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# Lawyering compliance with international law: Legal advisers in the 'War on Terror'

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## Abstract

According to rationalists and constructivists, compliance with international law occurs to the extent that states see non-compliance as unreasonable or wrong, respectively. An alternative account of compliance points to the practical difficulty of deciding to act contrary to international law. Here non-compliance is blocked rather than morally or instrumentally deterred. This article advances an organisational-process theory of this third kind. The explanatory mechanism lies in the constitutive rules of foreign policymaking, and points to the institutional function of legal advising. Under certain structural conditions (namely, lawyerised decision-making) legal advisers operate as the principal 'agents of compliance' within the state, bringing international law into the policymaking process and thus bridging the gap between foreign policy and legal expectations. The theory is applied to the interrogation programme implemented by the United States in the early years of the 'War on Terror' (2001–5). While initially violative of international legal standards, the programme eventually shifted towards compliance. Using process tracing, the case study provides fine-grained evidence that corroborates the explanatory power of organisational factors, in general, and legal advising, in particular.

## Keywords

International Law Compliance; Legal Advisers; International Humanitarian Law; War on Terrorism

## I. Introduction

The employment of 'enhanced interrogation techniques' will likely be remembered as one of the darkest sides of the so-called 'War on Terror'. It underscores, once again, the weakness of international law in preventing heinous acts such as state-authorised torture. While the infamous 'torture memos' in the United States made it to the front pages the world through, less visibility was given to the evolution of the US interrogation programme since its original formulation. This programme was progressively transformed to accommodate the requirements of international law. As a policy taken in response to what was perceived as an exceptional national security crisis, it is puzzling that the global hegemon would defer to international law in this case. Why, and how, was the interrogation programme gradually brought into compliance with international law?

Extant theories of international law disagree on what ultimately motivates compliance. Two broad strands of compliance theories stand out. For one, compliance occurs because of the (comparative) instrumental value of the complying policy. In such calculations states consider costs and benefits in

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terms as varied as reputation, retaliation, reciprocity, and so on. These costs and benefits induce the complying actor toward compliance – or away from it. They are typically international – that is, costs that materialise through other states[1] – but may as well be domestic, such as domestic audience costs.[2] Other theories posit compliance as motivated by an identity-dependent notion of appropriateness.[3] In these views, instead of making cost-benefit calculations, states perform a normative assessment about which of the policy alternatives is the 'right' one. This normative pull towards compliance (or away from it) is internal to the complying actor, as it results from the actor's internalisation of norms through international and domestic processes of socialisation.

Roger Fisher argued that compliance could also be caused by a different kind of mechanism. Besides instrumental or normative factors that make violations of the law *unreasonable* or *wrong*, respectively, he argued that certain internal barriers may produce compliance by making violations *difficult* to carry through. 'We may seek to control a horse by a judicious use of the carrot and the stick – or we may build a fence.'[4] The decision to build 'compliance fences' may be the result of instrumental calculations or normative considerations, but once built, the causal process through which a fence generates compliance cannot be described as either rational or normative. In the case of states, these 'fences' are typically institutional rules that constitute and regulate policymaking. They exist in, through and as institutional practice, and therefore operate in a more dynamic way than the 'horse fence' analogy may suggest. As Fisher argued, the rules that hold the state apparatus together, which make it be what it is and function as it does, cannot easily be overridden by any one individual, even an individual on top.[5] These rules can constitute mechanisms that make non-compliance difficult to occur.

To the extent policymaking remains disproportionally located within states, the organisational context within which these 'fencing' mechanisms operate is typically a domestic one – be it the state itself or a part thereof, such as the senate, the military, or the judiciary. In this sense, certain organisational processes function as a domestic system of compliance with international law. While internal to the state (that is, domestic), some organisational factors of compliance are external to the policymaking process – for example, enforcement of international law by domestic courts[6] – whereas

[1] See, for example, *Oran Young, Compliance and Public Authority: A Theory with International Applications* (Baltimore: The Johns Hopkins University Press, 1979); Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984); Robert Keohane, 'Reciprocity in International Relations', *International Organization*, 40:1 (1986), pp. 1–27; Kenneth Abbott, 'Modern International Relations theory: a prospectus for international lawyers', *Yale Journal of International Law*, 14 (1989), pp. 335–411; Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008).

[2] See, for example, Xinyuan Dai, 'Why comply? The domestic constituency mechanism', *International Organization*, 59:2 (2005), pp. 363–98.

[3] See, for example, Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990); Jeffrey Checkel, 'Why comply: Social learning and European identity change', *International Organization*, 55:3 (2001), pp. 553–88; Christian Reus-Smit, 'Politics and international legal obligation', *European Journal of International Relations*, 9:4 (2003), pp. 591–625; Ryan Goodman and Derek Jinks, 'How to influence states: Socialization and international human rights law', *Duke Law Journal*, 54:3 (2004), pp. 621–703; Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010).

[4] Roger Fisher, 'Internal enforcement of international rules', in Seymour Melman (ed.), *Disarmament: Its Politics and Economics* (Boston: The American Academy of Arts and Sciences, 1962), p. 106.

[5] Ibid., p. 110.

[6] See, for example, Anne-Marie Burley and Walter Mattli, 'Europe before the court: a political theory of legal integration', *International Organization*, 47:1 (1993), pp. 41–76; Karen Alter, 'Who are the "masters of the treaty"? European governments and the European Court of Justice', *International Organization*, 52:1 (1998), pp. 121–47.

