanrightsfirst.org/wp-content/uploads/pdf/Army_Field_Manual.pdf.

Additionally, Congress passed the Military Commissions Act in 2006. The Military Commissions Act (MCA) accomplishes three things. First, it created the legal definition of "lawful enemy combatant" and "unlawful enemy combatant." Second, it gave the President authority to create military commissions for violations of the laws of war and grants the commission's jurisdiction over unlawful enemy combatants. The established commissions would thus qualify as a "regularly constituted court" for the purposes of Article 3 of the Geneva Conventions, and strip unlawful enemy combatants' ability to invoke the Geneva Conventions as a source of rights.[165] And third, the MCA modified the War Crimes Act (1996) Section 3 by adding a new subsection (d) that limits grave breaches of torture and cruel or inhumane treatment only if "they inflict severe physical or mental pain or suffering...caused by or resulting from [*inter alia*]...(a) the intentional infliction or threatened infliction of severe physical pain or suffering;...(c) the threat of imminent death…"[166]

The Bush-era policies on the use of torture were revised under President Obama. Most significantly, an executive order issued days after taking office, President Obama revoked previous executive orders and all CIA regulations with the purpose of improving "the effectiveness of human intelligence gathering, to promote the safe, lawful, and humane treatment of individuals in United States custody...and to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions [...]"[167]

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[165] ICRC, https://casebook.icrc.org/case-study/united-states-military-commissions
[166] Quoted in Evan Wallach, "Drop by Drop: Forgetting the History of Water Torture in US Courts," *Columbia Journal of Transnational Law*, 45, (2007), pg. 471.
[167] Executive Order No. 13440, issued January 22, 2009.

Additionally, Obama signed the revised Military Commissions Act of 2009 (MCA 2009) on October 28 to amend the MCA under the Bush administration. The MCA 2009 has many significant elements, but most significantly for this project is the administration of judicial guarantees to unprivileged belligerents (what the Bush administration called 'unlawful combatants'). For example, the individual in custody has the right to attend their entire trial, examine all evidence presented against them, cross-examine witnesses, and their own witnesses. The Act also provides that no statement made resulting from the use of torture or cruel, inhumane, and degrading treatment, whether or not under the 'color of law,' will be admissible in a military commission. And finally, the MCA 2009 permits appeals to the US Court of Military Commissions Review and the US Supreme Court.[168]

Also under the Obama Administration is the National Defense Authorization Act of 2015 (NDAA 2015) which requires interrogators to limit interrogation methods to those approved in the Army Field Manual, and authorizes access for the ICRC to any and all individuals under US custody due to an armed conflict (which was not always observed under President Bush). This was a bipartisan effort, spearheaded by John McCain and Dianne Feinstein, to prevent future Presidents from unilaterally authorizing derogations from practices authorized in the Army Field Manual, or the use of torture. In other words, a President cannot use an executive order to change approved practices of interrogation or reinstate the use of torture.[169]

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[168] Military Commissions Act of 2009.
[169] http://www.humanrightsfirst.org/press-release/senate-passes-national-defense-authorization-act-solidifying-ban-torture.

In the United Kingdom, a domestic prohibition on the use of torture dates back to the Bill of Rights of 1688 and the Treason Act of 1708. The UK was ahead of many European jurisdictions in prohibiting the use of torture as punishment or to extract information. "It is…clear that from its earliest days the common law of England set its face firmly against the use of torture. Its rejection of this practice was indeed hailed as a distinguishing feature of the common law…"[170]

In the UK's modern legal framework, the prohibition of torture is codified in multiple treaties and domestic law, beyond the previously discussed Geneva Conventions and CAT. Article 3 of the European Convention of Human Rights (ECHR) prohibits the use of torture or inhuman or degrading treatment or punishment.[171] The prohibition of torture is absolute and may not be derogated from, even in times of emergency or war.[172] The prohibition in Article 3 is given effect in domestic law through the Human Rights Act 1998, which incorporates the rights contained in the ECHR into UK law. Thus, public officials are obliged to refrain from treatment or punishment constituting torture, inhuman, or degrading treatment under IHL and IHRL legal frameworks.

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[170] Lord Bingham in *A v Secretary of State for the Home Department [2005]* UKHL 71 [11]. The judgement continued, "In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law as moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice." (11).

[171] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as Amended by Protocol No. 11." Council of Europe Treaty Series 155. Strasbourg: Council of Europe. Article 3.

[172] Backbench Business Debate, "UK policy on torture and the treatment of asylum claims," March 2017.

Under domestic criminal law, torture is prohibited by section 134 of the Criminal Justice Act 1988.[173] This section defines subjection to torture as the infliction of severe pain or suffering by a public official in pursuit of public duties.[174]

Additionally, these sources prohibiting torture are included in British military manuals. The Joint Service Manual of the Law of Armed Conflict prohibits torture as a method of interrogation,[175] punishment for prisoners of war,[176] and as an "act prohibited at any time and in any place whatsoever."[177] The prohibition of torture for public actors is codified in multiple layers of jurisdiction. As such, we do not observe the same attempts to legitimize "harsh interrogation" as in the American case.

2.1.2.2. Unlawful Targeting

Targeting is one of the most important aspects of lawful conduct of an armed conflict.[178] Lawful targeting practices faces many challenges, such as quality and precision of targeting weapon, the terrain of the geographical zone for the campaign, and nature of the target itself. Targeting law was particularly challenging in Afghanistan and Iraq. Distinguishing the civilian population from combatants was an ongoing challenge for coalition forces, as Taliban and al

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[173] Criminal Justice Act 1988 c. 33. The Criminal Justice Act was updated in 2003 with broader police powers. See Criminal Justice Act 2003 c. 44.
[174] Ibid.
[175] Ministry of Defence, Joint Service Manual of the Law of Armed Conflict [JSP 383] 2004. Section 8.34.
[176] Ibid, Section 8.121.
[177] Ibid, Section 9.4.
[178] For an in-depth analysis of targeting laws, see Paul Ducheine, Michael Schmitt, and Frans Osinga (eds.), *Targeting: The Challenges of Modern Warfare*, Springer Books (2016).

Qaeda members did not have distinguishing features that separated them from civilians. Two IHL principles are vital in planning targeting campaigns: distinction and proportionality.

The principle of distinction is one of the fundamental principles of modern laws of war. Of the four conventions that constitute the Geneva Conventions, Convention IV concerns the protection of civilians in times of war and enshrined the legal prohibition of targeting civilians and those that do not take part in active hostilities (medics, aid workers, etc.)[179] This principle applies in international armed conflicts and non-international armed conflicts. Additional Protocol I (API), which expands Convention IV and provides new definitions of armed forces and combatants, gives protection to civilian populations against the effects of hostilities, contains a definition of 'military objective' and prohibits attacks on civilian persons and objects in international armed conflicts.[180] Unlawful targeting, or the intentional attack on civilian persons or objects, is the clearest violation of API and Geneva Convention IV. And Additional Protocol II (APII) is an amendment to the Geneva Conventions which protects civilians in non-international armed conflicts. IHL does not prohibit deaths for military necessity but it differs from civilian targeting because the latter refers to an intentional attack on civilian life or property that has no military utility. The United Kingdom has signed and ratified API and APII, and the U.S. has signed, but not ratified, API and APII.

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[179] Convention I concerns the Amelioration of the Condition of the Sick and Wounded (196 State Parties); Convention II concerns the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (196 State Parties); Convention III concerns the Treatment of Prisoners of War (196 State Parties). https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions.
[180] Art. 43 and 44 Additional Protocol I (1977). [Hereinafter AP I].

The principle of proportionality is equally important in targeting campaigns. Proportionality requires belligerents to conduct attacks in a manner that limits harm to civilians and civilian objects. If harm is to occur to the civilian population, that harm must be proportional to the military advantage gained.[181]

"Targeting" as a legal category refers to a wide range of activities in a multitude of contexts. For example, in Afghanistan and Iraq, 'night raids' and policies of targeted killings were common occurrence, and the CIA operated targeted killing campaigns alongside the armed forces. Intelligence officers do not have combatant immunity like the armed forces do, and thus are not protected from accountability from their actions.[182] This project takes a dual perspective on targeting. The empirical work addresses US and UK policies of drone strikes to operate state policies on targeted killings. The core issue in these chapters is not the drone technology; many others have in-depth analyses of drone technology as problematic (or not) under IHL.[183] Instead, the core question is how observer effects impact policies on targeted killings on and beyond the conventional battlefield.

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[181] AP I art. 51(5)(b)
[182] For more on the CIA and targeting without combatant immunity, see Tim Weiner, *Legacy of Ashes: The History of the CIA*, Doubleday (2007), pgs. 24, 45.
[183] See for example, Vivek Sahrawat, "Legal Status of Drones Under LOAC and International Law," *Penn State Journal of Law & International Affairs*, Vol. 5, No. 1 (2017); Michael W. Lewis, "Drones and the Boundaries of the Battlefield," *Texas International Law Journal* 294 (2011); David Turns, "Droning on: some international humanitarian law aspects of the use of unmanned aerial vehicles in contemporary armed conflicts," *Contemporary Challenges to the Laws of War*, 199 (2014).

2.1.3. Conflict Selection

This section explains the selection of Afghanistan and Iraq as the conflicts for the observer effects analysis. It continues with a brief sketch of the military operations to outline the players involved, strategic objectives, and legal justifications for the conflicts.[184]

This dissertation examines national security policies in the context of the wars in Afghanistan and Iraq. As the previous sections have detailed, the military operations in Afghanistan and Iraq occurred when legal accountability was highest for the crimes of torture and unlawful targeting.[185] As such, these conflicts are the 'most likely' armed conflicts where observer effects would exist in US and UK national security policymaking.

Table 4 and Table 5 offer a historical perspective for British and American conflicts and when those conflicts occurred in the evolution of legal accountability.

United Kingdom

[184] The US and UK internal deliberations for each invasion is discussed in Chapter 3; and specifics on coalition building for both conflicts are discussed in Chapter 4. This section strictly aims to put the military operations in context and explain the parameters of the conflict.

[185] I use the terms, "conflicts" "war" and "military operations" interchangeable in this thesis. Typically, the term military operation can refer to military actions below the threshold of war as well as actions satisfying the threshold of war. This dissertation strictly examines military operations satisfying the threshold of war.

No Law - No Accountability *Pre-1945* ● World War I (1914-1918) ● First Irish Campaign (1919-1921) ● Second Irish Campaign (1939-1940) ● *World War II* (1939-1945) ● Third Irish Campaign (1939-1940)	**Law - No Accountability** *1945-1966* ● Vietnam (Operation Masterdom) (1945-1946) ● Corfu Channel (1946-1948) ● ***Malayan War (1948-1960)*** ● Korean War (1950-1953) ● *Mau Mau Uprising (1952-1960)* ● ***Cyprus Independence (1955-1959)*** ● Fourth Irish Campaign (1956-1962) ● Suez Crisis (1956) ● Dhofar Rebellion (1963-1976) ● *Aden Emergency (1963-1967)* ● Indonesia-Malaysia Confrontation (1963-1966)
Law – International Accountability *1966-1998* ● ***Fifth Irish Campaign*** (1969-1997) ● Falklands War (1982) ● Gulf War I (1991) ● Bosnia & Croatia (1992-1995) ● Kosovo War (1998-1999)	**Law - Full Accountability** *1998-present* ● ***Afghanistan (*2001-2014)** ● ***Iraq*** (2003-2009) ● Syria/ISIL (2011-present)

Table 4. UK Conflicts and Legal Accountability

The UK historical conflicts are divided into four timeframes to capture the capacity of enforcement for the crimes of torture and unlawful targeting. The first timeframe is pre-1945. This time is labeled 'No Law - No Enforcement' because this era precedes the Geneva Conventions. To be sure, there were rules regulating warfare before 1945, but these rules were not enshrined in multilateral treaty, and thus standardized rules, as they exist today. The Geneva Conventions offered a uniform legal framework for the prohibitions of torture and unlawful killings that was non-existent before the Second World War. The second timeframe is 'Law - No Enforcement' and refers to the creation of the Geneva Conventions and established law, but limited mechanisms to enforce violations. This period exists from 1945 to 1966, when the UK granted individual petition, or the right to take a case to the ECtHR in Strasbourg for human

rights violations. This legislation then triggers the third timeframe, 'Law - International Enforcement'. For these 32 years, British nationals were able to challenge the UK for human rights violations in the ECtHR, and the Human Rights Act of 1998 allowed for British citizens to bring such suits before British Courts. Additionally, the International Criminal Court Act 2001 gives effect to the Rome Statute in domestic law. Thus, the final timeframe, 2001 to present, is characterized by access to courts at the international and domestic systems.

The US began in the same place as the UK but had a different trajectory in its legal developments. The first timeframe is 'No Law - No Enforcement' for the same reasons explained above. The second timeframe, 'Law-No Enforcement' the time following the creation and adoption of the Geneva Conventions, but minimal mechanisms to enforce violations. This changes in 1996, triggering the third and current timeframe, when Congress passed the War Crimes Act and permits grave breaches of the Geneva Conventions to be tried in federal courts.

United States

No Law - No Accountability *Pre-1945* ● *Philippine - American War* (1899-1902) ● *World War I* (1914-1918) ● *World War II* (1939-1945)	**Law - No Accountability** *1945-1996* ● Korean War (1950-1953) ● *Vietnam War* (1965-1973) ● Invasion of Grenada (1983) ● *Invasion of Panama* (1989-1990) ● Gulf War I (1991) ● Bosnia & Croatia (1992-1995)
Law - Domestic Accountability *1996-present* ● ***Afghanistan* (2001-2014)** ● ***Afghanistan* (2014-present)** ● ***Iraq*** (2003-2009) ● *Syria/ISIL* (2001-present) ● Kosovo War (1998-1999)	-------

Table 5. US Conflicts and Legal Accountability

The wars in Afghanistan and Iraq fall within the final timeframe for both the US and UK. This means these conflicts occur in the most judicialized, or highest legal accountability, and are the best candidates to evaluate observer effects.

There are two limitations to researching these conflicts. First, because the conflicts occur in the most likely era of legal accountability, the analysis does not have temporal variation. Analyzing conflicts before establishing mechanisms of legal accountability to compare with conflicts which contain legal accountability would be a valuable next step for this theoretical framework.[186] Second, both conflicts are asymmetrical in nature. Thus, this analysis cannot account for observer effects in internal conflicts or traditional inter-state conflict. These other conflict patterns merit further study.

2.1.3.1. Military Operations in Afghanistan and Iraq

The attacks of 9/11 in New York and Washington DC triggered the US-led multi-national invasion of Afghanistan.[187] The US Congress authorized the use of military force on September 18, 2001 granting the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, or aided the terrorist attacks of September 11, 2001, or harbored such organizations or persons, in order to prevent any future

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[186] Military justice systems were present in earlier conflicts; but Chapter 2 discusses the challenges of
[187] Chapter 4 contains a detailed discussion of forming the multinational coalition for both invasions in Afghanistan and Iraq.

attacks…"[188] The authorization, colloquially called the authorization of military force or AUMF, is deliberately temporally and geographically undefined, granting wide war powers to the executive. Those responsible for the 9/11 attacks were members of a transnational insurgency called al Qaeda; a militant organization founded in 1988 and led by Osama Bin Laden.[189]

The invasion of Afghanistan was launched on October 7, 2001, in a multinational coalition led by the United States. The Taliban, an Islamic fundamentalist group, ruled Afghanistan from 1996-2001.[190] President Bush accused the Taliban of providing safe haven for leadership of al Qaeda and were thus implicated in the 9/11 attacks. On September 20, 2001, in a joint session before Congress, President Bush exclaimed, "the leadership of al Qaeda had great influence in Afghanistan and support[ed] the Taliban regime in controlling most of the country."[191] The invasion of Afghanistan, codenamed Operation Enduring Freedom, had the strategic objectives of ousting the Taliban from power and locating members, particularly the leadership, of al Qaeda.

The initial invasion phase ended quickly when the Taliban fell from power in December 2001. The retreat of the Taliban culminated in the Bonn Agreement, a series of agreements

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[188] Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States. 115 Stat. 224.
[189] The background and evolution of al Qaeda is not explored further in this dissertation. See instead Rohan Gunaratna, *Inside Al Qaeda: Global Network of Terror;* Columbia University Press, (2002); Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/*11, Vintage Publishing (2007); Peter Bergen, *The Longest War: The Enduring Conflict between America and Al-Qaeda,* Free Press, (2011); Jason Burke, "Al Qaeda," *Foreign Policy* (2004).
[190] For more background on the Taliban, see Lindsay Maizland and Zachary Laub, "The Taliban in Afghanistan," *Council on Foreign Relations*, March 2020, https://www.cfr.org/backgrounder/taliban-afghanistan.
[191] "Transcript of President Bush's Address," CNN. September 21, 2001. https://web.archive.org/web/20100819021954/http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/

between leaders in Afghanistan and the United States to establish a stable system of governance in Afghanistan.[192] Upon completion of the initial invasion, strategic objectives turned to state-building in Afghanistan; at this stage, the International Security Assistance Force (ISAF) led by NATO took over operations in Afghanistan.

While the Taliban fell from power, the group retreated and regrouped under different leadership; Taliban attacks continued against ISAF and coalition partners under Operation Enduring Freedom.[193] The group stayed in rural areas launching guerilla style attacks and suicide bombing missions directed towards coalition forces and the Afghan civilian population.[194] The retreat helped the Taliban grow in strength and increase intensity of their attacks. At the time of writing, the armed conflict in Afghanistan between the Taliban and US forces continues and negotiations for peace are still ongoing.[195]

The war in Iraq, much more than Afghanistan, began in an atmosphere of controversy. The legitimacy of the Iraq invasion was questioned and doubted by critical international allies.[196] US justification for the invasion was based on intelligence, later found to be unfounded, that the

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[192] Radha Kumar, "A Roadmap for Afghanistan," Council on Foreign Relations, December 2001. https://www.cfr.org/report/roadmap-afghanistan.
[193] These specific operations and their coordination are discussed in more detail in Chapter 4.
[194] For more on these tactics as strategic tools of insurgencies, see Aaron Young and David Gray, "Insurgency, Guerilla Warfare and Terrorism: Conflict and its Application for the Future," *Global Security Studies* 2, (2011); Robert Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism,* Random House, (2005); Assaf Moghadam, "Suicide Terrorism, Occupation, and the Globalization of Martyrdom: A Critique of Dying to Win," *Studies in Conflict & Terrorism*, 8 (2005).
[195] Thomas Gibbons-Neff, "More U.S. Troops Will Leave Afghanistan Before the Election, Trump Says," The New York Times. August 4, 2020.
[196] Shirley V. Scott and Olivia Ambler, "Does Legality *Really* Matter? Accounting for the Decline in US Foreign Policy Legitimacy Following the 2003 Invasion of Iraq," *European Journal of International Relations*, 13 (2007).

Iraqi leader Saddam Hussein had connections to al Qaeda and was actively pursuing weapons of mass destruction (WMDs), posing a danger to the region and the US.[197] Despite significant international pushback to the invasion, the "coalition of the willing" invaded the Iraq on March 20, 2003, in an operation codenamed Operation Iraqi Freedom. The US and UK were the leading military contributors to the coalition and overwhelmed Iraqi forces, capturing Baghdad on April 9, 2003, leading to the capture of Saddam Hussein and the Ba'athist regime. The strategic objectives for the invasion to eliminate the Iraqi WMD program and capture members of al Qaeda and other insurgency groups.[198]

Following the invasion, coalition forces established the Coalition Provisional Authority (CPA) as a transition government for Iraq as an effort to build institutions, stability, and democratic governance.[199] At the early stages of state building, there was a pause in violence; but multiple insurgencies, including al Qaeda, regrouped and launched violent attacks against coalition forces in 2004. By fall 2004, violence increased to such a level that some military

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[197] For more on the US rationale for the Iraq Invasion, see Secretary of State Colin Powell's 2003 speech to the UN. The speech was considered controversial and based on faulty evidence. For text of the speech, see: https://www.theguardian.com/world/2003/feb/05/iraq.usa

[198] US General Tommy Franks commanded coalition troops and stated eight objectives of the invasion: First, end the regime of Saddam Hussein.
Second, to identify, isolate and eliminate Iraq's weapons of mass destruction.
Third, to search for, to capture and to drive out terrorists from that country.
Fourth, to collect such intelligence as we can related to terrorist networks.
Fifth, to collect such intelligence as we can related to the global network of illicit weapons of mass destruction.
Sixth, to end sanctions and to immediately deliver humanitarian support to the displaced and to many needy Iraqi citizens.
Seventh, to secure Iraq's oil fields and resources, which belong to the Iraqi people.
And last, to help the Iraqi people create conditions for a transition to a representative self-government.
Michelle Sale and Javaid Khan, "Mission Accomplished?" The New York Times. April 11, 2003.

[199] Michael Mazarr, *Leap of Faith: Hubris, Negligence, and America's Greatest Foreign Policy Tragedy*, Public Affairs (2019).

officials declared it the "heaviest urban combat since…Vietnam."[200] The increase in violence prompted the US to adopt a doctrine of counter insurgency (COIN), which aims to "integrate and synchronize political, security, economic, and informational components that reinforce governmental legitimacy and effectiveness while reducing insurgent influence over the population."[201] Revelations of US detention facilities and harsh interrogation practices at Abu Ghraib greatly hindered US COIN strategy, as the local population became disillusioned about US governance.[202]

Continued violence in Iraq subsequently led to a surge of US troops in 2009. As a response, the government of Iraq (instituted in 2005 with coalition support) called on US and coalition troops to withdraw from Iraq.[203] Political pressure mounted for coalition forces to withdraw from Iraq; these pressures led to troop reduction and exit strategies for many coalition partners.[204] US operations ended in Iraq in 2011, but some troops remained as part of an international coalition. As late as June 2020, the US and Iraq are engaged in strategic discussions for their future relationship and withdrawal of US troops.[205]

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[200] American Forces Information Service, https://web.archive.org/web/20160115202751/http://osd.dtic.mil/news/Jan2005/n01112005_2005011103.html.
[201] Department of State, Bureau of Political-Military Affairs, "US Government Counterinsurgency Guide" (2009).
[202] Mazarr (2019).
[203] Ibid.
[204] A. Flaherty, "Petraeus Talks of Troop Withdrawal," Associated Press. 2007; BBC News, "Bush pledges Iraq troop reduction," September 2007.
[205] See Louisa Loveluck, "US reaffirms commitment to withdrawing troops from Iraq," The Washington Post, June 12, 2020; Arwa Ibrahim, "US-Iraq talks promise US troop withdrawal, fall short of timeline," Al Jazeera News, June 12, 2020.

This section aims to give a broad outline of the conflicts for clarity regarding the players involved, strategic objectives, and legal justifications. Chapters 3 and 4 detail US-UK specific policies and challenges.

2.2. Method of Analysis

This project uses a qualitative approach to understand the legal-political-military nexus of national security policies. The methods I employed were cross-case analysis and process tracing. To supplement these approaches, I interviewed senior military and political officials that participated in the creation and/or oversight of the torture and targeted killing policies. Each of these approaches are explained in the following.

2.2.1. Cross-Case Analysis and Process Tracing

Cross-case analysis is a research tool that compares similarities and differences across specific cases.[206] Using cross-case analysis to examine judicial observer effects between the US and UK across two legal issues, and in two conflicts, is an opportunity to capture variation at each point of comparison. This project relied on primary source material, particularly official investigations, internal memos and communications, and legislative reports. Between the US and UK, I analyzed numerous government reports explaining the national security policies of

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[206] For more on cross-case comparisons as a qualitative tool, see Samia Khan and Robert VanWynsberghe, *"Cultivating the Under-Mined: Cross-Case Analysis as Knowledge Mobilization," Forum: Qualitative Social Research*, 9, (2008).

relevance, Congressional and Parliamentary investigations and, where applicable, relevant case law to assess what happened in the aftermath of creating policies on torture and targeted killings. Legislators continuously expressed concern regarding their respective government's role in each of these policies, which produced substantial investigations and inquiries through oral and written testimony of policymakers and senior commanders. Each of the government reports and testimonies used are discussed further in the text.

Cross-case analysis between the issues of torture and targeted killings relied on official government reports and declassified internal investigations, interviews with human rights organizations legal officers, declassified internal memos and communications, human rights organizations reporting, and media outlets.

Cross-case analysis on national security policies in the conflicts of Afghanistan and Iraq relied mostly on interviews with top military commanders, oral and written testimony from Congressional and Parliamentary inquiries, and secondary sources such as media outlets and scholarly writing. Multiple points of comparison in this dissertation will generate a more nuanced understanding of observer effects in the national security realm.

Using these multiple points of comparison, I employed process tracing to explain the relationship between observer effects and national security policies. The value of process tracing is that it looks within a particular case and explains the temporal sequence of events to determine

a causal relationship between two, or more, variables.[207] For this project, the process tracing analysis began with state level accounts of the creation of the torture and targeted killing programs, their implementation, and the subsequent investigations. These accounts are sourced largely by written and oral testimony of policymakers through legislative inquiry.

The next level of process tracing is a non-state account of the creation, implementation and aftermath of the torture and targeted killing program. These accounts often broaden the scope of the analysis to include a diversity of perspectives, perhaps including accounts that depart from the official state account. These sources included media outlets, human rights organization reporting and statistics, academic scholarship, and memoirs of those personally detained and interrogated.

The next level of process tracing is interviews. Interviews with senior administration and military officials, as well as to a lesser extent advocates from human rights organizations, allowed for an in-depth and tailored discussion to isolate observer effects in the determination and execution of the torture and targeted killing policies. This process is detailed below.

2.2.2. Interviews

To supplement the cross-case comparisons, I conducted semi-structured interviews with senior military and political officials, as well as relevant civil society actors. The interviews

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[207] For more on process tracing, see David Collier, "Understanding Process Tracing," *Political Science and Politics*, 44 (2011); Andrew Bennett and Jeffrey Checkel, *Process Tracing: From Metaphor to Analytic Tool*, Cambridge University Press (2014).

allowed me to tailor questions to go beyond the official sources and gain insight into personal experiences with legal accountability and decision-making.

Participant Category	**Number of participants**
Uniformed Military	13
Political-Legal Advisor	12
Intelligence Interrogator	1
Human Rights NGO	4
International Court	3
IO- Legal Advisor	1
Total	**34**

Table 6. Interview Participants Breakdown

Table 6 is a breakdown of the interviews completed for this study. All participants in this study agreed to interviews under assurances of anonymity. These assurances included the omission of any identifying features, such as name, title(s), or positions. Ensuring anonymity of participants is critical because there are still ongoing investigations into the issues examined in this dissertation. Naturally, this poses challenges to reporting the data when I must adhere to the agreed upon conditions of research participation. When referring to interviews, I only include the area of expertise of the participant or the governmental department that employed them at the time of the conflicts.

I conducted 34 interviews with top military and political officials. The categories above reflect positions participants had during the conflicts in Afghanistan and Iraq. Therefore, the 'uniformed military' category refers to those that were in uniform during the conflicts in Iraq and Afghanistan. Six of the military officials were two-star Generals or above, five were operational commanders, and two were field commanders at the tactical level. This variation gave me insight into decision making at different stages of military policy creation and implementation.

Twelve interviews were with high-ranking political officials and legal advisors. The breakdown is as follows: one cabinet-level national security official; six legal advisors to cabinet level officials or to highest-ranking uniformed officers; one general counsel in an executive agency; two Ambassadors; and two national security advisors.

Of the remaining nine interviews, one was with a former CIA interrogation officer, which offered insight into parallel interrogation and drone programs between the CIA and DOD. Four interviews with legal advisors or directors of human rights NGOs that brought litigation to domestic or international courts on behalf of victims of torture or unlawful killings. Three interviews were with former staff at the international criminal court. Finally, one interview with a legal official at an international organization.

Interviews were semi-structured and generally tailored to account for the participants diverse backgrounds. Some participants worked in executive agencies as political officials, others were senior military officers, and others were from human rights organizations; as such, interview questions adapted to capture the expertise and experience of the participants. However,

I asked five consistent questions at each interview, regardless of background, for consistent data points.[208]

An important caveat should be noted up front regarding the American and British militaries. I do not disaggregate the military analysis into the separate branches because the analysis is situated at a grand strategic level where senior military commander's work with political and legal officials. This also means I do not specifically engage with American and British Special Forces. This has important implications; many of the accusations of the UK abusing detainees in their detention facilities in Iraq or killing civilians in Afghanistan are accusations regarding the UK Special Forces.[209] The British and American Special Forces operate under a different chain of command and without Parliamentary/Congressional oversight. Accessing Special Forces is incredibly difficult for researchers as they operate in different processes and commands and information regarding decision making or operations are difficult to access. As such, Special Forces are not included in much of the research or applicable to the conclusions of this study.

There are inherent drawbacks to conducting interviews on the sensitive issues included in this project. One issue is access to unclassified information. For this reason, primary documents

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[208] The following questions were asked in each interview: (1) Have you received legal training either internally or externally and how was that training helpful, or not, for the jobs you have held? (2) Do you feel that you had enough legal training to help you make the decisions that are necessary for your job? (3) Do you worry that your decisions might be reviewed by a military or civilian judge? What would it take for one of your decisions to come under review? (4) In your career, have you noticed that procedures or policies have changed because of the creation of new laws, or the creation of international and regional courts? (5) How, or how much, was ICC jurisdiction considered in planning an in operations?

[209] For example, see recent reporting regarding revelations about UK Special Forces, https://www.bbc.com/news/uk-53597137.

previously discussed are the main sources of data and interviews supplemented publicly available information. Another inherent drawback is access to people involved. Interviews were voluntary and, unfortunately, many declined to participate, despite assurances of anonymity. Moreover, for those that did participate, it required time and building of trust within certain communities. One final drawback is the subjectivity of interviews, an issue that exists no matter the content of the research. The participants were forthcoming with their own professional experiences and thoughtfully considered my research questions; but participants ultimately take the discussion in the direction that makes the most sense to them from their perspective. To give as much consistency, and flexibility, to the interviews, I included a list of questions asked at every interview, regardless of their position, and grouped answers with similar or like-minded responses. Outside of those core questions, participants offered meaningful insight into their professional experiences.

One strength of the interviews is the diversity. Rather than interviewing individuals with positions that dealt exclusively with international law, I aimed to incorporate the broader spectrum of actors that contribute to national security policy. From this angle, I was able to see how participants with foreign policy experience, legal experience, and battlefield experience had similarities and differences in their relationship with legal accountability. This diversity in decision-making perspectives is an asset to the goal of the dissertation, which is insight into accountability within the national security apparatus.

Chapter 3. The Evolving Role of Judicial Review in War

"*It used to be a simple thing to fight a battle…In a perfect world, a general would get up and say, 'Follow me, men,' and everybody would say, 'Aye, sir' and run off. But that's not the world anymore…[now] you have to have a lawyer or a dozen. It's become very legalistic and very complex."*

– General James Jones, USMC (ret)[210]

1. Introduction

The interaction between the executive branches and judicial branches with regard to national security has evolved over time. This chapter details how this evolution culminated in layers of legal accountability in the international system by the time the conflicts of Afghanistan and Iraq occurred. The aim of this chapter is to provide a bird's eye view to the critical changes of this evolution and the set the backdrop for national security decision-making in Afghanistan and Iraq.

Military operations are regulated by a patchwork of traditional branches of international law such as law governing the use of force (*jus ad bellum*), international humanitarian law (*jus in bello*), international human rights law, the law of the sea and use of airspace, as well as branches of national law of the belligerent parties.[211] There is also the nontraditional, or hybrid, sources of

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[210] Quoted in Major General Charles J. Dunlap, "Lawfare Today: A Perspective," *Yale Journal of International Affairs,* Winter 2008.

[211] For an extensive discussion of the International Law of Military Operations, see *The Handbook of International Law of Military Operations*, eds. Terry D. and Dieter Fleck, Oxford University Press (2010).

regulation such as conflict-specific rules of engagement, or other *ad hoc* arrangements negotiated between parties.[212]

Historically, international humanitarian law (IHL) has been one of the more difficult branches of international law to enforce. In practice, there are multiple reasons for enforcement challenges that could challenge the narrative that legal accountability is a widespread practice, but I want to draw attention to three in particular.[213] First, by definition, legal violations occur in the context of an armed conflict that could pose dangers for investigators. Gathering evidence or potential witnesses is difficult in a war zone where violence is commonplace, and safety is a legitimate concern. The second enforcement challenge comes in the form of what many call the "fog of war."[214] This refers to the difficulties for combatants to make critical and immediate decisions in the midst and turmoil of combat. For investigators, separating war crimes from decisions taken in the fog of war, where seemingly combatants understood their lives to be in jeopardy, can prove a near impossible task. The third challenge is perhaps less common but nonetheless significant, which are political hurdles for prosecuting IHL violations. In some instances, highly publicized war crimes trials can have political costs by jeopardizing the legitimacy of the military operation. War crimes trials could dissuade public support for an

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[212] Ibid.
[213] For a broader analysis of IHL enforcement and the challenges involved, see Benjamin Perrin, "Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in Criminal Trials," *Ottawa Law Review* 39 (2007-8); Antonio Cassese, "On the Current Trend towards Criminal Prosecution and Punishment Breaches of International Humanitarian Law," *European Journal of International Law* 9 (1998); Daryl A. Mundis, "New Mechanisms for the Enforcement of International Humanitarian Law," *The American Journal of International Law,* Vol. 95 No. 4 (2001).
[214] See for example, Adil Ahmad Haque, "Killing in the Fog of War," *Southern California Law Review* 86 (2012).

overseas operation or negatively affect international reputation or standing; additionally, losing domestic or foreign support could compromise effectiveness or put armed services in more jeopardy. In essence, there are political incentives to resolve legal violations through internal investigations to avoid public prosecutions and the reputational costs associated.[215]

Despite legal and political hurdles, mechanisms for legal accountability of crimes in an armed conflict have increased. The following discussion describes how these changes have occurred and culminated in the landscape of court jurisdiction at the time of the Afghanistan and Iraq wars. This chapter continues in four sections. Section two begins with a brief history of domestic and international jurisdiction gaps in prosecuting the crimes of torture and unlawful targeting by armed forces. For decades, when American service members left the armed forces and obtained civilian status they could not be prosecuted in civilian or military courts for extraterritorial war crimes committed in pursuit of their duties. Section three describes when and how these jurisdiction gaps were filled, effectively giving way for judicial oversight to enter the national security policy processes and decision making. This section additionally outlines international and domestic jurisdiction (both civilian courts and military courts) over British and American military operations post 9/11. Section four discusses military deference doctrine. Military deference doctrine is a principle of limited judicial review in which national security decisions reached by the political branches are afforded a high degree of respect from courts.[216]

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[215] For more on politics of war crimes tribunals, see Garry Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press (2002).
[216] Barney F. Bilello, "Judicial Review and Soldiers' Rights: Is the Principle of Deference a Standard of Review?" *Hofstra Law Review*, 17 (1989).

This section explains military deference doctrine in US and UK courts, as well as significant departures of the practice in which the courts afforded judicial review for national security matters. Section five submits key conclusions for the chapter.

2. Courts in Military Operations: Early Jurisdiction Gaps

National security litigation is rare. Historically, domestic courts in the US and UK have rejected review of national security and military policy; judges have typically "assigned varying degrees of weight to the judgement of elected branches, out of respect for their superior competence, expertise, and/or democratic legitimacy."[217]

There are three reasons why national courts have averted review of national security litigation. First, in a democratic society threats to national security, and the appropriate measures to respond to such threats, fall within the competency of the executive and legislative branches.[218] Judicial review of such military activity rarely reaches the merits of a case; and if a court did decide on the merits, it has often ruled heavily in favor of the executive, which has at times resulted in case law that is later considered a disgrace and missed opportunity for the court to stop an injustice.[219] For example, the Supreme Court of the United States (SCOTUS)

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[217] Aileen Kavanagh, "Constitutional Review Under the UK Human Rights Act" (2009), 169. See also John Ip, "The Supreme Court and the House of Lords in the War on Terror: *Inter arma silent leges*?" *Michigan State Journal of International Law*, vol. 19, no.1, 2010.

[218] The majority of national security policy making occurs in the executive branch. Legislative branches have certain functions, such as authorizing military force, authority to declare war, and budgetary allotment. But legislative functions are beyond the scope of this study.

[219] Deeks (2011); Ip, (2010). See also Michael R. Belknap "The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case," *Military Law Review* 59 (2005). Belknap is critical of the Supreme Court's deference to unlawful executive policies, accusing the court of "falling into step with the drums of war." Pg. 95. The

executive deference regarding internment camps of Japanese citizens and American citizens of Japanese heritage, which SCOTUS then rectified in future proceedings.[220] Cases like this are used to show the dangers and moral failings of blanket executive deference. The second reason to avert judicial review is courts may lack access to sensitive information necessary to issue judgement.[221] The classified nature of intelligence or other national security information makes it difficult to enter into the public arena through litigation. The third reason is that national tribunals refer to both civilian courts and military courts. On military issues, military tribunals had precedence in dealing with military conduct (such as disciplinary action), and civilian courts did not have jurisdiction over crimes committed on foreign territory by armed services members. As such, civilian courts often deferred cases where military tribunals had jurisdiction.

In the post-9/11 landscape, the military deference doctrines shifted. While it is not the goal of this project to explain judicial behavior and why this doctrine shifted, exploring how jurisdictional gaps for civilian courts have closed and the national tribunals in both the US and

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Supreme Court's deference to the executive often looks to *Ex Parte Quirin* in which six German saboteurs landed on the East coast of the US. President Roosevelt directed that they be tried by military commission; but the saboteurs petitioned to the Supreme Court arguing they were entitled to be tried by a civilian court. SCOTUS convened for a special hearing for the case but did not issue their judgment before all six had been tried by military commission and executed. When the court did issue their judgement, they had rejected the saboteurs claims and deferred to the executive. Justice Scalia, referencing *Quirin*, admitted, "It was not the Supreme Court's finest hour." *Hamdi v. Rumsfeld* 542 (2004).

[220] *Hirabayashi v. United States* 320 U.S. 81 (1943). The court ruled "Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threated injury or danger and in the selection of the means for resisting it…Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs." Para. 93. Quoted in Ip (2010), pg. 7.

[221] Ip (2010).

UK had more activity in military and foreign policy affairs illustrates how conditions emerged for policymakers. At the core of this chapter is the civil-military interaction within the legal sphere, and the continuing interaction of civil-military court jurisdiction.[222]

This section focuses on the creation of IHL and IHRL jurisdiction in national and international tribunals. The focus includes the incorporation of the "grave breaches" doctrine into American and British law. Grave breaches of the Geneva Conventions include, among others, both torture and unlawful killing -- the two legal issues relevant to this dissertation. Grave breaches are the following if committed against persons or property protected by the Geneva Conventions: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or injury to body, extensive destruction and appropriation of property.[223]

2.1. United States

Until 1996, US federal courts did not have jurisdiction to prosecute war crimes committed on foreign territory by a member of the armed forces that was no longer in active duty.[224] Effectively, grave breaches of the Geneva Conventions did not have legal recourse in

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[222] For a critical insight into this important topic, see Pauline Therese Collins, *Civil-Military 'Legal' Relations: Where to from Here?* Brill Publishing (2018).

[223] ICRC, "How 'grave breaches' are defined in the Geneva Conventions and Additional Protocols," https://www.icrc.org/en/doc/resources/documents/faq/5zmgf9.htm#:~:text=Grave%20breaches%20to%20which%20the,serious%20injury%20to%20body%20or

[224] Additionally, this gap existed for war crimes committed by foreign nationals. During debate proceedings on the floor of Congress, a representative of Virginia stated,
"Mr. Speaker, now more than ever, we are sending our men and women to serve in hostile lands, and the specter of war crimes, looms over almost every U.S. military action abroad. As a member of the House National Security

federal courts from 1952, when the US ratified the Geneva Conventions and incorporated its principles in the Army Field Manual, until 1996, when legislators passed the War Crimes Act. In practice, if a service member left the military, and was no longer subject to the jurisdiction of court martial, they could not be prosecuted for war crimes committed on foreign territory.[225]

This jurisdictional gap was not an oversight. Concerned members of Congress periodically introduced legislation to close this jurisdictional gap over 40 years, which always failed until 1996.[226] Instead of passing legislation to hold perpetrators accountable, the courts created a wider lacuna for domestic legal accountability. The case of *Toth v. Quarles*[227] illustrates this, in which SCOTUS ruled that ex-servicemen could not be court martialled for alleged crimes committed in the course of military service.[228] Military courts, they argued, do

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Committee, we have the responsibility of providing these service men and women with the best training and equipment available. But this Congress should not stop there. We must ensure that we also protect the rights of all Americans who are defending the interests of our country abroad. While it is difficult to believe, in the absence of a military commission or an international criminal tribunal, the United States currently has no means, by which we can try and prosecute perpetrators of war crimes in our courts. The Geneva Convention of 1949 granted the authority to prosecute individuals for committing ''grave breaches'' of the Geneva Convention, however, the authority was not self-enacting. The Geneva Convention directed each of the participating countries to enact implementing legislation. The United States never did. Today, it would be possible, to find a known war criminal vacationing in our country, unconcerned with being punished for his crime. A modern-day Adolf Hitler could move to the United States without worry, as he could not be found guilty in our courts of committing a war crime. We could extradite him or deport him, but we could not try him in America as a war criminal." H8620 Congressional House Record, July 29, 1996.

[225] *Toth v. Quarles*, 350 U.S. 11 (1956)

[226] Hagopian (2013), pg1.

[227] The US Air Force alleged that Robert W. Toth murdered Bang Soon Kil during his military service in Korea. The military alleged they did not know about Toth's crime until after he had already been honorably discharged. Donald Quarles, then Secretary of the Air Force, argued because the crime was committed while Toth was in the military, the US military could try him.

[228] This ruling was an important precedent when, two years later, SCOTUS heard the case *Reid v. Covert* (354 US 1) which ruled US citizen civilians outside territorial jurisdiction cannot be tried by a US military tribunal. *Toth* and *Reid* were important precedents for the Court in *Hamdi v. Rumsfeld* (542 US 507) which recognized the government could detain enemy combatants abroad, including US citizens, but required US citizens must have due process and the ability to challenge their combatant status before an impartial court.

not have jurisdiction over civilians; and the petitioner, Robert Toth, received civilian status when he was honorably discharged from the US Air Force. The Supreme Court, recognizing this jurisdictional gap, said the onus was on Congress to implement judicial recourse for those crimes.

After *Toth v. Quarles* in 1955, the Supreme Court immunized civilians accompanying the armed forces overseas from court-martial (except in times of war); and when a military court determined "times of war" only referred to formal Congressional declarations of war.[229] This gap became particularly apparent to Congress and the greater American public when the atrocities of My Lai in the Vietnam war became public knowledge. By the time these crimes were revealed, along with an extensive military cover-up, 90% of the army unit responsible were out of uniform and could not be prosecuted in any court.[230]

The jurisdiction gap persisted, despite the exposure of the My Lai massacre,[231] due to a lack of consensus and political will from Congress, the Department of Defense, and the Justice Department.[232] This changed in 1996 with the passage of the War Crimes Act (WCA). There are two reasons why 1996 was the time to finally expand federal jurisdiction into the theater of war. First, the threat of universal jurisdiction and an international criminal court were real possibilities

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[229] See Hagopian (2013) for an extensive discussion of the US war crimes jurisdiction gap.
[230] Hagopian (2013), pg.2.
[231] Public opinion actually showed sympathy for William Calley, the one man prosecuted for the crimes of My Lai, seeing him as a scapegoat for the military elites that were actually to blame for the civilian deaths, see Michal R. Belknap, *The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley*, University Press of Kansas, (2013).
[232] Hagopian (2013).

and threatened the ability for the US to control war crimes internally.[233] The second reason is the legacy of Vietnam; US policymakers acknowledged jurisdiction gaps existed for foreign nations that commit crimes against American prisoners of war. With Vietnam as the backdrop, the War Crimes Act was aimed to rectify this gap for prosecutability of future war crimes.[234]

After the WCA, Congress subsequently passed the Expanded War Crimes Act (1997)[235] which expanded the 'grave breaches' standard to include grave breaches of Additional Protocol II, or crimes committed in non-international armed conflicts. Congress further passed the Military Extraterritorial Jurisdiction Act in 2000 to extend federal jurisdiction over military contractors, and other civilians, accompanying the armed forces in a civilian capacity.[236] The Military Extraterritorial Jurisdiction Act can also prosecute ex-servicemembers for alleged crimes committed while in active duty.[237] Within four years Congress took massive steps to expand federal jurisdiction into the theater of war, steps toward normalizing legal accountability in military operations.

