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Author

Buchwald, Todd F.

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CAN INTERNATIONAL LAW THRIVE IN THE UNITED STATES: QUESTIONS ON THE USE OF FORCE

Todd F. Buchwald*

Today's symposium asks whether international law can thrive in the United States. The question is intriguing but also ambiguous, and it is not immediately clear what it would mean for international law to "thrive" within a state. One might look to a range of possible indicators, including the extent to which international law is internalized in U.S. domestic law, its participation in treaty regimes, its willingness to submit disputes to international adjudication, or the prominence of international law issues in public discourse and government decision-making on important foreign policy matters. For purposes of this presentation, however, I focus on one concrete indicator: the extent to which the United States complies with international legal obligations in the especially difficult context of the rules governing the use of force—an area in which the stakes are unusually high and the incentives to depart from legal constraints can be particularly strong for a militarily powerful state like the United States.

The presentation will examine these issues through the prism of three prominent cases involving use of force by the United States: the quarantine imposed by President Kennedy during the Cuban missile crisis of 1962, the air campaign launched by President Clinton in response to the situation in Kosovo in 1999, and the invasion of Iraq directed by President Bush in 2003. These cases illustrate that whether international law is seen as "thriving" depends not only on the technical strength of the legal arguments advanced by the United States, but also on the extent to which others see decisions to use force as consistent with the values that underlie the relevant legal rules.

* This article is derived from a presentation delivered at the symposium *Can International Law Thrive in America?*, held at the University of California, Irvine School of Law on September 27, 2024.

I. States (including the United States) Comply with their International Legal Obligations in the Vast Majority of Cases

It is important at the outset to recognize the truism that, like most states, the United States generally complies with its international legal obligations as a matter of course. The truism is in line with Professor Henkin's famous observation that "almost all nations observe almost all principles of international law and almost all of their obligations almost all the time."¹ In the vast majority of situations, compliance is habitual, happening as an invisible part of everyday life, with states often "deciding" to do what international law requires without focusing on the fact that they are complying with the legal rules.²

In some cases, compliance reflects that states have internalized the relevant principles so that international law rules are not imposing meaningful constraints on decisions that they would otherwise want to make. In other cases, states have internalized that they have a longer-term interest in the integrity of the rules, despite advantages they might derive by disregarding the rules in a particular case. In yet other cases, states may be concerned about tangible legal consequences that could flow from violations, and thus may fear the prospect of binding dispute resolution, the risk of being exposed to counter-measures or claims in foreign courts, or the possibility of individual criminal responsibility. States also may fear the risk of reputational damage that may stem from being seen as violating international law. At a more mundane level, the people making day-to-day decisions may simply lack the domestic law authority to violate international law rules without approval from higher-level decision-makers who, as a practical matter, are inaccessible to them.

Whatever the reason for compliance in particular cases, any assessment of whether international law is "thriving" should take into account the vast majority of situations that the quote from Professor Henkin highlights.

1. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2nd ed. 1979).

2. See, e.g., Harold Hongju Koh, *Why Do States Obey International Law*, 106 YALE L.J. 2599, 2649 (1997). ("[R]easons for compliance [are] found at a transactional level: interaction, interpretation, and internalization of international norms into domestic legal structures."); RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMISING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 40 (1st ed. 2013) (through process of acculturation, decision makers are impelled "to minimize cognitive discomfort (such as dissonance) and to achieve cognitive comfort (such as maintaining membership in an 'in-group') with a shared identity.").

II. There are Exceptional Cases where Compliance is Less Routine

Even if states comply with “almost all of their obligations almost all the time,” it is the exceptional cases that are the most interesting. What characterizes these cases where compliance is less automatic?

If one imagines a spectrum of issues—with highly technical and non-controversial issues at one end and “highly sensitive national security” issues at the other end—it is natural to expect that the exceptions would likely be found at the “highly sensitive national security” part of the spectrum. Even here, the United States and most other states have usually found it advantageous to comply with their international law obligations. Nevertheless, it is here—in situations where decision-makers face issues they see as crucial for the national security, and perhaps in some cases the very survival, of a state—that decision-makers will be most tempted to view immediate policy imperatives as outweighing the risk of longer-term or more diffuse costs associated with violating international law.

The most prominent issues in this part of the spectrum, and the ones on which this presentation focuses, are related to the use of military force. This is not to say that there are no other important issues—*e.g.*, issues related to climate change, technology transfers, disinformation operations—in which immediate policy imperatives may play an outsize role. But use of force issues have a special place in the pantheon of international legal obligations, and the commitments under the UN Charter to settle disputes peacefully and to refrain from the threat or use of force are foundational to the entire post-World War II international legal architecture.³

Two considerations regarding use of force issues warrant more detailed attention. *First*, because they are typically among the most—if not the most—important policy decisions that policymakers can make, the chances increase that the immediate and tangible policy benefits of using force may seem to outweigh the more diffuse and longer-term costs. *Second*, the nature of use of force issues increases the likelihood that different states will come to different interpretations about what is legally permitted, depending on the security situations those states face. The next two sections discuss these considerations.

A. The Prospect of Positive Policy Considerations Outweighing Negative Legal Considerations

The first of these considerations is evident to any State Department lawyer that has been called upon to provide advice on issues seen as critical for national security. International legal advice is only one element in the mix of

3. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1629 (1984).

factors that decision-makers take into account in formulating their decisions on issues of fundamental importance. Use of force issues are invariably considered of fundamental importance.⁴ At least in a well-functioning government, decision-makers will not put their countries' blood and treasure in harm's way absent what they perceive as a paramount security imperative to do so. The more important they perceive the security imperative to act, the less likely they are to prioritize international law advice cautioning them not to act.

An episode from my time at the State Department illustrates this point. The episode took place in the early days of the George W. Bush administration, which was a tumultuous time for international law. I was at the time Assistant Legal Adviser for Political-Military Affairs and Will Taft had just become State Department Legal Adviser. I went to see him before presenting international law advice to a senior State Department official who it was plain would be displeased with what I planned to say. Should we tell it to him straight, even at the risk of unleashing the senior official's wrath?

The Taft advice was brilliant. He conjured a world in which a policymaker would need an "overall score" of twenty to take a particular action and the "policy score" for taking the action stood at nineteen. And the advice was: don't lead the policymaker to believe that the "legal score" is plus two if in fact it is minus three. It is the policymaker's job to weigh all the scores—the policy, the moral, the humanitarian, the political, and the legal scores—and then to decide what to do. My task was to make sure that the policymaker had a full appreciation of what the ramifications of the legal issues in fact were.

This story captures in a nutshell a policymaker's perspective—not an irrational one—on the importance of international legal issues when dealing with matters of paramount importance. The international law question is a factor but, in any given case, other factors may transcend its importance. Indeed, this phenomenon is not limited to international law but also captures the approach of policymakers even in cases involving domestic law. For example, if the legal consequences of acting inconsistently with domestic law are sufficiently severe—say criminal penalties under the Anti-Deficiency Act for policymakers who provide military assistance to a country for which funds have not been appropriated⁵—the policymaker will be highly incentivized to see the negative legal score as outweighing any positive policy score for providing the assistance.