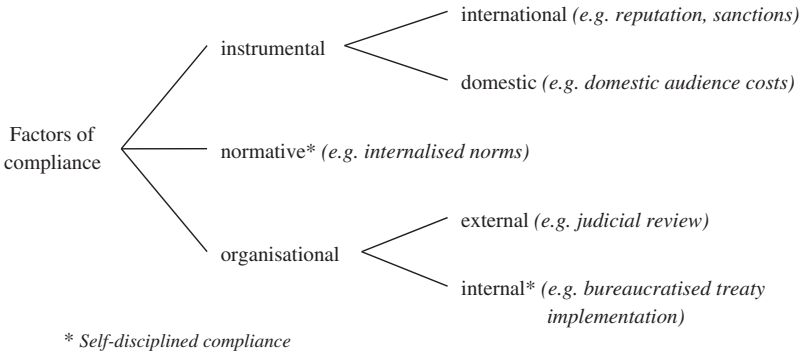


**Figure 1.** Why comply? Mapping the factors of compliance.

others are internal to it – for example, implementation of a particular treaty by specialised bureaucracies.[7] When internal to the policymaking process, these factors of compliance constitute mechanisms of self-discipline, in the sense that they do not depend on external inducements (such as reputation, reciprocity, and so on) or checks (for example, judicial review). The theory of compliance advanced here hinges on this kind of organisational mechanisms of self-discipline (see Figure 1).

There are at least two important reasons why self-disciplining organisational factors of compliance should be taken seriously. First, institutional fences may condition the operation of instrumental and normative logics of compliance. Compliance driven by instrumental or normative factors presuppose that non-compliance is an option seriously pondered by the choice-maker. When organisational barriers exist that effectively bar non-compliance, instrumental inducements and normative pulls no longer explain why compliance occurs. These factors may still account for the specific policy form that compliance will take, but the decision to comply (through one policy or another) is a given by the time the instrumental or normative assessment of policy alternatives is made.[8] In this sense, an organisational theory may provide a sufficient (though certainly not a necessary) cause of compliance. The policymaker may decide to defy the institutional compliance fences she faces and test their strength, but to the extent these fences work, non-compliance will be deterred (or, if this fails, compliance will be restored) *independently of its instrumental value or perceived appropriateness*.

Compliance theorists have been warned not to rely on the assumption that states have a pre-existing preference for complying with international law. This would assume away the compliance puzzle.[9]

[7] See, for example, Jeffrey Legro, 'Which norms matter? Revisiting the "failure" of internationalism', *International Organization*, 51:1 (1997), pp. 31–63; Amichai Cohen, 'Bureaucratic internalization: Domestic governmental agencies and the legitimation of international law', *Georgetown Journal of International Law*, 36 (2005), pp. 1079–144; Neal Katyal, 'Internal separation of powers: Checking today's most dangerous branch from within', *The Yale Law Journal*, 115:9 (2006), pp. 2314–49; Richard Carver, 'A new answer to an old question: National human rights institutions and the domestication of international law', *Human Rights Law Review*, 10:1 (2010), pp. 1–32.

[8] Note that the job of a theory of compliance is to account for the gap between international law and state behaviour, not to explain the specific policy through which a state chooses to comply with its international legal obligations.

[9] Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005), p. 10; Guzman, *How International Law Works*, pp. 16–17.

I agree. Although a state preference for compliance is exactly what 'compliance fences' imply, this organisational preference for compliance is observable and not an assumption in the theory. This highlights the second, empirical advantage that organisational theories of compliance have over their alternatives. Causal mechanisms driven by instrumental or normative logics – that is, the maximisation of expected utility or the assessment of appropriateness, respectively – ultimately 'happen' in an individual's head. They rely on the mental states of rational or normative choice-makers. But states are organisations, not individuals, and present a comparative advantage for the empirical researcher precisely because of this. Organisational processes happen 'out there'. There is no need to assume or infer their occurrence, what they look like or what they bring about. They are directly observable and thus traceable in ways cognitive processes are not. Organisational theories of compliance thus tend to advance more observable causal mechanisms than their instrumental or normative counterparts.

This article argues that states may be hard-wired to comply with international law – in the sense that compliance may be significantly affected by the structural constitution of the state as an organisation. More specifically, the claim is that deference to international law may be enhanced by the structural empowerment of legal advisers in the policymaking process. It goes without saying that states have very different organisational structures. The argument is not that all states are equally hard-wired in this sense. However, the literature on the role of legal advisers, although still rather impressionistic, highlights a remarkable global proliferation of legal offices in government in charge of dealing with matters regulated by international law. Where these offices did not exist, they were created. Where they existed, they expanded in size and function.[10] So the trend seems to be that the lawyerisation of decision-making is deepening within states and spreading across them. Be that as it may, the goal of this article is to develop a new theoretical mechanism of compliance with international law and to probe its empirical robustness in a single case study. I cannot undertake here the complementary task

[10] For qualitative accounts of the role of legal advisers in policymaking in an extensive selection of countries, see Richard Bilder, 'The office of the legal adviser: the state department lawyer and foreign affairs', *The American Journal of International Law*, 56 (1962), pp. 633–84; H. C. L. Merillat (ed.), *Legal Advisers and Foreign Affairs* (Dobbs Ferry, NY: Oceana, 1964); Shotaro Yachi, 'The role of the treaties bureau of the Ministry of Foreign Affairs in Japan's foreign policy decision-making process', *The Japanese Annual of International Law*, 31 (1988), pp. 82–93; Gilbert Guillaume, 'Droit international et action diplomatique: le Cas de la France', *European Journal of International Law*, 2:1 (1991), pp. 136–47; Arthur Watts, 'International law and International Relations: United Kingdom practice', *European Journal of International Law*, 2:1 (1991), pp. 157–64; Antonio Cassese, 'The role of legal advisers in ensuring that foreign policy conforms to international legal standards', *Michigan Journal of International Law*, 14 (1992), pp. 139–70; Krister Thelin, 'Legal advisers to the Armed Forces: the Swedish Experience', *International Review of the Red Cross*, 34 (1994), pp. 255–65; Michael Young, 'The role of the Attorney-Adviser in the U.S. Department of State: Institutional arrangements and structural imperatives', *Law and Contemporary Problems*, 61:2 (1998), pp. 133–53; United Nations Office of Legal Affairs (eds), *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (New York: United Nations, 1999); Michael Scharf and Paul Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge: Cambridge University Press, 2010); Laura Dickinson, 'Military lawyers on the battlefield: an empirical account of international law compliance', *The American Journal of International Law*, 104:1 (2010), pp. 1–28; Neomi Rao, 'Public choice and international law compliance: the executive branch is a "they", not an "it"', *Minnesota Law Review*, 96 (2011), pp. 194–277; Amichai Cohen, 'Legal operational advice in the Israeli Defense Forces: the international law department and the changing nature of international humanitarian law', *Connecticut Journal of International Law*, 26 (2011), pp. 367–413; Harold Koh, 'The State Department Legal Adviser's Office: Eight decades in peace and war', *The Georgetown Law Journal*, 100 (2012), pp. 1747–81. See also the symposium on legal advisers in the *Wisconsin International Law Journal*, 23:1 (2005).

of tracing empirically the extent to which this compliance mechanism operates in the international system as a whole.