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[233] Hagopian (2013), pg. 4. During the Congressional hearings on the War Crimes Act, this imperative was public record, "Our having jurisdiction may protect us in situations where we need to be able to say we want to deal with our people; we don't want to surrender them to an international court or to extradite them somewhere else."
[234] *Ibid.*
[235] H.R.1348 - Expanded War Crimes Act of 1997105th Congress (1997-1998).
[236] Military Extraterritorial Jurisdiction Act of 2000, PL 106-523 November 22, 2000.
[237] The Military Extraterritorial Jurisdiction Act was used to prosecute Jose Luis Nazario (who was later acquitted); he is the first American tried in a civilian court for war crimes allegedly committed while on active duty.

2.2. United Kingdom

Unlike the US, the UK did not experience the same level of jurisdiction gaps. The UK military established early mechanisms allowing for the prosecution of war crimes, for both civilians and military. The Geneva Conventions Act 1957 incorporated the Geneva provisions into British law, criminalizing grave breaches of the Conventions.[238] Military manuals instituted after the Second World War directly outlined the prosecutability of war crimes in British and foreign courts. The British Military Manual of 1953 states,

> Those who commit [acts of marauding], whether civilians who have never been lawful combatants, or persons who have belonged to a military unit, an organised resistance movement or a *levée en masse*, and have deserted and so ceased to be lawful combatants, are liable to be punished as war criminals. They may be tried and sentenced by the courts of either belligerents[239]

The manual also states,

> Charges of war crimes are subject to the jurisdiction of military courts, whether national or international, or of such other courts as the belligerent concerned may determine. With regard to the trial of civilians for "grave breaches" of the 1949 [Geneva] Conventions which include the most serious war crimes, jurisdiction can only be conferred upon the ordinary courts of the Power concerned or upon the courts set up by the Occupant. Prisoners of war charged with "grave breaches" and of all other war crimes must be tried by the same courts and in the same manner as in the case of crimes committed whilst in captivity. The courts, whether military or civil, of neutral States may also exercise jurisdiction in respect of war crimes. This jurisdiction is independent of any agreement made between neutral and belligerent States. War crimes are crimes *ex jure gentium* and are thus triable by the courts of all States … British military courts have jurisdictions outside the United Kingdom over war crimes committed not only by members of the enemy armed forces but also by enemy civilians and other persons of any nationality, including those of British nationality or the nationals of allied or neutral States. It is not necessary that the victim of the war crime be a British subject.[240]

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[238] Geneva Conventions Act 1957 c. 52.
[239] United Kingdom, The War Office HMSO 1958, Sec. 636.
[240] Ibid, Sec. 637. Updated UK LOAC Manual from 2004 explains grave breaches jurisdiction, "The Geneva Conventions 1949 introduced a new concept, that of "grave breaches". These are war crimes of such seriousness as to invoke universal jurisdiction. Universal jurisdiction entitles any state to exercise jurisdiction over any perpetrator, regardless of his nationality or the place where the offence was committed. In the case of grave breaches, states are

In 1991, Parliament passed the UK War Crimes Act, which confers jurisdiction on UK courts to try people for war crimes committed in Nazi Germany or territory occupied by Nazi Germany during the Second World War.[241] It applies to the time period of September 1, 1939 to June 5, 1945. The temporal limitations of the UK War Crimes Act are such that it was not applicable to the conflicts of Iraq and Afghanistan and is thus outside the scope of this project.

The International Criminal Court Act 2001 incorporated the provisions of the Rome Statute, which includes war crimes, into English and Northern Ireland law. The Act provides that, "It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime."[242] The Act applies to acts committed "(a) in England or Wales, or (b) outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction."[243] The UK Manual on the Law of Armed Conflict regards the ICC Act,

> In addition, the International Criminal Court Act 2001 gives jurisdiction to the civil courts of England, Wales and Northern Ireland to try any United Kingdom national or resident, or any person subject to Service jurisdiction, for any offence listed in the Rome Statute of the International Criminal Court, wherever committed. In respect of persons subject to Service jurisdiction, Service courts will also have jurisdiction over such offences except when they are committed within the United Kingdom.[244]

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obliged to introduce legislation to this effect… The civil courts of the United Kingdom can try persons of any nationality who are accused of committing any grave breach of the Geneva Conventions or of Additional Protocol I." Ministry of Defence, "The Manual for the Law of Armed Conflict," July 2004, secs. 16.23, 16.30.2.

[241] War Crimes Act 1991 c. 13.

[242] International Criminal Court Act 2001, Part 5, Section 51.

[243] Ibid.

[244] Ministry of Defence, "The Manual for the Law of Armed Conflict," July 2004, 16.30.3.

Therefore, regarding war crime jurisdiction, it is clear the UK did not have the same jurisdiction gap as was evident in the US.

The UK simultaneously participated in the creation of a European human right's legal framework. The UK had an important role in creating the ECHR.[245] The European Court of Human Rights was established in 1959; on the heels of decolonization, the UK was under the ECtHR jurisdiction beginning in 1966 and accepted the right to individual petition.[246] Under ECtHR jurisdiction, individuals can petition state breaches of their human rights obligations, and states can sue other contracting states for violations of their human rights obligations, including in military operations.[247] The Human Rights Act of 1998 incorporated British obligations under the ECHR into domestic law, granting applicants review in British courts. Human Rights jurisdiction in an armed conflict is discussed further below.

3. Jurisdiction in Military Operations: International and Domestic Courts

The modern system of the laws of armed conflict were originally designed to regulate conflicts that resembled the world wars. However, conflicts after the Second World War did not resemble the scale of a world war. Internal and asymmetrical conflicts were dominant styles of

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[245] Mikael Rask Madsen, "From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics," *Law & Social Inquiry* 32, 1 (2007).
[246] Ibid, pg. 146.
[247] The applicability of the ECHR to extraterritorial operations was not explicit. For more see Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations,* Cambridge University Press (2019).

war and presented significant and novel legal questions.[248] As the laws of armed conflict modernized, the ability to enforce them did not keep the same pace, despite the criminal tribunals of Nuremberg and Tokyo first creating the norm of individual criminal responsibility for top policymakers.[249] Debates about the most appropriate forum for adjudicating IHL violations has not reached consensus. Nevertheless, international human rights courts and criminal courts and tribunals were created and coupled with an expansion of domestic civilian jurisdiction over extra territorial military operations, adjudication in military space is a feature of modern international system. Warfare as "a domain where military and strategic logic generally prevails" is changing.[250]

This section describes the landscape of applicable jurisdiction to American and British military operations for the wars in Afghanistan and Iraq. It begins with international courts with jurisdiction to review military conduct followed by domestic courts, including military justice systems.

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[248] Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press (2016, 2nd ed.). Enforcement of IHL always trailed behind creating the rules themselves. For example, the Lieber Code (1863), one of the first codifications of the laws of armed conflict, lists many prohibitions and regulations; but does not offer any means of punishing those that violate the conditions. (Solis, pg. 92).
[249] Gary Komarow, "Individual Responsibility Under International Law: The Nuremberg Principles in Domestic Legal Systems," *The International and Comparative Law Quarterly* 29, 1 (1980).
[250] Jo and Simmons, (2016) pg. 444.

3.1. International Criminal Law Jurisdiction over Military Operations

International courts are a relatively new phenomenon. International courts with compulsory jurisdiction over military operations are very modern and extremely limited. International courts are very difficult to coordinate and create; they require a high degree of state will, cooperation and consent.[251] For example, when reporters asked Jamie Shea, a NATO spokesperson, about the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia over NATO actions, Shea responded,

> I think we have to distinguish between the theoretical and the practical. I believe when [Chief Prosecutor] Justice Arbour starts her investigation [into the events in Kosovo], she will because we will allow her to. It's not Milosevic that has allowed Justice Arbour her visa to go to Kosovo to carry out her investigation. If her court, as we want, is to be allowed access, it will be because of NATO.[252]

Currently, two international courts have jurisdiction over military operations. The International Court of Justice (ICJ) is the judicial organ of the United Nations. Article 93 of the UN Charter requires that all 193 state parties of the United Nations fall within the jurisdiction of the ICJ. Only states may be parties to a claim before the ICJ.[253] Article 36 of the Charter outlines the three bases for ICJ jurisdiction in contentious cases.[254] The first basis requires two parties to agree to submit to ICJ review; both parties must agree that the Court's ruling is final. Also

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[251] Jacob Katz Cogan, "International Criminal Courts and Fair Trials: Difficulties and Prospects," *Yale Journal of International Law* 27 (2002). See also David Bosco, *Rough Justice: The International Criminal Court in a world of power politics*, Oxford University Press (2014).
[252] Ibid, pg. 111.
[253] Karen Alter termed courts like the ICJ as "old style courts" because only states can be litigants. "New style courts" reflect the emergence of individual responsibility and compulsory jurisdiction as a way to navigate the inherent political limitations of 'old style courts.' See Alter (2014).
[254] Statute of the International Court of Justice.

provided for is jurisdiction over "matters specifically provided for… in treaties and conventions in force."[255] This is in the case of treaties containing a clause that provides for dispute resolution by the ICJ.[256] The third basis allows states to make an optional clause declaration accepting the jurisdiction of the Court. This is "compulsory" jurisdiction of the ICJ; but first requires states to opt in. Furthermore, if a State has accepted the compulsory jurisdiction of the ICJ, it may bring a suit against another state which has accepted the compulsory jurisdiction. Currently, 74 States have accepted this jurisdiction. The UK is the only member of the Security Council to accept ICJ compulsory jurisdiction.

The second international court is the International Criminal Court (ICC). The ICC is a unique international court – it has jurisdictional features are unprecedented for international courts. The most innovative feature of the ICC is the role of the Prosecutor with *proprio motu* powers, or a mandate in which the Prosecutor can trigger investigations into alleged member state violations of the Rome Statute.[257] This feature, critically, institutionalizes judicial uncertainty for state policymakers.[258]

ICC jurisdiction is limited by certain criteria. Procedurally, there are particular mechanisms through which the ICC exercises its jurisdiction.[259] First, an ICC member state may refer a situation to the Prosecutor [through self-referral or state party referral] if crimes within

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[255] Statute on the International Court of Justice 36(1).
[256] Ibid (36(2).
[257] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Art. 15. [Hereinafter Rome Statute].
[258] See Chapter 3 for more on this.
[259] Rome Statute Art. 13. See also generally Schabas (2007).

ICC jurisdiction has occurred on the territory of a state that makes the referral, on the territory of another state party, by a national of the self-referral state, or another state party.[260] Second, the UN Security Council may refer a situation to the Prosecutor, regardless of State party status.[261] Third, the innovative feature of the ICC, the Prosecutor may initiate an investigation into alleged crimes within the Rome Statute committed on the territory of a state party or by a national of a state party.[262] To initiate an investigation, the Prosecutor must receive approval by a Pre-Trial Chamber of judges.[263]

Jurisdiction of the ICC is limited in scope to four crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[264] This dissertation primarily examines the jurisdiction over war crimes.[265]

ICC jurisdiction is also temporally limited. Individuals can only be prosecuted for crimes committed after the Court came into force on July 1, 2002. Temporal jurisdiction is not retroactive, and thus crimes committed before the Rome Statute came into force cannot be prosecuted in the ICC.[266]

The ICC has particular admissibility requirements. Most important to this analysis is the principle of complementarity. The ICC is a court of last resort; and as such, the Prosecutor can

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[260] Rome Statute 13(a). Self-referrals to the ICC Prosecutor triggered ICC investigations in the Democratic Republic of the Congo, Uganda, the Central African Republic (twice), Mali, and Gabon. https://how-the-icc-works.aba-icc.org/.
[261] Rome Statute 13(b). The situations of Darfur (2005) and Libya (2011) were UN Security Council referrals.
[262] Rome Statute 13(b), 15. Examples of the Prosecutor initiating
[263] Rome Statute 15(3).
[264] Rome Statute 5.
[265] Rome Statute 8. See Article 8(2) for acts defined as war crimes.
[266] Rome Statute 126.

initiate an investigation if a state party has proved unwilling or unable to prosecute those most responsible for crimes included in the Rome Statute.[267] There are two other admissibility requirements, including a "gravity" threshold of the crime, which is undefined in the Rome Statute and has not reached consensus in ICC case law.[268] The final requirement is whether there is a reason to believe an ICC investigation would not be in the "interest of justice."[269] This is also left undefined in the Rome Statute and commentators consider this one of the more controversial aspects of ICC prosecutorial power.[270]

The United States is not a state party to the Rome Statute; the United Kingdom ratified in 2001. Upon ratification, member states are required to incorporate the international crimes into domestic criminal codes, which the UK did in the International Criminal Court Act 2001.

3.2. International Human Rights Jurisdiction over Military Operations

Although IHL and IHRL are separate legal frameworks, there is a degree of overlap in an armed conflict.[271] Nevertheless, the extent of this interaction between IHL and IHRL, as well as

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[267] Rome Statute 1.
[268] See Megumi Ochi "Gravity Threshold Before the International Criminal Court: An Overview of the Court's Practice," *International Crimes Database* Brief 19 (2016) for a thorough analysis of Court practice regarding the gravity threshold; See also Margaret M. DeGuzman, "Gravity and the Legitimacy of the International Criminal Court," *Fordham International Law Journal 32* (2008); Mohamed M. El Zeidy, "The Gravity Threshold Under the Statute of the International Criminal Court," *Criminal Law Forum* 19 (2008).
[269] Rome Statute 53(c).
[270] See for example, Philippa Webb, "The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice,'" *Criminal Law Quarterly* 50 (2005); Allison Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court," *American Journal of International Law* 97, (2003); Kenneth Rodman, "Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court," *Leiden Journal of International Law*, 22 (2009).
[271] See Ruti G. Teitel, "Humanity's Law: Rule of Law for the New Global Politics," *Cornell International Law Journal* 35 (2002); Cordula Droege, "International Humanitarian Law and Human Rights Law: A Legal Framework

the nature of the interaction as complementary or contradictory, has remained unclear and worthy of debate.[272] Particularly, when military operations in Afghanistan and Iraq began, the interaction of IHL and IHRL, and the extraterritorial application of the ECHR, was unclear. The empirical analysis that follows illustrates the uncertainty in the UK, from cabinet level ministers to military lawyers in the operational theaters. This section explores the chronology of case law dealing with IHRL in an armed conflict to illustrate the state of legal interpretations at the time of the conflicts. The section then details the case law that resulted from the conflicts in Afghanistan and Iraq that clarified many of the questions policymakers and legal advisers had at the time of the wars.

Traditional approaches argued that of IHL and IHRL were mutually exclusive in their applications; IHL applied in times of war and IHRL applied in times of peace.[273] Some scholars and human rights bodies refuted the dichotomous applicability and advocated for the protection of human rights in an armed conflict. They argued that it is contrary to the principles of human

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for Complementarity," 40(2) *Israel Law Review* (2007); John Cerone, "Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-international Armed Conflict in an Extraterritorial Context," 40(2) *Israel Law Review* (2007).

[272] For arguments in favor of IHL and IHRL as complementary legal frameworks, see Droege (2007) and Cerone (2007). For a discussion about the complexities and challenges of IHL and IHRL as complementary legal frameworks, see Laura M. Olson, "Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict," *Case Western Reserve Journal of Law* 40 (2009).

[273] Ralph Wilde, "The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq*, ILSA Journal of International & Comparative Law*, 11, no.2, (2005); Naz K. Modirazadeh, "The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict," *International Law Studies*, 86 (2010).

rights law to ensure human rights protections only in times of peace.[274] In 1999, in the case of *Coard v. United* States,[275] the Inter-American Commission on Human rights noted,

> While international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a 'common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,' and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict, and this is reflected, inter alia, in the designation of certain protections pertaining to the person as peremptory norms (jus cogens)…in a vast body of treaty law, in principles of customary international law, and the doctrine of practice of international human rights bodies such as this Commission. Both normative systems may thus be applicable to the situation under study.[276]

The Inter-American Commission on Human Rights supported the contention that certain core human rights are protected in times of war. The ICJ acknowledged this overlap in an advisory opinion on the *Legal Consequences of The Construction of a Wall in the Occupied Palestinian Territory* (or the *Wall* case). The ICJ stated, "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."[277] In this same advisory opinion, the ICJ stated regarding the ICCPR, "the protection of the ICCPR does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[278]

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[274] Ibid, pg. 489.
[275] *Coard v. United States* Case No. 109/99, Report No. 109/99. This case concerned US military detention of individuals during the US invasion of Grenada in 1983.
[276] Ibid, para. 39.
[277] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 106. [Hereinafter *Wall* Case].
[278] *Wall* Case, para. 3.

Some argue the derogation provisions in international human rights instruments inherently suggests the applicability of human rights to times of war or public emergency.[279] Derogation provisions require that states make a formal declaration of derogation; however, these derogations are limited. Certain rights are non-derogable (including torture and unlawful killings) and, further, states may only declare derogations that are necessary to meet the requirements of war.[280]

While it is largely accepted that, in theory, IHL and IHRL have parallel applications in times of war, *how* these frameworks interact in extra-territorial operations has no clear answer.[281] Both the US and UK rejected the extraterritorial application of their human rights obligations in Iraq. As previously discussed, the US and UK are signatories of the ICCPR which requires that state parties protect the right to life and prohibit the use of torture. To illustrate, a leaked memo from the US DOD from March 2003 stated, "[t]he US has maintained consistently that the Covenant does not apply outside the US or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict."[282] The UK agreed with this interpretation; and further argued British human rights obligations under the ECHR did not apply to extraterritorial military operations, which is discussed further below.[283] Because both the US and UK did not believe their human rights obligations applied to

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[279] Wilde (2005).
[280] Wilde (2005); ECHR art. 15(3).
[281] Modirazadeh (2010).
[282] Quoted in Wilde (2005), pg. 487.
[283] Wilde (2005).

extraterritorial military operations, neither state filed derogations under the ICCPR or the ECHR (in the British case).

Unlike international criminal law, there is no global human rights court. Instead, three regional human rights treaties established, at various times, three regional human rights courts – the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IAtHR), and the African Court on Human and People's Rights (ACHPR). The US did not ratify the American Convention of Human Rights and is, therefore, not subject to the jurisdiction of the IAtHR. The UK is a member state of the ECHR and is a state party to the ECtHR. Because the ECtHR is the only international human rights court with jurisdiction over the case studies of this project, the rest of the analysis will focus exclusively on the ECtHR.

The ECHR is an international treaty within the Council of Europe that established a European framework for the protection of human rights and was one of the first attempts after the Second World War to unify Europe.[284] Historically, the UK had a complex relationship with the ECtHR. Despite early inter-state cases involving the UK, the assumption in London was that "the United Kingdom's relationship to international human rights was that of exporting legal norms, not importing them."[285] The UK had been involved in substantial litigation in the 1980's, prompting the UK government to signal, "the UK was not to pull out, but the Court to pull

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[284] Alice Donald, et al., (2012).
[285] Mikael Rask Madsen, "The European Court of Human Rights: From the Cold War to the Brighton Declaration and Backlash," in *International Court Authority*, Karen Alter, Laurence Helfer, Mikael Rask Madsen (eds) Oxford University Press (2018), pg. 255.

back."[286] Between 1999 and 2000 alone, nearly 12,000 applications were brought to Strasbourg against the United Kingdom. However, the vast majority were rejected in the first round of review, and only 390 applications, or 3 percent, were admissible.[287] Of those, 215 applications, 1.8 percent, led to a judgement finding British violations of the ECHR.[288]

The ECtHR hears cases of alleged breaches by state parties of human rights and political rights enshrined in the Convention. The court has gone through significant changes since its inception and survived, even thrived, under evolving global and European political conditions.[289] Previous discussions already detailed UK legislation and participation to the ECtHR, and the prohibition against the use of torture and the right to life as protected in the ECHR. The ECtHR can hear applications for inter-state disputes between state parties, from individuals against state parties, and the ECtHR can issue advisory opinions.[290] Applications from individuals, or organizations located within the territory of a state party, constitutes the majority of cases before the ECtHR.[291] The UK accepted the right of individual petition in 1966.

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[286] Ibid, pg. 256
[287] Alice Donald, et. al., Equality and Human Rights Commission, "The UK and the European Court of Human Rights," Research Report 83, London Metropolitan University, https://www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf
[288] Ibid.
[289] For a thoughtful analysis of the evolution of the ECtHR, see Mikael Rask Madsen "From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics," *Law and Social Inquiry* 32 (2007).
[290] Rhona Smith and Christien van den Anker, *The Essentials of Human Rights,* Routledge (2005).
[291] Individual petitions are overwhelming in the ECtHR and led state parties to adopt Protocol 14 as a measure to address an overwhelming number of applications. Protocol 14, which came into force June 1, 2010, introduced new admissibility criterion related to the degree of disadvantage, in an attempt to stymie applications from individuals that have not suffered a great disadvantage. See also European Court of Human Rights Overview 1959-2014, https://www.echr.coe.int/Documents/Overview_19592014_ENG.pdf.

Certain principles of interpretation used by the ECtHR Important to the scope of this study is the ECtHR use of deference. Margin of appreciation is a human rights doctrine refers to, "latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies."[292] Margin of appreciation emerged out of the practical realities which may counter the aspirations of the ECHR.[293] Its first application was a case involving Cyprus and the United Kingdom. Some British commentators urged for the recognition that, "[I]t is at least arguable that the determination of the British Government that the situation in Cyprus was one of 'public emergency threatening the life of the nations…is a matter within their sole discretion.'"[294] Cases of public emergencies and the option of derogation from certain provisions of the Convention solidified as a tenet of human rights law.

As previously mentioned, the extraterritorial application of the ECHR was a controversial issue in the UK, and as will be demonstrated, infused a significant amount of uncertainty in British national security policymaking. Officially, the UK rejected the applicability of the ECHR in operations abroad. British Armed Forces minister, Adam Ingram MP, wrote to Adam Price MP in 2004 explaining,

> The ECHR is intended to apply as a regional context in the legal space of the Contracting States. It was not designed to be applied throughout the world and was not intended to cover the activities of a signatory in a country which is not signatory to the Convention. The ECHR can

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[292] Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer Law International (1996), pg. 13.
[293] For more on the interaction of margin of appreciation with other ECtHR doctrines, see Shai Dothan, "Judicial Deference Allows European Consensus to Emerge," *Chicago Journal of International Law* 18 (2018).
[294] Quoted in A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford University Press (2001), pg. 1000. For an interesting account of deliberations within the Human Rights Commission about whether to adopt a measure of discretion for the UK in an emergency context, see pgs. 1000-1005.

> have no application to the activities of the UK in Iraq because the citizens of Iraq had no rights under the ECHR prior to the military action by the Coalition Forces. Further, although the UK Armed Forces are an occupying power for the purposes of the Geneva Convention, it does not follow that the UK exercises the degree of control that is necessary to bring those parts of Iraq within the United Kingdom's jurisdiction for the purposes of article 1 of the Convention.[295]

At issue was the scope of "jurisdiction" in article 1. Article 1 of the Convention requires state parties, "shall secure to everyone within their jurisdiction the rights and freedoms…of this Convention."[296] At the inception of the conflicts, case law on extraterritoriality was unclear and never clarified the jurisdictional scope of the Convention.[297] The Court addressed the scope of jurisdiction in *Banković v. Belgium,*[298] a landmark case on extraterritoriality, and, "established that the fact that an individual had been affected by an act committed by a Contracting State or its agents was not sufficient to establish that [the individual] was within that State's jurisdiction."[299] In *Banković* the ECtHR tried to reconcile two strands of extraterritorial jurisdictional scope which were at the time simultaneously existing in case law. Some cases were decided on a "effective control of an area" model of jurisdiction, which held "a state possesses jurisdiction whenever it has effective overall control of an area."[300] The second strand employed the "state agent authority" which held, "a state has jurisdiction whenever it exercises authority or

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[295] Quoted in Wilde (2005) pg., 487-488.
[296] ECHR, Art. 1.
[297] Samantha Miko, "*Al-Skeini v. United Kingdom* and Extraterritorial Jurisdiction under the European Convention of Human Rights," *Boston College International and Comparative Law Review* 35 (2013).
[298] This case concerned the 1999 airstrikes by NATO forces in Belgrade. The claims of 5 of the applicants were filed by surviving family members of deceased in the airstrikes.
[299] *Al-Skeini and Others v United Kingdom* (2011) ECHR 1093 [hereinafter *Al-Skeini*], quoting the findings of Bankovic.
[300] Marko Milanovic, "Al-Skeini and Al-Jedda in Strasbourg," *European Journal of International Law* 23 (2012), cited in Miko (2013), pg. 70.

control over an individual."[301] Legal scholars and practitioners were critical of the ECtHR's lack of synthesis or clarity of these two strands of what constitutes extraterritorial jurisdiction. The case of *Banković* did not bring the clarity observers hoped for, and at the inception of the wars in Afghanistan and Iraq, these uncertainties about extraterritorial jurisdiction persisted.[302]

The issue has since been adjudicated in the ECtHR from the operations in Afghanistan and Iraq. But, of course, these judgements were not yet on the radar of policymakers. By way of illustrating, extraterritoriality of the ECHR was judged in British courts in the case of *Al-Skeini v. Secretary of Defense*[303] when the House of Lords ruled in 2007 that the ECHR, and by extension the HRA, was applicable to operations in Iraq when the victim is under the jurisdiction of the UK.[304] The House of Lords further decided that five of the six applicants in the case were not under the jurisdiction of the UK, and thus the ECHR (and by extension HRA) were not applicable. The sixth applicant that was ruled within UK jurisdiction was a person detained and was within British custody when he was mistreated and killed.[305]

After the House of Lords ruling, the *Al Skeini* case went to Strasbourg where the ECtHR disagreed with the House of Lords conclusion. The ECtHR found that, following the collapse of Ba'ath regime, both the US and UK exercised enough control to assume public powers that

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[301] Ibid.
[302] Ibid.
[303] The case concerned the deaths of six Iraqi civilians that were filed on behalf of their family members.
[304] *R (Al-Skeini and others) v Secretary of Defence* [2007] UKHL 26 (HL)
[305] The death of the sixth applicant, Baha Mousa, launched a substantial public inquiry into British conduct within military detention facilities in this case. Conditions in British detention facilities are discussed in Chapter 3.

would typically be expected of a sovereign government.[306] British forces, specifically, maintained security and order in southeastern Iraq, assuming governing and security duties. The judgement confirmed that UK human rights obligations are not limited to territorial jurisdiction, but rather extend to those under the "effective control" of the UK.[307]

This discussion of IHRL in extraterritorial armed conflicts serves to provide a birds eye view of the jurisdictional uncertainty that policymakers were operating in when the conflicts began.

3.3. Military Justice Systems

Domestic court jurisdiction refers to two types of tribunals. The first is civilian courts, which has historically had less activity in military or national security affairs; and the second is military courts, which operations primary jurisdiction over military misconduct. This section has already detailed civilian court jurisdiction in the US and UK – however, the American and British systems of military justice merit further exploration.

The military justice system is the body of laws and procedures for governing and prosecuting members of the armed forces. Military justice originally developed into a separate legal system under command control for practical reasons – often, military units were isolated from civilian populations and institutions, and utilizing civilian courts was not feasible when

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[306] *Al-Skeini*, para. 651.
[307] Ibid, 651; Miko (2013).

guilt needed to be determined quickly and efficiently.[308] As access to civilian courts was less of a hinderance than in previous eras, the military determined military justice remain under the control of the military because military operates by different legal standards, and civilian courts would not enforce or appreciate those differences in an acceptable manner.[309] Debates about military or civilian control of enforcing the military justice system is still alive today.[310]

Historically, commentators have been divided on the independence of the military justice system.[311] Justice Blackstone criticized that military justice in wartime "is built upon no settled principles, but is entirely arbitrary in its decisions, [and] is, as Sir Matthew Hale observers, in truth and reality no law, but something indulged rather than allowed as law."[312]

In the US, the military justice system is the primary jurisdiction regarding violations of military law.[313] The Uniform Code of Military Justice (UCMJ), enacted in 1950, is the foundation of US military law and carried on the tradition of courts-martial, a left-over of the Articles of War and British military tradition.[314] Article 18 of the UCMJ reads, "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a

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[308] Edward F. Sherman, "Military Justice Without Military Control," *Articles by Maurer Faculty* 2265 (1978).
[309] General Westmoreland, "Military Justice – A Commanders Viewpoint," *American Criminal Law Review* 10 (1971); Sherman (1978).
[310] Richard H. Kohn, "The Erosion of Civilian Control of the Military in the United States Today," *Naval War College Review* 55 (2002); Glenn Sulmasy and John Yoo, "Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror," *UCLA Law Review* 54 (2007); Charlie Dunlap, "The Golsteyn Case and Civilian Oversight in Military Justice," *Lawfare Blog,* January 17 2019. https://www.lawfareblog.com/golsteyn-case-and-civilian-oversight-military-justice.
[311] Arthur N. Gilbert, "Military and Civilian Justice in Eighteenth-Century England: An Assessment," *Journal of British Studies* 17, (1978).
[312] William Blackstone, *Commentaries on the Laws of England*, University of Chicago Press, (1979), pg. 413.
[313] Section Four below offers a deeper analysis of military court jurisdiction and civilian courts doctrine of military deference.
[314] Sherman (1978).

military tribunal and may adjudge any punishment by the law of war." The US has three types of courts-martial: summary, special, and general. A summary court-martial provides procedures to minor misconduct by military members. This is similar to what is colloquially known as an "Article 15 proceeding," a disciplinary action, or a non-judicial form of punishment.[315] A special court-martial is an intermediate proceeding, consisting of a military judge and, potentially, three officers as a jury. The sentences are limited in scope, but typically involve financial forfeitures and up to one-year confinement.[316] A general court-martial is the highest court level. Before a case goes to general court-martial, the UCMJ requires an investigation and pre-trial.[317] The most severe violations, such as torture or unlawful targeting, would be prosecuted in a general court-martial.[318]

The British military justice system served as a template for many military justice systems around the world, including the US; but the two systems separated after the Second World War, the UK opting for a military justice system that included a degree of civilian involvement and oversight. In 1946, the War Office recommended changes in courts-martial procedures for the Royal Army and Air Force.[319] The three reforms included, "(1) the extension… of the legal aid program for representing service-men in courts-martial by civilian lawyers; (2) the establishment in 1948 of an independent military prosecutorial agency along with a separate civilian

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[315] UCMJ, Art. 15.
[316] 10 U.S. Code Sec. 819, Art. 19.
[317] UCMJ, Art. 32.
[318] 10 U.S. Code Sec. 817, Art. 17.
[319] UK War Office, Report of the Army and Air Force Courts-Martial Committee, No. 7608 (1946).

organization to provide judicial officers for courts-martial; and (3) the creation in 1951 of a civilian Courts-Martial Appeal Court."[320]

In the 1990's the British military justice system underwent significant legal changes due to judgements. The basis for these changes were breaches of Article 6 of the ECHR, which requires, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[321] Challenges to Article 6 before the ECtHR regarding a perceived lack of independence of courts-martial led to the Armed Forces Act 1996 aimed to implement a formal separation of the chain of command and prosecution and institute independence and in the convening and conduct of courts-martial.[322] These developments toward independence and impartiality were not warmly welcomed by the individual services of the Armed Forces or the Ministry of Defence as an institution.[323]

Despite efforts toward impartiality, the MOD was still running into structural and procedural violations due to an antiquated system. Thus, the Armed Forces Act 2006 overhauled the military justice system. It contained many changes, but four should be noted. First, it unified the three branches of the armed forces under one system of military law.[324] Second, the Armed Forces Act 2006 changed the nature of court-martial system from ad hoc (as in the US) to a standing court beginning in November 2009. And third, stemming from concerns about the

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[320] Sherman (1978), pg. 1403.
[321] ECHR 6(1).
[322] Ann Lyon and Geoffrey Farmiloe "The new British system of courts martial," in *Military Justice in the Modern Age* Alison Duxbury and Matthew Groves (eds.) Cambridge University Press (2016); G. R. Rubin, "United Kingdom Military Law: Autonomy, Civilianisation, Juridification," *Modern Military Law Review* (2002).
[323] Ibid.
[324] Armed Forces Act 2006 c. 52. https://www.legislation.gov.uk/ukpga/2006/52/contents.

independence of certain Judge Advocates, each branch now contained civilian Judge Advocates sitting on all courts-martial. Fourth, the Act created an independent Service Prosecuting Authority that centralized review to a civilian Director of Service Prosecutions, as opposed to the traditional model where the accused's Commanding Officer would deal with the matter.[325]

This section is not intended to be an exhaustive overview of military justice systems, but rather to highlight core themes, particularly military-civilian oversight, and significant legal and legislative changes which could influence the way judicial observer effects have a role in military policymaking.

4. Military Deference Doctrines

Judicial deference with regard to national security is an established practice in British and American civilian courts. This section examines landmark cases that established this practice, as well as notable exceptions. Examining the history offers an understanding of uncertainty regarding probability and likelihood of judicial review.

4.1. Military Deference in United States

The evolution of military deference in the US Supreme Court can be divided into three eras. From 1828-1953, the US Supreme Court explicitly rejected involvement on issues related

[325] Armed Forces Act 2006 c. 52; Lyon and Farmiloe (2016) pg. 168 discusses the Armed Forces Act 2006 in more detail.

to military justice or military regulation. Some scholars define this era as the "Doctrine of Non-Interference."[326] During this first era, SCOTUS considered judicial review inappropriate in the face of the national security expertise within the political branches. In *Martin v. Mott* (1827), the Court noted "...judicial review would emasculate the President's ability to respond rapidly to foreign invasion."[327] The Court further dismissed judicial review because, "...in many instances, the evidence upon which the President might decide that there is imminent danger of invasion… might reveal important secrets of state".[328] Most of the cases during this era were habeas corpus challenges to court-martial convictions, and SCOTUS never got to the merits of the cases; if a court-martial had jurisdiction over the case, then the SCOTUS would promptly reject. There were zero substantive constitutional reviews during this time.[329]

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[326] John F. O'Connor, "The Origins and Application of the Military Deference Doctrine," *Georgia Law Review* 35 (2000).

[327] *Martin v. Mott*, 25 U.S. 12 (1827)*, at 30.* Quoted in O Connor 169. Other cases that defined the era of noninterference on military regulation or national security decision making are *Wilkes v. Dinsman* (48 U.S. [7 How.] 1849) between US Marine Samuel Dinsman and tort litigation with his commanding officer, Navy Captain Charles Wilkes. Captain Wilkes imprisoned Dinsman for not fulfilling his duties when Dinsman tried to end his enlistment in the military while stationed outside the US. Dinsman complained he was wrongfully imprisoned, and the conditions were substandard. Captain Wilkes had Dinsman flogged for insubordination. When they returned to the US, Captain Wilkes was tried by court-martial for "cruelty and oppression" of which he was eventually acquitted. Dinsman then filed a civil suit against Captain Wilkes alleging assault and false imprisonment. When the case reached the Supreme Court, the Court ruled in favor of Wilkes and clearly did not "view itself as having a role in deciding upon the wisdom, or even the constitutionality, of a decision by Congress to grant such power to naval commanders." (O Connell, 172) The second case of this era is *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857) which dealt with a Navy seaman's court-martial for desertion. The court-martial found him not guilty of desertion, but guilty of attempted desertion, and faced a six-month imprisonment sentence. Dynes filed a civil suit claiming his imprisonment was illegal because the crime he was convicted of was not the crime he was charged with. The Supreme Court, in line with the other cases dealing with judicial review of military justice and regulation, expressed doubts that it had the power to disturb a court-martial sentence. For a longer analysis of these cases and the "non-interference" era of the Supreme Court, see O'Connor (2000) pgs. 165-197.

[328] *Martin v. Mott,* at 31.

[329] Ibid

The second era represents the Supreme Court's willingness to challenge certain military practices from the years 1954-1969.[330] The cases during this period were mostly habeas corpus challenges to court-martial convictions, similar to the non-interference period. But this period was defined by new personal jurisdiction questions as the UCMJ had been recently passed in 1950. Under the UCMJ, new classes of civilians were opened to court-martial jurisdiction, such as civilians traveling as dependents with the military.[331] And it is on these issues of personal jurisdiction where the Supreme Court finds certain provisions in the UCMJ to be unconstitutional. A landmark case where the Court truly departs from its noninterference era is in *Toth v. Quarles* (1955). The Court found Article 3(a) of the UCMJ unconstitutional, which provided that courts-martial would have jurisdiction over a former service member for offenses committed during their time of service. In *Toth*, the Supreme Court took a noticeably different tone in the judgement:

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free Countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service… But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently, considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury.[332]

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[330] O'Connor (2000).

[331] See Madsen v. Kinsella, 343 U.S. 341 (1952); O'Connor (2000).

[332] *Toth v. Quarles*, at 22-23; See section 3.1 for further discussion of *Toth* case.

The *Toth* case represents a significant departure from the noninterference approach of the Court previously. The next five years of cases saw the same approach as the Supreme Court chipped away to invalidate court-martial jurisdiction over most classes of civilians.[333] Despite the Court's signal of its willingness to impose judicial review into military practices and court-martial jurisdiction, this era is short-lived. Ironically, during the third era of military deference doctrine the *Toth* case was used to solidify a jurisdiction gap in which former military members escape jurisdiction in both military and federal systems until 1996.[334]

The third era of Supreme Court treatment of military regulations is where we find ourselves today, the era of the military deference doctrine. Military deference doctrine should not be conflated with the nonintervention period, however. The current military deference doctrine "requires the Court to perform a deferential substantive review when considering constitutional challenges to military procedures."[335] The noninterference era never got to any substantive review. At the core of the military deference doctrine rests on the presumption that the constitutionally recognized competences for national security and military affairs lies with the political branches of government. The Court recognized this point in the *Rostker* case with "...in the context of Congress's authority over national defense and military affairs… has the Court accorded Congress greater deference."[336]

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[333] O'Connor (2000), pg. 203.
[334] See Section 3.1 above for more on jurisdiction gaps; Hagopian (2013).
[335] O'Connor (2000), pg. 165.
[336] *Rostker v. Goldberg,* 453 U.S. 57 (1981), paras. 64-65.

The cases that resulted from the conflicts in Afghanistan and Iraq (or the 'war on terror' broadly) in some ways departed from established practices of military deference. In June 2004, the Supreme Court decided on three landmark cases concerning indefinite detention. Two cases, *Hamdi v. Rumsfeld*[337] and *Rumsfeld v. Padilla*[338] regarded the indefinite detention of American citizens as enemy combatants. The third case, *Rasul v. Bush*,[339] addressed the indefinite detention of foreign detainees at Guantanamo Bay. These were the first in a number of cases which challenged indefinite detention and the status of the hastily created military commissions. *Hamdan v. Rumsfeld*[340] prompted Congress to enact significant legislation to authorize Guantanamo detention. The Military Commissions Act of 2006 (MCA) removed the statutory right of non-American citizen detainees to seek habeas corpus.[341] This part of the MCA was challenged in *Boumediene v. Bush*[342] in 2008 to "squarely address the entitlement of these detainees to the constitutional privilege of habeas corpus."[343]

At first glance, the string of cases for the Supreme Court to review the authority of the military to detain individuals (foreign and citizen) indefinitely in a military detention facility is a large departure from the military deference doctrine, and even signal a new era in which the Court promotes judicial review. But some scholars do not see the detention cases as a departure

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[337] *Hamdi v. Rumsfeld* 542 U.S. 507 (2004).
[338] *Rumsfeld v. Padilla* 542 U.S. 426 (2004).
[339] *Rasul v. Bush* 542 U.S. 466 (2004).
[340] *Hamdan v. Rumsfeld* 548 U.S. 557.
[341] Military Commissions Act of 2006, Sec. 7.
[342] *Boumediene v. Bush* 553 U.S. 723.
[343] John Ip "Supreme Court and House of Lords in the War on Terror: *Inter Arma Silent Leges?*" Michigan State Journal of International Law (2011), pg. 19.

from established practice or the military deference doctrine.[344] Significantly, all of the decisions were regarding cases that dealt exclusively with detention. Other aspects of the war on terror, such as abuse of detainees or unlawful killings, have been met with judicial deference.[345] Using deference doctrines (political questions, national security, state secrets) has been the norm, not the exception. This suggests that the US Supreme Court has begun to drop the veneer of deference only when it comes to cases of individual liberties, progress prompting Justice O'Connor to say, rather controversially, "We [the Court] have long since made it clear that a state of war is not a blank check for the President."[346]

4.2. Military Deference in United Kingdom

The United Kingdom also has a strong history of military deference doctrine in civilian courts; some observers recount, "…we see a period of military law autonomy as a lengthy one stretching almost a hundred years between the mid-nineteenth and mid-twentieth centuries. During this time military regulations, the authority of commanders, the awards of courts martial and disputes arising from military obligations overwhelmingly escaped the scrutiny of the civil courts…"[347]

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[344] See Ip (2011); see also David Golove, "The Bush Administrations War on Terror in the Supreme Court" *International Journal of Constitutional Law* 3 (2005).
[345] See Ip, 52.
[346] *Hamdi v. Rumsfeld (2004);* for more on this point, see Ip (2011).
[347] Rubin (2002), 42.

The UK had strong tradition of military deference through the world wars. In the First and Second World Wars, Parliament passed legislation that authorized broad, sweeping powers to the executive, which were eventually challenged in British Courts. During WWI, the Defence of the Realm Acts 1914-15 delegated broad executive powers, including "the internment of any person of hostile origin or association," where necessary for public security.[348] This regulation was challenged in *R v. Halliday, ex parte Zadig*[349] (*Halliday* case) where the majority upheld the internment initiative, including of Zadig, a British citizen of German descent. Lord Shaw raised his concern of judicial deference of executive power in his dissent. Essentially, Lord Shaw said if Parliament had an intention of sweeping executive powers, it would have been more direct or overt in its language; the Courts interpretation of the Defence of the Realm Act (or Regulation 14B which permitted internment) empowered the executive to, perhaps, a greater degree than was intended. He argued to not require specific or clear statutory permission would "imply the repeal of laws and liberties fundamental to British citizenship."[350]

The Second World War brought nearly identical cases. In 1939, Parliament passed the Emergency Powers (Defence) Act 1939.[351] The Act granted broad executive powers for the prosecution of war; including the power of internment.[352] In the case of *Liversidge v.*

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[348] Defense of the Realm Act, c. 29 (1914); Ip (2011). See also generally, Rachel Vorspan, "Law and War: Individual Rights, Executive Authority, and Judicial Power in England During World War I" 38 *Vanderbilt Journal of Transnational Law* 261 (2005).
[349] *R. v Halliday, ex parte Zadig* [1917] A.C. 260 (HL).
[350] *Halliday,* [1917] A.C. 260, para. 299; quoted in Ip (2011).
[351] Emergency Powers (Defence) Act 1939 2 & 3 Geo. 6, c. 62.
[352] A. W. Brian Simpson, *In the Highest Degree Odious,* Oxford University Press (1994), pg. 68.