4. See, e.g., Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011) (transcript available in the Obama White House Archives) ("[A]s Commander-in-Chief, I have no greater responsibility than keeping this country safe. And no decision weighs on me more than when to deploy our men and women in uniform."); See George W. Bush, Remarks by President Bush and Senator Kerry in Second 2004 Presidential Debate (Oct. 9, 2004) (transcript available in George W. Bush Archives) ("[T]he hardest decision a President makes is ever to use force.").

5. 13 U.S.C. § 1341; see also 13 U.S.C. § 1350 (providing for criminal penalties for up to two years for willful violations).

But consider a more revealing example: the sixty-day clock under section 5(b) of the War Powers Resolution.⁶ Section 5(b) requires the president to terminate the use of U.S. Armed Forces within sixty days of their introduction into situations of actual or imminent hostilities unless Congress takes affirmative action to declare war or affirmatively enacts specific statutory authorization.⁷ In plain terms, section 5(b) contemplates a requirement for the president to withdraw the forces if Congress takes no action at all. There may well be important political consequences if the president is seen as violating this law, but—unlike the example under the Anti-Deficiency Act—the consequences do not include imprisonment⁸

Now consider how this issue arises in the real world. The very fact that the president in the first place considered a situation sufficiently important to introduce military forces bespeaks a high likelihood that he or she will view a decision to order their withdrawal as profoundly important. As a former L colleague has astutely noted:

[A]ny President faced with the winding down of the 60-day clock would identify some justification for avoiding the terms of section 5(b). No responsible chief executive would terminate a military operation deemed in the national interest in the face of congressional inaction.⁹

The incentives for the president to grab on to even a weak legal argument to justify non-withdrawal can thus become overwhelming.¹⁰ Purely legal considerations about the terms of section 5(b) of the Resolution are thus relatively unlikely to garner enough “legal points” to persuade the president to withdraw the forces.¹¹ Or, to fit this into the Will Taft story, a poor legal score is at higher risk of being overwhelmed by what the decision-maker sees as an extraordinarily high policy score.

6. 50 U.S.C. § 1544(b).

7. *Id.*

8. *Trump v. United States*, 603 U.S. 593, 607 (2024) (stating that core constitutional powers for which the President has absolute immunity include his responsibilities for “commanding the Armed Forces of the United States”).

9. *Libya and War Powers: Hearing Before the Comm. on Foreign Rels.*, 112th Cong. 52 (2011) (statement of Peter Spiro, Charles R. Weiner Professor of L., Temple Univ., Beasley Sch. of L., Philadelphia, Pa.).

10. *Id.* at 52–53. Professor Spiro thus commented: “If not authorization gleaned from a funding measure, if not an argument relating to the definition of hostilities, then some other avenue would present itself to evade the termination provision. Section 5(b) is unlikely ever to be given effect, nor will the judiciary ever enforce it.”

11. See Todd Buchwald, *Anticipating the President’s Way Around the War Powers Resolution on Iran: Lessons of the 1980s Tanker Wars*, JUST SECURITY (June 28, 2019) (arguing that once the decision to not withdraw the troops is made, the job of the lawyer shifts towards crafting legal arguments that are persuasive as possible, although there are ethical and moral limits on how far such advocacy should go). As a result, public audiences may be left with the impression that the lawyers assigned a higher degree of legal confidence to the use of force during internal deliberations than they in fact did.

B. Structural Reasons Why U.S. Views on Use of Force Issues May be Out of Sync with Views of Other States

Will Taft's story also implicates another aspect of the nature of the vast majority of use of force issues on which lawyers in the State Department are called upon to provide advice, which is that the legal score is not determined objectively. The legal score is rarely one hundred percent black or white, but rather a gradated assessment that different lawyers may assess as varying shades of grey. The lawyer thus must typically analyze not just whether a particular course of conduct is "legal," but must advise on the strengths and weaknesses of the international law arguments, the likely receptivity to such arguments by other relevant actors, the risks to which any weaknesses of the arguments expose the decision, and the other possible ramifications of choosing one course or another.

The process involves an inevitable element of judgment. The assignment of "legal scores" to any particular question about using force can thus vary as between individual lawyers in any one U.S. government agency, lawyers at different U.S. government agencies, and lawyers in one presidential administration as compared to another. At the same time, the assessment can and does vary among the legal advisors of different states. Unsurprisingly, the legal interpretations of the legal advisors of different states will gravitate to an analysis that reflects the policy interests of those states, which in turn is affected by the overall security situation that each such state faces.

This is especially important because there is in the first place so much grey in the rules about which different international lawyers might potentially disagree. To be sure, the basic rules governing the use of force are widely accepted: a prohibition on the use of force in the absence of authorization from the Security Council, with an exception for at least certain actions taken in self-defense. But the interests that particular states have in how these basic rules should be interpreted and applied varies significantly. True, all states appear to have a strong interest in protecting themselves against the risk of force in ways that threaten their vital interests. However, powerful states with the military capabilities to use their armed forces to effectively protect those vital interests are more incentivized to interpret the exceptions to the prohibitions on the use of force in ways that allow them to use those capabilities to ensure their security. Less powerful states—those lacking the military capability to effectively protect themselves—are more incentivized to resist expanding such exceptions since the expanded exceptions will be of little practical benefit for them.

One can view as good or bad the fact that the interests of particular states will be influenced in this way. But whether good or bad, it is in fact what happens. Because of this, there is only so much congruence in the views of

differently situated states that one can realistically expect in the way they interpret the international law rules on the use of force. Accordingly, there are limits on the extent to which much of the world will see decisions on use of force as reflecting a United States that is compliant with their interpretations of international law, and thus limits on the extent that international actors are likely to see international law as “thriving” in the United States.

C. The Nature and Source of “Grey Areas” in the Use of Force Rules

It is worth considering the nature of some of these grey areas in which the United States can be incentivized to adopt interpretations with which other less powerful states are likely to contest.

The basic use of force rules are grounded in Articles 2 and 51 of the UN Charter and serve as the backbone of the post-World War II international legal architecture. Under Article 2(3), all UN Member States have agreed to settle their international disputes by peaceful means and Article 2(4) contains a prohibition on the threat or use of force against other states.¹² At the same time, these rules are subject to an exception under which states can use force in situations of self-defense. By its terms, Article 51 allows for the possibility to invoke this right of self-defense “if an armed attack occurs against a Member of the United Nations.”