The following section conceptualises and assembles the different components of the theoretical model. In order to fully grasp *how* legal advisers generate compliance with international law under certain institutional conditions, it is important to understand that compliance refers to a status that, far from being intrinsic to behaviour, is discursively constructed by what Ian Johnstone calls 'an interpretive community'. In order to enhance compliance, states must rely on the professional knowledge and skills of lawyers, whose advising, in turn, is constrained by institutional parameters that distinguish valid from invalid legal interpretations.

Section III traces the decision-making processes that built and transformed the interrogation programme implemented by the United States during the first years of the 'War on Terror' (2001–5). This is a 'least-likely' case for a theory of compliance with international law not only because it involves the 'high politics' of national security, but also because its context is a security *crisis* (rather than routine business as usual). Moreover, the Bush administration was influenced by neo-conservatism, which is particularly defiant of international legal constraints on national sovereignty. If it can be shown that compliance fences worked here, it can be safely inferred that they must work in many other cases (where they exist).[11] In addition, this is a particularly fruitful case because it is prompted by an act of defiance of organisational imperatives. Absent deviation from the normal process, structural factors, like good health, tend to go unnoticed. But when deviation occurs, and the dogs bark, this facilitates the observation of the institutional mechanisms in action, of the organisational processes that restore policymaking to its compliance-equilibrium. These processes are reconstructed in the case study through official memoranda and reports, and insiders' accounts. Section IV concludes the case study by synthesising and discussing the empirical findings in light of the theoretical expectations. Alternative accounts of the transformation of the interrogation programme are considered. Finally, Section V concludes on the limitations and promises of the proposed theoretical model for our understanding of state compliance with international law.

## II. Lawyered compliance

This section develops a theory of compliance under lawyerised policymaking. It begins by conceptualising the phenomenon to be explained (that is, compliance with international law) as a discourse-mediated fact. Next, the theory's causal variable (that is, lawyerised decision-making) and its observable components are presented, followed by the theory's causal mechanism (legal advising). Finally, the theory's assumptions are laid out, delineating its scope conditions.

### Compliance as a discursively constructed status

According to the standard definition in International Relations, compliance with international law is correspondence between state behaviour and international legal norms. This is a good starting point, but there is much more to compliance than this simple definition. The epistemological question must be asked: How can we know if an action is in compliance with international law? The answer to this question depends, in turn, on how the ontological question is answered: Is this norm-behaviour correspondence an objective relation to be discovered, just like a parent-child biological relation can

[11] To use Eckstein's terminology, this is a 'crucial case study' – see Harry Eckstein, 'Case study and theory in political science', in Fred Greenstein and Nelson Polsby (eds), *The Handbook of Political Science* (Reading, MA: Addison-Wesley, 1975), pp. 79–138.

be discovered through a DNA test? Or is this relation between behaviour and law intersubjectively constructed, and therefore presumably open to argumentative contestation? The difference is important. If compliance is an objective category, then given the law there is only one way to comply with it: behave accordingly. But if compliance is discursively constructed, then complying is not just about behaving; it is also about interpreting the law and the facts, and getting others to recognise the validity of that interpretation. An action *becomes* compliance, then, when its correspondence with international law is persuasively argued.

The 'New Haven School', initiated by Myers McDougal and Harold Lasswell many decades ago, has distinctly underscored the importance of decision-makers in determining which behaviours are in compliance with the law. The goal was to favour political context and decisional process over legal text, suggesting that the validity checks on legal interpretation come not from the specific norm itself but from the fundamental values of the world legal order that the norm is supposed to serve.[12] Although this approach has been correctly criticised for endorsing the practically unlimited indeterminacy of international law,[13] it has made an important contribution in pointing out that what counts as compliance is not something to be found *in* the legal rule but something to be constructed *from* it. There may be disagreement as to what constrains this construction and how constrained it effectively is,[14] but a denial of the importance of the interpretative process in determining what compliance is seems untenable, especially for international law where definitive interpretive authority has a scarce presence.[15] Although a *perceived* status, compliance is an intersubjective social fact, in that its perception is deeply determined by shared understandings and expectations as well as interpretive interactions. Like any other status, legal compliance refers to a collective perception.

If compliance is the result of a persuasive interpretation of facts and norms, and this persuasiveness admits degrees, then the compliance/non-compliance dichotomy should be replaced with a continuum of compliance. In this sense, compliance is better conceived as relative deference to international law, so that policies may be said to be in different degrees of compliance with the law. This is an important distinction in the study of compliance. It avoids the 'false negatives' that result from dismissing compliance effects which, no matter how behaviourally significant they may be, fall short of the (arbitrary?) threshold of strict compliance. Indeed, international law may have a profound effect on what states do even when they fail to comply fully with what the law prescribes. This kind of effect should not be overlooked by any study that seeks to help us better understand the relationship between international law and international politics.[16]

[12] Myres McDougal and W. Michael Reisman, 'International law in policy-oriented perspective', in R. St J. Macdonald and Douglas M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Boston: Martinus Nijhoff, 1983), pp. 103–29.

[13] Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999), pp. 207–10; Ian Johnstone, 'Treaty interpretation: the authority of interpretive communities', *Michigan Journal of International Law*, 12 (1991), p. 374.