Anderson[353] the House of Lords rejected the challenge against Regulation 18B (authorized internment). Regulation 18B authorized the Home Secretary to "order a person detained if he had a 'reasonable cause to believe' the person was of hostile origin or association…"[354] The majority held in *Liversidge* that Regulation 18B only required a subjective believe from the Home Secretary and "the Home Secretary's order was not to be second-guessed with an inquiry into the grounds for his belief."[355] This escalation in the majority's degree of deference to the executive was faced with an equal escalation from the dissenting minority. Lord Atkin's dissent in *Liversidge* stated,

> I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. . . In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. . . In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.[356]

Judicial deference regarding national security was a steady trend through the Cold War. Though the number of cases were few, they were notable for the House of Lords unwavering dedication to wide executive powers and lack of judicial review.[357]

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[353] *Liversidge v Anderson* [1942] AC 206 (HL).
[354] Ip (2011), pg. 10.
[355] Ip (2011) pg. 10; *Liversidge* [1942] para. 220.
[356] *Liversidge*, [1942] para. 244.
[357] Notable cases from the Cold War included, *R v Secretary of State for the Home Department, ex p Hosenball* [1977] 1 WLR 766 (CA) Mark Hosenball was a journalist that challenged his deportation. The Home Secretary decided to deport Hosenball using a discretionary power which permitted deportation 'conducive to the public good.' (Ip, 2011, pg. 11) The Home Secretary considered Hosenball a threat to security when he obtained information harmful to British national security; a fact only known to Hosenball after his deportation. Citing *Liversidge* and *Halliday*, the court rejected the challenge supporting the executive's interpretation national security measures. A second case, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL)

Judicial deference to the national security of the nation drastically changed shortly after 9/11; though, not immediately. The case of *Secretary of State for the Home Department v. Rehman*[358] was decided shortly after the attacks of 9/11. In the case, the Home Secretary decided to deport a Pakistani national because of his alleged associations with a terrorist organization engaged in violent activities on the Indian sub-continent; the Home Secretary argued for Rehman's deportation for his threats to British national security. The case first went to a special tribunal called the Special Immigration Appeals Commission (SIAC), which ruled that British national security had to involve a threat in which the United Kingdom was a target – which was not the case for Rehman. The House of Lords disagreed and reversed the SIAC ruling opting in favor of a broader definition of the grounds which constitute national security. Lord Hoffmann embodied the post-9/11 concern of terrorism in the Court's *Rehman* decision,

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign

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concerned Margaret Thatcher, in her role as Minister of Civil Service, banning union memberships at Government Communications Headquarters (GCHQ). The employees of GCHQ challenged this decision, arguing the principles of natural justice should "require prior consultation before changes to their employment conditions." (Ip, pg. 12.) The House of Lords sided with the government and accepted the government's argument that announcing the union membership ban beforehand would have had national security consequences. It may have resulted in "industrial action" – the very thing the ban was trying to avoid. (Ip, pg. 13) The Court ceded to the national security argument, even after it appeared the government invoked national security when they deemed, at first glance, they were likely to lose. (Ibid.) The third case worthy of mentioning is *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890 (CA) which concerned the deportation of a British resident of Lebanese origin. Cheblak was detained at the beginning of hostilities in the Gulf War and faced deportation on national security grounds. These were based on the government's determination that Cheblak was alleged to have connections to terrorism and posed a national security threat. Cheblak claimed the government's determination was unfounded and that he was not given sufficient reasoning for his deportation. The government responded they could not disclose the information for concern of threatening national security. In keeping with the tradition of deference, the court rejected Cheblak's challenge. The court "was not in a position to second-guess the Home Office affidavit that stated further notice could not be given" without threatening national security. (Ip, pg. 14)

[358] *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47, [2003] 1 A.C. 153.

> country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.[359]

Lord Hoffman's acceptance of the government's broad interpretation of national security appeared to signal a continued deference to the executive on matters of this regard. But a flurry of cases challenging new legislation in response to the terrorist attacks shifted the deference doctrine. The Anti-Terrorism, Crime and Security Act 2001 (ATCSA) generally expanded anti-terrorism powers; Part 4 allowed for indefinite detention of terrorist suspects.[360] The executive was warned by numerous executive agencies and human rights organizations that Part 4 of the ATCSA was incompatible with British human rights obligations.[361] Despite these objections, Part 4 was enacted and the UK adopted the indefinite detention policy. Sixteen people were detained as suspected terrorists at Belmarsh prison in London under the ATCSA; several challenged the lawfulness of their detention.[362] In a landmark case, *A. v. Secretary of State for the Home Department*, known as the "Belmarsh case," the House of Lords departed from deference doctrines and ruled the detention program of the ATCSA violated Article 5 of the ECHR.[363]

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[359] *Rehman* [2003] 1 A.C. para. 62; quoted in Ip (2011), pg. 22.
[360] Anti-Terrorism, Crime and Security Act, 2001 c. 24. Part 4 was repealed
[361] Ip (2011); Human Rights Watch, "United Kingdom: Neither Just nor Effective: Introduction," Background Briefing (2004). https://www.hrw.org/legacy/backgrounder/eca/uk/2.htm.
[362] Ip (2011); Sangeeta Shah, "The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish," *Human Rights Law Review* 5, 403 (2005).
[363] *A and others v Secretary of State for the Home Department [2005] UKHL 71*
More specifically, the House of Lords acknowledged there was a sufficient basis to warrant derogation under Article 15 of the ECHR; however, the indefinite detention scheme was not required by the circumstances of the emergency

The Belmarsh case signaled a critical shift away from overwhelming judicial deference to the national security powers of the executive. The cases that followed after 9/11 continued to, generally, challenge the detention and deportation programs.[364] One case in particular, *A v. Secretary of State for the Home Department (No. 2)*, also called the "Torture Case," dealt with the admissibility of evidence to the SIAC obtained through foreign torture.[365] The SIAC is a special tribunal and not bound by the laws of evidence.[366] The Home Office recognized that evidence obtained through torture "with the involvement or complicity of British officials would be inadmissible and an abuse of process…but the Home Secretary's position was that the same did not apply to evidence obtained through torture by foreign agents."[367] The House of Lords unanimously rejected the Home Secretary's position and ruled "no British court, including the SIAC, could rely on evidence that might have been procured through torture, regardless of the nationality of the torturer."[368]

Of course, not every case dealing with national security, or the conduct of the wars in Afghanistan and Iraq, resulted in the House of Lords rejecting the government's policy.[369] But

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and was in violation of Article 5. Additionally, the singling out of non-citizens suspects rather than citizen terrorist suspects qualified as discrimination under Article 14 of the ECHR. Thus, the House of Lords found the ATCSA in violation of Article 5 and 14 of the ECHR. (Ip, pg. 24).

[364] See Ip (2011) for further discussion of these detention and deportation cases; see also Mark Elliott, "United Kingdom: The 'War on Terror,' U.K. Style," *International Journal of Constitutional Law* 8 (2010).

[365] *A v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71

[366] Ip (2011); Special Immigration Appeals Commission (Procedure) Rules 2003, S.I. 2003/1034, rule 44(3).

[367] Ip (2011), pg. 27.

[368] Ibid; *A v. Secretary of State*

[369] As was previously discussed, *Al-Skeini v. Secretary of State for Defense* ruled in favor of the Government's argument that the HRA did not have extra territorial application because there was a lack of "jurisdictional link" between the applicants and UK. But this ruling did not come from the But this was ruled on the merits

these cases represent examples where the House of Lords afforded notable departures from the long-established deference doctrine; implying judicial oversight over the executive's policymaking in wartime is not as easy to dismiss.

5. Chapter Conclusions

In order to set the stage for context of national security policymaking for Afghanistan and Iraq, it is necessary to grasp the historical relationship between the judicial and executive branches, the introduction of supranational jurisdiction into the mix, and the degree of judicial deference. This chapter has detailed the evolution of jurisdiction – from jurisdiction gaps to landmark legislation expanding judicial review to the national security arena – and the interaction of civilian-military divide in the legal space.

There are three key take-aways for the forthcoming analysis. First, military and civilian courts contain historic jurisprudence circumscribing their jurisdictions. In the US, military oversight of military justice has been a core tenet of the courts-martial system, despite risks of commander bias. The UK, by contrast, has incorporated changes "civilianizing" the military justice system.

Second, the prohibitions of torture and unlawful targeting are well-established in multiple jurisdictions. They are codified in the Geneva Conventions, incorporated into military manuals and military justice system, domestic criminal codes, and are non-derogable rights in the ECHR.

Third, policymakers were operating in a certain degree of uncertainty regarding the probability of judicial review. The US is not a state party to the ICC or regional human rights frameworks; but there is a strong domestic judicial branch with a varied history in rulings

regarding the executive in wartime. The introduction of the War Crimes Act, the closing of a 40-year jurisdiction gap, and the strong rhetoric surrounding the importance of prosecuting war crimes could have injected a degree of uncertainty for America's next war. For the UK had a strong tradition of military deference in domestic courts; but a history of litigation at the ECtHR could leave a degree of uncertainty at the international level. Additionally, the British military justice system underwent significant alterations. In short, the conflicts of 9/11 were the first conflicts to occur in a system that had recently shifted dramatically.

This chapter has included discussion of important cases that emerged from the conflicts in Afghanistan and Iraq, but the rest of this dissertation focuses on how policymakers understood the threat of judicial review before review occurred. Chapters 4 and 5 illustrate how institutional and bureaucratic mechanisms enhanced judicial observer effects in US and UK national security policymaking and informed, though did not always substantively change, policies regarding torture and targeted killing.

Chapter 4. Judicial Observer Effects in the Executive Branch: Inter-Agency Interaction

1. Introduction

This chapter explores the judicial observer effect within the executive branch. The focus here is on the process of policymaking; that is, deliberations amongst relevant agencies creating national security policies and, eventually, implementing those policies. The goal is to illustrate how potential judicial review is understood by separate national security agencies. Relevant agencies may themselves be subject to different jurisdictions and foster different expertise that shape officials notion of judicial review; this results in respective agencies proposing policies that reflect their agency's position on judicial review.[1]

Throughout the course of policymaking (sometimes referred as policy setting), agencies interact with one another to debate and deliberate appropriate policy responses. This is both a formal and informal process. Interaction occurs formally through deliberations in established institutions, such as the US and UK National Security Councils; and it occurs informally through back channel discussion and internal communications.

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[1] A similar point is made by Abram Chayes regarding the Cuban Missile Crisis. He claims the various agency's involved preferred President Kennedy chose the policy that was proposed by their agency. The Departments of State, Defense, Central Intelligence, and others, compete for President to side with the policy from their respective department. This chapter takes a similar perspective; though, I am interested in how judicial review affects agencies differently and influences the policy options proposed to the President and Prime Minister.

The executive branch in the US and UK is composed of multiple agencies with various areas of expertise and responsibility within government; for national security, there are multiple agencies with military, legal, and foreign policy expertise that contribute and creating informed security policy. Executive agencies are not the only relevant actors in national security policy; the legislative branch is a significant component in monitoring budgets, providing oversight, and declaring war. However, the policy setting process for wartime policies on torture and targeting, and their legal frameworks, lie solely within the executive branch. Some argue the executive is the *de facto* authority for national security decisions as, "the executive's interpretation of its national security authority is therefore extremely significant and can often serve not only as one step in an inter-branch interpretive dance, but as lawmaking itself."[2] Executive branch lawyers have a vital role in national security policy making in their determination of the policy options available to policymakers and "if the lawyers say something is legal, government officials who act on that advice are safe from prosecution – even if the legal theories later are discredited and withdrawn."[3]

This chapter examines the interaction of executive agencies on the policies of torture and targeted killings. The goal is to capture how agency interaction in policy development brings legal accountability into the policy process. As will be shown, international and domestic legal obligations are extensively factored into agency discussions; but this chapter prioritizes how

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[2] Rebecca Ingber, "Interpretation Catalysts and Executive Branch Legal Decision-making," *Yale Journal of International Law* 38, no.2 (2013), pg. 361.
[3] Charlie Savage, *Power Wars: The Relentless Rise of Presidential Authority and Secrecy* (2015) pg. 38.

executive agencies understand the risk of accountability, and how that risk informs agency policy preferences.

Judicial observer effects vary between the issues of torture and targeted killing; yet in both cases, there is evidence of judicial review informing the policy process. Under the Bush administration, executive agencies were deeply divided and competitive on influencing national security policy on the issue of torture. After the attacks of 9/11, the stakes were high and policies on detainee treatment only occurred at a high-level of policymaking bypassing much of the bureaucratic infrastructure and disrupting established protocol. By contrast, under the Obama administration, policies on drone strikes and targeted killings had extensive agency cooperation and worked within bureaucratic structures. Despite the drone campaign initiating substantial pushback from the human rights community, the policy was entrenched in legal language and did not provoke the same distrust or outrage from allies.[4]

In the UK, agency interaction occurs nearly opposite from the US case. On torture, the Government launched extensive investigations and inquiries into British complicity or participation in the use of torture in interrogations. The Iraq Inquiry, which investigated Government decisions leading to the Iraq invasion in 2003, revealed how decentralized national security decision making was in 2003 and how executive agencies submitted preferred policy options that, in part, reflected agency understandings for the risks of legal accountability. Conversely, on British drone operations, there is substantial secrecy surrounding the existence of

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[4] See Savage (2015); for a human rights critique of the drone policies under the Obama administration, see Jameel Jaffer, *Drone Memos: Targeted Killing, Secrecy and the Law*, The New Press (2016).

a targeted killing program and invocation of the Government's professional privilege to keep the legal foundation classified. The uncertainty around the program, coupled with concern that the UK was assisting the US in their drone program, Parliament and numerous NGOs and media outlets launched investigations into British drone operations.

The results of these investigations suggest the risk of legal accountability is high for the UK operating drone strikes outside areas of active hostilities and in providing critical assistance to the US drone program. Cases which have come before English courts on British culpability in these drone operations illustrate the Government's reliance on the vitality of the US-UK intelligence relationship superseding legal accountability. One interpretation of British practices in drone operations is that legal accountability is a low priority as the Government continues to engage in uncertain practices around targeting suspected terrorists with drones; another interpretation is that legal accountability is a high priority and risk for the Government giving reason to execute the policies in secrecy and professional privileges.

The US and UK cases illustrate how interagency interaction functions as a mechanism for judicial observer effects to occur. This chapter shows that agencies formulate preferred policy options within the margins of their interpretation of probable judicial review. As agencies then interact with one another to develop an informed and measured state policy, diverse perspectives on the potential for judicial review facilitates boundaries of policymaking, contributing to the delineation effect of judicial review.

The rest of this chapter continues as follows. Section Two offers a brief description of how national security decisions are made in the US and UK. It illustrates the differences in structures and incorporation of international legal advice for each country, as well as recent

changes to the process in the United Kingdom. Section Three investigates the formulation of agency policy preferences. Beginning with policies regarding torture, it first examines the months following the 9/11 attacks. The US case shows how legal accountability was part of the debate surrounding the applicability of the Geneva Conventions to the conflict in Afghanistan and how each agency advocated for their preferred policy. It continues with a discussion of the evolution of the American torture program and how legal accountability was reflected differently in the Department of Defense (DOD), the Department of State (DOS) and to a lesser extent, the Central Intelligence Agency (CIA).

The UK case study begins with an illustration of agency interaction in the path to the Iraq invasion. It then turns to how the intelligence services, the Ministry of Defence (MOD) and the Foreign and Commonwealth Office (FCO) promoted legal accountability in their policy preferences. It looks at both British knowledge of torture in American detention facilities, and allegations of torture in British detention facilities. Policies on drone strikes follows a similar structure to the examination of torture, using as much information as is available to the public. The drone campaigns did not inspire the same level of Congressional and Parliamentary investigations, and interview participants were reluctant to speak about targeting practices. However, certain human rights organizations and few Parliamentary inquiries have uncovered enough information to draw substantial conclusions regarding legal accountability and targeting in drone campaigns. Finally, Section Four offers key conclusions of the chapter.

1.1. National Security Decision Making Processes

This section offers a brief description of key agencies and processes in creating national security policy in the US and UK. It offers a short synopsis of the executive agencies that are the focus of this chapter. However, it is not a comprehensive account of all national security agencies or their functions, but instead offers a foundation of context to serve as the bedrock for the analysis that follows.

1.2. National Security Decision Making in the United States

In the US, most of the authority to address threats to national security and war-fighting capability lies with the executive branch. Often, scholars describe the executive branch as a unitary actor; but in practice, it is a collection of decision makers with different, at times competing, preferences and interests.[5] The processes to address policies about detainee treatment and targeting involve a multitude of actors of different constellations (civilian-military; lawyer-non lawyer) that collectively compose the decision making process. "Determining the lawful parameters of executive action is only one piece of the policy decision making scheme. Yet because of the complexity and interconnectedness of law and policy in this arena, as well as the necessity for guidance on questions of legal policy in addition to those of pure legal

[5] Neomi Rao, "Public Choice and International Law Compliance: The Executive Branch is a "They," Not an "It," *Minnesota Law Review*, 387 (2011); John Yoo, "Administration of War," *Duke Law Journal*, Vol. 58, No. 8, (2009); see also generally Ingber (2013).

interpretation, executive branch lawyers play a critical role and their decisions and advice heavily inform the scope of options available."[6]

This chapter includes the Department of Defense (DOD), the Department of State (DOS), and to a lesser extent, the Central Intelligence Agency (CIA) in the analysis. The DOD (sometimes referred to exclusively as "the Pentagon") is home to the US military[7] and civilian command of military capabilities. The DOD mission is "to provide a lethal Joint Force to defend the security of our country and sustain American influence abroad."[8] The DOD has significant resources and global reach. In 2020, the DOD has a budget of $716 billion, comprised of 2.15 million service members and 732,079 civilians, has approximately 4,800 defense sites across the globe, and 11 unified combatant commands to centralize American military capability around the world.[9]

The President appoints the Secretary of Defense who functions as the civilian leader of the DOD. The Secretary of Defense also works with the Joint Chiefs of Staff (JCS), which is comprised of the most senior uniformed leaders from each branch of the US military. The JCS advises the President, the National Security Council (NSC), and other bodies on national security from the military perspective. The leader of the JCS is the Chairman of the JCS, the highest ranking and most senior military officer in the US military. Within the Office of the Secretary of

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[6] Ingber (2013).
[7] Including all six military departments: Joint Chiefs, US Navy, US Army, US Air Force, US Marine Corps, and US Coast Guard.
[8] https://dod.defense.gov/
[9] For more statistics, see https://www.defense.gov/Our-Story/. The 11 unified commands are: Africa Command, Cyber Command, Northern Command, Southern Command, Strategic Command, Central Command, European Command, Indo-Pacific Command, Special Operations Command, and Transportation Command.

Defense are other administrative offices including, DOD legal, DOD policy, Research & Engineering, Intelligence, among others. On national and international security matters, the DOD factors prominently in executive decision-making.

The DOS is primarily responsible for US diplomatic relations and US foreign policy more broadly. The DOS "leads America's foreign policy through diplomacy, advocacy, and assistance by advancing the interests of the American people, their safety and economic prosperity."[10] The DOS is responsible for a wide range of policy issues that includes issues of international and national security, human rights, and armed conflicts. The DOS annual budget is $54.2 billion, is comprised of roughly 13,000 Foreign Service officers, 11,000 civil service employees, and 45,000 local employees.[11] The DOS Office of the Legal Adviser is considered the foremost authority on matters of US policy and international law and is, typically, heavily involved in assessments and interpretations of US legal obligations under international law.[12]

The Central Intelligence Agency acts as the principle adviser to the President on intelligence and national security issues. As will be discussed in more detail below, the CIA involvement is directly involved with the policies and programs of interest in this research project. However, the focus is on military policies and legal accountability, thus I discuss CIA programs tangentially and to the extent necessary to understand the policy process of military policies.

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[10] https://www.state.gov/about/about-the-u-s-department-of-state/
[11] https://2009-2017.state.gov/m/dghr/workforce//index.htm
[12] Michael P. Scharf and Paul R. Williams, *Shaping Foreign Policy: The Role of International Law and the State Department Legal Adviser*, Cambridge University Press (2010).

The White House also contains national security agencies, the most significant being the NSC established in 1947. The NSC is the principle forum for the President to receive policy advice and information from senior national security advisers and cabinet officials.[13] The NSC also serves as the President's primary mechanism for coordinating policies among the executive agencies on national security policies. As such, the NSC is the centralized forum for policy exchange and development.

1.3. Caveat: DOD and CIA Parallel Programs

The two policies in the scope of this analysis, the torture policy and targeted killing policy (also simply called the "drone program"), had parallel operations by the CIA and DOD. As such, the CIA was central to US interrogation and targeting programs. The CIA programs were highly controversial for practices employed, lack of accountability, and criticism of the CIA operating outside their mission and traditional functions of intelligence gathering. President Bush's decision to turn to the CIA in the days following 9/11 (discussed further below) signaled the militarization and weaponization of the CIA in the 'global war on terror.' Instructing the CIA

[13] The President chairs the NSC. Its regular attendees (both statutory and non-statutory) are the Vice President, the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, and the Assistant to the President for National Security Affairs. The Chairman of the Joint Chiefs of Staff is the statutory military advisor to the Council, and the Director of National Intelligence is the intelligence advisor. The Chief of Staff to the President, Counsel to the President, and the Assistant to the President for Economic Policy are invited to attend any NSC meeting. The Attorney General and the Director of the Office of Management and Budget are invited to attend meetings pertaining to their responsibilities. The heads of other executive departments and agencies, as well as other senior officials, are invited to attend meetings of the NSC when appropriate. https://www.whitehouse.gov/nsc/.

to expand their role and adopt a more militarized function in the conflicts further contributed to an already complex relationship between the CIA and the military.[14]

The CIA and the DOD operated parallel detention/interrogation programs, occasionally on the same US bases. The CIA detention facilities are often called 'black sites' and there is limited information disclosed about these facilities. The Senate Report on CIA interrogation techniques revealed a substantial amount of information about locations and practices of CIA detention facilities, but there is still much unknown, redacted, and officially classified.[15] Additionally, the CIA launched a drone program parallel to the US military drone program. Eventually, these two programs were difficult to disentangle and used the same personnel and command structures.[16]

This dissertation primarily focuses on military policies of the US and UK, as such, the interrogation and drone programs of the CIA and British intelligence agencies (MI5 and MI6) are included to the extent necessary to understand the military policies. The ways in which the intelligence services of the US and UK interacted with, and influenced, military policies are striking; particularly from the perspective of legal accountability where intelligence officials fall outside the scope of the military justice system. The interaction and subsequent militarization of

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[14] For more on the CIA-DOD relationship, see David Oakley, *Subordinating Intelligence: The DoD/CIA Post-Cold War Relationship*, The University Press of Kentucky (2019); James Risen, *State of War: The Secret History of the CIA and the Bush Administration*, Simon & Schuster UK (2008).
[15] Senate Select Committee on Intelligence, "The Senate Intelligence Committee Report on Torture: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program," Released August 5, 2015. [Hereinafter the "Senate Torture Report"]
[16] Interview with former CIA official, November 2018.

intelligence agencies is deserving of further studies; however, is not addressed in the analysis further.

2.3. National Security Decision Making in the United Kingdom

National security decision making in the UK operates according to different processes and protocols than the US. Importantly, it has undergone significant changes in recent years. To mirror the US analysis, UK decision making focuses exclusively on the Ministry of Defence (MOD) and the Foreign and Commonwealth Office (FCO), and to a lesser extent, intelligence services that were actively involved in relevant policies.

Military policy planning is largely insular to the MOD. The MOD is one of 28 Ministerial agencies in the government and is responsible for "a secure and prosperous United Kingdom with global reach and influence. We will protect our people, territories, values and interests at home and overseas, through strong armed forces and in partnership and safeguard our prosperity."[17] The MOD is composed of four branches – the Royal Navy, the British Army, Royal Air Force, and Strategic Command.[18]

The MOD is composed of three groups – politicians, civil service, and the military. The Secretary of State for Defence (also called Defence Secretary) is a politician and the leader of strategic operations, defense planning and policy, and international partnerships. The Defence Secretary is a Senior Minister in the Cabinet and reports directly to the Prime Minister.

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[17] https://www.gov.uk/government/organisations/ministry-of-defence
[18] Ibid.

Civil servants are the longest-serving group of the MOD responsible for translating policy into practical programs and are accountable to Parliament for the allocation and utilization of defense funds. The civil servants also act as policy advisors to politicians and, higher ranking civil servants, operate alongside the military planners. This can lead to tension between the civil service and the military service and implicate policy.[19]

The military service is composed of the three branches of the British Armed Forces and the strategic command. Decision-making in the military service is similar to that of the US DOD. The top level, what the UK calls the grand strategic level, formulates policy goals at the cabinet-level. At the military strategic level, the Chief of the Defence Staff (CDS), who is the highest-ranking uniformed officer in the MOD, defines the policies into military objectives.[20] The role of CDS rotates within the three branches (Royal Navy, Royal Air Force, British Army) and works directly with the Defence Secretary. The CDS dispatches the military strategy to the operational commanders who make logistical and organizational decisions on how to achieve the strategic goals. The operational commanders dispatch the organizational decisions to battlefield commanders. The battlefield commanders are the lead decision makers at the tactical level.[21]

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[19] See Christopher L. Elliott, *High Command: British Military Leadership in the Iraq and Afghanistan Wars*, C. Hurst & Co. (2015) for a thorough account of inner workings of the MOD and tension between the civil service and the military service.
[20] The Chief of the Defence Staff is the equivalent to the Joint Chiefs of Staff in the DOD.
[21] Elliott (2015).

Defense spending in the MOD is roughly £38 billion (from 2018-2019) a large majority of which was dedicated to countering terrorism.[22] The MOD is comprised of roughly 192,000 military personnel and 57,000 civilian personnel.[23]

The FCO is also a ministerial department and "promotes the United Kingdom's interests overseas, supporting citizens and businesses around the globe."[24] The FCO is responsible for safeguarding Britain's foreign policy and diplomatic relations. It is home to the diplomatic service, but also has a fundamental role in British security policy. The Secretary of State for Foreign and Commonwealth affairs (called the Foreign Secretary) leads the FCO. Similar to the MOD, the FCO has a civil servant staff and the Permanent Under-Secretary for Foreign Affairs is responsible for day-to-day management. Similar to the US DOS, the FCO has a legal adviser office, which is the Government's authority on British obligations under international law.[25] Specifically, the FCO legal office deals with all issues of public international law (including the laws of war), European Union law, and international human rights law. The FCO acts as agents of the Government for all cases before the European Court of Human Rights (ECtHR).

In 2010, the UK established a National Security Council (NSC UK) to oversee all issues related to national security, intelligence coordination and defense policy. Before creating the council, it was difficult to obtain consensus because the process was composed of multiple

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[22]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831728/MOD_Annual_Report_and_Accounts_2018-19_WEB__ERRATUM_CORRECTED_.pdf. See page 16 for spending breakdown by issue area/conflict.

[23] https://www.gov.uk/government/statistics/mod-civilian-personnel-quarterly-report-2017

[24] https://www.gov.uk/government/organisations/foreign-commonwealth-office

[25] Scharf and Williams (2010). Despite the book focusing on the DOS Legal Adviser, the authors also spoke with legal advisors from allies, including the UK.

groups of officials. Prime Minister Cameron decided to centralize national security decision making with the NSC UK.

This section is a brief overview of relevant agencies, their respective resources available, and their roles in national security decision making. Before examining how these agencies interact, and how legal accountability is reflected in that process, I wanted to illustrate what actors are part of developing military policies in an armed conflict and the different interests that could be involved. In both the US and UK, the defense agencies and the diplomatic agencies often clashed over the appropriate policy response in war. These differences inspire agency cooperation and competition to ebb and flow. In Afghanistan and Iraq, the US and UK had many controversial policies that tested agency cooperation (and sometimes exacerbated competition); but importantly, legal accountability was understood differently by the agencies, and this filtered into the policy advocacy in the conflicts.

2. Inter-Agency Policy Preferences

This section takes the policies of torture and targeted killing to see the interaction within executive agencies. Executive agency interaction has attracted significant scholarly attention, particularly on "executive lawyering" – that is, the legal analysis and frameworks from lawyers in each agency.[26] Agency perspectives enrich our understandings of national security policies

[26] See for example Ingber (2013); Rao (2011); Chayes (1974); Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, Yale Law Journal 115, 2314, (2006); Treveor W.

because, "a decision is due, in large part, to the existence of numerous players – including legal players – within the executive who have distinct roles yet who overlap in their substantive interests, expertise, and spheres of influence. […] the decision-making mechanism, or process, employed and the identity and stature of the players involved and have a critical impact on the resulting decision…"[27]

Each of the agencies described above were involved with policies surrounding torture and targeting in the US and UK. As will be clear, the architecture and context of the policies is different for each country. In the US, for example, legal accountability was a key feature in the deliberations about the applicability of the Geneva Conventions in Afghanistan. By contrast, the UK never debated the applicability of Geneva for British military operations – the context that dominated British deliberations was how human rights law applied to extraterritorial military operations and the legality of the operations themselves. I discuss each context below.

2.1. Policies on Torture

Torture is illegal for both the US and UK.[28] The program that emerged in the United States on detainee treatment was officially the "enhanced interrogation technique" (EIT) program. The program focused on harsh interrogation techniques to coerce detainees to

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Morrison, "Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation," 124 *Harvard Law Review*, 62, 63 (2011); Richard Pildes, "Law and the President," 125 *Harvard Law Review* 1381, (2012).

[27] Ingber (2013), pg. 368.

[28] See Chapters 1 and 2 for extensive discussions regarding the legal prohibition on torture.

divulging intelligence that would prevent another terrorist attack. This program was arguably the most controversial feature of the Bush administration and negatively affected US relations around the globe.

2.1.1. United States

The debate about the Geneva Conventions illustrated inter-agency dynamics. The decision regarding the applicability of the Geneva Conventions to the conflict in Afghanistan set the tone for American military operations for the next fifteen years, and caused significant conflict among US executive agencies.[29] The Office of Legal Counsel (OLC) in the Justice Department argued the protections afforded by the Geneva Conventions, specifically Prisoner of War (POW) status, were not applicable to the Taliban or al Qaeda. However, the OLC said, as a matter of policy, the President had the authority to decide to apply the Geneva Conventions, but was not legally obligated to do so.[30]

DOD legal and the JAG corps supported the applicability of Geneva to both Taliban and Al Qaeda arguing the Geneva Conventions were customary international law (thus binding on the United States).[31] The DOD also argued that a decision to reject the application of the Geneva Conventions would put American troops at risk.[32] The State Department agreed with the DOD,

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[29] Jack Goldsmith, *The Terror Presidency: Law and Judgement Inside the Bush Administration* (2007); John Yoo, *War By Other Means: An Insider's Account of the War on Terror*, (2006); Rao (2011), pgs. 195-6.
[30] Memorandum from Jay Bybee for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of DOD, "Applicability of Treaties and Laws to al Qaeda and Taliban detainees." January 22, 2002.
[31] Yoo (2009); interview with former DOD legal official, January 2020.
[32] Ibid.

but said, among other reasons, applying the Geneva Conventions give more credibility to the coalition and reassurance to international partners.[33]

The DOS was the biggest advocate for applying the Geneva Conventions. William H. Taft IV, DOS Legal Adviser, was direct in challenging the OLC interpretation of the Geneva Applicability. A memo to Alberto Gonzales, Counsel to the President, Taft said,

> The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the [US] in introducing its forces into conflict over fifty years. It is consistent with the advice of DOS lawyers…and the position of every other party to the Conventions…A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections accorded by the Conventions to our troops in future conflicts.[34]

President Bush ultimately agreed with the OLC recommendation; he decided the Geneva Conventions do not apply to al Qaeda, as they are not a state, and thus, cannot be a state party to the treaty. Similarly, President Bush determined members of the Taliban to be "unlawful combatants" and not eligible for POW protections. Of course, it is the nature of government decision-making in any arena to disagree and advocate for diverse agency interests and in one sense, the Geneva example is not extraordinary. Nevertheless, bureaucratic competition or cooperation on policies such of this determined the nature of an armed conflict and had national security consequences that are still playing out today. This decision regarding Geneva had

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[33] Memorandum from Colin L. Powell to Counsel of President and Assistant to the President for National Security Affairs, "Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan," January 2002.
[34] Memorandum from William H. Taft, IV to Counsel to the President, Re: Comments on Your Paper on the Geneva Conventions, February 2, 2002.

strategic and legal consequences for the US and its allies; not the least of which was the creation and escalation of the Enhanced Interrogation Techniques (EIT), or also known as the torture program.

In 2003, leaked pictures from a detention facility in Iraq, Abu Ghraib, prompted international outrage regarding the treatment of detainees in American military detention facilities. The pictures demonstrated what had long been a cabinet-level debate within the Bush administration. The pictures of Abu Ghraib put the torture program in global headlines, but it was an issue acknowledged within the administration much earlier.

The US torture program is a defining feature of the US war on terror. Before the attacks of 9/11, intelligence interrogations were regulated by the standards set out in the Army Field Manual 34-52 (FM 34-52). The FM 34-52 was, until 2002, the source for all approved interrogation techniques for human intelligence (HUMINT) gathering. These standards applied to all military personnel, regardless of the legal status of the detainee or the presence of an armed conflict.[35] In 1992, FM 34-52 updated to incorporate lessons learned from the 1991 Gulf War in which prioritized reliability and legality.[36] The manual is impacted an informed by US legal obligations under the Geneva Conventions. "It [FM 34-52] prohibited the use of force, meaning all acts of violence or intimidation, including 'physical or mental torture, threats, insults, or

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[35] Note the Army Field Manual only applies to US armed forces and does not apply to non-military intelligence services, like the CIA. The CIA had their own manual outlining agency accepted interrogation techniques.
[36] Phillipe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values*, St. Martin's Press, (2008), see especially Chapter 2.

exposure to inhuman treatment as a means of or aid to interrogation.'"[37] FM 34-52 consistently reiterates US military commitment to lawful interrogation measures as a matter of utility and values; it unambiguously states "the barbarity of the enemy did not justify using illegal methods."[38]

As interrogations began in the context of the post-9/11 conflicts, DOD officials became impatient with FM 34-52. In the fall of 2002, DOD memos proposed expanding the approved interrogation techniques suggesting that FM 34-52 had reached its limit in the field. One memo for the Chairman of the Joint Chiefs of Staff read, "despite our best efforts, some detainees have tenaciously resisted our current interrogation methods."[39] The proposal for new interrogation techniques refers to FM 34-52 as having limited success, "I am fully aware of the techniques currently employed to gain valuable intelligence in support of the Global War on Terrorism. Although these techniques have resulted in significant exploitable intelligence, the same methods have become less effective over time."[40]

The new DOD interrogation policy changed in December 2002 and was applicable to detainees at Guantanamo Bay.[41] The new guidelines contain three categories of techniques. The first category are the least severe techniques, and where interrogators should initiate questioning.

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[37] Ibid.
[38] Ibid.
[39] Memorandum for Chairman of the Joint Chiefs, from General James T. Hill, "Counter-Resistance Techniques" October 25, 2002.
[40] Memorandum for Commander, United States Southern Command, from Major General Michael Dunlavey, "Counter-Resistance Strategies" October 11, 2002.
[41] Action Memo for Secretary of Defense, from DOD General Counsel William J. Haynes II, "Counter-Resistance Techniques". These techniques were later brought to other DOD detention facilities (such as Abu Ghraib) after DOD officials determined their success in gaining reliable intelligence.

It requires interrogators to provide a chair and a "generally comfortable environment."[42] The use of treats (like cookies or cigarettes) are suggested to establish good will with the detainee. If these efforts fail, Category I authorized two techniques: the use of deception (such as claiming to be an interrogator from a foreign nation); and yelling (though not directly in the ear).[43] If Category I techniques did not produce results, interrogators moved to Category II.

Category II includes twelve techniques but required *ad hoc* authorization from senior military officers. These included, *inter alia*, stress positions for up to 4 hours, isolation for up to 30 days, 20-hour interrogations, and forced grooming (such as shaving of facial hair).[44] These techniques intended to humiliate and put the detainee under significant stress.

Category III are the techniques that involve physical contact and always required approval from the Commanding General at Guantanamo Bay. The memo claims Category III techniques would only be necessary for a "very small percentage of the most uncooperative detainees (less than 3%)."[45] There are four techniques in Category III: (1) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for

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[42] The three categories are included in Memorandum for Commander, Joint Task Force 170 from Jerald Phifer, "Request for Approval of Counter-Resistance Strategies" October 11, 2002. [Declassified under Executive Order 12958].
[43] Ibid.
[44] Ibid. The full 12 techniques are: (1) the use of stress positions (like standing), for a maximum of 4 hours; (2) The use of falsified documents or reports; (3) Use of isolation facility for up to 30 days (request must be made through OIC, Interrogation Section…extensions beyond the initial 30 days must be approved by Commanding General; (4) Interrogating the detainee in an environment other than the standard interrogation booth; (5) Deprivation of light and auditory stimuli; (6) The detainee may have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainees should be under direct observation when hooded; (7) The use of 20 hour interrogations; (8) Removal of all comfort items (including religious items); (9) Switching the detainee from hot rations to MRE [meals ready to eat]; (10) Removal of clothing; (11) Forced grooming (having of facial hair, etc.); (12) Using detainees individual phobias (such as fear of dogs) to induce stress).
[45] Ibid, pg. 2.

him and/or his family; (2) Exposure to weather or water (with appropriate medical monitoring); (3) Use of a wet towel and dripping water to induce the misperception of suffocation (commonly called 'waterboarding'); (4) Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger and light pushing.[46]

The interrogation techniques for Guantanamo Bay clearly depart from the techniques of FM 34-52. One reason was, as already discussed, DOD officials believed the techniques of FM 43-52 were losing their effectiveness and interrogators needed more tools at their disposal in tactical questioning. Another reason is outlined in the legal brief on the proposed interrogation strategies for Guantanamo.[47] DOD lawyers concluded,

> "While the procedures outlined in Army FM 34-52 Intelligence Interrogation (September 28, 1992) are utilized, they are constrained by, and conform to the GC [Geneva Convention] and applicable international law, and therefore are not binding. Since the detainees are not EPW [enemy prisoner of war] the Geneva Conventions limitations that ordinarily would govern captured enemy personnel interrogations are not binding on US personnel conducting detainee interrogations at GTMO [Guantanamo Bay]. Consequently, in the absence of specific binding guidance, and in accordance with the President's directive to treat the detainees humanely, we must look to applicable international and domestic law in order to determine the legality of the more aggressive techniques recommended in this proposal."[48]

2.1.1.1. Department of Defense & Central Intelligence Agency

Department of Defense detention facilities used these interrogation techniques approved by the Bush administration. Military officials used the techniques in Guantanamo Bay, as the memos suggest, and in other facilities like Abu Ghraib, as photos suggest. There were divisions

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[46] Ibid.
[47] See Memorandum for Commander, Joint Task Force 170 from Diane E. Beaver, Staff Judge Advocate, "Legal Brief on Proposed Counter-Resistance Strategies," October 11, 2002.
[48] Ibid, para. 3.

within the DOD on harsh interrogation techniques, and disagreement about the legal framework regulating these practices. Divisions also existed among senior leadership and commanders in theater who were required, as will be shown, to make their own legal determinations while administration officials were still deliberating and formulating policy.

Officially, the DOD advocated for a policy that applied the Geneva Conventions to the 'war on terror' conflicts.[49] Senior DOD leadership consistently internally challenged the use of harsh or abusive interrogation techniques and shared those concerns with Secretary of Defense Rumsfeld.[50] "In the DOD there was unanimous agreement among the JAGs to return to the Geneva Conventions. The lawyers in the military were never even consulted when the Yoo memo was issued. They were blindsided."[51]

In early 2002, when the administration's legal offices were still working out the details of the Geneva Conventions, troops already deployed determined appropriate interrogation methods.[52] Bagram airbase in Afghanistan was a vital detention facility for gathering human intelligence (HUMINT) and one of the first established in the region.[53] Early crews at Bagram were not supplied with many answers regarding the limits of the Geneva Conventions and what techniques were permissible under US policy.

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[49] Yoo (2009).
[50] Interview with senior DOD legal official, January 2020.
[51] Interview with senior DOD legal official, January 2020.
[52] See Greg Miller, "Bound by Convention" *Stanford Magazine* (Nov./Dec. 2004) for accounts of how crew chiefs had to decide interrogation techniques and legal standards for themselves.
[53] Bagram air base was among the first detention facilities to open in Afghanistan and was a vital facility in the larger detention network that included Guantanamo and, later, Abu Ghraib. Before Bagram facilities were available, troops used a facility in Kandahar located in Southwest Afghanistan. Bagram facilities were critical for both US military and CIA intelligence interrogations. (Miller 2004).

> The Bagram crew [DOD interrogators] and their immediate officers were largely left on their own to sort out how far they could go within the constraints of the Geneva Conventions. What they didn't know was that a similar debate was simultaneously playing out in Washington…lawyers from the Pentagon, the CIA, the Justice Department and the White House were crafting memos defending harsh methods such as the use of dogs and stripping of detainees, and generally making the case that physical coercion might, in certain circumstances, be legally defensible.[54]

Reserve sergeant Chris Mackey, crew chief at Bagram in early 2002, spoke about the difficulties in interrogation techniques before the administration had formulated official policy. The Army interrogation training program was designed to extract tactical information from other uniformed soldiers (who were easy to identify and sort amongst each other) and the techniques presumed interrogation cooperation.[55] "Instruction focused more on knowing what to ask than on how to break a prisoner's will."[56] Interrogators in Bagram faced detainees that were 'uncooperative' and knowledgeable on how to effectively confuse interrogators.[57] Eventually, US Special Forces uncovered a document which was brought to Sergeant Mackey at Bagram that was an al Qaeda training manual on resisting interrogation and detailed the exact tactics interrogators had thus far encountered.[58] In an attempt to thwart the deception tactics in the al

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[54] Greg Miller, "Bound by Convention" *Stanford Magazine* (Nov./Dec. 2004)
[55] Military uniforms have symbols that indicate their rank and experience in the armed forces. The training program calls for separation of high-ranking officers from lower level commanders for the purposes of intelligence gathering. In Afghanistan, there was no way to make these determinations and left interrogators uncertain as to who, exactly, they were interrogating and the level of knowledge they should expect to gain through interrogation.
[56] Miller (2004), pg. 4.
[57] Ibid.
[58] Ibid. "The manual practically taunted the interrogators, saying prisoners had little to fear in US custody, that Americans were weak and disinclined to use the harsh methods employed by Middle East countries. Indeed, it urged prisoners to bait American interrogators into physical confrontations, saying bruises or broken bones witnessed by the Red Cross could create an international outcry…interrogators did take advantage of one of the manuals inadvertent disclosures – that even if Arab prisoners were not frightened of Americans, they were terrified of being sent back to their home countries, especially Egypt, Jordan and Saudi Arabia." Pg. 5.