Importantly, the Charter does not say that force cannot be used to address situations that fall outside the exception for self-defense. Rather, the Charter simply says that, in such situations, decisions to resort to force will be made collectively by the Security Council—which is authorized under Article 42 to use such force “as may be necessary to maintain or restore international peace and security”—and not left to the decision-making of individual states. The Charter’s structure thus assumes that situations falling outside self-defense would be addressed collectively by the Security Council. In a world where the Security Council is seen as dysfunctional on the key questions to which it is looked as a source of security, the United States, and at least some other states, are incentivized to gravitate towards interpretations that empower them to fill the gap.

From this perspective, it should thus not be surprising that the United States has taken positions on use of force issues over the years with which other states have disagreed. Some of its forward-leaning positions are, in fact, not particularly difficult to square with the plain language of the Charter. For

12. For the sake of simplicity, I will not address here possible arguments created by the fact that Article 2(4) contains additional language suggesting that the threat or use of force is prohibited only if undertaken “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

example, although there are differences of view about the issue, there is nothing in the language of Article 51 that on its face is inherently inconsistent with the long-stated U.S. view that force can be used in a state that is unable or unwilling to prevent its territory from being used to continue launching attacks against it, even if those attacks are not legally “imputed” to the state from whose territory the attacks emanate.¹³ At least insofar as its express terms are concerned, Article 51 does not state that the attack against which a state is responding must have been launched by a state or that the response must take place solely in the territory of any particular state.

Other forward-leaning positions are more amenable to textually-based objections. For example, Article 51 talks about using force in self-defense in response to an “armed attack.” Can a situation in which terrorists take American hostages in a hostile country qualify as an “armed attack,” or should the Charter be interpreted to mean that the United States could not use force to rescue those hostages without authorization from the Security Council? The United States, but certainly not all states, considers that such conduct can qualify as an armed attack against which it is permitted to use force in self-defense.¹⁴

Article 51 also talks about the right of self-defense existing only if an armed attack “occurs.” It can thus readily be interpreted as foreclosing a state’s right to rely on the right of self-defense *before* such an attack occurs, even in cases in which an armed attack is imminent. It is thus not surprising that many in the international community do not accept the longstanding U.S. view that force can be used in self-defense if an attack is imminent and even those that accept that conclusion can disagree with U.S. views regarding what qualifies as “imminent.”¹⁵

13. See, e.g., Ashley S. Deeks, “*Unable or Unwilling*”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 Va. J. of Int’l L. 483 (2012); Kevin Jon Heller, *The Absence of Practice Supporting the “Unable or Unwilling” Test*, OPINIO JURIS (Feb. 17, 2015), <https://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/>.

14. Early U.S. endorsement of the right to use force to rescue hostages came in the form of the U.S. response to the Israeli raid at Entebbe, Uganda, in 1976. In connection with that case, the U.S. representative in the Security Council said:

“Israel’s action in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally such a breach would be impermissible under the Charter of the United Nations. However, there is a well-established right to use limited force for the protection of one’s own nationals from an imminent threat of injury or death in a situation where the state in whose territory they are located either is unwilling or unable to protect them. The right, flowing from the right of self-defense, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.”

U.N. SCOR, 31st Sess., 1941st mtg. at 8, U.N. Doc. S/PV.1941 (Jul. 12, 1976).

15. In its 2002 National Security Strategy, the Bush Administration asserted: “For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.” Although it over-stated the extent of acceptance of this principle, the principle was given a boost shortly thereafter when a report by a High-level panel appointed by the UN Secretary-General said that—notwithstanding the restrictive language in Article

Notwithstanding the Charter language referred to above, robust U.S. views of self-defense have a long history, including at times even the notion that the right of self-defense transcends whatever restrictions treaty obligations might otherwise be interpreted to entail. Indeed, we can see a harbinger of this kind of thinking in the way Secretary of State Frank Kellogg described the right of self-defense to the Senate in connection with the prohibition on resorting to war that the United States undertook by becoming a party to the Kellogg-Briand Pact of 1928.¹⁶ Said Secretary Kellogg:

[T]he right of self-defense is not limited to territory in the continental United States, for example. It means that *this Government has a right to take such measures as it believes necessary to the defense of the country, or to prevent things that might endanger the country; but the United States must be the judge of that*, and it is answerable to the public opinion of the world if it is not an honest defense; that is all.¹⁷

To similar effect, Kellogg in April 1928 stated at an address before the American Society of International Law that the right of self-defense—

is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.¹⁸

To be sure, observations like Kellogg's were criticized at the time as overreaches that were not accurate interpretations of the Pact, particularly to the extent that they concluded that the assessment of whether an action constitutes lawful self-defense would be self-judging.¹⁹ That said, regardless of whether such interpretations were correct, statements like Kellogg's underscore the emphasis that the United States has placed on maintaining latitude to resort to force when necessary to protect vital national interests.

51—"long-established international law" allows a threatened state to use force in self-defense if an attack is imminent. U.N. Secretary-General, High-Level Panel on Threats, Challenges, and Change, ¶ 188, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter Rep. of the High-Level Panel on Threats, Challenges and Change].

16. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 U.N.T.S. 57 [hereinafter Kellogg-Briand Pact].

17. See *Hearings Before the Committee on Foreign Relations United States Senate Seventieth Congress on The General Pact for the Renunciation of War signed at Paris August 27, 1928*, 70th Cong. (1928) (statement of Hon. Frank B. Kellogg, Secretary of State) (emphasis added). When then asked whether the same rule would apply to every other country, Secretary Kellogg replied: "[c]ertainly; nor do I think it is practicable to do anything else; although there are idealists who say that it is practicable. It is entirely impracticable, in my judgment."

18. Frank B. Kellogg, *Remarks*, 22 PROC. AM. SOC'Y OF INT'L L. 143 (1928).

19. See, e.g., Hersch Lauterpacht, *The Pact of Paris and the Budapest Articles on Interpretation*, 20 TRANSACTIONS OF THE GROTIUS SOC'Y, PROBS. OF PEACE AND WAR 178 (1934).

It is important to recognize that, whatever incentives there may be for the United States to interpret the use of force rules in a forward-leaning manner, countervailing incentives counseling restraint also exist. Such countervailing incentives can be stronger or weaker at different times, depending on changes in the broader security environment in which decisions are being made. For example, in the bipolar environment that existed during the Cold War, maintaining overseas support for security cooperation with the United States among U.S. allies and their publics was itself highlighted as a pillar of security, as was the importance of attracting international support from countries emerging from colonial pasts that placed great weight on the importance of the rules against the use of force to protect their newly-achieved political independence and territorial integrity. These factors contributed to a climate in which the risk of adopting legal positions that might tarnish the reputation of the United States as indifferent to international law had to be given considerable weight. So too it was imperative to carefully consider the risk that the Soviet Union might turn legal arguments embraced by the United States against the West to justify or encourage its own adventurism.