[14] More on this in the 'theoretical assumptions' section later in the article.

[15] More recent process-oriented approaches include the 'managerial' school (for example, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995)) and some constructivist accounts of international law (for example, Brunnée and Toope, *Legitimacy and Legality in International Law*).

[16] Kal Raustiala and Anne-Marie Slaughter, 'International law, International Relations and compliance', in Walter Carlsnaes, Thomas Risse, and Beth A. Simmons (eds), *Handbook of International Relations* (SAGE, 2002), pp. 538–58.

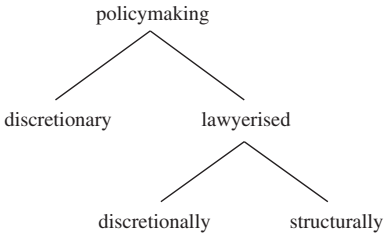


**Figure 2.** Policymaking and the empowerment of legal advisers.

## The lawyerisation of policymaking

The international lawyers working for the state are the main actors that bring international law into the process of policymaking. They are able to do so to the extent the institutionalised decision-making process is lawyerised. Lawyerisation refers here to the recognition of lawyers as legitimate participants, *qua* experts in international law, in the making of policy decisions. It is defined in contrast to discretionary decision-making. *Lawyerised decision-making* implies that the state, as a political organisation, grants decisional agency to its legal advisers. In *discretionary decision-making*, on the other hand, the leadership's practical judgment is authoritative and determinant of the decisional output. 'Discretionary' and 'lawyerised' are Weberian ideal types of policymaking. In reality, the making and implementation of policy manifests both kinds in varying proportions. In the theory advanced here the relevant legal advisers are those in charge of applying *international* legal norms from the state agencies that have competence over the policy-issue in question. In matters of international security, for example, the relevant legal advisers are the international lawyers in the military and in pertinent governmental agencies, as determined by the structure and procedural rules of the organisation. In a nutshell, the argument here is that compliance with international law can be the effect of a structural transformation of the internal policymaking process – namely, the transition from discretionary to lawyerised decision-making (see Figure 2).

This transformation of the state may be compatible with rationalist or normative accounts of behaviour, including the managerial approach as a hybrid of these two. That is, the lawyerisation of policymaking may be understood as a rational design intended to help the state avoid costly breaches of international law and thus better pursue its interests. Alternatively, it may be understood as the creation of organisational obstacles to prevent policymakers from carrying out inappropriate decisions (that is, violations of international law). And finally, lawyerisation may indeed be an institutional tool to 'manage' compliance. The theory proposed here is consciously agnostic about the causes of state lawyerisation. Its goal is to explain how lawyerisation (whatever its causes) boosts compliance with international law by making non-compliance organisationally difficult to carry through. The causal mechanism (that is, the organisational process of legal advising) is therefore the key element of the theoretical account developed here. Although lawyerisation itself may be 'rationalised' or 'normativised', the mechanism through which it generates compliance operates under an organisational logic, rather than an instrumentalist or normative one. Put differently, within this theoretical framework, the compliance effect is the result of neither a rational state's maximisation of utility nor a normative state's assessment of appropriateness.

Lawyerisation admits degrees, so that decisional outputs may be more or less affected by the input of legal advisers. In other words, organisational compliance fences may be more or less difficult to surmount, so that certain (illegal) policies will be more or less difficult to carry through. The degrees of lawyerisation are determined by the different levels of empowerment of legal advisers in the

policymaking apparatus. Empowerment here simply refers to the organisational entry points through which legal advisers can affect policy decisions. The empowerment of legal advisers can be discretional or structural. *Discretional empowerment* refers to the decisional power that legal advisers receive from decision-makers proper. A political leader's legal sensitivity may predispose them to seek and defer to legal advice. This is a hybrid in the discretionary-lawyerised typology of decision-making, in the sense that decision-making is lawyerised but this lawyerisation is contingent upon discretional delegation of decisional agency. A change in leadership may easily end the discretional empowerment of legal advisers. *Structural empowerment*, on the other hand, refers to the decisional power enjoyed by legal advisers whose sources are the formal and informal structures of the organisation, not the political leader's preferences. These structures are the set of norms that constitute the policy machinery of the state and that effectively regulate its operation. Many aspects of the organisational culture are part of the 'organisational structure' referred to here. Both forms of empowerment (that is, discretional and structural) may exist that strengthen the causal role played by legal advisers in eliciting compliance with international law, but the theory advanced here focuses on structural empowerment.

In order to measure the level of lawyerisation in the policymaking apparatus, there is a series of key sources of decisional power to look at. Legal advisers, as a collective actor within the policymaking apparatus, may be organised in different ways. They may be concentrated in a single agency, with one chief legal adviser at the top, or they may be distributed in quite a few independent agencies. *Centralisation* provides for a single chain of legal communication, thereby avoiding inconsistencies as to what is legally expected. When decentralised, legal advice may lose uniformity, especially when legal advisers work in isolation or even secrecy rather than communicating and discussing with each other their differing views with the purpose of forging a consensual legal opinion. *Inclusiveness* and *transparency* within the legal advising team are therefore key sources of lawyerisation. The more inconsistent or ambivalent the legal advice, the weaker its power to shape the decisional output, because policymakers can reach a decision based entirely on non-legal considerations and then cherry-pick the piece of legal advice that best suits that decision. In other words, fragmented and contradictory legal advice may give rise to a situation in which the structural empowerment of legal advisers is coupled with their discretional disempowerment, in the sense that the function of legal advising as a whole is structurally empowered but at the same time policymakers can discretionally dismiss the legal opinions that do not suit their preferences. Thus, the more centralised the function of legal advising and the more collaborative (that is, inclusive and transparent) the way it is performed, the higher the level of lawyerisation.

Formally or informally, the organisation may conceive of *the decisional function of legal advising* in very different ways, offering legal advisers different entry points into the policymaking process. For instance, legal advisers may be expected to participate in policy making simply as outside providers of information (on the legal aspects of the issue at hand), or to take an active part in policy discussions, or to even be in charge of providing clearance on policy decisions. The more limited and 'outside the process' the participation of legal advisers is expected to be, the lower the level of lawyerisation.