Qaeda manual and stay within the boundaries of US legal requirements, Sergeant Mackey developed an interrogation tactic called "Monstering."[59] Interrogators realized detainees began to slip and make mistakes in questioning as they got more tired. But sleep deprivation was not yet authorized as a legitimate interrogation technique.[60] To maneuver these restrictions, "monstering" was where "a prisoner could be kept awake and in the booth for as long as an interrogator could last. There could be no tag-teaming or substitutions. If the interrogator took a break, the prisoner got one too. Technically, the method was sleep deprivation, but it was considered defensible because the interrogator was being deprived of as much sleep as the prisoner."[61]

The 'monstering' technique shows how commanders in the field operated within their perceived parameters to extract the necessary intelligence and to respect the rules that applied. Subjecting both detainee and interrogator to the same method seemed a way to operate within the boundaries. When a policy was formulated in Washington, a journalist that had spent a significant amount of time at Bagram with Sergeant Mackey and his crew said, "…the lawyers in Washington saw more latitude than the soldiers [for what was permissible in interrogations.] Looking back through the lens of Abu Ghraib, the debates that took place among the interrogators at Bagram in early 2002 seem enlightened."[62]

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[59] Miller (2004).
[60] The use of prolonged interrogations (up to 180 hours in some CIA facilities) was authorized as a Category II technique by the DOD. Memorandum for Commander, Joint Task Force "Re: Request for Approval of Counter-Resistance Strategies," October 11, 2002. See also The Senate Torture Report for details on CIA use of sleep deprivation.
[61] Miller (2004), pg. 6 -7.
[62] Miller (2004), pg. 7.

At the senior military level, there was pushback against the use of the 'enhanced interrogation techniques' for fear of reciprocation on American soldiers captured by the enemy and the overall disadvantages of abusive techniques. And yet, DOD detention facilities experienced torture and leadership authorized harsh techniques.

> Torture was both official and unofficial; necessary and legal. There was torture at almost all levels, and it was known. For example, General McChrystal was briefed by [Michael] Flynn that significant abuse was happening at all levels and in many units. Flynn also did a study that found a negative correlation between brutality and effectiveness [of gaining reliable intelligence]. Essentially, the units that had a culture of non-brutality were far more effective because they were able to form better relationships with the community and build rapport. The units that were brutal were not trusted by anyone.[63]

Senior DOD officials that disagreed with the techniques used battlefield effectiveness and strategic considerations as evidence for a change in policy, not legal obligations. Flynn's study on the negative correlation of effectiveness and techniques spread quickly throughout the Pentagon.[64] And the DOD joined with the other executive agencies to monitor the success of US counter-terrorist strategy. One inter-agency meeting to calibrate US counter-terrorist strategy found that the torture program was the number one recruitment tool for foreign fighters.[65] "They found [at this meeting] that foreign fighters were responsible for 80-90% of US combat deaths in Iraq. They realized this was a big problem. The effectiveness argument is what got senior military leaders to get torture out."[66] The decision to eradicate torture from US counter terrorism strategy was not for legal reasons, but for battlefield effectiveness.

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[63] Interview with DOD official, January 2020.
[64] Interview with DOD official, January 2020.
[65] Ibid.
[66] Ibid.

In some instances, DOD policies reflected a need to operate facilities in legal limbo. The decision to use Guantanamo Bay as a military detention site was strategic for its proximity to the US and being located outside US federal jurisdiction. Originally, the DOD considered overseas bases as primary holding places for detainees (as Bagram Air Base was one of the main detention sites for the region). However, concerns existed that federal jurisdiction would cover activities at these facilities. "Ultimately, Guantanamo Bay was chosen as the detention facility because it was only 100 miles from the Florida coastline, it had the necessary infrastructure, and it was considered to be outside US legal review. I would not say judicial review was the primary concern, but it was part of it."[67]

While the primary concern of DOD was in-theater concerns, the risk of legal accountability was also present. DOD acknowledged that legal novelties of the conflicts in Afghanistan and Iraq were making them vulnerable to judicial review. Nevertheless, the overall perception was that "in an armed conflict, courts and judges don't get involved."[68] DOD lawyers relied on the military deference doctrine if DOD policies were to reach judicial review. If the court departed from military deference and engaged in review then, "the strategy would be to blame the courts for giving rights to terrorists. This [from the DOD perspective] may be enough of an incentive for courts to fall on military deference and avoid the legal review issue all together."[69] Legal obligations were part of the concerns for the DOD and the risks for overseas

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[67] Interview with senior State Department Official, March 2020.
[68] Interview with senior State Department Official, February 2020.
[69] Interview with senior State Department Official, February 2020.

personnel in mitigating the consequences of risky policies. Legal accountability more subtle, and largely tangential, in informing DOD policies.

The DOD-CIA relationship is important to understanding the evolution of torture and legal accountability. Secretary of Defense Donald Rumsfeld and CIA Director George Tenet had a skeptical personal relationship, and the consequences of that are evident in the torture program.[70] Immediately following 9/11, President Bush turned to George Tenet as a primary advisor. The CIA had a deeper knowledge of al Qaeda and conditions emerging in Afghanistan; agency officers had intelligence contact with leaders of main Taliban opposition group, the Northern Alliance, shortly before 9/11.[71] The Pentagon had minimal information about the political conditions in Afghanistan and "Rumsfeld…was deeply embarrassed that CIA officers were on the ground first, before the US military, and that they were on hand to welcome Special Forces troops as they arrived in the country."[72]

The special relationship between President Bush and George Tenet, coupled with CIA resources regarding conditions on the ground, contributed to the President's decision to turn to the CIA for a covert interrogation program. A Memo of Notification (MON) signed by President Bush on September 17, 2001, authorizes the CIA to "undertake operations designed to capture

[70] Interview with former State Department Official, January 2020; see also Risen (2006).
[71] James Risen, *State of War: The Secret History of the CIA and Bush Administration*, Free Press (2006).
[72] Risen (2006), 19.

and detain persons who pose a continuing, serious threat of violence or death to US persons and interests or who are planning terrorist activities."[73]

When the President was grappling with opposing legal analysis from his advisors on the applicability of the Geneva Conventions, President Bush declared, "I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."[74] Intelligence services and their interrogation programs were deliberately left out of this memo and were thus not bound by its restrictions.[75]

The CIA interrogation program had negative implications for the CIA-DOD relationship that was already tenuous at best.[76] "Donald Rumsfeld was threatened by Tenet and his interrogation program. He [Rumsfeld] wanted the military to be the ones responsible for getting the intelligence that saved the US from another 9/11. There was a lot of agency competition on this."[77] The military interrogation program and the CIA interrogation program functioned

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[73] Special Review from Office of Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001-October 2003) (2003-7123-IG) May 7, 2004. https://www.cia.gov/library/readingroom/docs/0005856717.pdf

[74] Memorandum from the White House to The Vice President, The Secretary of State, the Secretary of Defense, The Attorney General, Chief of Staff to President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff, "Re: Humane Treatment of al Qaeda and Taliban Detainees," February 7, 2002.

[75] Interview with senior State Department Official, January 2020.

[76] Ibid.

[77] Interview with senior State Department Official, January 2020.

independently and parallel to each other.[78] In some cases, their detention facilities were on the same base, or similar location, and whether a detainee landed in the CIA facility or the DOD facility was chance. "You had places like Bagram where there was a DOD detention facility, a CIA detention facility,[79] and a DIA [Defense Intelligence Agency] facility. They were operating separately but sharing brutal techniques. If this guy is doing one thing at CIA, then DOD is like 'oh we need to do it too.'"[80]

Agency competition, which stemmed directly from Rumsfeld and Tenet, was one element perpetuating the torture program, perhaps even escalating it; but legal accountability contributed to setting parameters of this bureaucratic competition and potential escalation.[81] Before the original OLC memos authorizing interrogation tactics which later were recognized as torture[82] the CIA requested legal immunity before launching the interrogation program.[83] "Tenet was worried his men would be held accountable and wanted assurance the administration would have his back. That's when the OLC is contacted and the Yoo memo is issued."[84] The Senate Torture

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[78] Senate Report on CIA torture (page 6). One of the conclusions of the report is the withholding of information. The CIA "impeded the national security missions of the other Executive Branch agencies" often with disastrous policy implications. In one example, the report mentions how the CIA blocked the knowledge of black sites from two Secretaries of State, and the ambassadors of the countries where the black sites existed. Often the State Department entered foreign policy negotiations with no knowledge of the CIA site, while their counterparts were all aware of the agreements. (see page 6-7 of Findings and Conclusions).

[79] CIA "black site" at Bagram reported by Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," The Washington Post, December 26, 2002.

[80] Interview with high-ranking State Department official, January 2020.

[81] See also Risen (2006) for a journalistic account of the DOD-CIA relationship.

[82] Within two in office, President Obama signed an executive order (EO 13491 "Ensuring Lawful Interrogations") which compels US armed forces and US intelligence agencies to conduct intelligence interrogations in compliance with US treaty obligations, notably the Geneva Conventions. It directs all agencies to return to the interrogation methods of FM 34-52.

[83] Interview with high-ranking DOS official, January 2020.

[84] Interview with high-ranking DOS official, January 2020.

Report acknowledged "…the legal justifications for the CIA's enhanced interrogation techniques relied on the CIA's claim that the techniques were necessary to save lives…CIA attorneys stated that 'a novel application of the necessity defense' could be used 'to avoid prosecution of US officials who tortured to obtain information that saved many lives.'"[85] In response, the OLC determined, "under the current circumstances, necessity or self-defense may justify interrogation methods that might violate the criminal prohibition against torture."[86]

Despite functioning separately, there was a degree of interaction between CIA and DOD interrogation programs. In some instances, the CIA transferred detainees to military custody out of accountability concerns.[87] For example, in January 2004, the International Committee for the Red Cross (ICRC) wrote to the US that it was aware of unacknowledged detainees in US custody in country [REDACTED].[88] The CIA misrepresented many interrogation techniques to the DOJ and the DOD and was adamant that external oversight should be avoided.[89] ICRC intervention compelled the CIA to release 5 detainees from US custody and transfer in March 2004 at least 25 detainees to the US military detention program and to foreign governments.[90] For at least one detainee in this transfer, Ali Jan, the CIA provided the DOD with false information and intelligence about him forcing the DOD to release him four months later in July 2004. Instances

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[85] Senate Select Committee on Intelligence, *Official Senate Report on CIA Torture*: *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, pg. 5 of "Findings and Conclusions."
[86] The Torture Report, pg. 5 of "Findings and Conclusions."
[87] The Torture Report, pg. 120.
[88] Ibid.
[89] The Torture Report discusses years of CIA misrepresentation to other agencies of the executive branch. For a general description of this strategy, see #7 and #8 of the Committee's "Findings and Conclusions" pgs. 6-7.
[90] The Torture Report, pg. 119.

like this continued to sour the relationship. In the face of ICRC calls for access to US detention facilities, Paul Wolfowitz urged the CIA to permit ICRC access. A CIA internal email revealed "the DOD is tired of 'taking hits' for CIA 'ghost detainees.' And that the US government, 'should not be in the position of causing people to 'disappear.'"[91]

The CIA's Office of the Inspector General (OIG) was tasked with ensuring the CIA conducted interrogations lawfully and within the parameters authorized by the US government. This included investigating accountability for interrogators that went beyond interrogation methods authorized by CIA headquarters. Within the CIA, "there is certainly a shadow of accountability. There is enough of a precedent since WWII that it is at least in the room and keeps people on their toes."[92] The OIG even "received information that some employees were concerned that certain covert Agency activities at an overseas detention and interrogation site might involve violations of human rights."[93] For some interrogators, challenges to the interrogation tactics were not welcome by senior Agency officials. "I didn't always feel comfortable with the interrogation tactics I was told to use. When I asked if this violated the Geneva Conventions, I was asked point blank, 'which flag do you serve?' At that point you shut up. But I did consult an attorney for personal protection."[94]

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[91] The Torture Report, Pg. 121; Email from [Redacted] to John Rizzo; "DoD's position on ICRC notification" September 13, 2004. Despite the internal dissent on how to handle the ICRC request for detention facility access in January 2004, the US did not respond to the ICRC until June 2005.
[92] Interview with intelligence official, November 2018.
[93] The Torture Report, pg. 121; first reported by OIG in Special Review, Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003) (2003-7123-IG) May 4, 2004.
[94] Interview with intelligence official, November 2018.

Domestic legal accountability seems to have a tangential role in the impacting policy preferences. The Guantanamo Bay location for the facility indicates the threat of judicial review is part of policy considerations in creating as much flexibility as possible, but priorities like battlefield effectiveness outweigh legal accountability. This is intuitive – the purpose of the DOD is to be effective in military operations; but these illustrations also demonstrate how domestic legal accountability enters the conversation and policy deliberations from the perspective of the DOD. The agency competition between the DOD and CIA has a significant role in the development and implementation of US torture policies; and legal accountability contributed to establishing parameters of agency policies.

International and foreign legal accountability does not have a substantial presence in informing DOD policy preferences. "We did not consider much about international courts, including the international criminal court. There is a sense of the ICC being important to coalition partners; but on the US directly, it just wasn't there."[95]

2.1.1.2. Department of State

There is substantial documentation that the DOS protested early decisions of the Bush administration out of concern of fostering cooperation with foreign partners.[96] The DOS urgency to recognize the application of Geneva Conventions and their status as customary international

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[95] Interview with high-ranking DOD official, October 2018; See Chapter 4 for an extensive discussion on how the coalition increased considerations of legal accountability.
[96] Yoo (2009); Rao (2011); Ingber (2013).

law resulted in the DOS, and Secretary of State Colin Powell specifically, being excluded from the planning and implementation of the interrogation program.[97] For example, an internal memo from the White House to George Tenet details instructions to "keep the program [CIA black sites] secret from then-Secretary of State Colin Powell out of concern he would 'blow his stack if he were to be briefed on what's been going on.'"[98]

In early 2002, when the administration was still deliberating and debating the applicability of the Geneva Conventions to Afghanistan, declassified memos from Secretary Powell demonstrate DOS policy focal points. The memo details the pros and cons of applying the Geneva Conventions. But before weighing pros and cons, Powell makes it clear that regardless of the decision on Geneva, there are four advantages the United States holds:

> (1) both options provide the same practical flexibility in how we treat detainees, including with respect to interrogation and length of detention;
> (2) Both provide flexibility to provide conditions of detention and trial that take into account constraints such as feasibility under the circumstances and necessary security requirements;
> (3) Both allow us not to give the privileges and benefits of POW status to al Qaeda and Taliban;
> (4) Neither option entails any significant risk of domestic prosecution against US officials.[99]

Secretary Powell consistently refers to the risks of domestic and international prosecution in this memo. The fourth point shows Secretary Powell's understanding that if the President chose to recognize the application of Geneva, it does not "significantly risk" exposure of US

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[97] Rao (2011).
[98] The Senate Torture Report, pgs. 118-119; see also Julie Vitkovskaya, "What are Black Sites? 6 Things to Know About the CIA's Secret Prisons Overseas," *The Washington Post*, Jan 25, 2017.
[99] Memorandum to Counsel to the President and Assistant to the President for National Security Affairs, "Draft Decision Memorandum for the President on the Applicability of the Geneva Conventions to the Conflict in Afghanistan," January 26, 2002. [Hereinafter "Powell Memo"]

officials to domestic accountability. One of the themes in the memo is Powell raising the risk that if the President does not apply Geneva standards, the risk of foreign and international prosecution is higher. Powell argues the risks (or "cons") of rejecting the applicability of Geneva Conventions are:

- It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy.
- It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops.
- It will make us more vulnerable to domestic and international legal challenge and deprive us of important legal options:
    - it undermines the President's Military Order by removing an important legal basis for trying the detainees before military commissions;
    - We will be challenged in international for a (UN Commission on Human Rights; World Court; etc.)
    - The Geneva Conventions are a more flexible and suitable legal framework than other laws that would arguably apply (customary international human rights, human rights conventions). The GPW [Geneva on Prisoners of War] permits long-term detention without criminal charges…
    - Determining GPW does not apply deprives us of a winning argument to oppose habeas corpus actions in US courts.[100]

The threat of domestic and foreign prosecution plays heavily into foundations of DOS policy. The insistence that the cabinet-level deliberations take the risks of legal accountability seriously in a fundamental decision in the conflict is a testament to how observer effects were part of the State Department strategy.

[100] Powell Memo (2002), pgs. 2-3.

Within DOS, the Office of the Legal Adviser is central to US interpretation of international law. The Office of the Legal Adviser in DOS is composed of over 170 Attorney-Advisers and,

> Furnishes advice on all legal issues, domestic and international, arising in the course of the Department's work. This includes assisting Department principles and policy officers in formulating and implementing the foreign policies of the United States and promoting the development of international law and its institutions as a fundamental element of those policies.[101]

The office of the legal adviser has a significant mission – to ensure US compliance with international law and to incorporate international legal norms within government and abroad.[102] "The US government internally spent a lot of time on which legal rules apply to al Qaeda and the conflict in Afghanistan; as early as Fall 2001. We [DOS] talked a lot about the domestic and international courts that could affect US operations. For example, on detention, the DOD was aware that there was a vulnerability to litigation. At State, we were advocating for an internal review [on detention status] to keep this out of the courts. We kept telling them [other agencies] – we don't want to tempt getting the courts involved."[103]

In the early days of the Bush administration, and as the Powell memo illustrates, the State Department was often on the losing side of the argument. DOS Legal Adviser Taft said, "During the days and weeks after September 11, the Legal Adviser's Office worked with lawyers in the White House Counsel's Office, the Department of Justice, and the Department of Defense to

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[101] Office of the Legal Adviser, U.S. Department of State., http://www.state.gov/s/l
[102] Richard B. Bilder, "The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs," *American Journal of International Law* 633 (1962); see also Rao (2011).
[103] Interview with high ranking State Department official, February 2020.

establish the legal basis for military operations we expected might be necessary…we were also in touch with lawyers in allied governments to share our understanding of their treaty obligations in the circumstances [such as NATO]."[104] The initial planning phases of military operations were functionally a collective effort of the executive agencies. But the internal disagreements fractured the legal interpretation.

> It is now well known that the Attorney General [OLC] advised the President that the Geneva Conventions did not apply to the conflict with al Qaeda or the Taliban and that captured members of these organizations were not entitled to any rights beyond what the President decided to provide them as a matter of policy. I reviewed this conclusion with the office staff [at the State Department] and we did not agree with it. Accordingly, I advised the Secretary [Powell] that the Conventions did apply to the conflict with the Taliban and, originally, that because our conflict with al Qaeda was part of the conflict with the Taliban, the Conventions applied to it also…the President had decided to apply the Conventions to the conflict with the Taliban as a matter of policy, so our differences with the Attorney General appeared to have been resolved. Regrettably, however, this seeming agreement was an illusion.[105]

Policy deliberations excluded the DOS at the cabinet level and in legal circles. President Bush's decision that the US would apply the Geneva Conventions as a matter of policy[106] the DOS believed their legal interpretation prevailed. "We thought that because it was our policy to treat the detainees consistent with the Conventions that it was being done. It developed, however…the DOJ lawyers were working separately with DOD lawyers to authorize certain

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[104] William H. Taft IV, "The Bush (43rd) Administration – William H. Taft IV (2001-2005)" in *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser*, Michael Scharf and Paul R. Williams, pgs. 127-128.

[105] Taft (129). "…On further consideration, we determined that the conflict with al Qaeda could be viewed as distinct from the conflict with the Taliban and came to agree with the Attorney General that the Conventions did not apply to it."

[106] See Memorandum from The White House, To: The Vice President, The Secretary of State, The Secretary of Defense, The Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and Chairman of the Joint Chiefs of Staff, "Re: Humane Treatment of al Qaeda and Taliban Detainees," February 7, 2002.

departures from the Conventions' terms in the treatment of detainees…my staff and I were not invited to review this work and we were, indeed, unaware of it being done."[107]

The backlash political backlash of the torture program compelled President Bush to change the way the State Department was included in key national security decisions during his second term.[108] From 2005-2008, the State Department took the lead in reversing first-term policies and re-calibrating inter-agency disputes. The DOS arranged for the ICRC to access CIA and DOD detention facilities and encouraged greater dialogue with foreign partners on US policies and legal interpretation.[109] In the second term, the DOS also fostered a better relationship between the United States and ICC; largely through offering US assistance on ongoing ICC investigations. But this did not translate into impact of the ICC on US policies. "There was little-to-no concern about the ICC [investigating US torture policies]. Even in Afghanistan."[110]

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[107] Taft, 130.
[108] John Bellinger, Legal Adviser for Bush's second term said, "During my tenure as legal adviser, L's relations with the OLC at the Justice Department and the Office of the General Counsel of the Defense Department – which had been strained during the first term, largely because of OLC's preparation of a number of memoranda for the Defense Department and the White House on international law issues without the involvement, or over the objections, of L's lawyers – also improved." See John Bellinger, "Bush 43rd Administration – John B. Bellinger III (2005-2009) in *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser*, Michael Scharf and Paul. D. Williams, pg. 138.
[109] Ibid.
[110] Interview with senior State Department official, February 2020.

2.1.2. United Kingdom

The "special relationship" between the US and UK shaped part of British foreign policy and was undoubtedly a motivating factor in supporting US military aspirations in Iraq. Prime Minister Tony Blair instructed his cabinet, "I tell you we must steer close to America. If we don't, we will lose our influence to shape what they do."[111] Tony Blair's foreign policy adviser, David Manning, said, "At the best of times, Britain's influence on the US is limited. But the only way we exercise that influence is by attaching ourselves to them and avoiding public criticism wherever possible."[112] But when it came to in-theater decisions, British intelligence agents told some British detainees reporting American interrogation tactics, "It's all in the hands of the Americans'…they're calling the shots."[113]

2.1.2.1. Background and Concerns of Iraq Invasion

The Iraq Inquiry (also known as the Chilcot Report or Chilcot Inquiry) was a massive effort of oversight into the British decision to support the United States in invading Iraq in 2003. The inquiry gathered substantial evidence detailing the steps in a major national security decision. The committee held oral testimonies as well as written evidence from multiple agencies and in aggregate, the testimonies detail agency interaction on regarding the decision to invade Iraq. The Iraq invasion is the purpose of the committee's inquiry; however, there is testimony

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[111] Alex Danchev, "Accomplicity: Britain, Torture and Terror," *BJPIR* Vol. 8 (2006), 588; Robin Cook, *Point of Departure: Diaries from the Front Bench*, Simon and Schuster (2004), 116.
[112] Danchev (2006), 588; John Kampfner, *Blair's Wars*, Gardners Books (2004), 117.
[113] Alex Danchev, 590.

regarding Afghanistan, particularly from senior military officials on the challenges of operating in two theaters simultaneously.

A memo from Attorney General Lord Goldsmith to Prime Minister Blair on March 7, 2003 offers the legal advice from the Attorney General on the interpretation of UNSC Resolution 1441 and legal justification for British use of force. UNSC resolution 1441 decides that Iraq has been in material breach of its obligations to cooperate with UN weapons inspectors and decides if Iraq continues to be uncooperative, Iraq will "face serious consequences as a result of its continued violations of its obligations."[114]

The memo concludes the resolution is ambiguous about "serious consequences" and the resolution is sufficient to justify use of military force. No further action from the Security Council would be necessary. Lord Goldsmith advises that because the resolution is ambiguous, it is more legally secure to seek a second resolution explicitly authorizing military force. The US did not want to seek another resolution from the UNSC and risk rejection of force as legitimate response. Nevertheless, the UNSC was deliberate in their ambiguity of the necessity of further UNSC action, and France (a vocal opponent of the Iraqi invasion) understood why the US was not interested in pursuing a second resolution. The memo offers clear legal guidance but hesitates on the strength of the argument. The memo, and Goldsmith's Iraq Inquiry testimony revealed, reflects the uncertainties of the legal foundation for the invasion if the matter were come before a court. "A further difficulty is that, if the matter ever came before a court, it is very

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[114] UN Security Council Resolution 1441 (2002) para. 13. S/RES/1441 (2002).

uncertain to what extent the court would accept evidence of the negotiating history to support a particular interpretation of the resolution…"[115]

Legal advisers from the FCO disagreed with Lord Goldsmith's conclusions. Sir Michael Wood, FCO Legal Adviser, submitted written testimony to the Iraq Inquiry stating, "I considered that the use of force against Iraq in March 2003 was contrary to international law. In my opinion, that use of force had not been authorized by the security council and had no other legal basis in international law."[116] Sir Michael Wood advised the Foreign Secretary at the time, Jack Straw, that without further action from the UNSC, the UK cannot lawfully employ military force in Iraq.[117] The Foreign Secretary believed Michael Wood was "being very dogmatic" and that "international law is pretty vague. When he [Straw] had been at the Home Office… he had often been advised things were unlawful and he had gone ahead anyway and won in the courts…which is what is recorded in the minute."[118] The FCO legal office, similar to the DOS Legal Adviser, protested the lawful basis for the use of force, all the way to the Prime Minister; and specifically took issue with both the Attorney General's conclusions and MOD legal conclusions[119] and warned "the risk of litigation was increasing."[120]

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[115] Lord Goldsmith Memo, March 7, 2003.
[116] Sir Michael Wood, Iraq Inquiry Testimony, January 26, 2010, pg. 21, col. 5-9.
[117] Ibid, pg. 30.
[118] Ibid, pg. 31. The minute from Jack Straw to Michael Wood went on to say, "I am as committed as anyone to international law and its obligations, but it is an uncertain field. There is no international court for resolving such questions in the manner of a domestic court. Moreover, in this case, the issue is an arguable one capable of honestly and reasonably-held differences of view." Sir Michael Wood Iraq Inquiry testimony, pgs. 32-33.
[119] Sir Michael Wood's testimony revealed the MOD legal position was that the Armed Forces would not be committing any crimes under international criminal law if the entire basis for the conflict was illegal, which he disagreed with. See pg. 42 of Wood's Iraq Inquiry testimony.
[120] Ibid, pg. 42.

Attorney General Lord Goldsmith detailed the risks of legal accountability for Prime Minister Blair. "In assessing the risks of acting on the basis of a reasonably arguable case, you will wish to take account of the ways in which the matter might be brought before a court."[121] The memo first addresses ICJ jurisdiction. There are two avenues of judicial review from the ICJ. The first was the risk of the UN General Assembly (GA) requesting an advisory opinion from the Court on the legality of military action; on the likelihood of this outcome, Lord Goldsmith warns Blair that a simple majority of the GA is necessary for an advisory opinion and there is no mechanism to block this action. The second option was for a State to bring a case to the ICJ because the UK is the only P5 nation that accepts compulsory jurisdiction of the ICJ. But Goldsmith advised this litigation is "an unlikely option since Iraq itself could not bring a case…but we cannot absolutely rule out that some State strongly opposed to military action might try to bring such a case."[122]

The memo next turns to ICC jurisdiction. The crime of aggression had not yet been activated for ICC jurisdiction and therefore the ICC could not initiate an investigation or prosecution for the use of military force.[123] Goldsmith notes "the ICC will however have jurisdiction to examine whether any military campaign has been conducted in accordance with international humanitarian law. Given the controversy surrounding the legal basis for action, it is likely that the Court will scrutinise any allegations of war crimes by UK forces very closely."[124]

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[121] Lord Goldsmith Memo, March 7, 2003.
[122] Ibid.
[123] The crime of aggression was activated in July 2018. https://www.icc-cpi.int/Pages/item.aspx?name=pr1350.
[124] Lord Goldsmith Memo, March 7, 2003.

On domestic jurisdiction, Prime Minister Blair had already experienced litigation on the legality of military action in Iraq.[125] *Campaign for Nuclear Disarmament v. Prime Minister Blair and Others* was a case in which the Campaign for Nuclear Disarmament (CND) sought an advisory declaration on whether UNSC 1441 had been incorporated into UK domestic law to guarantee executive action, and thus the lawfulness of military action in Iraq. The Court refused the declaration because the Court out of concern that the declaration would damage British international relations and the coalitions efforts. The memo addresses domestic litigation risk, but states, "I am confident that the courts would decline jurisdiction as they did in the case brought by CND last November. Two further, though remote, possibilities are an attempted prosecution for murder on the grounds that the military action is unlawful and an attempted prosecution for the crime of aggression…it might be argued that international aggression is a crime recognised by the common law which can be prosecuted in the UK courts."[126]

British human rights obligations and the ECtHR is missing from the analysis of risks of legal accountability. Human rights courts do not have jurisdiction over the use of force; international aggression does not fall under the jurisdiction of the ECtHR. However, Goldsmith notes ICC jurisdiction over conduct of the armed conflict and the likelihood the Prosecutor would consider accusations of British war crimes seriously. This suggests the Government believed the political climate surrounding the invasion enhanced the likelihood of ICC investigation if the conditions arose. Similarly, the omission of the Human Rights Act 1998 in

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[125] *Campaign for Nuclear Disarmament (CND) v The Prime Minister and others* [2002] EWHC 2777 (Admin)ns
[126] Lord Goldsmith Memo, March 7, 2003.

domestic accountability suggests legal accountability on human rights violations in the path to Iraq was not central to accountability at this stage.

The memo concludes, "Some of these seem fairly remote possibilities, but given the strength of opposition to military action against Iraq, it would not be surprising if some attempts were made to get a case of some sort off the ground. We cannot be certain that they would not succeed."[127] The concession that legal accountability is, under certain circumstances, intertwined with the political interest and risks of political accountability.

Similar to the US administration on the applicability of the Geneva Conventions, the UK was divided over the legal foundation of the Iraq invasion. The conclusions reached in the March 7th memo reflected tension between the legal advisers of the Foreign Office and the office of the Attorney General.

In the aftermath of this extremely significant memo, Lord Goldsmith was contacted by the MOD (both military and civil service, separately) regarding their personal risk of prosecution for their participation in the conflict.[128] Lord Goldsmith recalled,

> What would be the risk if we believed we were acting lawfully and what happened afterwards? Well, a number of things: there was a potential for court action – I set some of this out in my advice – and there was a concern about the position of servicemen and women and about civil servants. There was actually a difference of view between the Ministry of Defence and the Foreign Office about how real that risk was.[129]

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[127] Ibid.
[128] Lord Goldsmith Iraq Inquiry Testimony see pgs. 177-178, 180-181, 184.
[129] Ibid, pg. 177.

The general view of the MOD legal was the risk of accountability was low if soldiers followed orders and rules of engagement (ROE). But internally, senior commanders expressed concern about their risk of accountability and sought personal legal advice to quell these concerns.[130] "I spoke with one senior commander who was discussing the war with one of the civil servants at the MOD. He got really upset with what this guy told him and apparently yelled, 'I refuse to go to The Hague for you!' as he stormed out. There was tension about the personal risks some people believed they were facing."[131] Reflections from Lord Goldsmith support this view. To calculate the risk of personal accountability, Lord Goldsmith received letters from the CDS and the head of the Civil Service for clarification on this. "Both of them [CDS and Civil Service] in a sense were saying the same thing. They were saying, 'we are potentially at risk if we participate,' or in the case of Civil Service, 'assist in war, if it turns out to be unlawful, and, therefore, we want to know whether the Attorney's view is yes or no, lawful."[132] Lord Goldsmith recalled in his oral testimony that concerns from the CDS and civil service particularly weighed on his legal advice. The awareness of the risks of personal responsibility was openly discussed among senior commanders and cabinet-level ministers. "I did believe it was right to respond to these requests [for legal advice] from the head of the armed services, 'we want you to tell us, we want your backing, because otherwise – because that will give us legitimate cover for what we

[130] Ibid, pg. 177-178.
[131] Interview with leader of human rights organization, May 2019.
[132] Lord Goldsmith Iraq Inquiry Testimony, pg. 184.

are doing, and we genuinely want to know what your view is [as Attorney General].' That weighed with me."[133]

Lord Goldsmith's account illustrates that the threat of legal accountability prompted senior commanders and civil servants to calculate risks of personal responsibility enough to seek "legal cover." The Iraq Inquiry testimony turned away from concerns of personal responsibility towards whether the ICC was a background factor in Lord Goldsmith's formulation of legal advice for the State, and he recalled,

> …my recollection was we passed the International Criminal Court Act just before I was in government…in any event, it was an important issue. The legal position was that it would not have been possible for the [ICC] to have taken proceedings in relation to the crime of aggression…what could have happened…was [the UK] could be subject to proceedings based on the conduct of any military action, the international breach of international humanitarian law, and I think there had been some threat that there would be an attempt to do that… the International Criminal Court certainly focused the attention of the armed services on their personal responsibility. I think there is also another feature [of the ICC] which is a growing interest, belief, in legality, and the individual responsibilities of people who are involved in actions.[134]

Ultimately, Lord Goldsmith's testimony offers substantial insight into the role of legal accountability among policymakers on the road to the Iraq invasion. The ICC enhanced concerns about personal responsibility among military commanders and civil servants and urged multiple MOD officials to seek the advice of the Attorney General.

This section exclusively dealt with the decision-making process regarding the Iraq invasion. Although this analysis does not directly deal with British torture and targeted killing policies, it accomplishes two important goals. First, it illustrates inter-agency dynamics,

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[133] Ibid, pg. 191.
[134] Ibid, pgs. 180, 184.

including separate agency preferences regarding the legal foundation of the Iraq war. It also illustrates the disparate policy preferences of the MOD and the FCO along the same lines as the US analysis. Second, internal deliberations set the tone for the policies that emerged from within the conflict, including treatment of detainees and targeted killings.

The rest of the UK analysis examines British intelligence services in American detention facilities and British military detention facilities.

2.1.2.2. British Intelligence Services in American Detention Facilities

Despite official statements to the contrary, there is substantial evidence that the UK was aware of American interrogation techniques. Declassified information from the Committee on Intelligence Services revealed memorandums from the Office of the Foreign Secretary regarding CIA requests for British logistical support (including the use of airports and airspace), and the existence of American detention facilities in third countries.[135] The memo, in a question and answer format, clarifies,

> Would co-operating with a US rendition operation be illegal?
>
> If the US were to act contrary to its obligations, then co-operation with such an act would also be illegal if we knew of the circumstances. This would be the case, for example, in any co-operation over an extraordinary rendition without human rights assurances. Conversely, co-operation with a 'legal' rendition, that met the domestic law of both of the main countries concerned, and was consistent with their international obligations, would be legal. Where we have no knowledge of illegality, but allegations are brought to our attention, we ought to make reasonable enquiries.
>
> How do we know whether those our armed forces have helped capture in Iraq or Afghanistan have subsequently been sent to interrogation centres?

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[135] Siddiq, Memo to Grace Cassy, December 7, 2005.

> Cabinet Office is researching this with MoD. But we understand the basic answer is that we have no mechanism for establishing this, though we would not ourselves question such detainees while they were in such facilities.[136]

British military and intelligence had a presence at American detention facilities in Bagram and Guantanamo; though, the awareness of treatment during interrogations at those sites is denied by many in the British government.[137] Immediately after 9/11, UK intelligence services were authorized to obtain "time-sensitive" intelligence to assess the national security threat to the United Kingdom and its interests from al Qaeda.[138] Multiple British intelligence agencies were deployed to Afghanistan to interview detainees held at US bases, and subsequently, to interview detainees held in Cuba.[139] Unlike the US, the UK recognized the applicability of the Geneva Conventions in both Afghanistan and Iraq and people captured by the UK were considered to have prisoner of war (POW) status.[140]

Both the Security Service (MI5) and the Secret Intelligence Service (SIS), also known as MI6) interviewed detainees in Afghanistan and Iraq. UK intelligence conducted or witnessed over 2000 interrogations in Afghanistan, Guantanamo Bay and Iraq.[141] Despite the British hard

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[136] Ibid.
[137] When Foreign Secretary Jack Straw was asked about British knowledge or participation in US renditions and torture he responded, "Unless we all start believing in conspiracy theories and that the officials are lying, that I am lying, that behind this there is some kind of secret state which is in league with some dark forces in the United States…there simply is no truth in the claims that the United Kingdom has been involved in rendition." Ian Cobain, "Torture UK: why Britain has blood on its hands," *The Guardian*, October 19, 2012.
[138] Intelligence and Security Committee "The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq," Chairman: The Rt. Hon. Ann Taylor, MP, March 1, 2005. [Hereinafter Intelligence Report (2005)].
[139] Intelligence Report (2005), pg. 2, para. 1.
[140] Intelligence Report (2005), pg. 5, para. 10.
[141] Intelligence Report (2005), pg. 29, para. 110.

stand on observing international legal commitments relevant to military operations, the Intelligence and Security Committee noted, "the observance of human rights is an important part of the Agencies' [the Security Service and SIS] general training. However, prior to deployment to Afghanistan, the SIS officers were not given specific training on the rights of detainees and Geneva Conventions, nor were they aware of the 1972 announcement banning certain interrogation techniques."[142] However, the report continues that both intelligence agencies operate in a "culture that respects human rights" and regarded the intelligence agencies' training and obligations under the Human Rights Act 1998 to be "sufficient for the staff deploying to Afghanistan."[143]

January 10, 2002 was the first day the SIS had access to detainees in US detention facilities in Afghanistan.[144] One SIS officer conducted an interview and reported back to London his "…observations on the circumstances of the handling of [the] detainee by the US military before the beginning of the interview [REDACTED]."[145] A 2018 report from the Intelligence and Security Committee later detailed what was redacted in the original report which was that the prisoner "had been denied sleep for three days and was held in a series of stress positions by US [Military Police] (with our consent). He shook violently from cold, fatigue and fear but in consultation with CENTCOM [US Central Command] we agreed to maintain pressure for the

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[142] Intelligence Report (2005), pg. 11, para. 38.
[143] Intelligence Report (2005), pgs. 11-12, para. 39.
[144] Recall at this time the Bush administration were debating about the applicability of the Geneva Conventions and establishing legal memos justifying 'enhanced interrogation techniques.' American interrogators in theater felt pressured to make the call for acceptable interrogation techniques.
[145] Intelligence Report (2005), pg. 13, para. 46. Evidence provided to Intelligence and Security Committee in a letter from SIS, September 24, 2004.

next 24 hours."[146] The next day on January 11, 2002, instructions from SIS Head Office were sent to the SIS officer that conducted that interrogation in question, and copied all SIS and Security Service officers in Afghanistan which said,

> With regard to the status of the prisoners, under the various Geneva Conventions and protocols, all prisoners, however they are described, are entitled to the same levels of protection. You have commented on their treatment. It appears from your description that they may not be being treated in accordance with the appropriate standards. Given that they are not within our custody or control, the law does not require you to intervene to prevent this. That said, HMG's stated commitment to human rights makes it important that the Americans understand that we cannot be party to such ill treatment nor can we be seen to condone it. In no case should they be coerced during or in conjunction with an SIS interview of them. If circumstances allow, you should consider drawing this to the attention of a suitably senior US official locally.
>
> It is important that you do not engage in any activity yourself that involves inhumane or degrading treatment of prisoners. As a representative of a UK public authority, you are obliged to act in accordance with the Human Rights Act 2000 which prohibits torture, or inhumane or degrading treatment. Also, as a Crown Servant, you are bound by Section 31 of the Criminal Justice Act 1948, which makes acts carried out overseas in the course of your official duties subject to UK criminal law. In other words, your actions incur criminal liability in the same way as if you were carrying out those acts in the UK.[147]

The SIS responded quickly to remind their foreign intelligence officers of British human rights obligations abroad and risks of legal accountability if British authorities violated those obligations; an effect that did not exist in the American intelligence policy. The Intelligence and Security Committee praised the SIS's speedy response but urged the SIS to take different steps in the future. The Committee stated future concerns regarding the treatment of detainees should immediately be raised with a senior American official; the Committee relayed reporting incident

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[146] Intelligence and Security Committee of Parliament, "Detainee Mistreatment and Rendition: 2001-2010," Chair: Rt. Hon. Dominic Grieve, June 28, 2018, pg. 25. [Hereinafter Intelligence Report (2018)].
[147] Intelligence Report (2005), pg. 14, para. 47.

to London "did not go far enough."[148] The Committee also acknowledged the lack of inter-agency cooperation on the knowledge of detainee abuse. The report notes, "the Foreign Secretary should have been informed immediately that the officer had reported that a serious potential abuse by the US military had occurred and that instructions had, as a consequence, been issued to all deployed staff…"[149] Ministers of the Cabinet were not informed of intelligence reports regarding American abuse until July 2004 after the Abu Ghraib photos depicted abusive treatment of detainees and similar pictures from British detention facility, Camp Breadbasket, were also leaked to the public.[150]

There are two key signals on British intelligence policy to take away. First, and most importantly, it suggests the acknowledgment of human rights law as applicable to operations in Afghanistan. The application of the Human Rights Act was not embraced immediately by the armed forces, so the reliance on human rights training to guide intelligence interrogations is an important signal from the intelligence community. This is not to displace the applicability of the Geneva Conventions, as intelligence officers had to report to London whether their interrogations breached the Geneva Conventions; but human rights standards were the foundation for British intelligence interrogations. Written evidence from SIS Head Office stated, "our records suggest that there was recognition that SIS's human rights obligations extended to complicity."[151] Despite the SIS records and pledge to comply with the Human Rights Act 1998,

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[148] Ibid, para. 50.
[149] Ibid, para. 50.
[150] Ibid, para. 48.
[151] Intelligence Report (2018), pg. 29, para. 52; Written evidence – SIS January 21, 2016.

one SIS officer in theater testified there was a culture of omitting instances of detainee mistreatment (by the Americans) to avoid oversight and accountability. "There were situations where someone would say that is 'not for the write up' and there was quite an emphasis then on not putting things in writing…because presumably they didn't want the ISC to read the documents later….it wasn't as if the basic attitude to record-keeping had been abandoned; it was more that the more complicated stuff that was at the fringes of normal was not being recorded."[152]

Published accounts from British detainees offered a record of British intelligence services in American facilities. Detainee 558, a British national named Moazzam Begg, was visiting Islamabad when he was captured and detained in Bagram and then afterwards Guantanamo Bay. Begg detailed how he had been visited by British intelligence services, MI5 especially, in each facility. He recalled,

> I told him [MI5 agent] what had been done to me during the interrogations…emphasizing that the Americans had really intended to send me to Egypt to be tortured.[153] I asked how he, and the British government, felt about what their top allies had done and were threatening to do…He said that MI5 would never deign to be involved in things like that. I said that surely any information gathered by the Americans via abuse and torture had been shared with the British. He didn't answer that. He just reiterated that Britain would never take part in rendition and torture.[154]

There were nine British nationals held in Guantanamo Bay, five of which the FCO requested be released to British custody. British intelligence services and the FCO worked

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[152] Oral Evidence – former SIS officer, July 2016; Intelligence Report (2018), pg. 34, para. 69.
[153] Threatening to send detainees to Egypt was a familiar tactic that started at the Bagram detention center. The decision to use this tactic was described in Miller (2004).
[154] Moazzam Begg, *Enemy Combatant: A British Muslim's Journey to Guantanamo and Back*, Free Press (2006), 167.

closely with US DOS to negotiate their release.[155] Human rights organizations told the Intelligence and Security Committee that there had been no reports about any concerns or complaints relating to actions of UK intelligence personnel or agencies; however, there had been numerous complaints against the British military.[156] UK intelligence conducted or witnessed over 2000 interrogations at facilities in Afghanistan, Guantanamo Bay and Iraq and reported fewer than 15 occasions when UK personnel reported breaches of UK interrogation policy; if the intelligence services were to be accountable for anything, it was turning a blind eye and failing to inform other executive agencies whose operations would have benefitted from the knowledge of US treatment of detainees.[157]

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[155] Intelligence Report (2005) pg. 15, paras. 54, 57, 66.
[156] Ibid, pg. 28, para. 103.
[157] These points are reflected in the Intelligence and Security Committees final recommendations in paras. 17, 121, and 125. In 2018, another investigation by the Intelligence and Security Committee continued to find evidence that UK agency officers did not carry out direct physical mistreatment. The report found, however, nine cases of UK officers making verbal threats in the conduct of an interrogation; and two cases where UK officers were involved in the misconduct by US forces. On British knowledge of mistreatment of detainees, the committee found 13 incidents where UK personnel witnessed mistreatment; 25 incidents when detainees reported mistreatment to UK personnel; and 128 incidents where Agency officers were told by foreign liaison services about instances of detainee mistreatment. On whether UK intelligence turned a blind eye, the report said, "the Agencies say that they were not reluctant in principle to raise mistreatment with the US authorities. In our view, the evidence instead suggests a difficult balancing act: the Agencies were the junior partner with limited access or influence, and distinctly uncomfortable at the prospect of complaining to their host. That being said, we have found no 'smoking gun' in the primary material to indicate that the Agencies deliberately overlooked reports of mistreatment and rendition by the US as a matter of institutional policy." See Intelligence and Security Committee of Parliament, "Detainee Mistreatment and Rendition: 2001-2010," Chair: Rt. Hon. Dominic Grieve, June 28, 2018. [Hereinafter Intelligence Report (2018)].