In the final analysis, the rules on use of force are by their nature subject to differing interpretations by different states, and the positions adopted by any particular state inevitably reflect the specific security situation that the state faces. Because the United States faces security circumstances that differ from those of most other states, it is incentivized to take positions in tension with the positions taken by others, thus making criticism of the U.S. legal positions more likely, and—in terms of the question posed by today’s symposium—fostering a sense that the United States is not a place where international law is “thriving.”²⁰

III. How States Respond when Policy Choices are in Tension with their International Legal Obligations

In principle, U.S. policymakers may seek to resolve the tension between the law as it is seen to exist and the course of action they want to pursue in one of at least two ways.

First, U.S. policymakers might seek to resolve this tension by undertaking action covertly—that is, in the words of U.S. domestic legislation that governs covert action, by undertaking the action in a manner “that the role

20. It is of course impossible to know how future changes in the broader security environment might affect this analysis. That said, one can imagine that, in a world in which the United States becomes more cautious about projecting force abroad and more reliant on other friendly countries to shoulder a greater burden of the responsibility for maintaining international peace and security, the incentives for the United States to adopt legal positions more in sync with the legal positions of those countries would increase. Alternatively, one can imagine that, in a world in which the United States becomes more isolationist, including because of domestic political considerations, and seeks to decouple itself from the rest of the world, the United States might feel less of a need to give great weight to the views of others, and those incentives would lessen.

of the United States Government will not be apparent or acknowledged publicly.”²¹ In this way, policymakers can seek to insulate the United States from the legal and reputational harm that could be caused by openly violating the Charter’s rules. We see examples of this even in the seemingly halcyon days of the early Cold War, including in the U.S. role in cases such as the 1953 coup in Iran, the overthrow of the President of Guatemala in 1954, and the 1961 Bay of Pigs invasion. There was little doubt—really no doubt—about the impermissibility of such actions under international law. In connection with the Bay of Pigs, for example, State Department lawyers explicitly advised that the proposed U.S. role “was clearly a violation of our international obligations” and that the “world would regard [it] as lawless.” Upon offering to elaborate these concerns, however, the lawyers were told that President Kennedy “really doesn’t want to hear about that subject anymore.”²²

Indeed, language in the National Security Act of 1947 that governs all U.S. covert actions provides that no covert action may “violate the Constitution or any statute of the United States,”²³ and thus leaves little doubt that, as a matter of U.S. domestic law, Congress has acquiesced in the possibility of covert actions that violate international law.²⁴ As each of the Iran, Guatemala, and Bay of Pigs episodes demonstrates, however, the effectiveness in shielding the United States from international law criticism lasts only so long as the role of the United States in fact remains unknown. The very fact that these operations are so famously matters of public knowledge makes clear that it is not easy to maintain secrecy indefinitely.

The second way that U.S. policymakers might seek to resolve the incongruity between the law as it is seen to exist and the course of action they want to pursue is to develop legal interpretations that eliminate or at least narrow the perceived incongruity. Important examples of this can be seen in the positions, referred to above, that the United States and others have advanced regarding the right to use force when an attack is imminent (and not just—in the words of Article 51 of the Charter—“if an armed attack occurs”)²⁵ as well as the U.S. position treating the taking of U.S. nationals as hostages as amounting to an armed attack.²⁶

21. 50 U.S.C. § 3093(e).

22. Interview by Robert J. Martens with Leonard Meeker, Ambassador, Ass’n for Diplomatic Stud. and Training Foreign Aff. Oral Hist. Project (Apr. 25, 1989) (on file with Libr. of Cong.).

23. 50 U.S.C. § 3093(a)(5).

24. *Id.* (providing that the President may not authorize a covert action “that would violate the Constitution or any statute of the United States”); Caroline D. Krass, *Nomination of Caroline Krass to be General Counsel of the Central Intelligence Agency, Responses to Post Hearing Questions* 3 (2013) (noting that in executing covert actions, the U.S. complies with international law only “to the extent possible”).

25. Rep. of the High-Level Panel on Threats, Challenges and Change, *supra* note 15.

26. See Rescue Attempt for American Hostages in Iran, Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on the Operation (Apr. 26, 1980), in 1 PUB. PAPERS 777, 779

In any particular case, an attempt to narrow or eliminate the perceived incongruity can involve a combination of efforts to cast the facts in a way that fits more comfortably under existing rules, to persuade others to modify their interpretation of the existing rules, or to persuade others that the “normal” rules do not apply in the “normal” way in the particular circumstances of the situation under consideration. Some such efforts to bridge the gap have been reasonably persuasive, others less so. The three cases discussed in the next section show how this can work in practice.

IV. How This has Played Out in Practice: Three Historical Cases

With all this in mind, this section will examine the three prominent cases mentioned at the outset in order to shed light on how the considerations described above can play out in practice. Each of the three cases involves a decision by the president to use military force in circumstances where the international law basis was controversial: the Quarantine imposed by President Kennedy during the Cuban missile crisis of 1962, the air campaign launched by President Clinton in response to the situation in Kosovo in 1999, and the invasion of Iraq directed by President Bush in 2003. One may of course question the policy merits of any of these decisions but in each case the sitting president viewed the resort to force as having transcending importance. At the same time, there was in each case recognition of possible incongruities between the decision to use force and the rules under international law, at least as traditionally understood.

A. The Cuban Missile Crisis and President Kennedy’s “Quarantine”

The basic facts of the Cuban Missile Crisis are well-known. In July 1962, in the wake of the unsuccessful Bay of Pigs invasion that had been authorized first by President Eisenhower and then by President Kennedy in order to overthrow Cuban leader Fidel Castro,²⁷ the Soviets and Cubans secretly agreed to place Soviet missiles in Cuba in order to deter future invasion attempts.²⁸ By the middle of October, the United States had detected and photographed sites for ballistic missiles capable of carrying nuclear warheads under construction in Cuba. There was no evidence of imminent use but the

(1981) (defending attempt to use military force to rescue hostages taken at U.S. Embassy in Tehran as being in accordance with Article 51 of the Charter).

27. *The Bay of Pigs Invasion and its Aftermath, April 1961–October 1962*, U.S. DEP’T ST. OFF. HISTORIAN, <https://history.state.gov/milestones/1961-1968/bay-of-pigs> (last visited Oct. 12, 2025).

28. *The Cuban Missile Crisis, 1962*, U.S. DEP’T ST. OFF. HISTORIAN, <https://history.state.gov/milestones/1961-1968/cuban-missile-crisis> (last visited Nov. 16, 2025) [hereinafter Historian].

missiles would be in striking distance of at least half of the continental United States.²⁹ The Soviets had acted clandestinely in initiating the program, but there was nothing evident in their action that was identified as violating international law. Indeed, from their perspective, the installation of the missiles could well be seen as needed for collective self-defense with their Cuban friends to secure against the risk of further attacks from the United States.