Furthermore, every decisional process shows some path-dependency, so that later considerations are constrained by earlier discussions. In this sense, the impact of lawyers on the decisional output will depend on whether they are expected to step into the process at an earlier or later stage. *Timing* can be crucial. For instance, legal advisers may frame the policy problem in legal terms from the outset and effectively set the tone for subsequent deliberations; or they may step in later on and try to inject

a legal view into a discussion already framed in terms of realpolitik where some 'paths' have already been closed; or they may enter the process only after the policy has been decided and be asked to paint the best possible legal face on it. The earlier in the process legal advisers are expected to participate, the higher the level of lawyerisation.

Finally, the organisational rules about *the initiative of legal advice* are another important component of lawyerisation. Legal advice may be expected only upon request, or it can be legitimately given on the legal advisers' own initiative. This latter 'aggressive' form of legal advising makes it harder for the other members of the policymaking apparatus to keep legal advisers out of the decision-making process. The independence of the initiation of legal advising reflects a higher level of lawyerisation.

It is important to notice that, within the same state, the making of policies that are regulated by different areas of international law may be subject to decision-making processes that differ significantly in their level of lawyerisation. For example, legal advisers may be structurally empowered to effectively constrain how the state behaves on the battlefield (*jus in bello*), but may be marginal on decisions to go to war in the first place (*jus ad bellum*). In this sense, to the extent it is affected by lawyerisation, the relationship between a state's behaviour and international law may vary significantly from one issue-area to another.

## Getting from lawyerisation to compliance: Legal advising as causal mechanism

International law is a malleable discursive tool and international lawyers are the most qualified exploiters of its plasticity. The role of legal advisers is anything but that of passive, objective expounders of the law. As the agents of compliance within the state, they engage in two complementary strategies: *legal argumentation* – that is, pushing the discursive boundaries of legality so as to enclose within them a particular policy; and *behavioural adjustment* – that is, replacing one policy that falls outside the boundaries of legality with another that falls within. These strategies evoke the two components of (social) actions: meaning and behaviour, respectively.

The first strategy is possible only because the behavioural requirements of the law are never objectively fixed; instead, they are discursively contestable. The plasticity of the legal discourse that makes legal argumentation relevant is, however, not unlimited.[17] As Shirley Scott puts it, '[t]he indeterminacy of international law is by no means absolute; a lawyer cannot get away with justifying as legal just any action whatsoever'.[18] The level of plasticity depends on the applicable law given the specifics of the case. If the case falls within an area densely regulated by international law, so that permissible behaviour is highly restricted, what can be achieved through legal argumentation alone is very limited. This is more so if the applicable law is very precise, or if there exist close and consistent precedents, especially past judicial decisions.[19] The limits of what can be achieved through legal argumentation make behavioural adjustment a necessary fallback element of competent legal advising. The two strategies complement each other: the easier it is to argue the lawfulness of a preferred policy, the greater the confidence in sticking with that policy; but when the boundaries of

[17] Johnstone, 'Treaty interpretation', p. 418.
[18] Shirley Scott, *International Law in World Politics: An Introduction* (Boulder, CO: Lynne Reinner, 2004), p. 125.
[19] Shirley Scott, 'Explaining compliance with international law: Broadening the agenda for enquiry', *Australian Journal of Political Science*, 30 (1995), p. 296.

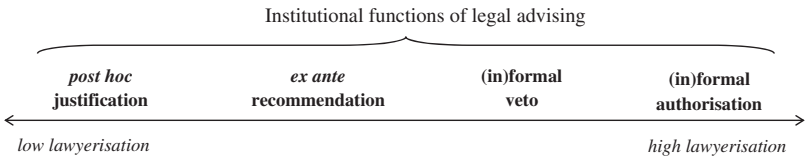


**Figure 3.** Legal advising under different levels of lawyerisation.

legality cannot be (successfully) pushed any further and the policy under consideration still falls outside those boundaries, some policy changes are called for. In short, on the one hand, the indeterminacy of international law and the malleability of its discourse allow legal advisers to have a critical role in 'saving' a policy by shaping its legal meaning. But, on the other hand, the bounds of that malleability also allow legal advising to affect the policy choice. Behavioural adjustments may be required in order to keep the necessary proximity between policy and law that compliance entails.

The claim that government lawyers seek to push policy towards the law turns out to be a partial, if not naïf, description of the function of legal advising. Rather, the role of legal advisers is to push policy towards the law as well as the law towards policy. Their goal is to reduce the perceived gap between what states do and what they are legally expected to do. The dual strategy to achieve that goal is to work on the latter expectation *and* on the former behaviour. In this sense, it is fair to say that lawyerised decision-making enhances compliance because legal advisers make it harder for states to breach international law *and easier for them to comply with it*. In other (more cynical) words, the empowerment of legal advisers renders a given set of international legal rules more permissible than what those very same rules would be in the absence of lawyerisation. This effect of stretching legal expectations is, however, limited by two factors: (a) as argued above, legal indeterminacy is limited; and (b) as argued in the next section, legal advisers are part of an 'interpretive community' that imposes strict parameters of validity on the manipulation of legal texts.

The very nature of the function of legal advising is a reflection of how much lawyerisation the process of policymaking has undergone (see Figure 3). Legal advising may simply consist of attempting to turn a *fait accompli* into a lawful action. Even if irrelevant as far as state behaviour is concerned, *post hoc justifications* are still important in terms of compliance. A clever legal framing of a decision already made may enhance its legality.