2.1.2.3. Ministry of Defence Detention Facilities

The UK was the only coalition member, besides the United States, that operated their own detention facilities; and like the American facilities, accusations of detainee abuse are well documented and initiated public investigations. But unlike the American case, there was substantial uncertainty with regard to the behavior reflecting a systematic government policy. The UK did not admit to a policy of systematic detainee abuse or prosecute anyone for such behavior.[158]

Significantly less is known about the British detention facilities compared to its American counterparts and investigations into British conduct have not demonstrated the abuse to be systematic. Yet, two major public inquiries coupled with domestic litigation and evidence submitted to the ICC produced a lot of information available to public to draw significant conclusions about risk of legal accountability in British military policies. Internally, MOD lawyers believed the armed forces faced lower accountability risks if the legal foundation for the war was deemed unlawful.[159] The FCO legal adviser disagreed with that assessment and warned the ICC could come to the opposite conclusion as MOD legal. "I think in the case of the International Criminal Court…if the underlying legal basis was unsound, that could heighten the risk of actions in the International Criminal Court…"[160]

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[158] Danchev (2006); See also Cobain (2012)
[159] Testimony of Sir Michael Wood, Iraq Inquiry, (2010), pg. 42.
[160] Testimony of Sir Michael Wood, Iraq Inquiry, (2010), pg. 44.

The British military could lawfully detain on reasonable grounds for suspicion of terrorist activity or support of terrorist organizations.[161] The detention facilities had higher standards than American facilities and were Geneva compliant; but British facilities were found to have routine practices amounting to inhuman and degrading treatment.[162] These routine practices included (a) "harsh" interrogation, involving deliberate attempts to humiliate the detainee with insults and verbal abuse; (b) sleep deprivation for the purposes of interrogation; (c) sensory deprivation, including "being made to wear blacked out goggles and ear defenders."[163] Civil litigation found these practices to be systematic and the MOD to have violated the Human Rights Act.[164]

Some prisoners alleged far worse mistreatment by British forces, amounting to torture under IHL. Often, the difficulty for detainees was proving the soldiers responsible for the mistreatment were British, not American. Some detainees claimed the British soldiers (and intelligence) would ask questions and then leave the room while American soldiers used harsh tactics and British soldiers returned to hear the answers to their questions.[165] Another tactic was to delegate interrogations to Pakistani Inter-Services Intelligence Agency (ISI) who conducted interrogations at facilities in Pakistan. The British did not explicitly authorize harsh interrogation techniques to ISI, but the ISI techniques were well known, and the British did not explicitly

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[161] See *Alseran and others v Ministry of Defence* [2017] EWHC 3289 (QB)
The *Alseran* case had, in total, 967 claims issued by Leigh Day on behalf of Iraqi citizens against the Ministry of Defence. Four such cases, the lead cases, were the main subjects of the judgement and found systematic inhuman and degrading treatment and unlawful detention. The court found the MOD to violate the Human Rights Act.
[162] Ibid, para. 17.
[163] Ibid, para. 17.
[164] Ibid.
[165] See Ian Cobain, *A Secret History of Torture*, pg. 241.

unauthorize their usual interrogation methods. The former President of Pakistan, Pervez Musharraf, later said, "the British 'never once' asked that the Pakistanis desist from their usual interrogation methods. You have to get the information. If you are extremely decent, we then don't get any information. We need to allow leeway to the intelligence operatives, the people who interrogate. Maybe [the British] wanted us to carry on whatever we were doing. It was a tacit approval of what we were doing."[166]

Ultimately, during the five-and-a-half years the British operated detention facilities in south-east of Iraq, there were vastly diverse accounts from those who were detained.[167] One British detention facility, Camp Breadbasket, just west of Basra, housed looters that were "detained, beaten, and sexually humiliated. When the victims' families arrived to demand their release, they too were dragged inside."[168] Camp Breadbasket became the UK's equivalent of Abu Ghraib. In May 2003, photos were leaked to the media depicting abusive treatment of detainees, including sexual humiliation, stress positions, and severe beatings.[169] The photographs generated significant public backlash to the British Army's handling of prisoners and resulted in the dismissal and prosecution of four soldiers.[170] General Sir Mike Jackson, MOD's highest ranking military official, apologized on behalf of the Army, but assured political officials the

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[166] Quoted in Cobain (2012), pg. 243.
[167] See Cobain (2012) for greater detail in detainee accounts, pg. 279.
[168] Cobain (2012), 286.
[169] http://news.bbc.co.uk/2/hi/uk_news/4296511.stm
[170] Ibid.

abusive behavior was not systematic and was the result of 'rotten apples.'[171] Lawyers of those prosecuted allege many senior officials had participated in abusive treatments.[172]

> We slowly became aware of concerns around treatment [of detainees], especially regarding the Americans. The Baha Mousa inquiry was really when we had to confront it, the MOD as an institution took away a lot from that inquiry in terms of institutional knowledge."[173] Another official said, "Collectively [the executive agencies] we understood the importance of Baha Mousa and what had been overlooked on the ground. It truly was a shame on the British government. But we all worked together to give the inquiry the means it needed; there was a lot of agency cooperation.[174]

2.1.3. Inter-Agency Interaction and Torture Policies: Conclusions

American policies regarding detainee interrogation techniques, often referred to as the "torture program," is one of the greatest controversial policy fixtures of the conflicts in Afghanistan and Iraq. Key decisions made early on by the Bush administration set the tone for the conflict and had significant implications for the formulation and implementation of the interrogation program. The deliberations within the administration regarding the applicability of the Geneva Conventions reveal inter-agency dynamics and the presence of observer effects. When the administration was presented with the risks of accountability, they did not abandon the policy or make substantive changes to the policy in an effort to mitigate the probability of judicial review. As such, US policymaking did not experience strong observer effects. However, we also cannot conclude that observer effects had no role in the policy setting process. Three crucial choices demonstrate adjustments to the policy program, suggesting the presence of weak

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[171] Ibid.
[172] Ibid.
[173] Interview with high-ranking MOD lawyer, February 2020.
[174] Interview with high-ranking MOD official, February 2020.

domestic observer effects. The first is the DOD decision to place their primary interrogation facility outside federal judicial review. Original designs of the program considered US military bases as detention facilities but concerns of federal jurisdiction over US bases compelled the DOD to seek other options.[175]

Second, President Bush's decision to delegate a covert detention and interrogation program to the CIA, outside their typical duties of intelligence gathering, and CIA leadership turning to the OLC for legal cover from accountability. Each of these decisions signal a maneuver to circumvent oversight or judicial review. The OLC memos produced at CIA request depart from US (and international) practice regarding the definition of torture. The OLC interpretation that the threshold for torture amounts to "organ failure or death" subsequently justified interrogation techniques used by both military and intelligence officers; a new American interpretation for the threshold which constitutes torture in order to justify a pre-existing policy amounts to adjusting a policy when faced with the prospects of legal accountability. The new torture interpretation was the legal bedrock of the interrogation program.

Third, bureaucratic competition between the CIA and DOD is a critical element to understanding the scope, and perhaps escalation, of the interrogation program. As discussed, each agency had different perceptions regarding legal accountability. The CIA sought OLC advice and protection, and the DOD leaned on a reliance of military deference in civilian court; perhaps this perception that their detention facilities operated outside these systems of oversight

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[175] John Prados, *The Ghosts of Langley: Into the CIA's Heart of Darkness*, The New Press, (2017).

allowed for agency competition to fuel interrogation practices. Fundamentally, the CIA-DOD practices were not overly constrained by observer effects.

I believe these policy modifications and adjustments represent weak domestic observer effects. The threat of legal accountability certainly entered the national security policy process; but it did not deter or substantively alter the policy outcome. The US program exhibited flexibility to adjust while simultaneously acknowledging and debating restrictions on US policy maneuverability.

The UK presents a different outcome. The testimony of Lord Goldsmith before the Iraq Inquiry offered significant insight into the importance of legal accountability, particularly international legal accountability, in the policy process leading to the Iraq invasion. ICC jurisdiction had senior commanders and civil servants contact Lord Goldsmith about their personal risk of responsibility in Iraq.

Both Lord Goldsmith and Sir Michael Wood offered a perspective that ICC proceedings were likely given the politically charged nature of the war in Iraq. They proved correct as allegations of British war crimes were brought to the ICC; these allegations included "civilian deaths, and inhuman treatment of civilians."[176] The ICC Prosecutor dismissed the investigation in 2006 for the lack of evidence that civilian deaths or mistreatment were intentional and there was a systematic policy authorizing such behavior.[177]

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[176] https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf
[177] Ibid.

The British intelligence services also exhibited signals that legal accountability factored into their policies. Declassified communication between intelligence officers stationed in US detention facilities and London demonstrated an early awareness that US interrogation practices may violate international law or depart from British custom. The swift response from headquarters was a reaffirmation of legal obligations and risks of accountability if British officers participated or contained knowledge of practices amounting to torture. This led to practices such as British officers conducting an interrogation and leaving the room for American officials to engage in abusive tactics out of British eyesight.

The accounts from British detention facilities contain two different narratives and there is still a gap in our knowledge about much of the information from the British detention facilities.[178] The Army acknowledged some abusive practices in the detention facilities and dismissed those responsible. But generally, they claimed the camps were Geneva compliant and British detainees were treated as POWs.

Fundamentally, the British policymaking space regarding treatment of prisoners was more constrained than their American counterparts. I argue these policy constraints and changes in behavior are the result of weak-to-strong observer effects in British national security policy making.

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[178] This gap in knowledge is because much of this information is not accessible to the public and still protected by the Official State Secrets Act.

2.2. Policies on Targeted Killings

Targeted killing policies attracted significant attention and backlash for their lack of transparency and risk to the civilian population. Much of the discussion focused on drones as a new military technology with precision and surveillance capability that could result in more strikes, rather than fewer. This section, however, does not deal with drones as a military technology. Instead, this section considers the inter-agency interaction on the legal foundations for a drone program. Targeting as a policy for the coalitions in Afghanistan and Iraq will be addressed in the following chapter.

The legal process for targeted killing provoked a strikingly different process than the torture debate. There are likely political reasons at play in those differences; but the legal foundation is clearly different. Torture is illegal in peace and war. There is no legal basis to justify the use of torture under any circumstance. But the laws of war allow combatants to lawfully kill. Understanding how inter-agency interactions occurred differently on the targeting issue offers insight into legal accountability where the law is more permissive.

2.2.1. United States Drone Program

Under the Bush administration, targeting policies were stricter than policies on interrogation. There are a few reasons for this. First, the Bush-era policies prioritized intelligence gathering to prevent further terrorist attacks on US soil. Thus, the focus was on capturing, detaining, and interrogating any suspected terrorists or those with knowledge of al Qaeda or Taliban future plans. In fact, in the early days of Afghanistan, the policies on targeting were stricter than the law required and led to confusion on the battlefield and among military

lawyers.[179] Targeting became more controversial during the Obama administration because within days of assuming office, President Obama issued an executive order banning the use of enhanced interrogation techniques and reinstating US interpretation of 'torture' to the standards in the Geneva Convention.[180] President Obama additionally attempted close Guantanamo Bay, but eventually issued an Executive Order requiring periodic review of Guantanamo detainees.[181]

The use of drone strikes in targeted killing missions rose exponentially during the Obama administration.[182] In 2009 alone, President Obama authorized more drone strikes than the entirety of the Bush administration.[183] By 2012, the DOD had 7,500 drones available for use, comprising about one-third of all US military aircraft capacity.[184] Many argued that the use of drones allow US greater compliance with IHL obligations – the video feed allowed operators to have 'real time' footage of the target and engage when the target is away from the civilian population; and furthermore, most missiles fired from drones have a smaller blast radius than

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[179] See Michael Schmitt, "Targeting and International Humanitarian Law in Afghanistan," *International Law Studies*, 85 (2009).
[180] Executive Order 13491 – Ensuring Lawful Interrogations, January 22, 2009. https://obamawhitehouse.archives.gov/the-press-office/ensuring-lawful-interrogations.
[181] Executive Order 13567 – Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Military Force, March 7, 2001. https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba.
[182] Drones are remotely piloted aircrafts, sometimes called 'unmanned aerial vehicles' or UAVs. Drones are used for multiple purposes, for example as surveillance and reconnaissance. For this research project, the term 'drones' refers explicitly to armed drones used for targeted killings on the battlefield.
[183] Peter Bergen and Katherine Tiedemann, "Hidden War, there were more drone strikes – and far fewer civilians killed', in *New America Foundation*, December 22, 2010; see also Stuart Casey-Maslen, "Pandora's Box? Drone strikes under *jus ad bellum, jus in bello,* and international human rights law," *International Review of the Red Cross*, Vol. 94, Summer 2012.
[184] Casey-Maslen (2012); W.J. Hennigan, "New drone has no pilot anywhere, so who's accountable?" *Los Angeles Times*, January 26, 2012.

conventional munitions.[185] Drones also do not put service members lives at risk. For these reasons, and likely more, the DOD is a major advocate of drones and prioritized their research and development as their air weapon of choice.[186] But there have also been significant mistakes and miscalculations using drones. In one instance, a single drone strike in Afghanistan killed 23 civilians and wounded 12 others.[187]

President Obama promised a change from the previous administration; and in the wars of Afghanistan and Iraq, many criticized Obama's policies as continuity of Bush's second term only with more drone strikes.[188] But there are some significant departures. Policies under the Obama administration required the US government no longer reserved the right to abuse detainees in overseas detention facilities; and the US government no longer sought indefinite detention of suspected terrorists when prosecution was available.[189] Following the controversies of the legality of the torture and detention policies, the executive agencies under Obama took executive branch lawyering to a stricter level than previous administrations.[190]

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[185] Casey-Maslen (2012), pg. 607.
[186] Interview with Senior Air Force Officer, October 2018.
[187] Ibid; see also "First drone friendly fire deaths," in *RT*, April 12, 2011. In another case, the DOD found that communication errors between military personnel led to a drone strike that accidentally killed two US troops in Afghanistan. Casey-Maslen (2012).
[188] See for example, Remarks of John Bellinger III, Rule of Law Symposium, International Bar Association, Vancouver Canada (October 8, 2010); Jack Goldsmith, "Obama Has Officially Adopted Bush's Iraq Doctrine," TIME Magazine, April, 6, 2016; for background to Obama administration, see Charlie Savage, *Power Wars: The Relentless Rise of Presidential Authority and Secrecy* (2015).
[189] Rebecca Ingber, "The Obama War Powers Legacy and the Internal forces That Entrench Executive Power," *American Journal of International Law* Vol. 110, No. 4 (2016).
[190] Savage (2015). Savage even goes so far as to suggest that Obama filled the executive branch with so many lawyers it was one of the most legalistic administrations in American history. Regarding the many memos that exist legally justifying drone strikes, one human rights lawyer said of the Obama administration, "the existence of these documents is an indication of the extent to which the drone campaign is saturated with the language of law. Perhaps

Senior officials in the administration of President Barack Obama variously described drone strikes as 'precise,' 'closely supervised,' 'effective,' 'indispensable,' and even the 'only game in town' – but what they emphasized most of all is that the drone strikes they authorized were lawful. In this context, though, 'lawful' had a specialized meaning…the law of the drone campaign had not been enacted by Congress or published in the US Code. No federal agency had issued regulations relating to drone strikes, and no federal court had adjudicated their legality…the 'law' they [Obama officials] invoked was their own. It was written by executive branch lawyers behind closed doors, withheld from the public and even from Congress, and shielded from judicial review.[191]

The drone campaign had striking similarities but important differences from the Bush detention-interrogation policy. Both administrations kept a substantial amount of the legal justifications classified and, as will be discussed further, promoted a 'borderless' battlefield.[192] But three differences are paramount, and each will be addressed in the pages below. First, the Obama administration used the bureaucratic machinery to entrench (some called it "normalize") the drone campaign into national security policy; the Bush administration tried to bypass existing structures to implement a policy that created significant divisions, but the Obama administration worked within existing institutions. Second, the Obama administration engaged in "strategic

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no administration before this one has tried so assiduously to justify its resort to the weapons of war." Jameel Jaffer, *Drone Memos*, pg. 7.

[191] Jameel Jaffer, *Drone Memos: Targeted Killing, Secrecy, and the Law*, New York: The New Press (2016), pg. 2.

[192] On the efforts by the Obama administration to keep the drone memos secret, see Jaffer "Secrecy and the Fiction of It" in *Drone Memos* (2016).

leaking" of legal justification in which top officials said enough to the public so that the strikes seemed transparent and lawful, without releasing the full legal analysis.[193] Third, and finally, there is a difference regarding legal requirements. Torture is prohibited during times of peace and war; the law of armed conflict does not give flexibility to the use of torture – even in the 'ticking time bomb' scenario. But the law of armed conflict does, if certain criteria is met, permit combatants to lawfully kill. Beyond the battlefield, international human rights law regulates and protects the right to life, except under very specific circumstances (i.e. self-defense). Thus, where the administration argues that the law of armed conflict applies carries significant weight on the lawfulness of targeted killing campaigns.

The following sections zoom into the legal analysis from specific executive agencies. First, the DOD and CIA are dealt with together because their targeted killing campaigns were intertwined with overlapping personnel and command. The DOD and CIA faced major legal questions, and substantial litigation from human rights groups, about expanding the drone strikes beyond conventional battlefields and adding American citizens to the CIA-JSOC "kill list." The next section looks to the State Department and the active role the Office of the Legal Advisor had in the drone campaign. The inter-agency cooperation on the drone program is a striking difference from the divisions observed in the first term of the Bush administration. But divisions

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[193] Jaffer discusses this extensively, particularly pages 30-35. "Judge Thomas Griffith, a conservative jurist with a libertarian bent, seemed particularly offended by the chasm between what the government said was secret and what was truly so. He interrogated the CIA's attorney about the government's long record of unofficial disclosures: 'Are you aware of *any* case in which we have been confronted with allegations of such widespread…and strategic leaking at such a high level? Are you aware of *any* case that's like this?'" (Jaffer, 32). [Emphasis in original.]

did exist, particularly between Jeh Johnson, General Counsel to the DOD and later Secretary of Homeland Security, and Harold Koh, Legal Advisor at Department of State.

2.2.1.1. Department of Defense & Central Intelligence Agency

As with the torture program, the DOD and CIA had parallel drone programs; as with the torture program, this campaign falls outside the usual scope of CIA, or any intelligence agency, mission. "The drone program for the CIA was important – it signaled a militarization of intelligence services. And there was little sign of that stopping anytime soon even though these functions do not fall under the mission and normal operations of the CIA. John Brennan was against that and asked a lot of questions to be sure their operations and behavior were lawful. The CIA and Pentagon started as separate programs, but eventually merged and essentially had the same personnel."[194]

The DOD, in conjunction with other executive branch legal offices, was pivotal to the expansion of the drone campaign and calibration of targeting standards. The first 100 days were consumed with whether to hold Bush administration officials accountable for the torture program and recognizing divisions between the White House and cabinet secretaries. Obama's legal team was recognizing their own divisions on critical legal questions such as "how much contact with al Qaeda was necessary to make someone eligible for indefinite detention without a trial and what kinds of charges were legitimate for tribunals."[195]

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[194] Interview with former CIA intelligence officer, November 2018.
[195] Savage (2015), 21.

The DOD was a huge proponent of utilizing predator drones (armed drones) for their accuracy and efficiency in theater, and the selection and engagement process was strict. Regardless of a predator drone used in-or-out of active hostilities the President had to directly authorize the strike.[196] For key targets, such as leadership of al Qaeda, the DOD would create a 'package' of intelligence for top DOD officials to review. "In the teleconferences I was a part of as [REDACTED] was with all the high-ranking officials. I was impressed that it [target review] was taken so seriously."[197]

The DOD was especially concerned with drone strikes outside conventional battlefields. In late 2009, the Pentagon and intelligence agencies believed that al Qaeda activity in Yemen was in the end stages of preparing to attack US interests.[198] Al Qaeda found the countryside of Yemen to be a safe haven because Yemen's President, Ali Abdullah Saleh, exercised little authority over it. Yemen had been a vital outpost for the DOD since 9/11. The US provided aid and established a joint operations center in Yemen's capital, Sanaa, which shared counter-terrorism intelligence and advisors with Saleh and his military advisers.[199] Yemen had granted authorization to strike suspected terrorists on Yemeni soil, as long as Americans did not acknowledge that authorization to the public; but leaked diplomatic cables showed Saleh did extend this authorization.[200]

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[196] Interview with high-ranking US Air Force official, October 2018.
[197] Interview with high-ranking DOD official, October 2018. I have redacted the participants title for anonymity.
[198] Savage (2015), 224.
[199] Ibid.
[200] Ibid; the diplomatic cable read from Saleh read, "Highlighting the potential for a future A.Q.A.P. attack on the U.S. embassy or other Western targets…I have given you an open door on terrorism, so I am not responsible." See Savage, pg. 224.

In some cases, DOD lawyers would simulate the courtroom to determine lawfulness of the strike based on the evidence given. "Top decision makers were often part of that process. Targets would receive treatment like a courtroom – someone acted as the prosecutor and someone acted as the defense attorney and there would be a decision to kill, wait, or cancel. The rules and constraints in place were taken very seriously."[201]

The probability, even possibility, of judicial review of authorized targeted killings using drone strikes was a concern for Obama administration officials, especially for the DOD where drones are pivotal to US air capacity.[202] It became particularly acute when the administration authorized American citizens abroad (and away from the conventional battlefield) to be included on the "kill list."[203] The American Civil Liberties Union (ACLU) brought the DOJ to court to compel judicial review on including American citizens abroad on the administrations kill list.

> John Bates, a federal district court judge, presided over a hearing in which DOJ lawyers argued that the Constitution permits the government to kill suspected terrorists without judicial process, and we argued in response that if the Constitution meant anything at all, it surely meant that the government could not kill its own citizens without ever justifying its actions to a court. In his subsequent ruling, Bates wrote that the case was 'unique and extraordinary' and he conceded that it raised profound questions about 'the proper role of courts in our constitutional structure,' but he nonetheless dismissed the case on procedural and jurisdictional grounds. Nine mounts later, with the court having declined to intervene, a drone strike in Yemen's northern al-Jawf governorate killed al-Aulaqi and three others…[204]

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[201] Interview with high-ranking DOD official, October 2018.
[202] Jameel Jaffer, former ACLU deputy legal director, accounts litigation the ACLU brought against the Obama administration in *Drone Memos* (2016).
[203] Jaffer (2016), pg. 5. The 'kill list' was a list of targets authorized for targeted killings in appropriate conditions (i.e. away from civilians) either on or off the conventional 'battlefield.' Both the CIA and the DOD Joint Special Operations Command (JSOC) maintained kill lists.
[204] Jaffer (2016), pg. 5.

Shortly after a drone strike killed Anwar al-Aulaqi, another strike killed his son, Abdulrahman al-Aulaqi, a US-born citizen. The ACLU filed another suit on behalf of the estates of three Americans killed in the strikes in Yemen.[205] This second case against the DOD was also dismissed, "with the government contending again that the lawfulness of drone strikes was for the political branches to decide… the court ultimately held that legal remedies that would have been available in other contexts were not available in this one."[206]

US courts were reluctant to get involved in targeting practices that were at the margins of lawful strikes. The drone strikes in question were targeting American citizens in territories away from confirmed battlefields. In some cases, the judgements recognized how frustrated the judges were in conceding significant flexibility and authority to the executive and conforming to the DOD's expectations of military deference. But judicial deference does not mean that risks of legal accountability do not filter into DOD policy development. On targeting protocols before and after 9/11, one DOD official said,

> We had intelligence on Osama Bin Laden pretty early on, during Clinton days. We developed long-range telescopes to put in the mountains to watch the places where we knew he [bin Laden] frequented. We were going to launch a missile when we were able, to take him out. But when we did, we noticed a swing set, and this changed the entire discussion. Suddenly the concern of collateral damage, especially children, were forefront. This was before 9/11, so he wasn't a military target yet, and there was concern that this would be considered an assassination. The lawyers at the DOD and CIA had to decide whether the collateral damage would prevent target engagement. We knew he was leading al Qaeda, but the lawyers thought the collateral damage was too risky. The lawyers proposed arming the Predator drones because of the inefficiencies and concerns with launching missiles. The law mattered a lot to what we did. But it really changed a lot after 9/11. A lot of the legal restrictions came off, the law kind of became a victim.[207]

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[205] *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014)
[206] Jaffer (2016), pg. 6.
[207] Interview with high-ranking US Air Force official, October 2018.

After 9/11, legal interpretations of IHL regulating US policies on targeting expanded to confront a new type of combatant and a higher threshold of necessity. Clearly, the risk of accountability did not restrict the DOD from engaging in targeted killing campaigns that maneuver at the margins of lawful strikes. Some lawyers concluded simply the act of putting American citizens overseas on a JSOC kill list is evidence that legal accountability is not a concern for the DOD.[208] But this is a simplistic interpretation. DOD interaction with the other executive agencies gives rise to legal accountability as establishing parameters of acceptable policy. Legal accountability on its own does not alter DOD policies because the DOD relies heavily on judicial deference; nevertheless, agency interaction incorporates legal accountability into policy formulation and development which contributes to establishing policy boundaries, even if they are controversial boundaries.

2.2.1.2. Department of State

The State Department was active in the legal interpretation of the US drone program. Though the drone campaign increased heavily during Obama's presidency, DOS legal advisers were essentially stuck with the same core legal questions that puzzled the Bush administration. Who can be detained? Who can be targeted? Who is a lawful combatant?[209]

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[208] Jaffer (2016).
[209] Interview with high-ranking State Department Official, February 2020.

Harold Koh, the State Department Legal Advisor 2009-2013, was one of the administration's top officials trying to publicly justify and garner support for the drone campaign. Koh, Dean of Yale law school and prominent human rights lawyer, used his human rights background to lend credibility to the drone campaign and its legal soundness. "One would not ordinarily have expected the State Department's legal adviser to be one of the most visible defenders of a program involving the summary killing of suspected terrorists."[210] Koh lobbied administration officials to be the public face to defend the legal foundation of the targeted killing campaign.[211] In his address to the American Society of International Law in 2010, Koh said, "…it is the considered view of this Administration – and it has certainly been my experience during my time as Legal Adviser – that US targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."[212]

Critics raised concerns that the administration was gratuitous in their interpretation of an armed conflict and engaging in extrajudicial killings. Koh clarified the administration's position.

> …some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes unlawful extrajudicial killing. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. Our procedures and practices for identifying lawful targets are extremely robust and advanced technologies helped to make our targeting even more precise.[213]

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[210] Jaffer (2010), 30. Jaffer continued, "In his book about the Obama administration's national security policies, journalist Daniel Klaidman writes that some drone operators considered making t-shirts that said 'Drones: If they're good enough for Harold Koh, they're good enough for me.'"
[211] Savage (2015), pg. 242.
[212] Jaffer (2010), pg. 121.
[213] Jaffer (2010), pg. 123.

Internally, DOD legal counsel, Jeh Johnson, and DOS legal advisor disagreed about the flexibility in the law to execute these strikes. Obama administration lawyers generally agreed on the necessity to target high-ranking al Qaeda members and that international law permitted such strikes. But disagreement about strikes on rank-and-file suspected terrorists divided the DOS and DOD.[214] DOD lawyers advocated keeping targeting options as flexible as possible to confront threats as necessary. DOS lawyers were concerned European allies would challenge US policies and, thus, advocated restricted targeting practices for the sake of international credibility and support.[215] International legal experts understood the administration's tension because "It's a tangled mess because the law is unsettled."[216]

DOS-DOD interpretations on targeting practices led to confusion inside the administration and the general public.

> Part of the ambiguity about what the Obama administration was saying stemmed from the fact that its own thinking was a muddle. Many Obama lawyers, including Johnson [DOD] were satisfied that armed conflict law followed the terrorists to ungoverned badlands, so that decisions about targeting were largely a policy issue, not a legal one. But some, especially Koh (DOS) wanted to place constraints on that power by overlaying human rights-law principles, raising the standards that had to be met. Meanwhile the main policymakers on targeting decisions – Obama and Brennan [CIA] – for reasons that had more to do with strategy than law, wanted to exercise restraint and strike only at highly threatening individuals, not just blast away at foot soldiers.[217]

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[214] Charlie Savage, "At White House, Weighing Limits of Terror Fight" *The New York* Times, Sept. 15, 2011. https://www.nytimes.com/2011/09/16/us/white-house-weighs-limits-of-terror-fight.html?hp
[215] Ibid.
[216] Ibid, quoting Professor Robert Chesney.
[217] Savage (2015), 246.

The drone program has a dual narrative. One the one hand, established protocol in target selection is highly regulated and involves high-ranking DOD officials to authorize lethal strikes. Even simulated court cases help officials determine the strength of the evidence in target selection. This suggests a rigorous process designed to filter out targets that do not meet a high threshold of evidence. On the other hand, executive branch lawyers advocate for the widest understandings of critical categories (i.e. where an armed conflict is ongoing.) The DOD-DOS divide reflects agency divisions that were also apparent in the torture case. The DOD advocates for maximum legal flexibility for in-theater operations; the DOS advocates for higher standards of legal interpretation to match international (mostly European) partners in exchange for their continued support. This is intuitive with their agency purpose. Legal accountability, and the degree of risk involved in military operations, is embedded into these intuitive policy positions. The DOD relies on deference doctrines and prioritizes strategic concerns and battlefield effectiveness. The DOD also has its own military justice system to handle individual violations; thus, the risk of accountability in US courts is small. The DOS more explicitly weighs the risk of legal accountability because litigation (domestic or international) leads to uneasy allies that may begin to worry about their own domestic legal accountability.[218] The risk of legal accountability informs DOS policy preferences which often leads to tension with DOD preferences. Thus, the boundaries of agency policy preferences are, at least in part, informed by the risk of legal accountability.

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[218] We see this exact scenario play out in the context of coalitions exacerbating the risk of accountability in Chapter 5.

2.2.2. United Kingdom Drone Program

British targeting practices during an armed conflict are regulated by the legal requirements under the laws of armed conflict. IHL requires combatants to employ the principle of distinction and restrict targeting practices to combatants and military objects.[219] Chapter 1 discussed the legal basis for targeting and the challenges the conflicts in Afghanistan and Iraq presented in complying with IHL targeting requirements. As with the US case above, this section explores UK drone policies and the legal implications of targeting suspected terrorists beyond conventional hostilities (in 'spillover' conflicts).[220] The British government adamantly denied having a 'targeted killing' policy or campaign, and condemned the American position that the global war on terror extends the IHL legal framework to nations outside the theater of hostilities.[221]

Risks of legal accountability around the operation of British drones center around two policies. The first is British drone strikes outside of coalition efforts. The UK has not

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[219] The principle of distinction is codified in International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, Articles 48, 51(2), 51(3).

[220] On December 2, 2015, the House of Commons authorized military force in Syria against the Islamic State (also called ISIS or Da'esh) which extended the theater of operations from only Iraq to both Iraq and Syria. HC Debs, Dec. 2, 2015, cols 495-499.

[221] House of Lords and House of Commons Joint Committee on Human Rights, "The Government's policy on the use of drones for targeted killing" 2015. [Hereinafter "Drone Report (2015)"]. When Secretary of State for Defence, Michael Fallon, was asked if the UK has a targeted killing policy, he responded, "There is no policy of targeted killing." Pg. 36. On differing interpretation on the limits of the battlefield and the applicability of the law of armed conflict, see Drone Report (2015) for the Committee's findings that the UK Government "does not take the US position of that it is in a global war against ISIL/Da'esh such that it can use lethal force against them anywhere in the world," pg. 50.

implemented a drone campaign like the US program, but the UK has carried out their own strikes; the targeting of a British national in Syria launched numerous investigations and concerns about legal liability. The second policy is British assistance in the American drone program. The UK provided three primary means of support: intelligence, infrastructure, and embedded personnel.[222]

The rest of this section will continue as follows. The first section explores British drone strikes as a policy and pushback the Government received to strikes outside the context of an armed conflict. The second section explores the relevant legal frameworks for British drone policy and the applicability of human rights law to lethal air strikes. Importantly, much of the legal advice and analysis is privileged information and thus not publicly available. As such, the breakdown of MOD-FCO interaction is limited; however, some Parliamentary reports, especially from the Joint Committee on Human Rights, addresses sources of legal interpretation for drone strikes with important insight into agency interaction. The third section details what has been released about the decision-making protocols in authorizing drone strikes. The fourth section addresses British assistance in the American drone program and concerns of criminal liability in providing intelligence, infrastructure, and personnel. Finally, the fifth section reflects on observer effects in the formulation and ambiguity of the British drone program.

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[222] Two useful reports on these are All Party Parliamentary Group on Drones Inquiry Report (APPG) "The UK's Use of Armed Drones: Working with Partners," (2018); Amnesty International, "Deadly Assistance: The Role of European States in US Drone Strikes," pgs. 36-51 (2018); to a lesser extent, see Drone Report (2018), pg. 57.

2.2.2.1. British Drone Strikes: A New Departure?

The campaign from the invasion of 2003 ended for the UK when they withdrew their troops from Iraq in May 2011.[223] As the terrorist threat in Iraq expanded beyond its borders and into neighboring Syria, which was in the midst of its civil war, the counter-terrorism strategies of many states had to address the growing unrest in the region. The threat of the Islamic State (IS; also called ISIS/ISIL, or Da'esh) threatened much of the Western world as plans for attacks became more widespread and more credible.[224] In September 2014, the House of Commons authorized British military force, including air strikes, against IS in Iraq. Importantly for the House of Commons, this authorization did not extend to Syria. "This motion does not endorse UK airstrikes in Syria as part of this campaign and any proposal to do so would be subject to a separate vote in Parliament."[225] The Government did not pursue a separate vote to authorize air strikes in Syria; instead, the UK worked with coalition partners coordinating air strikes in Iraq and the US operated in Syria.

But in August 2015, a British drone strike killed Reyaad Khan, a British national, in Syria for his suspected involvement in plotting deadly attacks in the UK and recruiting for the extremist group the Islamic State (IS).[226] Prime Minister David Cameron addressed the House of

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[223] Nick Hopkins, "UK's eight-year military presence in Iraq to end on Sunday," *The Guardian*, May 18, 2011.
[224] For more on the background and rise of the Islamic State, see Providence Research, *The ISIS Threat: The Rise of the Islamic State and their Dangerous Potential*, (2015); Jay Sekulow, *The Rise of ISIS: A Threat We Can't Ignore*, Howard Books (2014); Graeme Wood, "What ISIS Really Wants," *The Atlantic* (2015). On counterterrorism as a poor strategy for countering ISIS, see Audrey Kurth Cronin, "ISIS Is Not a Terrorist Group: Why Counterterrorism Won't Stop the Latest Jihadi Threat," Foreign Affairs 94, (2015).
[225] HC Deb, September 26, 2014, col 1255.
[226] Christine Gray, "Targeted killing outside armed conflict: a new departure for UK?" *Journal on the Use of Force and International Law*, Vol. 3, No. 2 (2016).

Commons immediately after summer recess on September 7, 2015, to discuss the incident. "I want to be clear that the strike was not part of coalition military action against ISIL in Syria: it was a targeted strike to deal with a clear, credible, and specific terrorist threat to our country at home."[227] He called this action "a new departure" because it was the first time in modern history British military action occur in a country in which the UK was not involved in an armed conflict.[228]

In 2015, Parliament's Joint Committee on Human Rights conducted an inquiry into UK targeted killing policy using drones and the Government's compliance with international and domestic legal obligations.[229] Legal accountability is central to the report's considerations because, "we were also concerned the ongoing uncertainty about the Government's policy might leave front-line intelligence and service personnel in considerable doubt about whether what they are being asked to do is lawful, and may therefore expose them, and Ministers, to the risk of criminal prosecution for murder or complicity in murder."[230]

Whether the Syrian drone strike should be regulated under the laws of armed conflict or international human rights law was a core concern of Members of Parliament and human rights groups. The legal basis offered by the Government was that lethal force in counterterrorism is

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[227] HC Debs, Dec 2, 2015, cols. 495-499.
[228] This "new departure" policy received significant backlash and triggered a Parliamentary inquiry into British targeted killings.
[229] House of Lords and House of Commons Joint Committee on Human Rights, "The Government's policy on the use of drones for targeted killing" 2015. [Hereinafter "Drone Report (2015)"]. The inquiry sets out to clarify four crucial questions, (1) what precisely is the Government's policy? (2) what is its legal basis? (3) what is, and what should be, the decision-making process that precedes such a lethal force? (4) what are, and what should be, the mechanisms for accountability? Pg. 6.
[230] Drone Report (2015), pg. 6.

lawful if it complies with international law governing the use of force and the law of armed conflict. If the strike is compliant with the laws of armed conflict, the Government argued, then the Government is discharged of any human rights obligations, including the ECHR.[231]

Article 51 of the UN Charter acknowledges the inherent right of states for individual or collective self-defence if an armed attack occurs.[232] On the legality of the strike, the Prime Minister said,

> I am clear the action we took was entirely lawful. The Attorney General was consulted and was clear that there would be a clear legal basis for action in international law. We were exercising the UK's inherent right to self-defence. There was clear evidence of these individuals planning and directing armed attacks against the UK…It was therefore necessary and proportionate for the individual self-defence of the United Kingdom.[233]

The Attorney General went further in his testimony before the Justice Committee stating,

> …in order for any state to act in lawful self-defence, it is necessary to demonstrate that there is an imminent threat that needs to be countered and that, in countering that threat, the action taken is both necessary and proportionate, and it is necessary to demonstrate that what you do complies

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[231] The Government's argument regarding human rights obligations is apparent in the following exchange during the testimony of Secretary of State for Defence, Michael Fallon.
The Chair: "The human rights law standard says that lethal force outside an armed conflict situation is justified only if it is absolutely necessary to protect life. Is that the standard?"
Michael Fallon MP: "I think compliance with international humanitarian law discharges any obligation that we have under international human rights law, if I can put it that way. If any of those obligations might be thought to apply, they are discharged by our general conformity with international humanitarian law." Drone Report (2015), pg. 42.

[232] United Nations, *Charter of the United Nations*, 24 October 1945, Article 51.

[233] HC Deb, September 7, col 26. In a Government Memorandum on Drones, the Government made the case that the requirement of an "armed attack" that is necessary to invoke self-defense was satisfied. The memo stated, "Individual terrorist attacks, or an ongoing series of terrorist attacks, may rise to the level of an 'armed attack' for these purposes if they are of sufficient gravity. This is demonstrated by UN Security Council resolutions 1368 (2001) and 1373 (2001) following the attacks on New York and Washington of 11 September 2001. Whether the gravity of an attack is sufficient to give rise to the exercise of the inherent right of self-defense must be determined by reference to all the facts in a given case. The scale and effects of ISIL's campaign are judged to reach the level of an armed attack against the UK that justifies the use of force to counter it in accordance with Article 51." Drone Report (2015), pg. 41.

> with international and humanitarian law. In all of those respects, I was satisfied that this was a lawful decision.[234]

Whether the right of self-defense can be used against a non-state group is debated among international lawyers.[235] But state practice since 9/11 has supported the position that a state can use the right to self-defense against a non-state group; however, exercising the right to self-defense requires that the state from which the attack is to be based is unwilling or unable to prevent the attack. Prime Minister Cameron addressed this requirement in his address to the House of Commons stating, "there is a solid basis of evidence on which to conclude, first, that there is a direct link between the presence and activities of ISIL in Syria and its ongoing attack on Iraq, and secondly, that the Assad regime is unwilling and/or unable to take action necessary to prevent ISIL's continuing attack on Iraq, or indeed attacks on us."[236]

Other's in Parliament were not satisfied with the Government's conclusion that international human rights law does not apply because the drone strike was IHL compliant. Because Parliament did not authorize air strikes in Syria, as it did in Iraq, some understood the Syrian strike to signal a targeted killing policy, similar to the American policy, in which the UK would use lethal force against suspected terrorists in territories where the UK was not participating in an armed conflict. Members of Parliament Caroline Lucas and Baroness Jones of

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[234] Oral evidence taken before the Justice Select Committee, September 15, 2015, HC (2015-16) 409. The term "imminence" holds significant weight for the exercise of self-defense; for an in-depth discussion of British interpretation of imminence see Drone Report (2015) pgs. 45-48.
[235] See Drone Report (2015), pg. 43, for further discussion. See also, Davis Brown, "Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses," *Cordozo Journal of International and Comparative Law* (2003).
[236] HC Deb, November 26, 2015, col 1491.

Moulsecoomb threated to impose judicial review on the policy arguing, "the Government's failure to formulate and publish a Targeted Killing Policy, or publish any such existing policies or procedures, governing the circumstances in which it will preauthorize the deliberate killing of individuals overseas outside an armed conflict or war…"[237]

If a strike occurs outside of an armed conflict, whereby the laws of armed conflict do not apply, international human rights law regulates the exercise of lethal force. The right to life is protected by Article 6 of the International Covenant on Civil and Political Rights and Article 2 of the ECHR.[238] Determining the applicability of human rights is vital because the standards for lethal strikes are stricter than what is required under IHL. Where the right to life is concerned, the ECHR requires that,

> (1) the use of lethal force must be 'no more than absolutely necessary' to avert an immediate threat of unlawful violence to other people and be strictly proportionate to that aim; (2) the use of lethal force by the state must be effectively regulated by a clear legal framework and the planning and control of any particular operation must be such as to minimize the risk of loss of life; and (3) there must be an effective independent investigation capable of leading to accountability for any unlawful deprivation of life.[239]

The applicability of the right to life is depends on the target being within the jurisdiction of the UK.[240] The case of *Al Saadoon v. Secretary of State for Defence* dealt with the issue of

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[237] Drone Report (2015), pg. 30.
[238] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) [*ICCPR*]. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950 (entered into force 3 September 1953) [*ECHR*].
[239] Drone Report (2015), 53; Article 15(2) ECHR; Article 2(2)(a) ECHR.
[240] Article 1 of the ECHR provides, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

whether an airstrike is an example of exercising jurisdiction over an individual and thus the applicability of the ECHR.[241] The High Court judge concluded that exercising a lethal strike is a demonstration of physical control.

> I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is indeed the ultimate exercise of physical control over another human being…jurisdiction arose through the exercise of physical power and control over the individual who was shot and killed.[242]

The Court of Appeal disagreed with the High Court view.