For its part, the Kennedy administration viewed the threat posed by the installation of the weapons in Cuba as profound. President Kennedy had already released a statement in September that “the gravest issues would arise” if weapons with offensive capabilities were introduced into Cuba.³⁰ The Kennedy administration considered a variety of possible responses, including recommendations from the Joint Chiefs of Staff favoring air strikes to destroy the missiles.³¹ For a variety of reasons—including President Kennedy’s fear that a surprise airstrike would seem too much like the Japanese attack on Pearl Harbor (and thus a concern that can easily be seen as intertwined with the international law prohibition against the use of armed force)—President Kennedy settled on the idea of preventing further shipments, while simultaneously demanding that the Soviets withdraw the missiles already in place.

Decision-making on how to respond was limited to a tight circle but senior State Department lawyers were deeply involved. Perhaps the most historically famous issue concerned whether to refer to the operation as a “blockade.” State Department lawyers expressed concern that doing so would presume the existence of a state of war between the United States and the Soviet Union. They thus considered it important, and other administration officials were persuaded, to characterize the operation as a “quarantine.”

Those involved considered the change in nomenclature vital but had no illusion that it did anything to change that “[t]he blunt fact of the quarantine is that it involved the use of naval force to interfere with shipping on the high seas.”³² Accordingly, they were compelled to consider how to justify it as consistent with the restrictions on use of force under the Charter. As events played out, the Kennedy administration very deliberately avoided characterizing the operation as justified on the basis of the right of self-defense, as it was clear to them that no actual or imminent attack existed upon which a claim of self-defense could be plausibly based.³³ An oral history interview of former State

29. *Id.*

30. U.S. Reaffirms Policy on Prevention of Aggressive Actions by Cuba, Statement by President Kennedy (Sept. 4, 1962), in 47 DEP’T ST. BULLETIN 450 (1962).

31. HISTORIAN, *supra* note 28.

32. Abram Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFF. 550, 550 (1963).

33. To be sure, the Justice Department, in the form of Deputy Attorney General Nicholas Katzenbach, initially favored an argument based on self-defense, and indicated that this would be “an entirely sufficient justification.” See Ass’n for Diplomatic Studies & Training Foreign Affairs Oral History Project, Interview

Department Deputy Legal Adviser Leonard Meeker—who was in the room, working directly with Secretary of State Dean Rusk, Attorney General Robert Kennedy, and an array of other cabinet officials to craft the U.S. government's response to the crisis—makes evident that the United States believed that the situation in Cuba did not constitute an “armed attack by any country [the Soviet Union or Cuba] against another [the United States]” and that any response therefore needed to be justified on grounds other than self-defense.³⁴ For this reason, the administration looked instead to resolutions from the Organization of American States (“OAS”) that the administration was able to quickly coax its OAS partners to adopt.

The administration's posture was politically effective but the legal theory for reliance on the OAS action was in fact highly questionable. To be sure, the OAS resolution spoke about taking “all measures, individually and collectively, including the use of armed force” to stop the continued supply of the Soviet missiles. Under the Rio Treaty, however, the OAS resolution could only “*recommend*” that member states take such measures and that was all the relevant OAS resolution in fact purported to do.³⁵ It is thus quite hard to understand how these resolutions could, as a legal matter, create authority to use force. As a matter of logic, it is not possible for states to rely upon *recommendations* to take actions that they are not otherwise authorized to undertake.

Importantly, the fact that the OAS adopted “recommendations”—as opposed to “authorizations”—was not the result of some oversight. But even to the extent that the recommendation in the OAS resolution implicitly had been intended to constitute both a recommendation and an authorization, it would be difficult to understand how the authorization element could avoid qualifying as an “enforcement action” and thus avoid being impermissible under Chapter VIII of the UN Charter. True, Article 53(1) of the Charter contemplates that

with Leonard Meeker (Apr. 25, 1989), at 5, 7, <https://tile.loc.gov/storage-services/service/mss/mfdip/2004/2004mee01/2004mee01.pdf>.

34. Meeker Oral History, page 5. In the event, neither President Kennedy in his speech to the nation announcing the decision to impose the quarantine nor the Organization of American States in its resolution supporting the operation (discussed in the ensuing text) invoked Article 51. Chayes, *supra* note 32, at 554.

35. Inter-American Treaty of Reciprocal Assistance, 1949, 62 Stat. 1681, TIAS, No. 1838; Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L.

515, 517 (1963), <https://www.jstor.org/stable/2196077>. The Resolution, adopted by the Provisional Organ of Consultation of the Organization of American states, recommended that “that the member states, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent.” See OAS Resolution adopted at the meeting held on Oct. 23, 1962, attachment to Letter dated Oct. 23, 1962, from the Secretary-General of the Organization of American States Addressed to the Acting Secretary-General of the United Nations, U.N. Doc. S/5193 (Oct. 25, 1962), <https://digitallibrary.un.org/record/628998?ln=en&v=pdf>.

the Security Council “shall, where appropriate, utilize” regional arrangements such as the OAS, “for enforcement action under its authority.” But, of course, the Security Council took no action to do so. Meanwhile, the very next sentence of Article 53(1) states explicitly that “no enforcement action shall be taken under [any such regional arrangements] without the authorization of the Security Council.”³⁶ The legal rationale for the Quarantine is thus far from self-evident (as even a subsequent State Department legal adviser has publicly conceded).³⁷

All that said, history records that the legal argument was sufficiently persuasive to accomplish what needed to be accomplished politically, including to persuade the OAS members to adopt the resolution demonstrating their support. And whatever the technical legal strengths or weaknesses of the argument, the episode is in fact remembered as one of the U.S. Government’s prouder moments in international lawyering.

B. The Use of Force in the Kosovo and Iraq Situations

The Cuban Missile Crisis can be usefully compared with two more recent cases: the decision by President Clinton to use force in the situation in Kosovo in 1999, and the decision by President George W. Bush to invade Iraq in 2003.

For the Kosovo air campaign, the United States did not even *claim* that the resort to military force was permissible under international law. Rather, there was a concerted effort by the United States, together with its North Atlantic Treaty Organization (“NATO”) allies, to develop a list of factors from which each NATO government would be free to pick and choose in explaining the use of force to their publics. In the words of the primary U.S. lawyer involved in the discussions, “[t]here was deliberate evasion of making a ‘legal’ assertion.”³⁸ Accordingly, when asked on the eve of the air campaign to explain the international law justification, the State Department spokesperson studiously evaded the issue. In well-prepared remarks drafted after he had been

36. Article 53(1) includes an exception for action taken against the so-called “enemy states” of World War II that is not relevant to this discussion.

37. See Remarks of Former Legal Adviser Davis Robinson. In discussing criticism of the U.S. use of force to “rescue” medical students from Grenada as exceptionally weak, Robinson quipped that—on a scale of one to ten—the rationale for the Grenada operation “was a ten compared to [the] ‘quarantine’ argument in the Cuban Missile Crisis.” MICHAEL P. SCHARF AND PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS* 59 (2010); Jonathan Colman, *Toward ‘World Support’ and ‘The Ultimate Judgment of History’: The U.S. Legal Case for the Blockade of Cuba during the Missile Crisis, October-November 1962*, 21 J. OF COLD WAR STUD. 150 (2019) (drawing on archival sources to support conclusion that relevant governments endorsed U.S. policy *despite, not because of*, the U.S. legal case, which they found highly questionable).