Thus even this weak form of legal advising may have a non-negligible effect on compliance. State behaviour may be affected through legal advising when it takes the form of *ex ante recommendations*. In this case the legal adviser intervenes before a decision has been reached, and informs the policymaking apparatus about the attractiveness of the different policy options under consideration in light of international law. Given that the malleability of the legal discourse is limited, that there is so much valid framing possible, legal advisers may tilt the balance in favour of some of the policies under consideration; or they may even bring new policy options to the table.[20] Finally, legal advising may take the form of a formally or informally institutionalised prerogative in the decisional process, functioning as a *veto* or even a required *authorisation* for action. In this case the organisation expects that policy decisions be cleared (implicitly or explicitly, respectively) by the legal-advising team.

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

## Theoretical assumptions: the professional infallibility of the legal-advising team as a bureaucratic actor

The internal consistency of the theory proposed here depends on one exogenous condition: the professional quality of legal advisers. The causal link between lawyerisation and compliance assumes that legal advisers have been socialised by their profession, in the sense that they have internalised the profession's shared understandings about the international legal system and their role in it. More specifically, the assumption is that legal advisers recognise and abide by the conventional parameters that distinguish a valid legal interpretation from an invalid one. These parameters constitute the 'interpretive community'[21] that lawyers are members of, and imply that the discursive construction of compliance is a highly institutionalised business – a professional practice. For example, a legal argument will be credited as valid only to the extent that it identifies the legal rules applicable to the case at hand by reference to the professionally recognised sources of international law, as listed in the Statute of the International Court of Justice (Art. 38). Similarly, the interpretation of that law will be valid only to the extent that it is consistent with interpretations previously applied (by judges, arbitrators, legal experts, and other recognised interpretive authorities), with opinions expressed at the time of negotiating the applicable treaty (*travaux préparatoires*), with other well-established legal norms, and so on. In short, this theoretical model assumes that the production of legal advice is effectively constrained by the professional 'know how' shared by international law practitioners.

This assumption sets the theory's scope conditions. Note that the assumption refers to the legal advising corps – to legal advisers as a collective actor within the state – not to each individual legal adviser. The presence of a lawyer that does not abide by the standards of the profession may be problematic for the theory, especially if this lawyer sits at the top of the legal advising agency. However, if lawyerisation is high, this problem should be mitigated by structural remedies, such as the organisational habit of sharing legal opinions (transparency) and involving as many legal advisers as available (inclusiveness). Moreover, some governments have an internal office that evaluates the professional conduct of its individual legal advisers, such as the Office of Professional Responsibility of the US Justice Department. In addition, the legal profession provides external incentives to observe professional vows, especially for civilian lawyers. Professional legal associations may monitor and punish those members who fail to meet their standards. Sanctions could result in the revocation of the licence to practise law. Finally, the criminal justice system may hold a lawyer complicit in criminal conduct for legal advice 'intended to assist or provide a "road map" for the client in violating or circumventing the law'.[22] Not only has this possibility been seriously discussed in relation to the 'torture memos'[23] but there are also precedents of actual conviction in other contexts.[24] For all these reasons, the legal interpretive community is presumed to serve as a shield against the political pressure legal advisers may face – especially those politically appointed. The professional fallibility of an individual legal adviser should not

[21] Johnstone, 'Treaty interpretation'.

[22] Richard Bilder and Detlev Vagts, 'Speaking law to power: Lawyers and torture', *The American Journal of International Law*, 98 (2004), p. 694.

[23] Jordan Paust, 'Criminal responsibility of Bush Administration officials with respect to unlawful interrogation tactics and the facilitating conduct of lawyers', in Marjorie Cohn (ed.), *The United States and Torture: Interrogation, Incarceration, and Abuse* (New York: New York University Press, 2011), pp. 281–310.

[24] Ribbentrop, for instance, was convicted at Nuremberg for having issued memoranda supporting the use of force against Norway, Denmark, and the Netherlands in 1940 (Bilder and Vagts, 'Speaking law to power', p. 694).

prevent legal advising from enhancing compliance under high lawyerisation. It still may, however, disturb the causal process, *delaying* the compliance effect expected – as illustrated precisely in the case study that follows.

The next section provides a qualitative analysis of the process of making and remaking the US interrogation policy for 'War on Terror' detainees. The analysis (a) identifies the extent to which policymaking was lawyerised; and (b) probes the causal link between lawyerisation and policy output. The case study therefore traces the decision-making process by focusing on certain organisational compliance fences and on the role of legal advisers as their gatekeepers. The goal is less to demonstrate the (il)legality of the actions taken than to show the behavioural impact of legal advising under a lawyerised institutional context.

## III. The US policy of interrogation of 'War on Terror' detainees (2001–5)

During the first Bush Presidency (2001–5), the US interrogation program for 'War on Terror' detainees underwent significant changes. Immediately after the September 11 attacks, five senior government legal advisers formed the 'War Council'. The council 'would plot legal strategy in the war on terrorism, sometimes as a prelude to dealing with lawyers from the State Department, the National Security Council, and the Joint Chiefs of Staff who would ordinarily be involved in war-related interagency legal decisions, and sometimes to the exclusion of the interagency process altogether'.[25] In short, the War Council became a self-insulated group of legal advisers with privileged access to top policymakers. This privileged access implied a *de facto* centralisation of legal advising on matters related to the War on Terror, subverting the well-established decentralised structure of legal advising within the Executive.

The Justice Department's Office of Legal Counsel (OLC) wields the institutional power, rarely contested by the (domestic) courts, of *establishing* what is legally permissible, thus protecting state agents from (domestic) criminal liability. OLC speaks for the Justice Department, and it is the department that prosecutes criminal conduct.[26] As an OLC legal adviser with expertise in wartime legal regulations, John Yoo was a key figure within the War Council.

Amongst the biggest obstacles to the counterterrorism policies preferred by the Bush administration were the rules of international humanitarian and human rights law that protect war captives from ill treatment.[27] These laws (and their corresponding domestic statutes) made intelligence officials hesitate before applying the aggression the White House's new, 'forward-leaning' counterterrorism paradigm deemed necessary.[28] Complying with organisational expectations, policymakers and officials in charge of interrogations sought legal advice in advance. In accordance with the

[25] Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: W. W. Norton & Co, 2009), p. 22.