> It [the Court of Appeal] decided that the Strasbourg Court 'did not intend to extend this category of extra-territorial jurisdiction to cases where the only jurisdictional link was the use of lethal or potentially lethal force and that this is, therefore, insufficient to bring the victim into the acting State's jurisdiction for this purpose.' […] in laying down this basis of extra-territorial jurisdiction, the Grand Chamber required a greater degree of power and control than that represented by the use of lethal or potentially lethal force alone. […] the intention of the Strasbourg Court was to require that there be an element of control of the individual prior to lethal force.[243]

The Government welcomed the Court of Appeals judgement for its qualified physical power and narrowed the applicability of the ECHR on lethal strikes. This interpretation potentially gives the Government more flexibility in their drone program where the Government demonstrates targets are not under their physical control. A Government response to the Joint Committee on Human Rights report on a British drone program asserts that the Appeals judgement confirms that Article 2 does not apply to drone strikes, whether within or outside an

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[241] *Al Saadoon and others v Secretary of State for Defence* [2015] EWHC 715 (Admin)
[242] Ibid, paras 95 and 117.
[243] Ibid.

armed conflict.[244] This is a generous reading of the judgement. The Court of Appeals noted that, as a result of *Al Saadoon*, it will be necessary to distinguish between degrees of physical control, as there may be other degrees of power or control other than detaining an individual which would satisfy Article 1 and fall within the scope of the Convention.

2.2.2.2. Decision-making Protocols: Authorizing Drone Strikes

At the strategic level of decision-making, the Prime Minister Cameron detailed the processes and agency involvement in the authorization of the Syrian drone strike.

> Our intelligence agencies identified the direct threat to the UK from this individual and informed me [Prime Minister] and other senior Ministers of that threat. At a meeting of the most senior members of the National Security Council, we agreed that should the right opportunity arise, military action should be taken. The Attorney General attended the meeting and confirmed that there was a legal basis for action. On that basis, the Defence Secretary authorized the operation. The strike was conducted according to specific military rules of engagement, which always comply with international law and the principles of proportionality and military necessity. The military assessed the target location and chose the optimum time to minimize the risk of civilian casualties.[245]

The specific strike the Prime Minister refers to is unique in the thoroughness of the process. In testimony before Parliament's Joint Committee on Human Rights, Secretary of State for Defence, Michael Fallon, suggested that other strikes do not receive this level of

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[244] Joint Committee on Human Rights, "The Government's policy on the use of drones for targeted killing: Government Response to Committee's Second Report of Session 2015-16." HC 747 HL Paper 49 (October 2016), pg. 7.
[245] HC Deb, September 7, col. 26.

authorization, including legal advice from the Attorney General.[246] The Secretary for Defence noted that MOD lawyers more closely advise the military policy process.[247]

The Joint Committee's report notes, "there has been no reference to whether legal advice was sought from the Foreign Office Legal Advisers at any stage in the decision-making process. The Foreign Office Legal Advisers are an important part of the acknowledged expertise in international law within Government."[248] This suggests the legal analysis is insular to the MOD, and the NSC on an *ad hoc* basis. One result from the Inquiry into the decision to invade Iraq was how the FCO legal advisers were more risk-averse and concerned with British human rights obligations. The MOD position that the ECHR does not apply to British drone strikes could be a result of the omission of the FCO in the legal process. This is a striking difference from the US approach which utilized legal analysis from multiple executive agencies for a comprehensive perspective. The Joint Committee's report noted this US-UK difference in approach, "the US policy explicitly states that 'the senior lawyers of key departments and agencies' will review and determine the legality of proposals to use lethal force against individual terrorists outside the US and outside areas of active hostilities. We recommend the Government should make clear…precisely when legal advice is sought and from whom… and that legal advice should always be sought from senior Foreign Office lawyers on any question of international law."[249]

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[246] Drone Report (2015), pg. 64. Much of the legal analysis is protected by the Government's right to "legal professional privilege," in which the legal analysis is not available for public record. Much of the legal analysis of UK drone policy and protocol is protected under this privilege and even shielded from Parliamentary inquiry. See pg. 64 of the "Drone Report" for more on the legal professional privilege in this context.
[247] Drone Report, pg. 65.
[248] Drone Report, pg. 65.
[249] Drone Report, pg. 65.

2.2.2.3. British Assistance in American Drone Program

British assistance in the American drone program caused controversy and left policymakers concerned about criminal liability for the UK in targeted killings carried out by the US military. The UK provides three areas of assistance – intelligence sharing, embedded personnel, and access to British infrastructure.

The US-UK relationship includes a significant intelligence-sharing element. Shortly after the Second World War, they established the UK-US Communication Intelligence Agreement.[250] This agreement allows for sharing raw intelligence as well as methods and techniques for intelligence gathering. The last version of the Intelligence Agreement made publicly available is from 1955 but is unlikely to include major changes in intelligence gathering.[251] Intelligence sharing also occurs through as part of the "Five Eyes" intelligence alliance between UK, US, Australia, Canada and New Zealand.

Much of the information available about UK intelligence in drone strikes is revealed through leaked documents. A set of documents from 2008 detailed intelligence programs operated from British air bases which were tools, "that enabled a significant number of capture-kill operations against terrorists," in the Middle East.[252] The program, called OVERHEAD, is implemented out of RAF base Menwith Hill uses US satellites to locate and regulate wireless

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[250] Amnesty International, "Deadly Assistance" pg. 36.
[251] Ibid.
[252] Ibid.

communications, such as cell phone usage and WIFI traffic.[253] NGOs report that this data was used to facilitate drone strikes in Yemen, in which the targets were suspected members of al Qaeda in the Arabian Peninsula (AQAP).[254] Reports from human rights NGOs and the media have declared British intelligence contributing to drone strikes in Iraq, Syria, Yemen, Somalia, Pakistan and Afghanistan.[255]

According to Amnesty International, multiple RAF bases have been utilized to assist the US drone program, including RAF Croughton, RAF Menwith Hill, RAF Molesworth, and RAF Digby.[256] RAF Menwith Hill has the most involvement with data-gathering programs and has been the subject of multiple investigations and leaked documents. The leaked information in the Snowden campaign revealed that RAF Menwith Hill is the base of operations for surveillance used in Iraq, Afghanistan and Yemen.[257] The NSA utilized RAF Menwith Hill to target individuals accessing the internet around the world. Two intelligence tools, code named FORNSAT and OVERHEAD used signal intelligence (SIGINT) to support drone strikes. FORNSAT used powerful satellites to intercept communications between foreign satellites; and

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[253] Amnesty International, "Deadly Assistance" pg. 38. See also Ryan Gallagher, "Inside Menwith Hill: The NSA's British Base at the Heart of U.S. Targeted Killing," The Intercept, September 6, 2016.
[254] Amnesty International, "Deadly Assistance," pg. 38.
[255] Ibid, pg. 38. On strikes in Iraq: The Independent, "Britain's tactics from Operation Shader in Iraq will be repeated in Syria following Commons vote," December 5, 2015; Bureau of Investigative Journalism, "Revealed: Britain has flown 301 Reaper drone missions against ISIS in Iraq, firing at least 102 missiles" May 10, 2015. On strikes in Syria: The Guardian, "GCHQ documents raise fresh questions over UK complicity in US drone strikes" June 24, 2015; The Telegraph, "How the US and UK tracked down and killed Jihadi John," November 13, 2015. On strikes in Yemen: The Guardian, "GCHQ documents raise fresh questions over UK complicity in US drone strikes," June 24, 2015. On strikes in Pakistan and Afghanistan: The Guardian, "Concern mounts over UK role in Pakistan drone attacks," September 12, 2015. On strikes in Somalia: APPG on Drones Inquiry Report, pg. 8.
[256] Amnesty International, "Deadly Assistance," pgs. 39-44.
[257] Amnesty International, "Deadly Assistance," pg. 41.

OVERHEAD monitors and regulates mobile phone usage and WIFI traffic in targeted countries.[258] The large presence of US personnel at RAF Menwith Hill also suggests a close cooperation on gathering SIGINT.[259]

Due to the secrecy and classified nature of much of the US-UK drone program, there is limited available information on embedded personnel or the role of British operators in the administration of drone strikes. However, a Freedom of Information request from a human rights NGO showed that British RAF pilots were assigned to the command which operates drone strikes out of Creech Air Force Base in Nevada.[260] But the direct level of involvement of RAF pilots is not available to the public. In Parliamentary forums, ministers of the MOD and the FCO have disclosed minimal information on activities and the legal basis from which the UK operates.[261]

In *Noor Khan v. The Secretary of State for Foreign and Commonwealth Affairs*, the court was asked to provide judicial review of British involvement in American drone strikes.[262] In this case, the claimant's father was killed in a CIA drone strike in North Waziristan, Pakistan. His

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[258] Ibid.
[259] The latest numbers released from the MOD in November 2017 had personnel listed as: US Military (33); US Contractors (344); US Civilians (250); UK Military (7); UK Contractors (85); UK Civilians (486). UK Parliament, RAF Menwith Hill: Written Question – 112002, November 7, 2017. Amnesty International, "Deadly Assistance," pg. 42.
[260] Ministry of Defence, Response to a Freedom of Information Act Request, September 8 2015, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462375/20150908-UK_Personnel_stationed_Creech_Air_Force_Base.pdf; Amnesty International, "Deadly Assistance," pg. 44.
[261] For an exchange in which Secretary of State for Defence addresses questions about UK involvement in US drone strikes and the legal basis for such activity, see: https://hansard.parliament.uk/Commons/2012-10-22/debates/1210222000020/TopicalQuestions#contribution-1210222000154; See also Alice Ross, "UK Faces Calls for Intelligence-Sharing Guidance Over Drone Attacks," *The Guardian*, June 26, 2015.
[262] R (*Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24

father was killed during a council of tribal elders, called a Jirga; 40 people were killed in this strike. The claim was brought in an attempt to establish the policies and practices of the UK, specifically providing "locational intelligence" to the CIA for drone strikes, is unlawful. The claimant said the practice of GCHQ offering locational intelligence for the execution of American drone strikes could risk violating sections 44-47 of the Serious Crimes Act (2007).[263] The Court of Appeal rejected the claim on the basis that in determining the liability of officers from GCHQ, the Court would have to determine the lawfulness of the strike itself and sit in judgement of activities by the United States government. The judgment reads, "…a finding by our court that the notional UK operator of a drone bomb which caused a death was guilty of murder would inevitably be understood (and rightly understood) by the US as a condemnation of the US…what matters is that the findings would be understood by the US authorities as critical of them."[264] The Courts conclusion shielded British practices, and potential violations, from liability. However, despite the claim being rejected, the Court left future litigation open in admitting, "I accept that it is certainly not clear that the defence of combatant immunity would be available to a UK national who was tried in England and Wales with the offence of murder by drone strike."[265] In 2017, a Supreme Court case came to a different conclusion, effectively opening the door for future litigation for British assistance in another state's unlawful acts.[266]

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[263] Ibid, para. 14.
[264] Ibid, para. 36.
[265] Ibid, para. 19.
[266] *Belhaj and others v. Straw and others* [2017] UKSC 3

2.2.3. Targeting and Legal Accountability Conclusions

The process of developing military policies in the UK is different than in the US. Until the creation of the National Security Council in 2010, the national security sphere was decentralized and heavily filtered through the inter-agency bureaucracy of the executive authority. The decision-making process to the invasion in Iraq is illustrative of the inter-agency interaction in the decentralized structure and shows how observer effects, largely domestic, filtered into decision-making. The inter-agency interaction on the treatment of detainees shows early efforts from officials to clarify the risk of legal accountability. Steps were taken in interrogation practices to comply with IHL and IHRL obligations; but in practice, this led to buck passing to the Americans that did not operate under the same policies on treatment of detainees. There is evidence to suggest that there was a degree of knowledge and tolerance of the American standard of treatment and interrogation; and even some cases where this was exploited to the UK's benefit.

The secrecy and classified nature of the drone program makes it difficult to highlight the inter-agency dynamic of decision-making; however, this secrecy has initiated multiple inquiries with enough information to draw three conclusions about the UK drone program and legal accountability. First, the risk of criminal liability is understood by the Government in its program to assist the United States in their drone operations. In the *Noor Khan* case, lawyers for the Government certainly avoided any concession on the lawfulness of the CIA drone strike in Pakistan and British culpability for providing intelligence. But the Government made a strong, and ultimately successful, case for the damage to national security cooperation if granted judicial review, regardless of whether the UK violated the Serious Crimes Act of 2007. Put another way, even if the UK broke the law, the consequences of permitting judicial review on Britain's

national security is too great. The Government argued, "Whatever the findings of the Court, an intervention by a judicial body into this complex and sensitive area of bilateral relations is liable to complicate the UK's bilateral relations with both the US and Pakistan, and there is a clear risk of damage to essential UK interests."[267] In citing the cooperative nature of US-UK intelligence sharing as of superior concern than accountability for unlawful targeting practices, the Government shields itself from liability of its contribution and/or complicity in international and domestic legal violations.

Second, much of the drone strike decision-making is insular to the MOD. The Joint Committee on Human Rights' finding that lawyers from the FCO were not consulted on the legality of the strikes is neglecting a legal office that has historically, as in the case of the Iraq invasion, challenged MOD legal interpretations. The foreign policy implications of unlawful drone strikes and British involvement in these operations could be substantial. On military policies during Operation Telic, MOD lawyers included FCO lawyers when there was concern that human rights or the ECtHR would be at issue.[268] The MOD's determination that human rights law is not applicable to drone operations is likely a reason the FCO legal advisors were not consulted for these strikes.[269]

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[267] *Noor Khan v. Secretary of State for Foreign and Commonwealth Affairs*, para. 23.
[268] Interview with former MOD lawyer, March 2020.
[269] The FCO was involved in drone operations to the extent the GCHQ was involved, which the Secretary of State for Foreign and Commonwealth Affairs is responsible. The findings from the human rights committee was strictly regarding the legal offices as absent from the policy process.

Finally, many elements of the UK's involvement in the drone campaign operate at the fringes of legal uncertainty. The Government has invoked its professional privileges of secrecy regarding the legal framework, the definition of combatants, and the contribution to American strikes where, as a matter of policy, American interpretations may violate British rules of engagement. Certainly, it is the nature of national security policy that secrecy is inevitable and necessary. But more layers of jurisdiction have not, in this case, led to higher transparency; rather, it contributes to a substantial level of secrecy and reliance on the US. The US and Israel are the only other nations with drone strike programs, and both have released parameters of the program and the legal framework which justifies it.[270]

The MOD has adamantly refused to admit the UK has a targeted killing program and that any strike authorized by the UK is compliant with IHL but maneuvers away from addressing the more complex concerns Parliament and the public has raised – where does the UK understand itself to be participating in an armed conflict; what definition of a combatant is the UK using to operationalize drone strikes; and, if operating outside active hostilities, how is the UK interpreting their human rights obligations with respect to the right to life in these campaigns. The Governments tendency to keep these issues shielded may in itself be a reflection of the risk of accountability. When there is higher risk of accountability, the UK is protecting more of its behavior which is at the margins of legal uncertainty and limiting the horizon of agency interaction.

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[270] See Drone Report (2015) for more on the US-Israel willingness to release a policy but not the UK.

3. Chapter Conclusions

This chapter explores decision-making policies of the executive branch through an agency-level analysis. The goal is to understand how each agency understood the risks of legal accountability; and how these disparate perceptions informed agency national security policies. A key observation is that each agency cites different courts in their policy justifications. In both primary source documentation and interviews with agency leaders, there are different sources of accountability that motivate decision-making within the respective agency.

In the US case, the DOD operated with the military justice system as the primary accountability mechanism. This is reflected in DOD references to the military manuals as the primary sources of rules and regulations; additionally, when confronted with the risk of civilian court jurisdiction, the DOD explicitly relied on the military deference doctrine as the most likely outcome in case of judicial review. Even further, when confronted with the possibility of civilian court review, DOD response was a strategy to vilify the court – some policymakers believed this was enough for the courts to reject judicial review. The Senate Torture Report revealed the CIA reached out to the OLC because of accountability concerns. CIA Director, George Tenet, understood CIA officers were operating outside their usual functions in intelligence gathering; running a detention facility and conducting systematic interrogations did not explicitly fall within the duties and mission of the Agency. The 'torture memos' from the OLC were a response to this request and protected CIA officers from prosecution in domestic courts. The DOS more often cited international and foreign jurisdiction as potential sources of accountability; this is intuitive for the DOS foreign policy expertise and mission to foster cooperation with allies and the larger

international system. But what this suggests is that international and foreign mechanisms of legal accountability informed DOS national security preferences.

In the UK, there is a similar result. But compared to the US, national security policy making is more insular to the MOD.[271] However, agency documentation with regard to both the American torture program and the controversial decision to invade Iraq reveals important observations about the role of legal accountability. Unique to the British case is the role of international accountability in motivating top military officials and civil servants to seek legal protection for their role in the conflicts. The FCO was the primary source for matters regarding ECtHR jurisdiction and human rights concerns more broadly.

The three necessary conditions for judicial observer effects to exist (triggering event, jurisdictional or substantive uncertainty, and risk calculation) are reflected in this chapter. In the US case, the triggering event was the attacks of 9/11. Recall from Chapter 2, I argued triggering events could be judicial and non-judicial situations that force policymakers to evaluate their likelihood of legal accountability. The attacks of 9/11 initiated a conflict in which the US was at war with a militant Islamist organization that was transnational in nature. I argue the novelties of the conflict, triggered by the attacks of 9/11, and perpetuated concerns of legal accountability. The second condition, jurisdictional or substantive uncertainty, refers to an awareness within the executive branch that a particular national security policy may come under judicial review.[272] Internal communications reveal that multiple agencies grappled with the likelihood of judicial

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[271] This changed in 2010 with the creation of the National Security Council.
[272] Recall from Chapter 1 and Deeks (2013), pg. 838.

review; for example, this issue was central to the Powell memo outlining the risks of rejecting the applicability of the Geneva Conventions. A second example is detailed in the Senate Torture Report which revealed CIA Director George Tenet's concern of accountability for CIA officers in the interrogation program. The third element, risk calculation, is evidenced in in internal communications as executive agencies advocated policy preferences.

Despite the necessary conditions for observer effects, the explicit acknowledgment of the administration regarding the threat of legal accountability did not result in abandoning or making substantive changes to the policy or behavior; thus, there is no evidence of strong observer effects. On the other hand, there is also little evidence that legal accountability had zero role in policy setting. Two instances illustrate weak domestic observer effects exist in the case of the US torture program. The first is the DOD decision to place their primary interrogation facility outside federal judicial review. Second, President Bush's decision to delegate a covert detention and interrogation program to the CIA, outside their typical duties of intelligence gathering, and CIA leadership turning to the OLC for legal cover from accountability.

There is little evidence foreign or international observer effects had a role in the policy planning process. The Powell Memo mentions the risk of prosecution in foreign jurisdictions and international tribunals; but there is little evidence these concerns went further than this. As such, they did not lead to adjustments in policy planning.

The UK demonstrates a policy process more constrained by legal accountability than the US. Testimony from Cabinet officials underscored the role of accountability in major decisions, such as the lead up to the Iraq war, and in navigating revelations regarding the use of harsh interrogation practices in the US interrogation program. The UK case also demonstrates the

presence of observer effects necessary conditions. The first element, a triggering event, is the UK decision to be the leading junior partner in a US-led coalition. This policy choice can intrinsically prompt considerations about probability of judicial review for a particular policy. The second element, uncertainty, is reflected in diverging interpretations for lawfulness of the use of force. Some UK officials believed the UK was positioning itself for near certain litigation and review; others believed actions by the UNSC were sufficient as legal justification for the use of force. Risk calculation is reflected in the same process. As the UK marched toward invasion with the US, the political and legal risks were immense. The internal communications of the Government reflect that process of risk calculation and policy calibration in the face of such risk.

This chapter has demonstrated that inter-agency interaction is one mechanism through which judicial observer effects enter the national security policy space. More investigation is necessary to fully unbox the complexities of inter-agency and inter-branch dynamics; but this chapter is a useful starting point toward advancing this clarity in the role of judicial observer effects in policy processes.

Chapter 5. Judicial Observer Effects in Coalition Warfare: Partner Jurisdictions and Legal Interoperability

There is at least one thing worse than fighting with allies – and that is fighting without them.

-Winston Churchill

1. Introduction

In most modern conflicts, multinational operations have been the norm rather than the exception. Multinational operations are conducted by forces from two or more nations that function within the arrangements of a coalition or an alliance.[1] Coalitions (also called partnered operations or multinational operations) offer commanders a range of benefits, including wider access to resources from contributing nations and political legitimacy of collective action.[2] The strategic advantages of coalitions has made it a global trend and preferred outlet for military

[1] Other multinational arrangements could include supervision by an international organization, such as the United Nations, NATO, or Organization for Security and Cooperation in Europe. See Joint Publication 3-16, US Department of Army, "Multinational Operations" March 1, 2019, pg. ix. [Hereinafter 'Multinational Operations JP 3-16].

[2] See, e.g., President of the United States, National Security Strategy 7 (2015); HM Government, National Security Strategy and Strategic Defence and Security Review 2015 para. 4.39 (2015).

operations; as such, coalitional warfare makes military alliances and partnerships the bedrock of international security.[3]

The terms alliance and coalition are often used interchangeably; however, they represent different constellations of partnerships. An alliance is, "the relationship that results from a formal agreement between two or more nations for broad, long-term objectives that further the common interests of the members."[4] Coalitions, by contrast, are "an arrangement between two or more nations for common action. Coalitions are typically ad hoc; formed by different nations, often with different objectives; usually for a single problem or issue…"[5] Alliances are a broad from of partnerships built for long-term strategic interests for a state's international relations.[6] Coalitional warfare is type of alliance that is a specific agreement to counter a common threat or achieve a strategic objective.[7]

The success of a coalition significantly depends on its ability to address challenges of interoperability. Coalition interoperability is, broadly, the degree to which contributing nations are able to operate together cohesively to achieve their goal.[8] Interoperability occurs at every

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[3]Multinational Operations JP 3-16, I-1.
[4] Ibid.
[5] Ibid.
[6] For a review of alliance literature, see Zeev Maoz, "Alliances: The Street Gangs of World Politics – Their Origins, Management, and Consequences, 1816-1986," in *What Do We Know About War?* ed. John A. Vasquez, Rowman & Littlefield, (2000), pgs. 111-144.
[7] For more on coalitions, see Sarah Kreps, *Coalitions of Convenience: United States Military Interventions After the Cold War* (New York: Oxford University Press, 2011); Patricia A. Weitsman, *Alliances, Coalitions, and Institutions of Interstate Violence* (Stanford: Stanford University Press, 2013). On Afghanistan, in particular, see David P. Auerswald and Stephen M. Saideman, *NATO in Afghanistan: Fighting Together, Fighting Alone* (Princeton: Princeton University Press, 2014); Sten Rynning, *NATO in Afghanistan: The Liberal Disconnect* (Stanford: Stanford University Press, 2012). On collective security, see Charles A. Kupchan and Clifford A. Kupchan, "The Promise of Collective Security," *International Security* 20(1) (1995).
[8] Myron Hura et al., "Interoperability: A Continuing Challenge in Coalition Air Operations," RAND (2000).

level and dimension of coalition interaction and presents challenges to coalition effectiveness and cohesion. A broad definition of interoperability is, "the ability of systems, units, or forces to provide services to and accept services from other systems, units, or forces, and to use the services so exchanged to enable them to operate effectively together."[9] Three broad themes embody much of the research on coalition interoperability. First, the ability of contributing nations to work together under combined military organizational structures.[10] This perspective focuses on internal dynamics and cohesion of the coalition. Second, how interoperability helps or hinders the coalition partners' ability to fulfill the strategic objectives and how interoperability translates to battlefield effectiveness.[11] Third, the degree of operability and compatibility of weapons systems and historic challenges of diverse weapons and equipment.[12]

A subset of coalition interoperability that has received far less scholarly attention is a coalition's legal interoperability. Legal interoperability refers to the coordination of operations around contributing nations' legal diversities without compromising coalition effectiveness and respecting applicable law. Coordination of legal interoperability typically revolves around the degree to which coalition partners have different substantive legal obligations (particularly

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[9] Ibid, pgs. 7-8.
[10] Ibid; see also Sara Bjerg Moller, *Fighting Friends: Institutional Cooperation and Military Effectiveness in Multinational War*, PhD Dissertation, Columbia University, 2016.
[11] Caitlin Talmadge, "Explaining Military Effectiveness: Political Intervention and Battlefield Performance," PhD Diss., Massachusetts Institute of Technology (2011); Klaus Knorr, *Military Power and Potential*, Lexington: Heath and Company (1970) pg. 4; Waldo D. Freeman, Randall J. Hess and Manuel Faria, "The Challenges of Combined Operations," *Military Review* (1992); Moller (2016).
[12] Moller (2016) citing John Hixon, "Operation Shingle: Combined Planning and Preparation," *Military Review*, (1989); John Hixon and Benjamin F. Cooling, "Combined Operations in Peace and War" *U.S. Army Military History Institute*, (1981).

pertinent regarding human rights law), and where coalition partners have the same legal obligations but diverse interpretations of those obligations.[13] The disparities in layers of legal accountability for partnered operations is a current gap in discussions regarding legal interoperability and is the central focus of this chapter.

This chapter explores how coalition legal interoperability functions as a mechanism for judicial observer effects to occur in US and UK policies. Research on legal interoperability has traditionally focused on diversity of partner nations' substantive legal obligations; however, there has been minimal examination in diversity in partner nations' court jurisdiction and how this variation could have an important role in the formulation of coalition policies.[14]

The previous chapter took an internal perspective of executive agency preferences and how this interaction of preferences facilitated judicial observer effects within the national security policy process. This chapter pivots outward to explore how American and British policies within the coalition were influenced by the prospect of judicial review. Critically, this chapter shows that coalition legal interoperability particularly heightened the awareness of international and foreign courts, as operations were coordinated to accommodate partner

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[13] For a more in-depth discussion of interoperability for states with varying legal obligations, see Marten Zwanenburg, "International Humanitarian Law Interoperability in Multi-National Operations," *International Review of the Red Cross* 95 (2013), especially page 690.

[14] A notable exception is David S. Goddard, "Understanding the Challenge of Legal Interoperability in Coalition Operations," *Journal of National Security Law and Policy,* Vol. 9 (2017). For legal interoperability in practice, see also Steven Hill and Leonard Holzer, "Detention Operations in Non-International Armed Conflicts Between International Humanitarian Law, Human Rights Law and National Standards: A NATO Perspective," *Israel Yearbook on Human Rights*, (49) (2019).

jurisdictions in joint operations. As a result, international and foreign observer effects were more evident through the legal interoperability mechanism.

The rest of this chapter continues as follows. Section two is a deeper analysis into coalition interoperability and defining legal interoperability; it expands on coalition interoperability and challenges to battlefield effectiveness and operation integration. This section also expands on legal interoperability and challenges states encounter in coordinating operations to accommodate member states legal obligations. Section three details the coalitions in Afghanistan and Iraq to better understand the legal variation, command structure, and caveats specific to each coalition. Section four examines legal interoperability and judicial observer effects on US and UK policies of torture and coalition targeting. This section illustrates how the institutional design of coalitions enhances judicial observer effects in US and UK policies. Section five offers chapter conclusions.

2. Expanding Interoperability

This section expands on interoperability and legal interoperability as conceptual and practical coalition functions. Understanding interoperability in a broader and multi-dimensional sense will contextualize the role of legal interoperability as one facet of coalition integration and cohesion. Coalition legal interoperability has practical implications for over coalition interoperability but has received far less scholarly attention than other aspects of coalition interoperability. This chapter attempts to place legal interoperability in the forefront of coalition integration and explore how judicial observer effects influence coalition operations.

2.1. Coalition Interoperability

Coalition interoperability is one of the most critical aspects to strategic and tactical success of the coalition. Interoperability is necessary at every level and in every dimension of the coalition dynamic; successful interoperability requires repeated calibration among contributing partners.[15]

As a standing coalition, NATO consistently navigates effective interoperability. NATO defines interoperability as, "the effectiveness of Allied forces in peace, crisis or in conflict, depends on the ability of the forces provided to operate together coherently, effectively and efficiently. Allied joint operations should be prepared for, planned and conducted in a manner that makes the best use of the relative strengths and capabilities of the forces which members offer for an operation."[16]

Interoperability exists along three dimensions – technical (e.g. hardware, systems), procedural (e.g. doctrines, procedures) and human (e.g. language, terminology, and training.)[17] The NATO experience of interoperability is likely unique from other forms of coalitions, such the US-led coalitions in Afghanistan and Iraq. NATO has an integrated command structure; which occurs when a strategic commander is designated from a member nation, but commanders and command staff are multinational. This command structure could affect interoperability

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[15] See for example, Juan Carlos Neves, "Interoperability in Multinational Coalitions: Lessons from the Persian Gulf War," *Naval War College Review* 41(1) (1995).
[16] North Atlantic Treaty Organization, *Allied Joint Doctrine for Air and Space Operation*, P 2.2.1, AJP-3.3 Ed. B Version 1 (April 2016); see also David S. Goddard, "Understanding the Challenge of Legal Interoperability in Coalition Operations," Journal of National Security Law and Policy 9, no.2 (2017) 211-232.
[17] Ibid.

because it suggests the multinational integration is deeper and more established, and thus, easier to work with.

The coalitions in Afghanistan and Iraq had a lead-nation command structure. This is a system in which all member nations accept that their forces are under the control of the leading nation. This structure imposes a lead nation command and staff arrangement while allowing subordinate elements to retain national integrity and authority.[18]

In lead-nation command coalitions, coordinating interoperability falls to the lead nation. "The most powerful state leading a coalition… has to accept a degree of operational ineffectiveness to gain political benefits from the participation of junior partners in a multinational military intervention."[19] In Afghanistan and Iraq, DOD took the lead in integrating partners into a combined structure and coordinating operations to effectively and coherently achieve the coalition's objectives.[20]

The literature on coalitions explores multiple challenges and opportunities of interoperability; particularly, with a focus on how it affects, and often impedes, battlefield effectiveness. For example, one interoperability challenge has historically been diversity of weapons systems used by coalition partners. This translated to battlefield ineffectiveness because allies could not share resources and this subsequently encouraged standardization of weapons

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[18] Multinational Operations JP 3-16, pg. xii.
[19] Olivier Schmitt, *Allies That Count: Junior Partners in Coalition Warfare*, Georgetown University Press (2018), pg. 8.
[20] Interview with former DOD official, January 2020. There is also literature on inter-branch interoperability challenges within a State's armed forces. This aspect of interoperability falls outside the scope of this project, but Moller (2016) draws attention to issues raised in coalition interoperability are recognized domestically in joint operations.

and equipment.[21] For example, in the Second World War, variation in equipment and weapons systems within partnered operations negatively disrupted Allied combat operations. In one instance, American forces supporting British units in Tunisia were forced to withdraw active support because American small weapons and artillery were not equipped or fitted for British calibers.[22] Once American units were out of ammunition, they were not able to use British reserves and ineffective as support.[23] For most of the Second World War, British and American equipment were not operable with one another; this ultimately triggered efforts towards standardizing weapons systems to avoid these interoperability challenges in future multi-national operations.

Integration of equipment is often the most discussed aspect of interoperability because of the concrete implications; however, scholars have urged for greater recognition of other aspects of interoperability that also have significant implications. For example, some have argued that cultural interoperability is becoming an important aspect of multinational coherence and effectiveness.[24] Cultural interoperability emphasizes coordination around language, similar ethos and procedures. "Over and beyond the problem of linguistic communication, or the difficulties involved in harmonizing procedures, technical arrangements, etc., there remains an issue that is

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[21] Moller (2016).
[22] Calibers in small arms refers to the internal diameter of the gun barrel.
[23] Moller (2016) citing John Hixon, "Operation Shingle: Combined Planning and Preparation," *Military Review*, (1989); John Hixon and Benjamin F. Cooling, "Combined Operations in Peace and War" *U.S. Army Military History Institute*, (1981).
[24] Steven Paget, "Interoperability of the Mind: Professional Military Education and the Development of Interoperability," *The RUSI Journal* 161:4 (2016).

less easily apprehended and ought to top the agenda of military social scientists: that of cultural interoperability."[25]

Creating a coalition requires multi-dimensional coordination. Olivier Schmitt in *Allies That Count* examines how junior partners in a coalition (junior partners are all member states besides the leading state) bring utility to the operation. Schmitt breaks down junior partner's utility into six components: standing (a state's international standing in the system), respect for IHL, integration, responsiveness, skills, and quality. The main argument is that two mechanisms -- standing and the combination of integration and quality -- lead to a junior partner's utility in the coalition. Schmitt argues that his central findings run contrary to conventional wisdom of coalition building in the post-Cold War era. It was generally assumed that the more states participated in a coalition, the more legitimate the intervention. Schmitt argues that this is not the case - when forming a coalition, it is quality, not quantity. The lead-state of a military coalition (historically the United States) wants junior partners to bring utility to the overall goal of the operation.

Schmitt's study gives an important primer for this study. It offers a rich analysis of properties which are determinant of a junior partner's effectiveness on the battlefield, and the far-reaching consequences of the effectiveness, or ineffectiveness in some cases. But it also documents the US-UK relationship closely. For each of the conflicts in Schmitt's study (Gulf

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[25] Bernard Boene and Didier Danet, "France: Farewell to the Draft and All That," in Jurgen Kuhlman and Jean Callaghan (eds), *Military and Society in 21st Century Europe: A Comparative Analysis*, Transaction Publishers, pg. 240; quoted in Paget (2016).

War, Kosovo, Iraq, Afghanistan), the utility of British is closely examined. But the study does not include legal interoperability and considers legal issues as tangential. Schmitt measures junior partner's contribution to the legitimacy of the intervention through the behavior of troops on the ground. Troop behavior is determined through compliance with IHL. Schmitt claims, "If junior partners are accused of war crimes or IHL violations, they undermine both the legitimacy of an intervention and the utility of their contribution. Behavior is then a negative measure: Respecting IHL does not add anything to the legitimacy of an intervention, but disrespecting IHL definitely decreases its legitimacy." This claim is intuitive given what we know about compliance and legitimacy, but it does not give a full picture of international humanitarian law, or legal accountability, in coalition operations.

In sum, interoperability carries significant weight in multiple dimensions. Coordinating equipment and weapons, military doctrine and training, and troop contributions and political legitimacy (among many others) makes coalition warfare a complex, but often necessary, choice. In comparison to the aspects of interoperability discussed here, legal interoperability has received less scholarly attention. The strategic implications of differing legal obligations and interpretations merits a closer examination.

2.2. Legal Interoperability

A core challenge for multi-national coalitions is navigating variance in legal obligations and legal interpretation. "Legal factors have a bearing on everything in alliance and coalition operations – from determining basic 'troop-to-task' considerations to decisions regarding the

targets to be engaged – and the types of ordinances that may be used."[26] Legal constraints exist at all levels of coalition decision-making. As the previous section illustrated, military coalitions require a significant amount of synchronization of military strategy, plans, and minds. This section illustrates the necessity of synchronization of legal issues.

There are two challenges for legal interoperability. The first is when coalition partners have different substantive legal obligations.[27] The goal for any coalition is to establish as much uniformity as possible; however, if member states are parties to different treaties relevant to the armed conflict, then this poses a challenge for coalition planners. For the law of armed conflict, this particular challenge does not occur often because most countries are party to the Geneva Conventions and their protocols. Of course, there are important exceptions. For example, the US is not party to Protocol I and II of the Geneva Conventions; the 1997 Convention on the Prohibition of the Use, Stockpiling and Transfer of Anti-Personnel Mines and on their Destruction; or the 2008 Convention on Cluster Munitions. Yet, 21 of its 27 NATO partners are parties to all four and every other member of NATO is party to at least one.[28] International human rights law is another example of variation in legal obligations – European partners are bound by the ECHR and the judgements of the ECtHR. But this substantive disparity may not be

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[26] Col. Michael Kelly, "Legal Factors in Military Planning for Coalition Warfare and Military Interoperability: Some Implications for the Australian Defence Force," *Australian Army Journal*, Vol. 2, no.2, (2005), pg. 161. https://researchcentre.army.gov.au/sites/default/files/aaj_2005_2.pdf#page=161

[27] Zwanenburg (2013), especially page 690.

[28] See Goddard (2017), pg. 224; see also International Committee of the Red Cross, State Parties to the Following International Humanitarian Law and Other Related Treaties, http://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/4B377401045736EOC12580A300505F5B/%24File/IHL and other related_ Treaties.pdf

as extreme in practice.[29] Much of IHL is considered customary law and thus binding on all combatants regardless of their status as a treaty party; and most states (including the US) are party to some international human rights mechanism.[30] In multi-national coalitions, commanders are not "limited by his own nation's laws and policies, but also by the laws and policies of each of the operations' troop-contributing nations."[31]

What occurs more frequently, and could have more far-reaching practical consequences, is difference in interpretation of the same international legal obligations, "varying interpretations of the same obligations can give rise to significant, concrete differences in the parameters to which states consider themselves bound in conducting military operations."[32] Differences in interpretation can greatly affect the legal interoperability of coalitions. For example, members of the US-led coalitions disagreed on the extraterritorial application of the International Covenant on Civil and Political Rights (ICCPR). As an international human rights mechanism, Article 6 of the ICCPR guarantees the right to life and Article 7 prohibits the use of torture; but the United States understood their ICCPR obligations were not applicable for extraterritorial operations,

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[29] See Goddard (2017) for an expansion of this point.
[30] For more on IHL as status of custom, see the ICRC customary IHL survey (fn 77 in Goddard for two sides of debate)
[31] Jerrod Fussnecker, "The Effects of International Human Rights Law on the Legal Interoperability of Multinational Military Operations," *Army Lawyer* 2014, no. 5 (2014), 9. See also Peter Rowe, *The Impact of Human Rights Law on Armed Forces*, *Cambridge University Press* (2006); Major Winston S. Williams, Jr., "Multinational Rules of Engagement: Caveats and Friction," *Army Law*., (2013).
[32] Goddard, 226.

while understanding that other coalition members interpreted ICCPR obligations do apply extraterritorially.[33]

Divergent legal interpretations can also have tactical consequences for military operations. If contributing states differ on whether a situation rises to the threshold of an armed conflict, for example, the coalition will disagree on which body of law applies.

> Troop-contributing nations' characterization of a military operation, which stem from their nations' legal obligations and strategic policy decisions, have a direct impact on the tactical issues faced by soldiers, such as determining whether or not they are allowed to conduct lethal offensive operations and whether or not they are allowed to administratively detain individuals who pose a security risk… however, even if a troop-contributing nation has determined that the operation should be classified as an armed conflict, there is disagreement among troop-contributing nations as to whether human rights law is displaced by the law of armed conflict.[34]

For example, targeting laws under IHL typically consider concrete objects, such as infrastructure or weapons, to be legitimate targets only if these objects make "an effective contribution to military action."[35] Such objects are subsequently categorized as "military objects." But the US has a broader interpretation of military objects than coalition partners, "the United States interpreted this [military objects] to include objects that make an effective contribution to an enemy's 'war-sustaining,' as well as its 'war-fighting' and 'war-supporting'

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[33] See Beth Van Schaack, "The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change," 90 *International Law Studies*, (2014); for more generally on IHRL interoperability, see Kirby Abbott, "A Brief Overview of Legal Interoperability Challenges for NATO Arising from the Interrelationship Between IHL and IHRL in Light of the European Convention on Human Rights," *International Review of the Red Cross* 107 (2014); Vicki McConachie, "Coalition Operations: A Compromise or an Accommodation," 84 *International Law Studies*, 235 (2008)

[34] Jerrod Fussnecker, "The Effects of International Human Rights Law on the Legal Interoperability of Multinational Military Operations," *Army Lawyer* (2014) 9.

[35] ICRC customary IHL study; see also Goddard (2017), 226.

capability."[36] In practice, this means the US interpretation authorizes targeting engagement for objects that coalition partners, and NATO, would categorize as 'civilian objects' because they are more economic in nature. Under the American interpretation, legitimate military objectives could include exports that inject capital into the armed forces or war efforts, or the airport that is used for their transportation.

2.2.1. State Responsibility in a Coalition

The two legal issues at stake in this dissertation, torture and targeting, inspired differing, at times, contradictory interpretations. All members of the coalition had a substantive legal obligation to refrain from the use of torture and unlawful targeting practices; thus, substantive legal differences of coalition members were not the central issue. The central issue was that states disputed the interpretation and application of their legal obligations. These disputed interpretations are important because, in a coalition, a state risks accountability for the actions of others. And, as this thesis explores, the coalition members had different levels of enforcing a states' obligation. Since the United States was the leader of each coalition, and had the broadest interpretations, the issue of state responsibility was vital for junior partners.

The articles on state responsibility from the International Law Commission (ILC) establish two conditions necessary to establish state responsibility for an unlawful act.[37] First,

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[36] Goddard (2017), 226; see also Department of Defense "Law of War Manual" §1.11.4.4 (2nd edition 2016).
[37] See Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc. A/56/10; see also Goddard (2017) pgs. 213-224; Boris Kondoch and Marten Zwanenburg, "International Responsibility and Military Operations," in *The Handbook of the International Law of Military Operations,* Terry D. Gill and Dieter Fleck eds., 2nd ed. (2015), pgs 559-77.

unlawful act has to be attributable to the State. Generally, the behavior of the armed forces is attributable to the State.[38] This includes *ultra vires* conduct, "that which is in excess to the authority granted to the organ or is contrary to the instructions of the State, e.g., rules of engagement, so long as it is done in an official capacity."[39] Even in the case of a coalition, if multiple States violate their own legal obligations in a collective action, each state is individually accountable for the violation.[40] For example, if two States together invade a separate State in violation their obligation under Article 2(4) of the UN Charter, the invading States are independently responsible for the violation of international law.[41]

There are narrow exceptions to this rule relevant for coalition warfare. First, a state may no longer be responsible for the actions of their armed forces if the, "armed forces are placed at the disposal of another State."[42] To satisfy this condition, the armed forces need to be under the "exclusive direction and control [of the receiving State], rather than on instructions from the sending State."[43] The exclusive direction condition is difficult to prove in practice; even for coalitions with integrated command structures, States rarely give exclusive control over their armed forces. Instead, States usually retain a degree of control because unlawful conduct is individually attributable under state responsibility laws. The ECtHR dealt with issue in *Jaloud v. Netherlands*, in which the Court found the conduct of Dutch armed forces in Iraq was still

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[38] ARSIWA, art. 4.
[39] Goddard, 214.
[40] *Ibid.*
[41] ARSIWA, commentary to art. 1 para. 6; See also Goddard, 213; James Crawford, "State Responsibility: The General Part," (2013)
[42] Goddard, 214; ARSIWA, art. 6.
[43] ARSIWA, commentary to art.6 para. 2.

attributable to the Netherlands, despite functioning under the operational control of the British.[44] The Court made the distinction here that while Dutch troops received "day-to-day orders" from British commanders, the Netherlands still retained authority to "formulate essential policy," such as "distinct rules on the use of force."[45] The Court also noted that the Netherlands continued to exercise command and control, including "exclusive disciplinary and criminal jurisdiction over personnel."[46] While the Netherlands case is directly relevant to ECHR parties, the ruling is indicative of the necessary measures to establish "effective control" over another State's armed forces.

The second ILC condition to establish state responsibility is that the conduct must be a breach of that State's international legal obligation, "Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations."[47] As such, in a multi-national coalition with substantive legal differences, some actions may be lawful for some members and unlawful for others. Each state's legal obligations bind them individually. Because State's are individually responsible for conduct taken in a collective, risky behavior will be calculated differently, not only against a State's individual legal obligation, but against the consequences the state may face.

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[44] *Jaloud v Netherlands* App no 47708/08 (ECtHR Grand Chamber, 20 November 2014)
[45] Ibid, para. 147
[46] Ibid, para. 101.
[47] ARSIWA, commentary to art. 1, para. 6.