38. Statement of Former Deputy Legal Adviser Michael J. Matheson, quoted in SCHARF & WILLIAMS, *supra* note 37, at 124.

asked a week earlier for a formal response, the press spokesperson explained only why the administration believed the use of force was “legitimate.”³⁹

Despite the weakness of the international legal position, there was an overwhelming sense among the NATO allies that the situation in Kosovo had become intolerable and that intervention was imperative.⁴⁰ Thus, notwithstanding the inability to agree on an international law rationale—or even to agree on a conclusion that the operation was permissible under international law—all the NATO states supported action. Indeed, with the potential for imminent slaughter of large segments of the Muslim population of Kosovo, there was also significant support from within the global south.⁴¹ Whether or not these facts were legally relevant, they lent a great deal of legitimacy even in the absence of an international law explanation. Indeed, when Russia introduced a Security Council resolution that would have determined the NATO action to be a threat to international peace and security and called for an immediate cessation of hostilities,⁴² the council defeated the resolution by an overwhelming 3-12 vote.⁴³

A second useful point of comparison is the 2003 invasion of Iraq, which has been the most widely criticized among the three examples. That criticism

39. Specifically, the Press Spokesperson said:

“There has been extensive consideration of this issue with our NATO allies. We and our allies have looked to numerous factors in making our judgment, including - there have been serious and widespread violations of international law; there has been the use of excessive and indiscriminate force; Yugoslavia has failed to comply with OSCE and NATO agreements, with UN Security Council resolutions, with its obligation to cooperate with the War Crimes Tribunal, as well as with numerous other commitments.

With Belgrade giving every indication of conducting a new offensive against Kosovar Albanians, we face the prospect of a new explosion if the international community doesn't take preventive action. It could be an explosion that exceeds the suffering of last fall. In short, Serbia's actions constitute a threat to the region, particularly Albania and Macedonia and potentially NATO allies Greece and Turkey.

On the basis of such considerations, we and our NATO allies believe there are legitimate grounds to threaten and, if necessary, use force. These issues have been repeatedly discussed. I think if you look, the NATO alliance, the European Union, the members of the Organization of Security and Cooperation in Europe are all united that we cannot stand by and let the Serbs crack down again on the Kosovar Albanians, when they have shown such reasonableness in agreeing to this peace agreement. That is the consensus of the European Union, the NATO alliance, the United States; and we believe that is a substantial and legitimate grounds for action internationally.

U.S. Department of State, Daily Press Briefing (Mar. 23, 1999), <https://1997-2001.state.gov/briefings/9903/990323db.html>.

40. See, e.g., Javier Solana, Press Statement by Dr. Javier Solana, Secretary General of NATO (Mar. 23, 1999); William J. Clinton, Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro) (Mar. 24, 1999).

41. See, e.g., Third World Network Berhad, Third World nations split over Kosovo, <https://twon.my/title/kosovo-cn.htm>, (reporting that an “overwhelming majority of the 56 Islamic states at the United Nations is backing NATO”).

42. U.N. Security Council, *Belarus, India and Russian Federation: Draft Resolution*, U.N. Doc. S/1999/328 (Mar. 26, 1999).

43. U.N. Security Council, *Belarus, 3989th Meeting*, U.N. Doc. S/PV.3989 (Mar. 26, 1999).

may well be deserved but its legal arguments appear to be the most facially plausible of the three cases. Indeed, even some of the strongest critics of the U.S. position described the arguments as facially plausible⁴⁴ and they were ultimately sufficiently persuasive at the time to rally a reported thirty-eight countries to supply around 25,000 troops to support the effort.⁴⁵

The international law arguments about the Iraq invasion, pros and cons, have been debated at length and it is not my intent to re-hash them here, but the legal advice was in fact based on prior practice that had been accepted by the council in dealing with the situation in Iraq during the 1990's.⁴⁶ Indeed, the justification relied on the same basic legal reasoning on which President Clinton had relied in order to use military force at various stages of the U.S. confrontation with Iraq after the cease fire under Security Council resolution 687 in 1991.⁴⁷ Moreover, unlike in Kosovo—separate from whether the international law advice was right or wrong—the president was operating on the basis of formal advice from the Justice Department that the use of force was in fact permissible under international law.⁴⁸

Thus, if I were to rank the strength of the legal position of the president with respect to these three important uses of military force, I would rank the international law argument for use of force in Iraq as stronger than the argument for the Cuba quarantine, and even more strong in comparison to the argument for Kosovo, where the United States did not even assert an international law basis for its actions. Yet such a ranking would bear little resemblance to widespread perceptions about the extent to which international law was “thriving” in the United States during these three episodes.

V. The Strength of the International Law Position Taken by the United States Does Not Necessarily Match Whether International Law would be Viewed as Having Thrived

After the 2003 Iraq War, I participated in various symposiums and panels about the troubling international law issues that President Bush's decision to use force presented. There was in fact widespread criticism of the U.S. international legal justification that is easy to appreciate. But it was striking

44. See, e.g., Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 185 (2004) (arguing that the Bush Administration's legal argument was “wrong” even though “[o]n its face, the asserted legal basis for the invasion of Iraq seems plausible”).

45. Lionel Beehner, *The Coalition of the Willing*, COUNCIL ON FOREIGN RELATIONS (Feb. 22, 2007, 7:00AM), <https://www.cfr.org/background/coalition-willing>.

46. See William H. Taft & Todd F. Buchwald, *Pre-Emption, Iraq, and International Law*, 97 AMER. J. INT'L L. 557 (2003) [hereinafter Taft and Buchwald].

47. *Id.* at 570-71.

48. Office of Legal Counsel, *Authority of the President Under Domestic and International Law to Use Military Force Against Iraq*, 26 OP. O.L.C. 143 (2002).

that I faced little such international law criticism of the nearly contemporaneous Kosovo War, where the silence of the U.S. government effectively *conceded* that the resort to force was impermissible under international law. I could only conclude that the reason was that—at least among the largely western audiences to which I was speaking—the Kosovo cause was popular and the air campaign was seen as having succeeded, whereas the decision to invade Iraq had been disastrous. This suggested that much of the legal reaction was actually policy reaction dressed up as legal reaction, and that a crucial factor in perceptions of whether international law is “thriving” is in fact the extent to which it is seen as facilitating policy results viewed as desirable.