[26] Goldsmith, *The Terror Presidency*, pp. 96–7, 80; George Harris, 'The rule of law and the War on Terror: the professional responsibilities of executive branch lawyers in the wake of 9/11', *Journal of National Security Law and Policy*, 1 (2005), p. 424.

[27] The main international instruments discussed during the policymaking process were the Geneva Conventions (especially Common Article 3) and the Torture Convention. The pertinent provisions constitute also customary international law, and the main prohibitions against torture are considered peremptory norms.

[28] United States Senate (Select Committee on Intelligence), *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (3 April 2014), Foreword, p. 6.

organisational culture, this implied consulting the legal offices from the pertinent departments. This is exactly what was done immediately after the September 11 attacks, in relation to the applicability of certain international legal norms (in particular those contained in the Geneva Conventions, many of which are also customary law) to the situation at hand.

In a draft memo written for the Department of Defense General Counsel – *Application of Treaties (draft)*[29] – John Yoo argued that the conflicts with the Taliban and al Qaeda were 'armed conflicts', yet the Geneva Conventions did not apply to them because they were international conflicts against non-state actors. As to what protections captives would consequently merit, Yoo's answer was clear: none – not even Common Article 3 protections. Furthermore, according to Yoo's draft memo, the President could suspend treaty obligations, including the Geneva Conventions.

The draft memo was shared with the State Department, whose top legal advisor, William Taft, repudiated it immediately.[30] Taft went as far as referring to Yoo's draft memo as 'seriously flawed' in both its factual assumptions and its legal analysis. This natural gesture of working with State Department lawyers would not be repeated for the rest of the War Council period. When OLC decided to circulate its draft memo in the State Department, as is the institutional practice whenever OLC is working with matters of international law, it was seeking approval, not critically constructive feedback. The harsh criticisms of the State Department's Legal Adviser were virtually ignored, and the final OLC memo – Jay Bybee's *Application of Treaties*[31] – replicated the reasoning and conclusions of the rebuked draft. The final memo was further discussed by legal advisers from the departments of Justice, Defense and State, the Joint Chiefs of Staff, the White House, and the Office of the Vice President. The White House Counsel summarised the conclusions from those discussions in a paper. Major disagreement amongst legal advisers transpired.[32] The War Council learned the lesson from this first experience: the rest of the legal advisers had to be cut off the loop so as to prevent irreconcilable disagreement in legal advice.

In order to monopolise legal advising by disempowering the rest of the legal advisers, the War Council resorted to the frequent use of high security classifications as well as secrecy and the short-circuiting of legal advice. These manoeuvres constituted a subversion of conventional decision-making procedures; they heavily curtailed OLC's normal practise of vetting draft opinions within its legal team. This undermined the quality of the advice OLC generated, and, more generally, it hijacked what was normally a transparent and inclusive process that engaged several lawyers from OLC and the legal offices of other departments.[33]

[29] Memorandum from John Yoo and Robert Delahunty to William Haynes, *Application of Treaties and Laws to al Qaeda and Taliban Detainees (draft)* (9 January 2002), reprinted in Karen Greenberg and Joshua Dratel, *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005), p. 49.

[30] Memorandum from William Taft to John Yoo, *Your Draft Memorandum of January 9* (11 January 2002). Unless stated otherwise, all memoranda referenced can be found on the National Security Archive of the George Washington University.

[31] Memorandum from Jay Bybee to Alberto Gonzales and William Haynes, *Application of Treaties and Laws to al Qaeda and Taliban* Detainees (22 January 2002), reprinted in Greenberg and Dratel, *The Torture Papers*, pp. 81–117.

[32] Memorandum from Alberto Gonzales to President Bush, *Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (draft)* (25 January 2002), reprinted in Greenberg and Dratel, *The Torture Papers*, p. 119.

[33] Harold Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (Lawrence, KS: University Press of Kansas, 2009), p. 125; Harris, 'The rule of law', p. 431.

Although masking serious disagreements within OLC and with other departments, Yoo's legal memoranda, which functioned as policy authorisations, 'gave counterterrorism officials the comfort of knowing that they could not easily be prosecuted later for the approved actions'.[34]

## Lawyers as authorisers of policy

In the summer of 2002, CIA agents were frustrated because their interrogations failed to obtain the information the Administration was pressuring them to extract from detainees. They wanted to apply harsher methods, but would not do so without legal coverage. In July 2002 the CIA sought and obtained oral advice from OLC about the legality of the proposed interrogation techniques. However, they insisted on *written* authorisation that would shield them from criminal prosecution.[35] The War Council met to discuss the legality of harsh interrogation techniques, and in August Yoo produced an extensive secret document advising on the matter. The document was signed by his boss, Jay Bybee, and addressed to the President's top lawyer.[36] It was a general legal opinion on the question of interrogation of war detainees, but it was specifically meant to inform the CIA and its circulation was kept secretly restricted.

The memorandum – *Interrogation I* – analysed the prohibitions imposed by the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984 (CAT) as implemented by the Anti-Torture Act (18 U.S.C. §§ 2340–2340A). The statute criminalises torture committed outside of the United States. The first element of Yoo and Bybee's advice to the President's Counsel was that 'torture' should be given a very narrow definition.[37] On top of that, these shrunk prohibitions were interpreted to have no force of law when it came to interrogating 'War on Terror' detainees. In effect, the Unitary Executive doctrine,[38] endorsed by Bybee's OLC, renders the anti-torture statute unconstitutional if it is construed to constrain the president's authority to command in war.[39] By extension, the same reasoning 'preclude[s] an application of … [the Anti-Torture Act] to punish officials for aiding the President in exercising his exclusive constitutional authorities'.[40] The entire opinion was driven by an exclusive concern for (domestic) criminal liability, and it was viewed as 'a "golden shield", as one CIA official later called it, that provided enormous comfort'.[41]

CIA agents were not the only ones under pressure to produce intelligence to prevent future terrorist attacks. Military interrogators were too.[42] Just like CIA agents had done two months earlier, on 11 October 2002 an army officer requested explicit authorisation from his superiors to make