Enforcement of legal obligations varies in each state, and as we will see, this disparity does calculate in the military operations.[48] "The risk of being judged to have acted unlawfully is something that States are likely to consider when deciding on whether, and how, to conduct military operations. This will depend not only on their appetite for risk, but on the consequences that each state may face, which may vary."[49] The threat of consequences, what I term "observer effect", is not constant or uniform for all coalition members. It depends on a variety of factors such as the historical relationship between national security and the domestic court system, the presence of international court jurisdiction, a state's propensity for risk, and the unlawful conduct at stake.

The discussion of the coalitions in Afghanistan and Iraq will illustrate how the observer effect differed for decision-making in the United States and the United Kingdom, but ultimately the observer effect occurred through the mechanism of legal interoperability. Concerns of enforcement for policymakers was handled in the navigation of the legal complexity of state responsibility, domestic-international law interplay, and IHL and IHRL interplay.

2.2.2. Red Cards and Caveats

In multinational operations, contributing members can limit how, when and where the coalition's commander can use their military contingency. These conditions are policies of caveats, or "red cards," which are "national reservations on the use of force in a coalition

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[48] See also Goddard for a brief discussion of variation in enforcement in multi-national coalitions, pg. 227.
[49] Goddard, 227.

context."[50] Caveats are "quite a complex problem for force commanders" that require significant coordination.[51] "There is an office in the DOD that has to sit there and coordinate coalition operations around what partners are comfortable, or allowed, to do. What their caveats restrict."[52] Operations in Afghanistan yielded a high number of caveats that some analysts argue directly impeded the coalition's ability to achieve strategic objectives.[53]

Coalition forces in nearly every recent conflict have dealt with caveats and red card holders.[54] The NATO operation in Afghanistan detailed over 70 instances of coalition members using national caveats,[55] and US-led coalition in Afghanistan had over 50 national caveats.[56] These numbers reflect published and publicly available data on caveats – informal and unstated caveats are unknown.[57]

For example, Germany issued a national caveat for NATO operations in Afghanistan that stated they would not participate in the areas of Afghanistan with the most combat.[58] Lead nations and junior partners negotiate these conditions during early stages in exchange for

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[50] Per Marius Frost-Nielsen, "Conditional Commitments: Why States Use Caveats to Reserve Their Efforts in Military Coalition Operations," *Contemporary Security Policy*, (2017), pg. 373.
[51] United States Department of Defense "National caveats among key topics at NATO meeting" February 9, 2005. https://archive.defense.gov/news/newsarticle.aspx?id=25938.
[52] Interview with former high-ranking DOD official, January 2020.
[53] Gunnar Fermann, *Coping with Caveats in Coalition Warfare: An Empirical Research Program*, Palgrave Macmillan, (2019); see also Auerswald and Saidman (2014).
[54] For an interesting empirical study into coalition efforts in Libya and the differentiation of using caveats in air campaigns, see Frost-Nielsen (2017).
[55] Peter L. Bergen, *The Longest War: The Enduring Conflict between America and al-Qaeda,* Free Press NY, (2011), pg. 189; Fermann (2019), pg. 5.
[56] Aueswald and Saideman (2014); Fermann (2019), pg. 5.
[57] Stephen Saideman and David Auerswald, "Comparing Caveats: Understanding the Sources of National Restrictions upon NATO's Mission in Afghanistan," *International Studies Quarterly* 56 (2012).
[58] The same caveat was issued by France, Spain and Italy. https://www.dw.com/en/germanys-non-combat-caveats-to-be-reviewed-by-nato/a-2250071.

support, whether symbolic or combat. "Germany told the Americans that they were going to issue a caveat saying they would not participate in night raids. They were concerned about the domestic consequences if their soldiers made mistakes during the night."[59]

Officials from the US and UK tried to convince junior partners to lift their restrictions and remove national caveats. They argued that the caveats diminished availability of troops necessary for the coalition to accomplish their mission in Afghanistan.[60] General Craddock, NATO Commander, said caveats, "increase the risk to every service member deployed in Afghanistan and bring increased risk to mission success…they are a detriment to effective command and control, unity of effort and command."[61] In practice, this led to the UK, and especially the US, to have to increase their troops to replace the lost units resulting from caveats.

More empirical study is necessary for researchers to understand the differentiation of caveats and limits of operational effectiveness in the face of these constraints.[62] Nevertheless, some scholars find that coalition partners with concerns about the conduct of the armed forces are more likely to issue caveats, whereas coalition partners with greater concerns about the coalitions strategic objectives are larger foreign policy goals are less likely to issue caveats.[63] In a wider study that included cases that issued caveats, this could be relevant for future research on

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[59] Interview with high-ranking DOD official, October 2018; see also Ben Lombardi, "All Politics is Local: Germany, the Bundeswehr, and Afghanistan," *International Journal*, 63(3) (2008).
[60] Saideman and Auerswald (2012).
[61] Ibid, pg. 67.
[62] Saideman and Auerswald (2012) echo the same need for systematic analysis of caveats and the lengths of their influence.
[63] Ibid, pg. 71.

observer effects in coalition warfare. However, for the US and UK, neither case issued caveats; and indeed, tried to reduce the use of caveats and policy limitations by coalition partners.[64]

3. Coalitions in Afghanistan and Iraq

Operations in Afghanistan and Iraq were multinational operations. The trend of coalitions has become well entrenched in recent conflicts and some analysts argue future wars will continue with this trend, making it all the more imperative that researchers grasp the comprehensive implications of coalitions.[65] Whether these will occur through standing military alliances like NATO or ad hoc coalitions like the US-led coalitions in Afghanistan and Iraq is uncertain. Nevertheless, recognizing how the institutional design of coalitions encourages observer effects to have a role in coalition interoperability will be valuable for future wars.

The conflicts in Afghanistan and Iraq required massive operations and, together, operations in Afghanistan and Iraq are the longest sustained US military operation since the Vietnam War. In total, over 1.9 million US military personnel were deployed on over 3 million

[64] House of Commons Defence Committee, "UK Operations in Afghanistan," Session 2006-2007, Released July 3, 2007, pg. 18.
[65] See for example, Raphael S. Cohen, et al., "The Future of Warfare in 2030," RAND (2020). The report predicts that future wars will require the US military to confront adversaries in multinational operations.

tours.[66] The British Armed Forces, as of 2015, contributed roughly 300,000 troops to operations in both Afghanistan and Iraq.[67]

3.1. Operation Enduring Freedom/International Security Assistance Force

Within hours of the attacks on 9/11, officials understood the risk and the cost of war in the Middle East with a "decentralized and shadowy insurgency."[68] The administration also understood the political pressure to respond forcefully to the attacks that killed 3,000 American civilians on US soil. "In the end, there seemed to be little choice but the respond with war."[69]

When support from allies began to reach the administration, critical decisions were necessary about forming a coalition. When Tony Blair offered British support to an American coalition, President Bush looked to Secretary of Defense Donald Rumsfeld and said, "give them a role."[70] Despite NATO's activation of Article 5 to support the US, the Bush administration opted toward forming a lead-nation coalition, or a "coalition of the willing." Some believed this signaled a decline in the relevance of NATO as a military alliance; but to American officials, the

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[66] National Center for Biotechnology Information, "Returning Home from Iraq and Afghanistan: Preliminary Assessment of Readjustment Needs of Veterans, Service Members, and Their Families," https://www.ncbi.nlm.nih.gov/books/NBK220068/. This figure includes repeat tours.
[67] This figure comes from the MOD in a FOIA request. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/412959/PUBLIC_1425293223.pdf
[68] Interview with high-ranking State Department official, January 2020.
[69] Interview with high-ranking State Department official, January 2020.
[70] Olivier Schmitt, "More allies, Weaker Missions? How Junior Partners Contribute to Multinational Military Operations," *Contemporary Security Policy*, 40(1), (2019), pg. 70.

hurdles of the Kosovo intervention were fresh in policymakers' minds and did not want to conduct operations in Afghanistan in another "war by committee" which could limit options.[71]

On September 18, 2001, President Bush signed into law the authorization for the use of military force (AUMF) against those responsible for carrying out the attacks of 9/11. The AUMF was used as the legal basis for many aspects of the war on terror; including the invasion of Afghanistan, the detention facilities in Guantanamo Bay, and even for eavesdropping on US citizens without a court order. This is because the authorization is sweeping and broad in its scope, authorizing the President to,

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11th, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[72]

The AUMF departed from previous Congressional authorizations to use force because there is no temporal, geographical, or political limitations for the executive branch. Congress authorized force on any entity (state, organization, or individual) that directly or indirectly participated in the 2001 attacks.[73] The international community sanctioned a military response confirming the US had "the right of individual or collective self-defense."[74]

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[71] Ibid; on relevance to the future of NATO, see Brian Collins "Operation Enduring Freedom and the Future of NATO" *Georgetown Journal of International Affairs* Vol. 3, no.2 (2002).
[72] 115 Stat. 224 Joint Resolution to Authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States, Public Law 107 -40 – Sept. 18, 2001.
[73] See Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press (2016 2nd ed.).
[74] UN Security Council Resolution 1368.

Operation Enduring Freedom (OEF) is the code name for all hostilities within the umbrella term "global war on terror"; though, it primarily refers to efforts of the US-led coalition. As the AUMF permits, the OEF's primary objective was to overthrow the Taliban and hunt down al Qaeda leaders. Some European partners were hesitant to promote unilateral action from the US and establish a precedent for use of force outside the NATO alliance.[75] To encourage public and private support from allies, President Bush assured, "We fully understand that some nations will feel comfortable supporting overt activities. Some nations will only be comfortable supporting covert activities; some nations will only be comfortable in providing information; others will… only feel helpful on financial matters. I understand that."[76] OEF forces quickly removed Taliban forces from positions of control, but the OEF was an ongoing mission and began to work parallel with the International Security Assistance Force (ISAF).

In December 2001, the Bonn Conference implemented institutional mechanisms to restore order to Afghanistan. One of the more important creations was the volunteer-led International Security Assistance Force (ISAF). Endorsed by the UNSC in Resolution 1386, the ISAF was to restore order in Kabul. ISAF's mandate calls upon UN member states to assist ISAF materially and non-materially (such as overflight clearances).[77] In August 2003, NATO took over leadership of ISAF and oversaw the subsequent expansion beyond the city limits of Kabul. This point is often mistaken in the literature - ISAF was not a NATO mission, but a UN

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[75] Collins, 2002.
[76] David E. Sanger, "Bush is deploying jet bombers toward Afghanistan" *New York Times*, September 20, 2001.
[77] Ibid.

mandated international military operation that was led by NATO.[78] Because of this, not all ISAF contributing states were NATO members, though the majority was.[79]

OEF and ISAF are officially separate coalitions that worked parallel and complemented each other's missions. The OEF focused on counterterrorism and training the Afghan National Army, whereas ISAF focused on peacekeeping, stability operations, and counterinsurgency (COIN).[80] In practice, this distinction did not hold well; the missions blurred national operations and the multinational operations. Each operation had separate chains of command, but effectively the same goal.

By the end of 2002, US attention and priority shifted toward the invasion of Iraq. While the US (and for a while the UK) were focused on operations in Iraq, ISAF was the major force in the Afghan theater. Eventually, ISAF's mission expanded beyond Kabul and the years of 2005-2006 expanded ISAF's operations substantially.[81]

When US attention shifted back towards Afghanistan in 2009, the OEF and ISAF continued to work alongside one another. The OEF terminated in 2014; but, US combat and non-combat operations in Afghanistan was replaced with Operation Freedom's Sentinel.

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[78] UNSC resolution 1386

[79] Non-NATO member states included Armenia, Australia, Austria, Azerbaijan, Finland, The Former Yugoslav Republic of Macedonia, Georgia, Ireland, Jordan, New Zealand, Sweden, Singapore, Ukraine, United Arab Emirates, and Bosnia and Herzegovina.
NATO members included Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom, and United States.
Source: https://www.nato.int/isaf/structure/nations/

[80] Saideman and Auerswald (2012).

[81] Ibid.

3.2. Operation Herrick

Operation Herrick is the codename for all British military operations in Afghanistan from 2002-2014. This includes British operations under the OEF and operations under ISAF. When ISAF coordinated its expansion beyond Kabul, the British took the lead on operations in the South, specifically Helmand province.[82]

UK operations in Helmand began in 2006 and relieved American forces that had previously been in the region. British presence in Helmand is a controversial component of British operations and will be detailed further below in discussions of British limitations in the coalition. Nevertheless, a consistent criticism is the lack of strategy and clarity of purpose. "Initially there was little understanding, even at the highest levels, of what the British were doing in Helmand in the first place."[83] ISAF commander for Southern Afghanistan, General David Richards, said, "We were told the Canadians had asked to do Kandahar and that we would go to a place called Helmand. And I thought, 'where's Helmand? That's not very important. Kandahar is what matters.' And I've never yet had a good reason given to me why that decision was taken."[84]

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[82] For a detailed account of British operations in Helmand, see Frank Ledwidge, *Losing Small Wars: British Military Failure in Iraq and Afghanistan*, Yale University Press, (2011). For Ministry of Defence account of Operation Herrick, see British Army, "Operation Herrick Campaign Study" March 2015. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/492757/20160107115638.pdf

[83] Ledwidge (2011), pg. 62.

[84] James Fergusson, *A Million Bullets: The Real Story of the British Army's War in Afghanistan,* Bantam Press (2008), pg. 172; quoted in Ledwidge (2011), pg. 62.

The initial mission in Helmand was to provide security for reconstruction in the region, but Taliban presence brought British forces into combat. Active hostilities in the region caught British under prepared and were running out of resources, particularly air power to support ground troops.[85] In a secret meeting, the UK and Taliban reached a ceasefire deal to address resource scarcity and recalibrate strategy and tactics.[86] The hostilities put pressure on the MOD to send more troops to Helmand, despite a crunch of resources as the UK was operating in two mid-size theaters in Iraq and Afghanistan.

Former Chief of the Defence Staff, Lord Jock Stirrup, testified to the Iraq Inquiry about the imperatives of Afghanistan.

> I think it is fair to say that some of us were very nervous [going into Helmand], because the assumption was that we would be drawing down in Iraq at the same time as we were ramping up in Afghanistan, and, therefore, the overall commitment for our forces would remain about the same in balance. I certainly took the view and a number of my colleagues did, that things never work out as you expect or as you plan, and that usually these things tend to be delayed, and so there was a risk, if we were not careful, of placing a burden on our forces beyond that which they could sustain over the long-term.
>
> We discussed that on many occasions, and it was clearly a risk, but there was also a sense of strategic momentum within NATO, bearing in mind that we were talking about ISAF, which is a NATO force and it was a NATO plan to extend the influence of ISAF from Kabul in the North through the west and south and then around to the east, and eventually to have unified command over the whole of the country rather than having a split between ISAF and American Operation Enduring Freedom.
>
> These things, once you set them underway and you start discussing them, particularly in an international context, they develop a life and a momentum of their own and we certainly found ourselves, I recollect, in 2005, in a position where we were seen within NATO as dragging our heels.

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[85] Alastair Leithead, "Aircraft Needed in Afghanistan" BBC News, June 2006. http://news.bbc.co.uk/2/hi/uk_news/5136594.stm

[86] Alastair Leithead, "Can Change in Tactics Bring Peace?" BBC News October 2006, http://news.bbc.co.uk/2/hi/uk_news/6060384.stm

> At one stage, I recall, we actually put a stop to planning for UK force deployment, because we were not sure what the Dutch were going to do, and it seemed to us unwise to be deploying our force into an environment where we didn't know what the surrounding forces were going to be and who they would be working with.
>
> The Dutch – so there was a pause at that stage, but during that pause we were coming under considerable pressure more widely within NATO, because there was an urgency within the alliance to get this done.
>
> So when the Dutch resolved their particular concerns and decided what they were going to do, our planning continued, but there was always this concern about overlap between Iraq and Afghanistan and the doubt whether we would actually be able to reduce in Iraq quite as quickly as we were planning at that time."
>
> I think the view on that decision was that this was going to be a NATO operation that was going to happen and that there was an urgent need in Afghanistan to do something about the west and south if the whole Afghanistan enterprise were not to fail, that restricting NATO and ISAF only to Kabul and to the north would not deal with the issues which by then were starting to emerge much more clearly in terms of a resurgent Taliban, in terms of lawlessness, in terms of lack of governance. So, there was a requirement to do something and that we had to participate in that. We had to contribute to it as an alliance member, as a substantial alliance member, but at that time we were concerned because we were still in Iraq.[87]

Some believed the British were overconfident in their ability to win small wars since that has dominated much of British military history in modern conflicts. The British Army's 'lessons learned' from Operation Herrick warn against this thinking. "The Army must dispel any residual belief that it is inherently proficient at this form of soldiering (by virtue of historical experience). COIN is not in its genes any more than other types of operation. It needs constant attention in the form of understanding, doctrine and investment in training and equipment."[88]

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[87] Oral Testimony, Iraq Inquiry, Jock Stirrup Testimony in 2010, pgs. 28-32.
[88] British Army, "Operation Herrick Campaign Study" March 2015, pg. xxix, para. 10.

3.3. Operation Iraqi Freedom

Creating a 'coalition of the willing' for Iraq was strikingly different from the experience in Afghanistan. The Bush administration faced significant pushback because the justification for the Iraq invasion did not convince all US allies of its legitimacy.[89] Nevertheless, the US moved forward with Operation Iraqi Freedom (OIF).

President Bush gave a speech at the 2002 NATO summit demanding Saddam Hussein "disarm or face the consequences,"[90] using UNSC resolution 1441 of November 8, 2002 as legal justification for the use of force.[91] The resolution does similarly calls on Iraq to comply with previous disarmament obligations and cooperate with International Atomic Energy Agency (IAEA) inspectors. US officials claimed to have key intelligence which confirmed the WMD program and intelligence that linked Saddam Hussein to terrorist networks the US was already at war within Afghanistan. US officials presented audio evidence to the UNSC in February 2003 confirming that Iraqi officials were deceiving inspectors that were looking for WMDs. "Could any member of this council honestly rise in Defense of this false declaration? Everything we have seen and heard indicates that, instead of cooperating actively with inspectors to ensure the success of their mission, Saddam Hussein and his regime are busy doing all they possible can to ensure that inspectors succeed in finding absolutely nothing."[92]

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[89] See Chapter 3 for an in-depth discussion of the UN Security Council resolutions and ambiguity surrounding the use of force.
[90] President George W. Bush, Speech
[91] UN Security Council Resolution 1441, Nov. 2002.
[92] Secretary of State Colin Powell, February 5, 2003. https://www.theguardian.com/world/2003/feb/05/iraq.usa

Despite controversy, about 60 nations supported coalition efforts in Iraq, both directly and indirectly and 37 nations offered direct support in military operations.[93] However, at the outset of operations, only four nations sent troops: the US, the UK, Australia, and Poland.[94] As a lead-nation coalition, all multinational forces were under the command and control of US commander of CENTCOM [Central Command], though, national command structures were still in place.[95]

The invasion began on March 20, 2003 and control over Baghdad was declared on April 9, 2003.[96] The battle phase of the invasion was met with resistance and combat, but the coalition effectively completed the invasion phase with the capture of Baghdad. In the weeks during the invasion phase, more troops arrived in Iraq from other coalition contributing states and by April 31st, 11 partners had 30,000 troops in Iraq.[97]

Once combat operations concluded, the Combined Joint Task Force—7 was established as headquarters for all strategic, operational, and tactical operations. The mission of the task force shifted to establishing an interim Iraqi government. This led to the creation of the Iraqi Governing Council and the Coalition Provisional Authority (CPA). Quickly, commanders lost control of law and order in parts of Iraq and had to turn to a function of security. Many attribute

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[93] The exact number is classified as some states preferred their support remain out of public view. See Stephen A. Carney, "Allied Participation in Operation Iraqi Freedom," Center of Military History (2011). https://history.army.mil/html/books/059/59-3-1/CMH_59-3-1.pdf

[94] Ibid, pg.6. According to Carney, Denmark is also thought to have sent Special Forces for the initial invasion but has not publicly acknowledged that.

[95] Ibid.

[96] Carney details day-by-day battles of the invasion, pgs. 8-12.

[97] Carney, pg. 11.

this dissolution of the security situation to two early and critical decisions by US Ambassador Paul Bremer who was leading the CPA.[98] The first was the process of de-Baathification of the Iraqi regime which shut down all Iraqi governing infrastructure and institutions. The US struggled to provide the resources and expertise to operate an effective Iraqi administration.[99] The second decision was to disband the Iraqi army which left many military-trained men unemployed and easy for insurgencies to recruit.[100]

OIF faced significant attacks from insurgencies that were increasing with each year. By 2006, President Bush announced a surge in OIF, dramatically increasing US troops in Iraq.[101] The levels of violence began to decrease by the end of 2007 as the US increased troops, shifted toward a strategy of 'winning the hearts and minds' of local populations, and the training of the Iraqi Security Force. As the Iraqi forces increased, the number of coalition troops decreased.

In 2008, Iraqi officials signaled their preferences to end the OIF mandate and subsequently the majority of OIF coalition members withdrew by the end of the year. The Iraqi government entered into new status-of-forces agreements with certain coalition members, including the US and UK. US forces were allowed to remain in Iraq until 2011, under certain conditions, including the US withdrawal from Iraqi urban areas.[102] The UK, along with Australia, El Salvador, Estonia and Romania, were permitted to stay in Iraq until 2009.

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[98] Michael Mazarr, *Leap of Faith: Hubris, Negligence, and America's Greatest Foreign Policy Tragedy*, Public Affairs (2019).
[99] Interview with former high-ranking State Department official, January 2020.
[100] Ibid. See also Mazarr (2019).
[101] Carney (2011), pg. 24.
[102] Carney (2011), pg. 27.

3.4. Operation Telic

Operation Telic was the code name for all British operations in Iraq and began in March 2003 with the initial invasion. The UK committed about 46,000 troops to Iraq for the initial combat operations, roughly March 2003 – June 2003.[103] Operation Telic was terminated in April 2009.

Second only to US contributions, UK consistently contributed more resources and troops to operations in Iraq than any other coalition member. The UK also assumed leadership roles, particularly in the southeast, and was critical to reconstruction efforts in Iraq.[104] The main objective for Operation Telic was to secure the city of Basra (in the southeast) which the UK ultimately failed to do.[105] The UK was never able to secure enough troops and resources necessary to secure Basra – by September 2003, decisionmakers in London reduced British capacity to 11,000 troops, and 8,000 by December 2003. The consequences were significant as "these swift withdrawals made it impossible for coalition forces on the ground to provide any form of security for the local population, whose safety was now in the hands of hastily formed local security forces."[106] This lack of sufficient resources forced British forces to "strike a humiliating" deal with militias in Basra.[107] Following this deal, an Iraqi-led force with US support had to regain control of Basra.

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[103] Carney (2011), pg. 119.
[104] Ibid, pg. 121.
[105] See Schmitt (2018) pgs. 106-121.
[106] David Ucko and Robert Egnell, *Counterinsurgency in Crisis: Britain and the Challenges of Modern Warfare,* Columbia University Press (2013); quoted in Schmitt (2018) pg. 114.
[107] Schmitt (2018), pg. 106.

The US and UK clashed over strategic objectives in Iraq. "Our central goal in Iraq was to train Iraqi forces so they could protect themselves. I tried to get this point across to the Americans multiple times. The Americans were more interested in building institutions – I recognized this would take too much and was not our role. We wanted to protect people and train Iraqi forces – anything else is state building."[108] From the US perspective, a former DOD official said, "We couldn't rely on all the partners to effectively handle things on their own. The British were the only ones we could really rely on, but even that ran into problems in Basra. We recognized we had to keep an element of control in all aspects because we started to have differences come up with multiple partners."[109]

Ultimately, Operation Telic ran into strategic confrontations and obstacles of resource allocation. The British contribution to Iraq is generally perceived to be the legitimacy they brought to the invasion and the political support in the UNSC in the lead up to Iraq.[110]

4. Legal Interoperability and Judicial Observer Effects

The analysis of judicial observer effects and legal interoperability departs from the structure of the previous chapter. In this section, I will examine US and UK policies from the vantage point of each type of judicial observer effect (domestic, international, and foreign) to

[108] Interview with former MOD official, February 2020.
[109] Interview with former DOD official, October 2018.
[110] Schmitt (2018); see Chapter 3 for a detailed description of British decision making leading up to the Iraq Invasion.

demonstrate how each type of effect had an influence, or how each type lacked an influence, in national security policies concerning the coalition.

For both ad hoc coalitions, the US was the lead nation and in command of most operational decision-making. For coalition policies, the US did not experience high domestic observer effects or international observer effects; however, foreign observer effects were greatly enhanced through the coalition. American decision-makers took deliberate steps in operational planning to avoid accountability in foreign jurisdictions, including human rights in European courts. Additionally, US policies considered "risky" by coalition partners triggered direct confrontations from key allies out of their concerns for political and legal accountability. This political pressure jeopardized the foundations of the coalition and prompted rocky relations with critical European allies.

The UK experienced different types of judicial observer effects. British coalition policies exhibit greater influence by domestic observer effects and international observer effects. There is little evidence that foreign observer effects influenced British policies.

Degrees of observer effects also differed by issue area. Targeting in the coalition is a different process than targeting as discussed in the inter-agency chapter. In a coalition, targeting policies have to satisfy the legal requirements and caveats submitted by contributing partners. As will be discussed, targeting policies in Afghanistan were stricter standards than was required under IHL obligations. Due to conflict conditions in which distinguishing combatants from civilians by identifying features was impossible, the coalition targeting policy had to adapt. The same restraint is not present for interrogation policies in the coalition, where participating members were more willing to adopt riskier policies.

This section continues as follows. First, I will discuss how foreign observer effects filtered into US policymaking. Foreign observer effects are present at the coalition and tactical levels. At the coalition level, internal memos reveal a discussion at the cabinet-level about the vulnerability of US forces working with coalition partners. At the tactical level, combat operations were disrupted when decisions in theater led commanders to determine how conditions risked US accountability in foreign courts. Second, I discuss how coalition partners put pressure on US policymakers when US policies were too risky for coalition partners. This pressure culminated in back-channel confrontations in which coalition partners threated cooperation if US policies continued to put the entire coalition at risk of litigation. US policies had to respond accordingly to continue support.

4.1. US Policies and Foreign Observer Effects

The risk of foreign jurisdiction is the most direct pathway judicial observer effects influenced US policy. Uncertainty about the risks of legal accountability for US forces operating jointly with foreign partners was a cabinet-level concern that was relevant to multiple key decisions in the early days of 9/11. One key decision was to interpret the attacks not as an act of terrorism, but an act of war, to some controversy in among high-ranking members.[111] The domestic political pressures to respond with force to the 9/11 attacks led even those who disagreed with a war-framework understood the political necessity of it.[112]

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[111] Interview with author, January 2020.
[112] Interview with author with high ranking State Department official, January 2020.

Chapter 3 offered a detailed discussion of the key post-9/11 decisions, especially the applicability of the Geneva Conventions, from an inter-agency perspective. This chapter examines some of these key decisions from the perspective of coalition building. Much of the internal communications in the executive recognized the necessity of international support and contributions of key allies. In light of this perspective, the OLC memos justifying harsh interrogation methods has different implications. National security policymakers not only had to manage the inter-agency debates about the detention and interrogation program; but the implications on coalition partners were central to administration discussions and would ultimately prove to have negative consequences for the US.

Recall DOJ legal advice on the standards of conduct required by the US under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) as implemented by Sections 2340-2340A of title 18 of the US Criminal Code (known as the 'torture statute'). As required by CAT, the torture statute implements the legal obligations as the US understood through their declarations, reservations and understandings the US submitted with the CAT's ratification.

The memo from the OLC was vital to the administration's legal architecture for an interrogation policy and ultimately concludes,

> …for an act to constitute torture as defined in Section 2340 [torture statute], it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. We conclude that the statute…makes plain that it prohibits only extreme acts.[113]

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[113] Memorandum for Alberto R. Gonzales, Counsel to the President, from: Jay S. Bybee, Assistant Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. 2340-2340A* (August 1, 2002).

On the question of enforcement and accountability under the torture statute, the memo reassures, "… in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war…under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A."[114]

Three important points should be highlighted about the memo before analyzing the effects of it for the coalition. First, and most clearly, this memo grants extensive authority to the interrogation agents with impunity. The threshold for "severe pain" was adopted from statutes defining emergency medical conditions for the purposes of providing health benefits, namely Medicare legislation.[115] This threshold departs from the internationally recognized standard for acceptable conduct in armed conflict.[116] Second, the memo suggests that even in the case of reaching the high threshold of torture, certain grounds justify abusive practices and still avoid accountability. The "ticking time bomb" scenario was often used to describe such an acceptable episode in which the intelligence gathered from inflicting torture would thwart a terrorist plot.[117]

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[114] Ibid.
[115] Nancy Baker, "Who Was John Yoo's Client? The Torture Memos and Professional Misconduct," *Presidential Studies Quarterly*, 40,4 (2010).
[116] See also Gary Solis, *Law of Armed Conflict*, for more on this point.
[117] See Kate Kovarovic, "Our 'Jack Bauer' Culture: Eliminating the Ticking Time Bomb Exception to Torture," *Florida Journal of International Law* (2010); David Luban, "Liberalism, Torture, and the Ticking Bomb," *Intervention, Terrorism, and Torture* (2007); for a broader moral and philosophical discussion of the ticking time bomb scenario, see George Hunsinger, "Torture *Is* the Ticking Time-Bomb: Why the Necessity Defense Fails," *Dialog*, September 2008; Fritz Allhoff, *Terrorism, Ticking Time-Bombs, and Torture: A Philosophical Analysis*,

The legal justification in this memo would not lead one to expect the observer effect to be particularly powerful within the aftermath of 9/11.

Finally, some scholars argue the existence of the "torture memo" is evidence of the power of law in high politics.[118] While the memo's legal soundness has been discredited,[119] seeking this legal justification signals an internalization of legal norms and cements the idea that law is a powerful part of the political process. However, I argue the observer effect offers another perspective and context to situate the existence of the "torture memos." Internal communications from the OLC and the DOD legal office acknowledge the gap in legal interpretation on the torture statute in US courts.[120] Legal advisors at this time believed US courts would continue the established practice of military deference, and the OLC as an agency had an established practice of deferring to the policy preferences of the White House.[121] interrogators from prosecution under the torture statute in federal courts.[122]

2012; Fritz Allhoff, "A Defense of Torture: Separation of Cases, Ticking Time-bombs, and Moral Justification," *Journal of Applied Philosophy*, (2005).

[118] See Kathryn Sikkink, *Justice Cascade*, Chapter 8 for the comprehensive argument.

[119] A memo released by the same office in 2004 replaces and reverses much of the legal analysis from the 2002 Bybee memo, see Memorandum for Deputy Attorney General James B. Coney, from Daniel Levin, Acting Assistant Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. 2340-2340A* (Dec. 30, 2004).

[120] See also Secretary of Defense Rumsfeld Memo, Re: Guantanamo Interrogation Policy, Dec. 2, 2002; Memorandum for Commander, Joint Task Force, Re: Legal Brief on Proposed Counter-Resistance Strategies, October 11, 2002. "Case law in the context of the federal torture statute and interrogations is also lacking, as the majority of case law involving torture relates to either the illegality of brutal tactics used by the police to obtain confessions… no case law on point within the context of 18 U.S.C. 2340." (2[c])

[121] See Adoree Kim, for an empirical analysis of 123 OLC opinions. Kim finds the OLC systematically deferential to the President and presidential action, while remaining relatively impartial towards agencies. "The Partiality Norm: Systematic Deference in the Office of Legal Counsel," *Cornell Law Review* vol. 103, 757 (2018).

[122] OLC memos carry the force of law but are not law. See Kim (2018); and see Fred Barbash, "Justice Department opinions take on the force of law – but are not, in fact, the law," *The Washington Post* May 31, 2019. This analysis looks to the Mueller investigation and OLC opinions, but the constitutional analysis applies to the torture interpretation.

On February 7, 2002, weeks after the OLC memo, White House counsel issued a draft memo detailing the administration's policy regarding the applicability of the Geneva Conventions to the conflict in Afghanistan.[123] "Our recent extensive discussions… confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 to the conflict with al Qaeda and the Taliban involves complex legal questions…the Geneva Conventions applies to conflicts involving 'High Contracting Parties,' which can only be states. Moreover, it assures the existence of *regular* armed forces fighting on behalf of states."[124] Cabinet members anticipated the legal consequences of the decision. Secretary of State Colin Powell replied with a memo outlining the areas where the White House counsel fell short in their consideration of the scope of consequences in rejecting the applicability of the Geneva Conventions.[125] The State Department memo considers the choices of application or rejection of the Geneva Conventions and weighs the pros and cons of each. Importantly, Secretary Powell acknowledges that regardless of the decision on the applicability of Geneva, neither option "entails any significant risk of domestic prosecution against U.S. officials."[126]

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[123] Memorandum from The White House to The Vice President, The Secretary of State, Secretary of Defense, The Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and Chairman of the Joint Chiefs of Staff, Re: Humane Treatment of al Qaeda and Taliban Detainees, February 7, 2002. [Hereinafter "Geneva Memo,"]
[124] Geneva Memo, emphasis in text.
[125] Memorandum for Counsel to the President and Assistant to the President for National Security Affairs from Colin Powell, Re: Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan, January 26. [Hereinafter "Powell Memo"]
[126] Powell memo (2002), pg. 2.

However, legal accountability through foreign jurisdiction is strongly considered in the State Department memo. If the administration chose to reject the application of Geneva Conventions, Powell noted two important points. First, "Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice." European partners have stricter human rights standards under their obligations in the ECHR, and these restrictions could limit American options and effectiveness. Second, "It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops…it will make us [US forces] more vulnerable to domestic and international legal challenge and deprive us of important legal options…we will be challenged in international for a (UN Commission on Human Rights; World Court; etc.)[127] Powell stresses the risks of rejecting the applicability Geneva Conventions as the risks of rejecting the interpretation of coalition partners. US policy would isolate itself and increase exposure to legal accountability in foreign and international courts. If the US accepted the applicability of Geneva Conventions, Powell claims it "a more defensible legal framework, preserves our flexibility under both domestic and international law… it preserves US credibility and more authority by taking the high ground… puts us in a better position to demand and receive international support… and reduces incentives for international criminal investigations directed against US officials and troops."[128]

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[127] Powell memo (2002), pg. 3.
[128] Powell memo, pg. 3-4.

Foreign and international observer effects were clearly considered in the policy planning process regarding detention and treatment of detainees. But the February 7, 2002 memo from President Bush decides to reject the applicability of the Geneva Conventions. US officials opted for a policy that maximized their maneuverability in the face of the risks of foreign and international prosecution. While foreign and international observer effects were considered, it was not strong enough to alter US policy towards the more widely accepted interpretation of Geneva applicability. But the US still opted to work within coalitions, and the disparities in legal interpretation of applicable law carried tactical implications that disrupted combat operations in theater.

The tactical disruptions are especially evident regarding detention and treatment of detainees. As noted previously, the policies of interrogation, and accountability for harsh techniques, became a central issue for the administration and for foreign partners. An unclassified DOD memo which lists approved interrogation techniques states, "the policy aspects of certain techniques should be considered to the extent those policy aspects reflect the views of other major U.S. partner nations."[129] The memo lists 24 approved interrogation techniques of which five include a caveat that the technique would be interpreted by coalition partners to violate the Geneva Conventions (or coalition domestic law) and "consideration of these views should be given prior to use of this technique."[130]

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[129] Memorandum for the Commander US Southern Command from Secretary of Defense Rumsfeld, Re: Counter-Resistance Techniques in the War on Terrorism, April 16, 2003. [Hereafter the "Techniques Memo"].
[130] Ibid. As an example, technique "O" states: *Mutt and Jeff: A team of a friendly and harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique. [Caution: Other Nations that believe that POW*

The incorporation of coalition partners' different legal interpretations and obligations led to "extremely unusual design of operations in both Iraq and Afghanistan, but especially Afghanistan."[131] The legal interoperability led most partners of the coalition to avoid detention and interrogation altogether. American and British forces were the only national forces detaining and interrogating detainees. American officials navigated operations to avoid subjecting armed forces to European human rights standards through joint operations.

> There were complex arrangements that made detention operations very difficult. For example, we could not detain anyone in Afghanistan for more than 96 hours or else we risk subjection to the ECHR which meant we couldn't then [after 96 hours] hand them [detainees] over to Afghan forces because they were at risk for torture. So, if we kept them longer for 96 hours, we had to take them home with us, which was outrageous.[132]

There are two key take-aways here. First, the 96-hour rule was a vital standard for the coalition and, though originally adopted from the ECHR, became both NATO and US policy.[133] Operations were "complex arrangements" in order to reduce the uncertainty associated with foreign jurisdiction. Second, it illustrates the calculated risk on behalf of American policymakers regarding joint operations with state parties to the ECHR. The consideration was focused on

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protections apply to detainees might view this technique as inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.] Another caveat to the techniques warns, [*Caution: Based on court cases in other countries, some nations may view application of this technique in certain circumstances to be inhumane. Consideration of these views should be given prior to use of this technique.]* Techniques Memo, p. U, Tab A.

[131] Interview with high ranking legal advisor, February 2020.

[132] Interview with former State Department legal official, February 2020.

[133] See Steven Hill and Leonard Holzer, "Detention Operations in Non-International Armed Conflicts Between International Humanitarian Law, Human Rights Law and National Standards: A NATO Perspective," *Israel Yearbook on Human Rights*,

coalition forces having "effective control" over the local territories in Afghanistan and/or Iraq.[134] US officials expressed concern that if US command fell under the jurisdiction of the ECHR through their joint operations with European partners, then US forces could be further at risk for violating ECHR Article 3 in transferring detainees for Afghan security forces where there was a risk of detainee abuse.[135] Another official said, "There wasn't massive concern about ECHR standards or European litigation in the sense that it wasn't the primary consideration. But there was an awareness that we [the US] could be risking some exposure."[136] The degree of the risk of accountability for US forces for human rights obligations was clearly not a primary concern; however, the awareness was enough to adjust policies to mitigate the risks and exposure of joint operations.

Foreign observer effects also impacted US policies as coalition partners worried about their domestic repercussions in supporting the US interrogation program that used techniques unacceptable in some jurisdictions. Some coalition partners had higher levels of court jurisdiction (domestic and international) and urged more caution in their approach to coalition legal interoperability. The risk for joint operations is when states are responsible for the actions of other coalition members.[137] When the US interrogation program was becoming common

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[134] The effective control doctrine will be explored more in the UK case study. ECtHR jurisprudence on the extraterritorial application of the ECHR confirms that ECHR member states have an obligation to fulfill their human rights obligations extraterritorially when it can be demonstrated that ECHR states have effective control over the territory. Citizens within the controlled territory then fall under the jurisdiction of ECHR, and the ECtHR. See *Loizidou v. Turkey* 40/1993/435/514 Council of Europe: European Court of Human Rights, February 23, 1995.
[135] Interview with former State Department legal official, February 2020.
[136] Interview with former State Department legal official, March 2020.
[137] See the laws on State Responsibility in joint operations in Section 2.2.1. of this chapter.

knowledge within the coalition, some member states faced concerns that they were complicit in the US torture program and could face legal, and political, accountability in their domestic jurisdictions.

In 2002, DOD legal officials were confronted by key coalition partners when faced with risks of legal accountability.[138] The risks for junior partners were particularly acute for states with stricter human rights obligations, "there was greater uncertainty with the courts because at the time the application of the ECHR was not completely clear."[139] There is not a lot of evidence to suggest that legal accountability was a constant tension among the US and European partners; however, when the US interrogation policy became coalition knowledge, or what some called the "risky US behavior,"[140] coalition partners coordinated confrontations to express their concerns.

The treatment of detainees at Guantanamo and in Iraq were risky enough to jeopardize the foundations of the coalition. At the direction of their superiors, military lawyers from the United Kingdom, Canada, New Zealand, and Australia[141] coordinated a confrontation with their DOD counterparts.

> They urged that DOD policymakers recognize that US detainee abuse put the entire coalition at risk. They said their cooperation with the US military… and intelligence will decrease if you [the US] continue to abuse prisoners. They told me they didn't want the legal justifications. At this time, I thought the abuse in Guantanamo was only a lapse in judgement, but our allies had different understandings. We [the US] ruined the human rights standard, and our partners had both legal and political obligations to do something.[142]

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[138] Interviews with high-ranking DOD and State Department officials discussed these back-channel interactions as much as possible without disclosing classified information.
[139] Interview with former UK MOD legal official, February 2020.
[140] Interview with DOD legal official, January 2020.
[141] All coalition partners and members of the "five-eyes", an intelligence-sharing alliance among the English-speaking countries.
[142] Interview with DOD legal official, January 2020.

According to DOD officials, this confrontation was ordered by higher authorities as this confrontation "couldn't have occurred at the cabinet level."[143]

Coalition partners in confrontations like this (it is unclear if more occurred) were partly acting as a result of their own domestic observer effects. While the US case, as Chapter 3 explains, did not experience strong domestic observer effects which permitted "riskier" policies regarding interrogation, the US did have to address foreign observer effects through the architecture of the coalition. "I came back to the DOD with the message, and we knew we had to take it seriously."[144]

Foreign observer effects also impacted US targeting operations. One of the main challenges in a coalition is coordinating the legal interoperability of targeting procedures. The international and national obligations for military targeting are more expansive for some and more restricted for others.

For example, the US and Australia were both members of the coalition and are vital military partners. But Australia's targeting protocols are stricter than American protocols, which led to tactical disruptions to combat operations in theater. As one Australian colonel said,

> While declarations have made it easier to manage contending approaches in targeting between the United States and Australia, differences continue to exist. The United States has adopted a broad application of the use of kinetic means in military targeting. However, recent military practice has suggested that, when working in a coalition environment, the United States is prepared to modify this approach in the interest of harmony with its military partners. Frequently, the management of

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[143] Ibid.
[144] Interview with former DOD legal official, January 2020.

> legal factors for interoperability has involved determining the lowest common denominator that is acceptable to all parties and then proceeding on that basis.[145]

US and coalition targeting policies in Afghanistan signaled a major departure from previous conflicts. Recall that under IHL, targeting people or objects in armed conflict is guided by the principle of distinction. IHL permits the a lawful engagement of a target under three conditions (1) the enemy is declared hostile, and all members of a hostile enemy is a lawful target at all times; (2) Civilians are legitimate targets only if, and for during such time as, they are directly participating in hostilities; (3) and when soldiers are acting in self-defense, or in the defense of others, and less extreme measures are not available.[146]

The conditions outlined in IHL do not necessarily capture the operational challenges posed by different kinds of conflicts, and commanders can decide to impose stricter targeting measures than IHL requires. The conflict in Afghanistan was a counter insurgency (COIN), sometimes also called irregular warfare, and relied heavily on the legitimacy of the whole operation.[147]

> "The application of a purely military approach to irregular warfare [IW] has not proved successful in the past. IW is about winning a war of ideas and perception. Its battles are fought amongst the people and its outcomes are determined by the perceptions and support of the people. The campaign must change the perception and offer viable alternatives, rather than specifically kill an enemy or destroy his resources in isolation."[148]

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[145] Kelly, pg. 168
[146] See where Schmitt cites; otherwise, IHL protocols
[147] See Michael Schmitt, "Targeting in Afghanistan" (2009) for more on COIN and the importance of legitimacy
[148] Schmitt (2009), 309.