In the case of Iraq, whatever the strengths or weaknesses of the technical legal arguments, the surrounding circumstances left a stench that the stated legal rationale had little to do with the real reasons for the decision to invade. These circumstances included the appearance that policymakers were in fact eager to invade;⁴⁹ suspicions that this eagerness reflected a “real” objective of regime change and transformation of the political situation in the Middle East,⁵⁰ or of ensuring greater U.S. control over Iraqi oil;⁵¹ the lack of serious congressional consideration of the international legal issues in the congressional debates that led to enactment of the Authorization for Use of Military Force Against Iraq Resolution of 2002;⁵² the seemingly cavalier attitude of the president towards suggestions that international law should be an important consideration in

49. See, e.g., Bruce Riedel, *9/11 and Iraq: The making of a tragedy*, BROOKINGS, (Sep. 17, 2021), <https://www.brookings.edu/articles/9-11-and-iraq-the-making-of-a-tragedy/>; Max Fisher, *20 Years On, a Question Lingers About Iraq: Why Did the U.S. Invade?*, NEW YORK TIMES, (Mar. 18, 2023), <https://www.nytimes.com/2023/03/18/world/middleeast/iraq-war-reason.html>; Matthew Rycroft, *The Secret Downing Street Memo*, (Jul. 23 2002), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB328/II-Doc14.pdf>.

50. The Iraq Liberation Act of 1998, Pub. L. No. 105–338, § 3, 112 Stat. 3178, 3179, passed by both houses of the Congress, signed by President Clinton and still in force at the time of the invasion, said specifically that it “should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq.”).

51. John S. Duffield, *Oil and the Decision to Invade Iraq*, POL. SCI. FAC. PUBL'NS, Nov. 5, 2010, <https://core.ac.uk/download/pdf/214061761.pdf> (majority of respondents from France (75 percent), Germany (54 percent), and Russia (76 percent) agreed with statement that “the United States wanted to control Iraqi oil”); see also David Osborne, *WMD Just a Convenient Excuse for War, admits Wolfowitz*, THE INDEPENDENT, May 30, 2003, <https://www.independent.co.uk/news/world/middle-east/wmd-just-a-convenient-excuse-for-war-admits-wolfowitz-106754.html> (quoting Deputy Secretary of Defense that WMD destruction was settled upon for bureaucratic reasons as the one issue upon which administration officials could agree).

52. H.J. Res. 114, Pub. L. No. 107–243, 116 Stat. 1498 (2002).

decision-making on Iraq;⁵³ and the fact that the administration's claims about Iraq's WMD program were eventually revealed to be untrue.⁵⁴

All this was accompanied by the fact that the United States seemed uninterested in support from multilateral institutions to justify its actions. There were neither formal endorsements from the Security Council nor expressions of support from the General Assembly. Even NATO countries were sharply divided. The "coalition of the willing" that participated in Iraq stood in sharp contrast to the strong support from the OAS and NATO for the Cuba and Kosovo operations (and in even sharper contrast to the strong support by the Security Council for the use of force during the first Gulf War).⁵⁵

In addition, even for those that might have otherwise found the international law justification based on the Security Council resolutions persuasive, the manner in which senior administration officials spoke about the issue undermined its credibility. Indeed, the administration spoke of two separate international law justifications: one based on language contained in relevant resolutions of the Security Council that the administration argued amounted to an authorization, and one based on the principle that force could be used in self-defense on an expansive view of what it means for an attack to be "imminent."⁵⁶

The differences between the two justifications were fundamental and even the United States' closest allies did not accept this second justification.⁵⁷ The first argument was consistent with the basic legal architecture under which force cannot be used in absent an actual or imminent attack unless authorized by the Security Council. True, the U.S. interpretation of the relevant Security Council resolutions differed from the interpretation of those resolutions by the opponents of U.S. action. In terms of implications for the overall international legal architecture, however, that dispute was about the meaning of particular words in particular resolutions. The second argument was different. It relied on

53. John Barry, *I Better Call My Lawyer*, NEWSWEEK (Dec. 21, 2003), <https://www.newsweek.com/i-better-call-my-lawyer-131673> (when asked at a "photo op" about how punitive steps squared with international law, President Bush cited—with what was reported as "an edge of sarcasm"—"International Law? I better call my lawyer. He didn't bring that up to me." President Bush went on to say: "I don't know what you are talking about by international law; I'd better consult my lawyer"); C-SPAN, *Presidential Photo Opportunity*, at 3:16 (C-Span, December 11, 2003), <https://www.c-span.org/program/white-house-event/presidential-photo-opportunity/122398>.

54. Dana Milbank, *For Bush, a Tactical Retreat on Iraq*, WASH. POST, Feb. 1, 2004 (quoting David Kay, chief United States weapons inspector, as saying "we were almost all wrong"); George W. Bush, President of the U.S., *Press Conference* (Aug. 21, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/08/20060821.html> (acknowledging that "it turns out" that Saddam Hussein did not have weapons of mass destruction).

55. See S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorizing the use of "all necessary means"). G.A. Res. 832 (IX), at 19 (Oct. 21, 1954).

56. See OLC Opinion, *supra* note 48.

57. Memorandum from Lord Goldsmith to the UK Prime Minister (Mar. 7, 2003) para. 3 (concluding that the use of force in Iraq was authorized under Security Council resolutions, but rejecting self-defense as a justification).

an interpretation under which force could be used in self-defense even in the absence of what heretofore had been accepted as the kind of conduct that could qualify as an “imminent” attack.

The administration’s insistence on pressing this second argument rather than relying simply on the first fueled suspicions that the United States was not simply prepared to violate international law, but that its leaders saw the erosion of international law barriers to using force as a desirable element of the endeavor. In effect, it was made to seem that part of the U.S. goal was in fact to “break” the international legal architecture, and to create an international legal regime in which the United States—the sole remaining super-power—would be freed from international law constraints in making decisions to use military force.⁵⁸ Thus, whatever the technical merits of the international legal arguments based on authorization from the Security Council to use force in Iraq may have been, the optics were seen as reflecting U.S. hostility towards international law. It certainly did not feel like international law was thriving.

The circumstances that surrounded the Cuban Missile Crisis could not have been more different. President Kennedy was seen as a hero for having rescued the world from the brink of World War III, while avoiding a permanent presence of Soviet nuclear missiles pointed at the United States from 90 miles offshore. The administration refrained from bellicosity.⁵⁹ The overall effort was seen as a resounding policy success. Whatever the technical weaknesses, the United States put forward extensive argumentation that gave great weight to the importance of decision-making by multilateral institutions. Lawyers had participated in the high-level decision-making and international law concerns were seen as having been taken seriously. Senior State Department lawyers were sent to New York to assist Ambassador Adlai Stevenson on talking through the issues with other delegations. It thus seemed quite evident that the United States

58. Taft and Buchwald, *supra* note 46, explained the U.S. position in the American Journal of International Law. The article was specifically intended to persuade international audiences that the “official” U.S. stance was based on the wording of the Security Council resolutions and did not pose a threat to the basic architecture of international law. During the inter-agency clearance process, however, others prevailed in insisting on one change: the insertion of language in footnote 1 of the article that said: “[i]n the case of Iraq, President Bush made clear that the United States could always proceed in the exercise of its inherent right of self-defense recognized in Article 51 of the United Nations Charter.” This sentence was in significant tension with the point we were trying to make and the requirement to include the language was a great disappointment at the time. However, after careful reflection and consultation with colleagues, I concluded that the language was sufficiently obscure that I should neither seek to withdraw the article nor my name as an author.