Because perceptions from the local population, and the political support of the population at home, is vital to the success of the campaign, targeting measures directly reflect the campaign legitimacy and success. Assessing and fostering campaign legitimacy through targeting measures was the bedrock of US and coalition doctrine and COIN targeting planners decided they had to go beyond the legal norms governing targeting.[149]

Targeting planners had two challenges. First, the operational terrain was difficult to navigate. Michael Schmitt explains the obstacles for coalition planners in balancing air attacks with ground operations,

> The operational environment was difficult. The terrain, distance, and infrastructure led the coalition to rely heavily on air attacks; also, to avoid the ground invasion mistakes the Soviets made decades prior. During the initial phases of hostilities, friendly indigenous armed groups (supported by US and coalition) shouldered most ground operations. But, once the conflict morphed into a classic insurgency, ground operations became more important. Nevertheless, air attacks remain a dominant feature of the war in Afghanistan.[150]

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[149] Schmitt (2009); As an example, the Air Force requires consideration of the following factors during the "target validation" phase of planning:

1. Does the target meet [combined force air component commander] or higher commanders' objectives, guidance, intent?
2. Is the target consistent with LOAC and ROE?
3. Is the desired effect on the target consistent with the end state?
4. Is the target politically or culturally "sensitive?"
    4.a. What will the effect of striking it be on public opinion (enemy, friendly, and neutral)?
5. What are the risks and likely consequences of collateral damage?
6. Is it feasible to attack this target? What is the risk?
7. Is it feasible to attack the target *at this time?*
8. What are the consequences of *not* attacking the target?
9. Will attacking the target negatively affect friendly operations due to current or planned friendly exploitation of the target?

[150] Schmitt (2009).

Second, the enemy had no distinguishing emblems, features, or facilities that separated them from the civilian population. Possession of arms was not sufficient to identify combatants because Afghans often carried weapons for protection and local armed groups that were assisting coalition forces were indistinguishable from Taliban and Al Qaeda. General T. Michael Mosely said, "in any given space-ground space – out there, you had regular and unconventional forces, humanitarian assistance guys, maybe regular guys and not one of us in command authority knew where all those guys were."[151]

To overcome these obstacles, coalition partners adopted a new targeting procedure that had never been used in ground operations in previous conflicts. Coalition forces did not declare any enemy forces hostile, meaning there was no 'lawful combatant' under the first prong of IHL targeting.[152] Instead, a legitimate target had to present a "likely and identifiable threat" (LIT) before being attacked. If a target did not meet this standard, they could not be engaged.[153] The LIT standard caused significant confusion for commanders and military lawyers because its application is entirely contextual. As Schmitt rightly acknowledges, it is paradoxical in that the LIT standard is more restrictive than declaring enemy forces hostile because the target had to manifest some degree of threat before engagement. But on the other hand, it is also more

[151] Schmitt (2009) 313-4.
[152] See Schmitt (2009).
[153] This is in contrast to Operation Iraqi Freedom, where Iraqi military forces were declared hostile from the outset.

permissive in that it did not require any status-criterion – the circumstances alone justified engagement regardless of any intelligence about membership.[154]

The targeting standard exhibits a different standard than interrogation and I argue there are multiple reasons for this. The standards for targeting are higher because more coalition partners engaged in targeting than interrogation. Recall, most coalition partners submitted caveats for detention operations; and as such, detention and interrogation did not have the necessity to meet the standards of all coalition partners. But the United States had to formulate targeting protocols that would satisfy coalition partners and mitigate risks of accountability. Legal accountability is not the only motivation for stricter targeting protocols; coalition partners are not likely to contribute to an operation in which they need to violate their legal obligations. But it does represent how coalition partners' domestic observer effects impact US coalition policies, and these judicial observer effects contributed to US policy making.

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[154] Schmitt (2009); a commander explained this decision-making: "I intentionally designed it to allow the guys in contact (Ground Forces) the ability to engage the "enemy," such as they were, without actually being shot at first, while at the same time limiting the ability of the guys flying at 21,000 feet and 210 knots to drop bombs everywhere they wanted (potentially on our allies). As you know, when we began operations targets (deliberate targets) were intentionally held at the highest levels and this was a way to provide some flexibility to the guy in the field. "Self Defense Plus" is how I describe it. In theory, this gave the Air Force the ability to strike as well (e.g. SAM batteries, anti-aircraft guns. etc). Based on the "OPLAN" I knew there would be people (ally and enemy alike) all over the country that looked exactly the same (white robes, turbans [,] on horses/pickup trucks. etc). Identification of the enemy was everything during this conflict. There wasn't even a FLOT forward line of own troops]. Eventually, the best we could do was create small zones/boxes where we could say none of our people were located. You simply couldn't tell who the enemy was from the lawn darts [slang for an F-16] and this was a way of empowering the guys in contact to shoot or call air strikes based upon "Positive Identification" (the totality of the circumstances). And, even with these tight rules the conflict didn't go without incident."

4.1. US Policies and Domestic Observer Effects

There is little evidence that US courts impacted US policies toward the coalition. The coalitions functioned as a mechanism that enhanced the role of foreign observer effects, and to a lesser extent, international observer effects.

This chapter has not placed the emphasis on domestic legal obligations in the coalition. Certainly, US policies in the coalition are built on the foundation of US legal obligations.

> US domestic law, policies and regulations have the potential to significantly impact US forces' conduct in coalitions. For US forces, domestic law is another aspect of LOAC. Our policy is to apply LOAC principles to any conflict, no matter how characterized. Going even further, US forces normally operate within the rules of engagement (ROE) for a particular operation. Using LOAC as a foundation, civilian and military leadership develops ROE based on domestic law and policy considerations, in addition to LOAC. Common ROE for coalition forces is highly desirable. However, even ROE for coalition forces can be different as a result of each partner's own domestic laws and policy. The United States works with coalition partners to develop and abide by common ROE in coalition operations; however, US forces always retain the right to 'use necessary and proportionate force for unit and individual self-defense.[155]

As Dunlap suggests, US domestic and international legal obligations are embedded in US ROE and military manuals. Domestic judicial observer effects seemed to operate more clearly in the inter-agency mechanism in contrast to the coalition mechanism. This is intuitive, as the inter-agency mechanism inherently captures domestic institutions and inter-branch dynamics; but the coalition considerations naturally gives more weight to external jurisdictions.

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[155] Charles Dunlap, "Legal Issues in Coalition Warfare: A US Perspective," *International Law Studies*, 82 (2007).

4.2. US Policies and International Observer Effects

Similar to domestic observer effects, there is little evidence to suggest that international judicial observer effects have significant explanatory power for US policies. US policymakers acknowledged the risks of joint operations with state parties to the ECHR and whether US operations were exposed to human rights accountability under the ECHR. But there is no concrete evidence this went beyond policy considerations; it does not appear to be foundational to US operational policy regarding interrogation techniques or targeting.

Additionally, there is little evidence the ICC had a motivating role for US policy in the coalition. Arguably, ICC jurisdiction indirectly influenced US and coalition policies because coalition partners that are subject to ICC jurisdiction may have submitted red cards or caveats. By member states refusing to participate in certain operations due to their own international observer effects, it could indirectly shape the policy possibilities for the United States, or the coalition as a whole. However, as other member states (besides the UK, who did not submit any caveats) are beyond the scope of this study, this point merits further investigation and research.

5. Observer Effects in Legal Interoperability: UK Operations

The UK was the second-largest contributor to the coalition forces and their experience with coalition legal interoperability was different from the American experience. British military policies had higher degrees of domestic and international observer effects. British forces had more layers of jurisdiction and multiple legal frameworks to consider in their operations and operated with high levels of uncertainty. Coupled with pressures of uncertainty regarding

domestic judicial review, the ECtHR showed, "it does not generally apply a degree of deference to autonomy of the executive which characterize[d] recent English law."[156]

Fundamentally, British policies toward the coalition experienced greater judicial observer effects and resulted in more constrained policy options. "Law matters in war, in a big way. And courts mattered insofar as they established the constellation, the architecture, of operability in the coalition."[157] The architecture of the coalition operability differed for coalition partners, but the UK experienced particular tensions after taking a strong political stand as the closest US ally.[158] The UK was public in their policy of working with Americans and accommodating to the extent they were able to lead and support the military operations in Afghanistan and Iraq. But they had more legal coverage to consider than American counterparts and disagreed on some of the strategic objectives.[159]

Domestic judicial observer effects more directly constrained the policy space for military policy planners. This occurred in two ways. The first was through coroners' courts imposing policy on the MOD. This caused significant tension among MOD officials who believed coroner inquiries could lead to disruption in British operations, impede effectiveness, and even result in more deaths of British soldiers.[160] The second mechanism for domestic effects on policy is the

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[156] Lord Sumption, "Foreign Affairs in the English Courts Since 9/11," Lecture at the Department of Government, London School of Economics, May 12, 2012.
[157] Interview with high ranking MOD official, March 2020.
[158] Unfortunately, that loyalty was not returned as Donald Rumsfeld publicly announced the US would proceed with the Iraq invasion "whether the UK was there or not." Schmitt (2018), pg. 108.
[159] Ibid.
[160] House of Lords Select Committee on the Constitution, *Inquiry into the Constitutional Arrangements for the use of the Armed Forces*, 2013-14, HL Paper 46; oral evidence Lord Guthrie, (21), Jack Straw MP (Q40), Lord Stirrup (23).

Human Rights Act. The application of the HRA to extraterritorial military operations was debated and unclear.[161] The expanded legal coverage for British operations became a source of tension with the US and led to tensions when the UK chose to disrupt tactical joint operations out of concern of violating the ECHR.[162]

International observer effects also had a role in British legal interoperability, but to a lesser extent than domestic observer effects. The ECtHR was the primary source of the international observer effects. The International Criminal Court had a minimal role in containing British policies.

The rest of this section will continue as follows. First, I will explore the domestic observer effects. The first effect is coroners' courts and the debate about how its investigations hinder British battlefield effectiveness within the coalition. The second effect is HRA in constraining British policies in coalition interoperability. Second, I will explore the international effects on British legal interoperability. The strongest international effect is through the ECtHR and the uncertainty around the likely conclusions of ECtHR rulings. The role of the ICC in British policy making was minimal.

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[161] Interview with former MOD legal official, October 2018.
[162] Whether British forces believed they were violating the MOD had different understandings at different levels. This was reflected in interviews with personnel at the tactical, operational, and strategic levels.

5.1. Domestic Observer Effects

The uncertainty of judicial review in English courts affected British military policies in encouraging more caution. "The consideration of courts was mostly in uncertainty. *Maybe* they would end up examining this. It wasn't our primary issue in determining our course, but it was a consideration."[163] This sentiment initiated backlash among some MOD officials that declare, "if you are so worried about having a judge, or an international lawyer, following you around the battlefield, you will do nothing."[164] As Chapter 2 discussed, British courts have an established practice of military deference on issues relating to the laws of armed conflict, but human rights law has opened new avenues for legal accountability to filter into national and international military policies.

5.1.1. Coroners' Courts

It was common until after the Falklands war that British soldiers were buried in the foreign lands where they fell.[165] By 2000 a new policy of repatriation of British soldiers killed in battle overseas involved would involve the local coroner of the region where body arrived in the UK. At first most of the repatriation flights by the Royal Air Force (RAF) was Lyneham in Wiltshire, but then flights mostly landed RAF Brize Norton in Oxfordshire – the local county coroner at these landing sites that had to investigate the cause of death of those that died in active

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[163] Interview with high-ranking MOD official, March 2020.
[164] Lord Guthrie, *supra note* 189, 21. See also more generally, Tom Tugenhadt and Laura Croft, "The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power," *Policy Exchange*, 2013.
[165] Peter Rowe (2016), 116.

duty.[166] Coroners that took on this duty and conducted these investigations often issued verdicts that the soldier died of 'unlawful' circumstances. Coroner records are public and their verdicts eventually jeopardized MOD policies.[167]

> The individual cases before coroners have, broadly, thrown up three main issues. First, coroners have frequently made a determination that a soldier was 'unlawfully killed.' Secondly, their investigations have often involved hearing evidence as to the actual circumstances of death, a matter that has attracted media interest, particularly when the coroner's narrative verdict has involved criticism of the Ministry of Defence. The third issue has been the perceived problem of commanders having to explain their actions 'on the battlefield' to a civilian coroner.[168]

The English coroners' courts became important to the legal interoperability of UK military operations. Coroner verdicts and their effect on the MOD exacerbated the 'legal creep' or 'legal erosion' that soldiers and commanders feared.[169] "The coroners making law mattered significantly for the MOD."[170] For some, this process initiated the, "gradual cumulative insidious changes in attitudes to and tolerance of error and risk in recent years has altered the armed forces' DNA…it was becoming clear to senior officers, right up to and including the Army Board, that our more junior commanders were becoming increasingly risk-averse…evidence was gathered in a systematic process of de-briefing those, of all ranks from private soldier to brigadier, who had just returned from operations; and it [the shift towards risk aversion] was a recurrent theme in discussions…"[171] Each of the interviews conducted with MOD officials

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[166] Coroners and Justice Act 2009 (Previous legislation was Coroners Act 1988). See also Peter Rowe, 117.
[167] By July 2014, there had been 610 inquests of military personnel from both Afghanistan and Iraq. (Rowe, 117).
[168] Rowe, 117.
[169] For more on this point, see Tugendhat and Croft, "Fog of Law" Chapter 2.
[170] Interview with high ranking MOD official, March 2020.
[171] Tugendhat and Croft, "Fog of Law," 24.

pointed to coroners courts as particularly pertinent to the MOD and their ability to conduct operations effectively overseas.

Defence Secretary, Des Browne, attempted to prevent coroners from encroaching on MOD policy and criticizing their conduct of operations.[172] MOD lawyers claimed coroners' criticisms in their verdicts on the circumstances of deaths might be used against the MOD by families of soldiers seeking compensation for their loved ones.[173]

Coroners' verdicts posed two specific problems from the perspective of the MOD. The first was the verdict of 'unlawful death' as justification for the families of the deceased solider to bring a claim that the soldier's human rights had been violated in the conditions of the operations.[174] The human rights of British soldiers serving overseas caused much controversy in the MOD. "The idea that the soldier has a right to life was greatly challenged in the MOD. What it put in people's minds was something unattainable. No one has a right to life, and it is not a protection that can be guaranteed under any circumstances, let alone in war."[175]

The second effect of coroners' courts were instilling, or reinforcing, a sense of pending litigation which resulted in overly cautious field commanders. The MOD perceived this caution to translate into operational ineffectiveness and a hinderance on the UK's abilities to operate

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[172] Anil Dawar, "MoD seeks court ban on criticisms from coroners," The Guardian, March 18, 2008.
[173] Ibid.
[174] This was a major issue for the MOD that their American counterparts did not have to consider at any level. See *Smith v. MOD* in which the Supreme Court found that soldiers were within the jurisdiction of the UK for ECHR purposes and positive obligations under the right to life were applicable in principle but left the final decision for trial when casting doubt upon whether there had been a breach. See Nigel D. White, "UK Armed Forces Personnel and the Legal Framework for Future Operations," December 4, 2013, Session 2013-14. *Smith and others v Ministry of Defence* [2013] UKSC 41.
[175] Interview with senior MOD official, March 2002.

with the necessary flexibility with coalition partners. For the coalition, some commanders worried the hesitancy concerning potential litigation at home could impact the operability of the coalition or restrict the UK's response capabilities. "The coroners' courts got into some people's heads. We tried to mitigate these influences – there was a job to do."[176]

5.1.2. Human Rights Law in British Policies

A significant challenge for the UK in the coalition was the tension in maintaining their role as the largest supporter to the US, materially and politically, and in fulfilling legal obligations.[177] "We obviously wanted to keep the Americans happy, but we just didn't agree with much of their objectives. It certainly led to tension in the coalition."[178]

For the military lawyers in theater, the policy on human rights applicability in the operations carried major significance.

> I asked the MOD multiple times whether and how we were applying the ECHR to our operations in Iraq. They never responded with any kind of clear policy - told me it would ultimately be my decision. I decided that our human rights obligations would be part of our in-theater policy. But I watched the ECtHR closely. I think there was a case going on at the time involving Turkey and ECHR extraterritorial application [*Manitaras and Others v. Turkey*], and I watched closely to see how the Court would decide in case we were next.[179]

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[176] Interview with senior MOD official, February 2020.
[177] Interview with senior MOD official, February 2020.
[178] Ibid.
[179] Interview with senior MOD legal official, May 2019.

In the absence of clear legal requirements, the application or rejection of those obligations are a matter of policy. In this case, lawyers in-theater, or on the battlefield, had to formulate the UK policy on human rights application.

The application of human rights was a point of friction in navigating the legal interoperability of joint operations. "It was almost impossible to work with the American lawyers in joint operations. We [UK JAGs] were very upfront about our human rights obligations and putting them in to practice; the Americans were always twisting the language as much as they could to avoid human rights obligations. Obviously, we had big issues with each other in theater."[180] From the American perspective, "I didn't get the sense the Brits had different values. Americans also value human rights. But there were clearly accountability differences. If we didn't apply human rights law as a matter of policy in Iraq, who would hold us accountable?"[181]

The British human rights obligations had two important policy outcomes in tactical operations. After Abu Ghraib, and the exposure of the systematic abuse of detainees by US officials, the British took action.[182] British officials proposed the West Point process in which US and UK delegations gathered at West Point academy to voice their concerns about the strategy forward in joint operations.[183] "At the first meeting the UK voiced and outlined the scope of what they wanted to assess with the US. But at the second meeting the UK said they

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[180] Ibid.
[181] Interview with US JAG, December 2018.
[182] Interview with senior DOD official, January 2020.
[183] I discussed this process in interviews with multiple officials from the DOS and DOD, March 2020 and January 2020.

could not guarantee that the issues they discussed would not be litigated before British courts. The US completely stopped talking and refused to engage in discussions around strategic goals. It really affected our joint cooperation in these operations."[184] "The intelligence sharing relationship was greatly affected between US and UK. The British voiced concern regarding the torture policy, Guantanamo Bay, military commissions and the issue of indefinite detention."[185] Another US official said, "The British raised their concerns early on. And once litigation started in London, the US shut down the intelligence sharing. Joint operations in the coalition were affected once the courts were looking at this stuff."[186] British concerns of the torture policy were high enough for backdoor dialogues and, as the US case study discussed, multilateral confrontations with other coalition partners.

The second tactical outcome is the releasing of captured suspected terrorists in-theater. "Some [British] units released men they captured as suspected terrorists because they would have transferred them to US detention facilities. They were worried they violated the ECHR in giving them to the Americans. So, they just let them go."[187] The concerns of violating ECHR Article 3 disrupted transfer and detention policies for European partners. "The timing is important to this. Right after Abu Ghraib, some coalition partners expressed concern of violating

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[184] Interview with senior DOD legal official, January 2020.
[185] Interview with author, Senior DOD official, February 2020.
[186] Interview with senior DOD official, October 2018.
[187] Interview with senior DOD official, October 2018; also interview with DOD official January 2020.

laws about transferring where there is a risk of abuse. But this did not continue for the rest of the conflict."[188]

Legal accountability for violating British human rights obligations clearly held significance at strategic and tactical levels. The uncertainty surrounding ECtHR jurisprudence regarding extraterritorial jurisdiction and how to engage with a lead-nation accused of torturing detainees left the UK (and other European coalition partners) in a difficult position. This uncertainty is evident in the lack of a coherent policy regarding extraterritorial applicability of human rights and in reversing detainee transfers to US detention facilities as the prospect of violating Article 3 of the ECHR lingered over detainee abuse.

In another instance, MOD and SIS (MI6, UK foreign intelligence agency) instituted a policy in 2005 to refuse transfer of captured detainees to a particular US detention facility code named ALNWICK.[189] British officers said working with US officials and conditions of ALNWICK was "an endless source of complications" and British officials began to use an adjacent facility (close to ALNWICK) that was "to UK standards."[190] The policy faced criticism from MOD officials because, while the UK interrogation was conducted in a facility that met UK standards, detainees were taken back to ALNWICK once the interview was concluded. One former SIS officer said,

> …there must have been enough ambiguity in the way the policy was communicated – I am not questioning the policy – but there must have been enough ambiguity in the communication of it to

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[188] Interview with former State Department official, March 2020.
[189] The name of the facility is still redacted from public record. But conditions of the facility and British refusal to detain is documented in Intelligence and Security Report (2018), pg. 36, para. 77.
[190] Intelligence Report (2018), pg. 36, para. 77.

> allow that to have happened…I'm pretty sure that, even in that environment, if you have a written legal advice saying, "Do not do this," we will not just go and do it anyway.[191]

Domestic and international observer effects had significant policy implications for the British, even leading to tactical disruptions in combat operations. The application of human rights, and the uncertainty around obligations, jeopardized cooperation with the US in theater and damaged their intelligence sharing relationship. The threat of review in British and international courts had concrete consequences on British policy both in strategy and tactical operations.

6. Chapter Conclusions

This chapter explores coalitional warfare as a mechanism facilitating judicial observer effects in US and UK national security policies. In multi-national operations, the coalition provides a certain architecture in which elements that would not otherwise enter into US or UK policymaking are able to carry an influence into American and British warfare. Legal interoperability in a coalition gives a larger role for international law and legal accountability, likely more than would be present in unilateral military operations.

For the United States, as the lead-nation of OEF and OIF, the responsibility to coordinate military operations to accommodate coalition partners' legal obligations and red cards or caveats

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[191] Intelligence Report (2018), pg. 36-37, para. 77. Oral evidence to Intelligence and Security Committee, July 14, 2016.

fell to the DOD. This chapter showed that foreign observer effects were more enhanced through the confines of the coalition and led to the DOD to reconsider, alter, and implement their national security policies accordingly. This was illustrated in three ways.

First, Secretary of State Colin Powell urged other cabinet members of the Bush administration to recognize that certain aspects critical to the interrogation program could exacerbate the likelihood that the US would face foreign and European prosecution. The memo urged the administration to recognize that building a coalition, and garnering international support, would be essential to American strategic success. This memo signals US policymakers' acknowledgement of foreign observer effects, and effectively brought it into the cabinet-level policy deliberations.

Second, the confrontation described by a former DOD legal official reveals foreign observer effects in alliance interaction. The pressure felt by the UK (and the other five-eye partners) to confront DOD counterparts for the "risky policies" of interrogation. This is a clear demonstration of foreign observer effects because junior partners established a boundary for their participation that compelled DOD legal officials to reconsider American interrogation policies. Junior partners felt vulnerable to national jurisdictions did not want to be held legally accountable for American behavior.

Third, the US advocated for stricter targeting standards than was required under IHL. One challenge to legal interoperability and the necessities of coordination is satisfying the domestic and international obligations of coalition partners; the US instituted a standard of targeting that mitigated coalition accountability.

And fourth, but to a far less extent, is the acknowledgment that joint operations could have left US operations exposed to the human rights standards of the ECHR. There is uncertainty regarding how much weight was afforded to this prospect of accountability; but nevertheless, it signals how coalitional warfare can elevate legal accountability into national security policy that may not exist in unilateral operations.

In the US case, the three necessary conditions of observer effects are present. The triggering event in this instance, which is perhaps one among many, is the responsibility to coordinate what one policymaker called "complex arrangements" among coalition partners. As coalition partners submit caveats and impose conditions to their participation, the DOD organically has to calibrate the operations to satisfy partner conditions while maximizing interoperability and effectiveness. It is worth noting that the alliance confrontation could have also functioned as a sort of triggering event. Clear evidence linking this encounter to substantive policy changes was not available; but the prospect merits further investigation. Uncertainty, particularly jurisdictional uncertainty, also is evident in US policies. For example, the considerations regarding ECHR applicability to US operations shows the human rights uncertainty in US policymaking. Risk calculation was also present; continuing the ECHR example, policymakers acknowledged the jurisdictional uncertainty and had to make a calculated risk assessment regarding the likelihood of accountability under the ECHR. Holding detainees longer than 96 hours were risks that US commanders had to take, or "take them home with us" if the risk was deemed too great.

The United Kingdom did not experience foreign observer effects like the United States. British policies reflected more constraint resulting from domestic and international judicial

observer effects. Domestic observer effects occurred in two ways. The first was through Coroners' courts, which had a significant role for MOD policy planners. As Coroners' conducted mandatory investigations into the deaths of British soldiers very often concluding the deaths "unlawful." This exposed the MOD to litigation which in turn "altered the armed forces' DNA." Critics within the MOD said these measures translated into more cautious commanders and less maneuverability to respond to the demands of the battlefield.

The second significant domestic judicial observer effect was the extraterritorial application of the ECHR and, by extension, the HRA. Military lawyers that were responsible for the legality of operations did not receive a coherent policy from the MOD regarding human rights jurisdiction. For strategic considerations, human rights jurisdiction impacted British policies to the coalition at the alliance and tactical levels. At the alliance level, the intelligence sharing relationship between the US and UK was impacted by the probability of litigation in British courts. British policymakers approached the American counterparts to discuss the systematic abuse of detainees resulting in a dialogue between the two governments. However, participants to the dialogue noted how the risks of litigation hindered the intelligence sharing relationship. At the tactical level, British soldiers expressed concern over violating Article 3 of the ECHR if they transferred detainees to American detention facilities, a practice that had been standard procedure in the conflict. The US interrogation program left some coalition partners concerned with the extent American policies put others at risk.

Ultimately, the British case study illustrates more constrained coalition policies than the American case study. The three necessary conditions are also present in the British coalition experience. The first element, a triggering event, is most evident in two forms. The first is

coroner investigations. These investigations were mandatory and, according to senior MOD officials, had tangible effects on the battlefield and in policymaking. The second event is the necessity of a British response to American interrogation practices. British policymakers were prompted to form a response to this at every level – alliance, operational, and tactical. The second element, uncertainty, is a recurring theme in the UK case study. The uncertainty of extraterritorial human rights obligations is clear in the lack of a coherent policy and military lawyers' accounts uncertainty in-theater. The third element of risk calculation is most evident in the steps the UK found necessary to mitigate their risks of accountability. For example, moving the British detention facilities away from the American facility which caused "endless complications" was a substantial change in policy that reflects the presence of judicial observer effects.

This chapter analyzed judicial observer effects within the conditions of coalitions. Coalitional warfare presents unique challenges and opportunities, particularly with regard to legal interoperability. This analysis demonstrates that one result is that the design and requirements of coalitional warfare can facilitate a judicial observer effect.

Chapter 6. Conclusions

1. Introduction

War compels policymakers, legal advisers, and military officials of all ranks to make difficult decisions; some decisions are made in the battlefield, some are made in conference rooms. This project furthers our understanding of the ingredients that contribute to these difficult decisions and how the prospect of judicial review was part of the American and British experiences in Afghanistan and Iraq. These conflicts occurred at a moment in history when legal accountability was on the rise and international law as a system of rules had permeated much of international relations. In some ways, the wars that followed the 9-11 attacks, even beyond the borders of Afghanistan and Iraq, were a significant test for courts and the newly evolved system of legal accountability. This dissertation is one step in examining the efficacy of the legal accountability system, but more research is necessary to capture this vital relationship and contribute to an informed and reasoned approach to future wars.

2. Research Questions Revisited: Empirical and Theoretical Findings

This dissertation began with two research questions: first, more broadly, how does international law shape executive national security policies in armed conflict? Second, more narrowly, how does international and domestic legal accountability influence national security policies regarding torture and targeted killings? The second question is the core empirical

question of the dissertation, and one way to answer the first (and broader) research question. Therefore, I will first offer the empirical findings of the dissertation and then offer the larger theoretical implications.

2.1. Empirical Findings

The core empirical finding of this dissertation are the two mechanisms through which judicial oversight filtered into national security policymaking producing judicial observer effects. Court jurisdiction influenced the national security policy space through executive inter-agency interaction and the institutional design of coalitional warfare.

The inter-agency mechanism illustrates how domestic, international, and foreign jurisdiction enter national security policy making. In examining the defense agencies, foreign policy agencies, and intelligence agencies, this project captured how each agency is motivated by a particular type of court jurisdiction. In the US, the DOD expressed a greater awareness for domestic mechanisms of legal accountability, especially the military justice system. Additionally, when faced with the prospect of judicial review, the DOD expressed a certain amount of reliance on military deference from the courts. The implication of DOD perceptions of accountability suggests that the DOD operates in a policy space with significant flexibility to respond to the demands of the conflict as necessary. Importantly, it does not suggest the DOD acts wantonly and with disregard for legal accountability. The DOD has an awareness of legal accountability that is limited to its military justice system and which predicts a certain amount of deference from civilian courts.

For the issues of torture and targeted killings, the DOS repeatedly diverged from DOD legal interpretations. The DOS expressed more awareness for prospective accountability in international and foreign forums. The DOS often pushed the inter-agency policy deliberation toward recognizing the foreign policy implications and reputation-damage that the US would incur from policies that departed too far from globally accepted standards. The DOS argued (for both issues) implementing policies regarding detainee treatment and targeted killings that went beyond US legal obligations would yield greater results in the long run – allies could be more willing to support US policy and legitimize US military operations globally. If the US were to face judicial review in an international court or foreign jurisdiction, it would greatly damage the US's image as a champion of global human rights. There is evidence that the DOS also expressed awareness and concern for domestic courts; but their function in the inter-agency interaction was bringing international and foreign policy repercussions into the policy process.

The CIA operated in a different space of legal accountability; the nature of intelligence gathering, and covert operations promoted CIA operations to function in a grey zone of accountability. American intelligence activities are regulated by national and international law; the issue is accessibility and transparency to information that is necessary in judicial proceedings. The CIA operates with less oversight than the DOD.[1] The nature of CIA operations

[1] This is reflected in many national security policies. For example, a Congressional Commission established to investigate the 9/11 attacks issued a report in 2004 that the DOD should take the lead in any response to the 9/11 attacks, even covert or clandestine. Their reasoning is that the DOD has more Congressional oversight and compliance with domestic and international law. See Philip Alston, "The CIA and Targeted Killings Beyond Borders," *Harvard National Security Journal* 2(2), (2011).

is that they are covert and classified; including the identities of officers involved. CIA detention and interrogation and targeted killing campaigns illustrated the challenges of judicial oversight in the intelligence sphere. The detention facilities (or "black sites") are still classified and were not widely released to Congress. CIA Attorney General is supposed to report to the OLC any intelligence activities that violate US and international law. However, the Senate Torture Report uncovered many instances in which the CIA either changed details of their submissions or never filed a submission to the OLC. And yet, the CIA sought the approval of the OLC for an interrogation program and interpretation for a threshold of interrogation techniques. The core take-away is the CIA actively protected its officers from prosecution by seeking legal protection from the OLC; but the nature of the CIA is their oversight mechanisms only work if the CIA acknowledges and reports crimes committed overseas. Of course, any agency (clandestine or not) has incentives to cover up such crimes. But the legal grey zone in which the CIA constantly operated allowed them to operate, more so than other agencies, with wide flexibility and weak observer effects.

In the United Kingdom, agencies acted along similar lines; however, there are some minor differences. Oral testimony from the Iraq inquiry suggests the prospect of ICC accountability affected senior commanders of the MOD. Personal accounts of confrontations among military and civil servants, and senior commanders approaching the Attorney General about ICC jurisdiction and personal responsibility suggests a greater awareness of legal accountability in British participation in Iraq. ICC jurisdiction enhanced the concerns of individual prosecution by those involved; similarly, Government ministers were attuned to the personal prosecution risks taken by military commanders. Risks of individual prosecution was

present in both top military and civilian decision-making. Additionally, the MOD expressed deep prospects for domestic review. Repeatedly, the MOD criticized coroner's courts and the mandatory investigations as directly limiting their maneuverability in the operational theaters, and that this directly hindered their effectiveness. Some senior commanders challenged the trend toward "civilianization" and "judicialization" of war; some decision-makers inherently understood this to constrain British military activities. To an extent, the empirics in this project support this. The MOD had to calibrate detention, interrogation, and targeting policies to ensure compliance with legal obligations. For example, after the photos of abusive treatment in Abu Ghraib were published, British combat operations were disrupted as the British (and other coalition partners) juggled their human rights obligations while working with the lead-nation of the coalition. At the coalition level, this led to tense confrontations between junior partners and the US as American interrogation policies risked legal accountability for coalition partners. Tactically, this led to releasing prisoners instead of transferring them to American detention facilities. Whether these disruptions translated to less effectiveness on the battlefield is debatable; but there is evidence of both domestic and international observer effects in MOD policies.

The FCO parallels the DOS in their perception of legal accountability and policy formulation. The FCO more often advocated for British national security policy that reflected a greater awareness of foreign policy risks and alliance building. The lead-up to the Iraq invasion case illustrated where the FCO often departed from MOD (and other agency) perspectives. The FCO urged hesitation in joining the US coalition without explicit UNSC authorization for use of force. The FCO legal advisers believed the risk of legal accountability was high for the UK in

this conflict; and a shaky legal foundation for the use of force could exacerbate the probability of litigation regarding MOD conduct. The implication of FCO policy position is that the multiple forums for accountability regarding domestic and international courts shaped FCO interpretation of acceptable national security policies. The FCO observed a more constrained policy setting space than the MOD.

British intelligence services in US detention facilities and their responses to accusations from detainees of American torture signaled British intelligence urgency for IHL and IHRL compliance. Certain behaviors of British intelligence showed different standards of operations and an unwillingness to cross legal boundaries. However, early internal communication offers significant evidence that British intelligence was aware of American interrogation practice and that there could be legal consequences for the UK if they were complicit in American torture.

As national security policy is created, the inter-action of these agencies carried judicial oversight into the policy space, enhancing the role of judicial observer effects in national security. Each agency reflected different sources of legal accountability subsequently expanding the types of judicial observer effects reflected in national security policy.

The second mechanism which carries judicial oversight into national security policy is the institutional design of coalitions. For a coalition to realize success in strategic objectives, it must achieve a high degree of interoperability. Coalition interoperability requires coordination and integration of equipment, procedures, and doctrine to maximize efficiency and effectiveness. Legal interoperability is a sub-set of coalition interoperability; it is the coordination of military operations to respect diverse national legal obligations and jurisdictions.

The chapter on the coalitions in Afghanistan and Iraq is a snapshot of the legal issues the US and coalition partners faced in the conflicts. But critically, the demands of legal interoperability for effectiveness influenced British and American national security policies. The US, as the lead-nation, managed coalition partners' domestic constraints, particularly when US policies pushed boundaries of partner nations legal obligations. US policies on torture and targeted killing operated at the margins of what partner nations deemed acceptable. The confrontation between critical US allies and DOD officials is a clear example of domestic accountability in foreign nations confronting US military policies; American detention and interrogation policies triggered coalition partner concerns of complicity. This is particularly evident in the UK as the largest contributor to operations and the only other contributing state operating detention facilities. American policymakers were confronted by British counterparts as London was concerned about how US treatment of detainees and whether it left the UK vulnerable to litigation. The UK acknowledged the exposure that both the US and UK had to litigation in British courts, and this shifted the nature of the intelligence sharing relationship between the allies. In sum, partnered military operations in which some contributing nations had higher levels of judicial oversight impacted US policies.

The UK was more constrained by domestic observer effects in the coalition. The role of coroners' courts and British human rights obligations left the MOD and field commanders constrained by the prospects of investigations. This exposed the MOD to litigation which in turn

"altered the armed forces' DNA."[2] Critics within the MOD said these measures translated into more cautious commanders and less maneuverability to respond to the demands of the battlefield.

	Domestic Observer Effect	International Observer Effect	Foreign Observer Effect
UNITED STATES	Weak	None	Weak/Strong
UNITED KINGDOM	Strong	Weak/Strong	None

Table 7: Degrees of Judicial Observer Effects Revisited

Chapter 1 offered predictions of judicial observer effects based strictly on the presence of court jurisdiction. But the cross-case analysis offers conclusions on different points of comparison in this dissertation. Table 7 illustrates the degrees of observer effects after concluding the empirical analysis. Looking through the lens of the mechanisms discussed, there are clear take-aways regarding degrees of observer effects in the US and UK. The US case study exhibits weak domestic observer effects. For the issues examined here, the US exhibited modifications to national security policies when faced with prospective accountability; but there is little evidence of the US abandoning policies in out of risks of legal accountability. The study found no evidence that international observer effects influenced US national security policies. As the US is not a state party to the international criminal court or human rights courts, this finding is intuitive and was predicted in Chapter 1. Finally, there is evidence of foreign observer effects substantively altering US policies through the coalition mechanism. The US with shifts in policy

[2] Tugendhat and Croft (2013), pg. 24.

to risks of legal accountability in foreign jurisdictions. Importantly, a conflict that does not occur in a coalition is unlikely to yield this result; the demands of legal interoperability required the US to respond to elements in their national security policies vulnerable to litigation.

The United Kingdom experienced higher degrees of domestic and international observer effects than the United States, and lower degrees of foreign observer effects. British military policies responded to domestic risks with significant jurisdictional uncertainty; but there is evidence that the UK made substantive policy changes regarding detainee treatment when faced with these uncertainties.

2.2. Theoretical Implications: Judges on the Battlefield?

How does international law shape executive national security policies in an armed conflict? This study finds that the prospect of legal accountability is a contributing factor to delineating the parameters of national security policy making. States with greater "judicial observer effects" will set national security policies in a more confined policy space with less maneuverability in the face of legal and strategic uncertainty. States with fewer "judicial observer effects" will create national security policies with greater a flexibility to maneuver in legal and strategic uncertainty. In other words, judicial observer effects delineate acceptable boundaries of national security policy.

Judicial observer effects are not the only element delineating the boundaries of policymaking. The boundaries of policymaking may be set by strategic conditions and objectives, domestic political considerations, or other elements that permeate decision making.

But the core theoretical contribution of this analysis is that potential or probable legal accountability is a factor that contributes to national security policymaking in the US and UK.

Critics of expanding court jurisdiction into military operations accused this judicialization process would put "judges on the battlefield" which would inhibit the armed forces' effectiveness in the theater of war.[3] I do not interpret this research to support the conclusion that judicial observer effects put a judge on the battlefield in the way the critique intends. The findings suggest that observer effects filter into the policy setting process through particular mechanisms and contributes to establishing parameters that policymakers operate within. There is little evidence in this research that the UK faced effectiveness challenges due to observer effects in the policy process. British commanders understood the legal risks involved in their operations and this led some commanders to exhibit more caution on the battlefield. But I did not find evidence in this study that this caution or legal constraint prevented the British from being able to achieve their strategic objectives or respond to immediate threats on the battlefield.

In sum, this study finds that judicial observer effects influence national security policies by contributing to delineating policy parameters in which national security policies are established. This delineation effect occurs through two mechanisms – inter-agency interactions and the institutional design of coalitions. Judicial observer effects do not put judges on the battlefield; but it may put them closer to the Situation Room (or the Cabinet Office Briefing Room) to greater degrees than before norms of legal accountability became standard.

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[3] Ibid.

3. Alternative Explanations and Framework Limitations

There are multiple counterarguments to the argument presented in this dissertation. I will discuss three which are particularly important to raise. The first is the inherent limitations of the observer effect framework. The framework presented here has limitations in clearly identifying judicial observer effects in isolation of other motivating and competing forces in national security decision making. Other factors could explain the outcomes I have discussed in this dissertation. For example, the UK could exhibit a more confined policy setting space because British policymakers perceive the UK as rule-following and as having a uniquely strong commitment to international law. While I acknowledge limitations in the observer effect framework, this research demonstrates that judicial observer effects are having some influence in policy setting. Interviews with policymakers in each case study did exhibit variation in the extent to which judicial observer effects influenced policy. This dissertation does not remove every other element impacting policymakers; on the contrary, I do not believe judicial observer effects and the state identity example are mutually exclusive explanations. Judicial observer effects operate alongside many other variables that impact national security policymaking; the aim of this dissertation is simply to demonstrate that judicial observer effects are one among many.

Another limitation that should be addressed relates to the drawbacks in using the US and UK as case studies. There are disparities in military capabilities between the US and UK which could affect the policy process in ways the judicial observer effect framework does not capture. This alternative explanation argues the constraint exhibited by the UK may not be a result of judicial observer effects, but because the British military did not have the capacity or resources

to contribute to operations comparable to the American military. There is some evidence to support this alternative explanation. For example, testimonies from senior commanders to the Iraq Inquiry revealed major budgetary limitations for the armed forces to acquire multiple weapons for air campaigns, including helicopters and UAVs (or drones). The lack of a targeted killing policy could be a result of lack of resources rather than constraint resulting from judicial observer effects. A similar argument could be created related to detention facilities and opportunities for interrogation; the US had significantly more resources at their disposal for creating and operating detention facilities than the UK. There is almost certainly truth in the capabilities disparity playing a role in policy making.

Nevertheless, the British had a drone fleet and operated their own detention facilities; just not with an arsenal as large as their American counterpart. There is no country that can compete with US military capability and resources allocation; but the UK was the only other junior partner in the coalition that shouldered much of the weight of the military operations. If a British lack of resources was a primary feature of British policymaking, I do not believe the UK would have assumed the level of burden sharing it did. If anything, the targeted killing example illustrates the UK worked with the Americans for their resources but provided the necessary intelligence for implementing the policy. It is possible that judicial observer effects could explain why the UK turned to the US for assistance on policies that would otherwise leave the UK too vulnerable to legal accountability. But this assertion warrants more empirical research.

A limitation that bears mentioning is researcher access to information. The nature of national security, and certainly policies about the use of torture and targeted killings, is that all the information is not available for public consumption. This research project did run into

instances were information was classified and could not be disclosed for research purposes. This was particularly true for the United Kingdom. The accessibility to policymakers was more restricted because of ongoing litigation or concerns that the information may still qualify under the Official State Secrets Act. This led to a certain amount of disparity in the analysis between the US and UK. There is no remedy to classified information; and as such, I worked with information available in the public domain and tailored interview discussions on publicly available information. This creates limitations to the analysis. For example, the British case study concludes the UK exhibited more constraint in policymaking; yet, the UK is under investigation by the ICC for war crimes committed in Iraq. Much of the accusations of the UK abusing detainees in their detention facilities in Iraq or killing civilians in Afghanistan are accusations regarding the UK Special Forces.[4] The British Special Forces operate under a different chain of command and without Parliamentary oversight; as such, policies of the Special Forces are not included in much of the research supporting the conclusion of this dissertation. Acquiring information about judicial observer effects and the MOD had accessibility challenges; an investigation into judicial observer effects in the UK Special Forces with public information would be a substantial hurdle that would likely influence any conclusions that could be reached.

[4] For example, see recent reporting regarding revelations about UK Special Forces, https://www.bbc.com/news/uk-53597137.

4. Avenues of Future Research

Significant future research is necessary to better understand judicial observer effects in modern warfare. This project is one piece of a larger puzzle to uncover the layers of judicial observer effects, or indeed other types of observer effects, which may drive national security policy making. Our understandings of the role of courts in warfare would be greatly expanded by broadening the scope of this analysis. Examining judicial observer effects in different case studies and in different political contexts would offer a far richer and comprehensive assessment of judicialization of armed conflict.

Additionally, it is critical to examine judicial observer effects in conflicts that are not asymmetrical in nature. How judicial observer effects operate in great power conflicts may change drastically than in asymmetrical conflicts resembling Afghanistan and Iraq. The rise of China has shifted academic and policy debates about the future of warfare toward great-power conflict; a context which is outside the scope of this dissertation but holds significant weight for the future. More research on different constellations of conflicts is necessary for a more comprehensive picture of judicial observer effects in diverse kinds of military operations.

Similarly, analyzing judicial observer effects beyond the legal issues of torture and targeting is necessary for a comprehensive understanding of the functions of courts in modern warfare. The issues of detention and extraordinary renditions repeatedly influenced this analysis and capturing how judicial observer effects function in different issue areas that are pertinent to policymakers will be valuable to academic debates and national security practitioners.

No discussion about the future of warfare would be complete without mentioning the future of military technology and international law. The prospect of automated weapons,

machine learning, and quantum computing made military technology the center of any nuanced discussion of the future of military operations. How judicial observer effects and the evolution of military technology interact is vital to understanding and anticipating the future of war.

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