59. Meeker reports that President Kennedy was “very concerned not to seem to crow over the victory, not to make matters more difficult for Khrushchev, or to appear to humiliate the Soviet Union in the eyes of the world, any more than the facts already made it appear humiliated. He gave directions all down the line that people in the U.S. government were to treat this as a very serious international crisis, which had been settled through careful, thoughtful negotiation. He wanted no one to boast or brag that the U.S. had threatened its nuclear power against the Soviet Union and had forced the USSR to bow at the American will.” Leonard C. Meeker, *Oral History Interview by Robert J. Martens*, at 19, *Association for Diplomatic Studies and Training, Foreign Affairs Oral History Project* (Apr. 25, 1989) <https://www.loc.gov/item/mfdipbib000802>.

appreciated that international law was seen as important.⁶⁰ Even if it is easy in hindsight to criticize the legal argumentation, the seriousness of the effort politically insulated the Kennedy administration from accusations that it was indifferent to the concerns.

Conclusion: So When will International Law be Seen as Thriving?

The symposium raises the question whether the extent to which international law will be seen as “thriving” is well-measured by the fastidiousness of states in strictly complying with it? The three cases discussed above suggest that the answer is not an obvious yes.

The benefits of compliance with international law are self-evidently important, particularly given the overall stake individual states have in maintaining the stability fostered by a strong norm against the use of force and in their reputational interest in being seen as compliant. At the end of the day, however, there are other pieces to the puzzle that policymakers face when making national security decisions. It is in the context of that larger puzzle that the international law implications of policymakers’ decisions will be assessed by the public and by the international community. In deciding how to proceed, the policymaker must integrate security, moral, humanitarian and other factors, in addition to the international law considerations. From the perspective of the policymaker, the strength of the international law justifications for using force is thus important, but not necessarily dispositive.

At the same time, given the ambiguities and debates about what international law actually requires, the perception of whether an action complies with international law is affected by the perception of whether the policymaker’s decision to resort to force was, ultimately, prudent. International law will thus only be seen as “thriving” when it is placed in the service of policy results that are judged to be sound. As a consequence, it becomes quite complicated to assess the extent to which international law has “thrived” separate from an assessment of the policy decisions that international law arguments are being used to support. Nothing can really make up for bad decision-making.

In the final analysis, whatever course of action policymakers choose, the sense that international law is thriving will be enhanced only if policymakers are seen as acting in ways that resonate with the deeper principles in which the “rules” of international law are ultimately grounded. What do those underlying principles demand? There is room for debate, but they would seem to include:

60. *Id.* at 15.

- ***Full acceptance of the principle that military force must be a last resort, used only where the imperatives to act are truly overwhelming.*** It is fully reasonable for publics and the international community to ask whether policymakers have done everything they reasonably can to avoid using force. For example, in the case of Iraq, the most implacable problem in defending the 2003 invasion was that, whatever artful international law arguments the administration's lawyers might have advanced, the Iraq invasion was widely perceived as a war of choice. The fact that the Iraqis were eventually found not to possess weapons of mass destruction—together with the disastrous instability that the war unleashed throughout the region—solidified history's conclusion that the war was unnecessary. This stands in stark contrast with Kosovo, where the ongoing repression was profound and widely reported and, at least among the nineteen NATO countries, it was felt that "no efforts to achieve a negotiated solution" had been spared.⁶¹ Similarly, the Iraq experience contrasts sharply with the situation in Cuba, where the objectives were perceived to be existential, where the "amount" of force authorized was tailored (*e.g.*, a quarantine to prevent shipments rather than the air strikes against already-shipped weapons that the Joint Chiefs of Staff had recommended), and where ultimately the quarantine was successful and no shots were ever fired.
- ***Forthright and full explanations of the basis for any decisions to use force, and the avoidance of explanations that seem to mask ulterior motives.*** The international law rationales will not persuade publics and the international community if they do not align with what are perceived to be the "real" motives for the action taken. Iraq again provides a good example. The stated desire to ensure a sound inspection regime was widely seen as cover for "real" objectives that included regime change, control of Iraqi oil, and transformational political change in the Middle East.⁶²
- ***Endorsement or support from multilateral institutions, so as to reflect the strong Charter biases against decisions of individual states to resort to force and in favor of a strong role for regional arrangements or agencies.*** Thus, the role played by the OAS during the Cuban Missile Crisis was crucial, and—notwithstanding the questions described above about the actual international law effect of the OAS's actions—there is little doubt that its involvement played a critical role in swaying international opinion. So too with Kosovo, the

61. Press Release, North Atlantic Treaty Organization, No. 041 (Mar. 24, 1999), <https://www.nato.int/docu/pr/1999/p99-041e.htm>.

62. *Supra* notes 49-51.

fact that the nineteen democratic countries that then comprised NATO had unanimously endorsed the campaign was critical in helping to stave off criticism. Tellingly, notwithstanding that the “Coalition of the Willing” that the United States led during the Iraq invasion comprised more countries than either the OAS or NATO, the completely *ad hoc* nature of that Coalition, and the perception that it had undermined an institution as important as NATO,⁶³ blunted the legitimizing role that such a coalition might have otherwise played.

- ***The existence of a careful and considered process of decision-making, in which international legal advice is provided in a forthright way, and fully taken into account, and under which—in the parlance of the Taft paradigm described above—a negative legal score can only be overcome by truly overwhelming policy imperatives.*** In Cuba, for example, lawyers were integrated into the decision-making process and, as the historical record makes clear, they played a key role both in framing the U.S. response and in explaining and justifying in the crucial diplomacy that was being carried out in New York. That stands in sharp contrast with Iraq, where it was widely perceived that the Bush administration was intent on carrying out the invasion with or without strong international law arguments, its leaders seemed not just willing but eager to promote rationales that were inconsistent with traditional principles of international law, and where President Bush himself was seen as viewing international law constraints as unimportant.

63. See Mark Baker, U.S.: Rumsfeld's 'Old' and 'New' Europe Touches on Uneasy Divide, RADIO FREE EUROPE/RADIO LIBERTY, (Jan 24, 2003), <https://www.rferl.org/a/1102012.html> (describing divisions among NATO states generated by the Iraq war); Ronald D. Asmus, *Reinventing Nato (Yet Again) Politically*, (Apr. 1, 2005), <https://www.nato.int/en/news-and-events/events/transcripts/2005/04/01/reinventing-nato-yet-again-politically>, (referring to the Bush Administration comments as a “downgrading” of the alliance).