[34] Goldsmith, *The Terror Presidency*, p. 23.
[35] Memorandum from Jay Bybee to John Rizzo (CIA Acting General Counsel), *Interrogation of al Qaeda Operative* (1 August 2002).
[36] Memorandum from Jay Bybee to Alberto Gonzales, *Standards of Conduct for Interrogation under 18 U.S.C.* (1 August 2002) (hereinafter *Interrogation I*), pp. 172–217.
[37] United States Senate (Committee on Armed Services), *Inquiry into the Treatment of Detainees in U.S. Custody* (20 November 2008), pp. xv–xvi.
[38] Briefly stated for the purpose of this study, the doctrine asserts that, in times of war, the Commander-in-Chief powers vested in the President by the US Constitution cannot be curtailed by laws inferior to the Constitution – such as federal legislation or international law.
[39] *Interrogation I*, p. 203.
[40] *Ibid*., p. 204. This is contrary to well-established principles of criminal responsibility set forth at Nuremberg (see, for example, US *v.* Ohlendorf, et al., 1948) and codified in the CAT (art. 2(3)).
[41] Goldsmith, *The Terror Presidency*, p. 144.
[42] US Senate, *Inquiry into the Treatment of Detainees*, p. xvii.

interrogations more aggressive.[43] *Interrogation I* was still concealed from the military. The request for approval reached the Joint Chiefs of Staff later that month.[44] On 2 December, Defense Secretary Rumsfeld gave a formal approval for the use of 24 of the proposed interrogation techniques, as laid out in a memorandum issued by the Defense Department's top lawyer, William Haynes, and based on *Interrogation I*.[45] Following Haynes's advice, the decision was that, even though they may be legally available, approval of the remaining techniques – that is, the harshest ones proposed, including waterboarding and mock executions – was not warranted at the time. The reason given for holding off was the acknowledgement of the Armed Force's tradition of restraint.[46]

## Resistance to exclusionism and secrecy

Haynes did not want to go so far with military interrogators as *Interrogation I* had gone with those from the CIA, because he feared resistance from military officers, in general, and military lawyers, in particular. He was right. Navy lawyer Alberto J. Mora first learned about the questionable treatment of detainees on 17 December 2002. Breaking the circle of secrecy, his counterpart in the Army, Steven Morello, supplied him with Haynes's memorandum from 27 November approving several coercive techniques. Like Mora, Morello disagreed with these legal interpretations, and had previously tried to stop Rumsfeld to no avail.[47] Captain Jane Dalton, Legal Counsel to the Chairman of the Joint Chiefs of Staff, testified to the Senate that she 'had her own concerns with the GTMO request and directed her staff to initiate a thorough legal and policy review of the techniques'.[48] That review, however, was cut short by the Chairman upon Haynes's request. According to Dalton, 'this occasion marked the only time she had ever been told to stop analyzing a request that came to her for review'.[49]

On 20 December 2002, Alberto Mora met with William Haynes. This episode of unrequested, 'aggressive' legal advising was the first of at least three meetings Mora would have with Haynes with the purpose of stopping the interrogation programme under way in Guantánamo. Complaining about the abuses contained in Haynes's memorandum, Mora 'expressed surprise that the Secretary had been *allowed* to sign it'.[50] To Mora, 'the memo's fundamental problem was that it was completely unbounded – it failed to establish a clear boundary for prohibited treatment'.[51]

Faced with Haynes's indifference, on 15 January 2003 Mora threatened to issue a formal memorandum protesting the unlawfulness of the interrogation programme unless the programme was suspended and subjected to further discussion. By the end of the day, Haynes informed Mora

[43] Memorandum from Jerald Phifer to Michael Dunlavey, *Request for Approval of Counter-Resistance Strategies* (11 October 2002), reprinted in Greenberg and Dratel, *The Torture Papers*, pp. 227–8.
[44] Memorandum from James Hill to Richard Myers, *Counter-Resistance Techniques* (25 October 2002), reprinted in Greenberg and Dratel, *The Torture Papers*, pp. 223–4.
[45] Memorandum from William Haynes to Donald Rumsfeld, *Counter-Resistance Techniques* (27 November 2002), approved by Rumsfeld on 2 December 2002, reprinted in Greenberg and Dratel, *The Torture Papers*, p. 237.
[46] Ibid., p. 237.
[47] Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008), p. 220.
[48] US Senate, *Inquiry into the Treatment of Detainees*, p. xviii.
[49] Ibid., p. xix.
[50] Memorandum from Alberto Mora to Albert Church, *Statement for the Record: Office of General Counsel Involvement in Interrogation Issues* (7 July 2004) (hereinafter *Mora memo*), p. 7, emphasis added.
[51] *Mora memo*, pp. 7–8.

that Rumsfeld was suspending the programme and authorising a special 'working group' of a few dozen lawyers, including Mora himself, to discuss and agree on new interrogation guidelines.[52]

The establishment of the Working Group was certainly not the end of the War Council's attempts to disempower the Pentagon legal advisers. The Working Group was notified that OLC would prepare an overarching legal opinion that was to serve as definitive guidance ('controlling authority') for the discussions. The opinion turned out to be Yoo's *Interrogation II*,[53] which replicated the legal reasoning of *Interrogation I*. This reasoning was new to the Pentagon lawyers, as they had never had access to the earlier memorandum.

Many legal advisers in the Working Group pointed out that other nations were likely to disagree with the interpretation of international law laid out in *Interrogation II*.[54] Convinced that there was no tenable legal argumentation for the policies under analysis, their legal advice called for unavoidable policy adjustment. One of their main concerns referred to the risk of subjecting uniformed personnel to criminal prosecution in foreign or international tribunals, acknowledging the incompatibility between the interrogation methods in question and applicable international criminal laws.[55] Another major concern was about the effect that a departure from the Geneva Convention protections would have on the United States' international reputation as well as its impact on the public's support for the war.[56] Finally, resistance reflected the constitutive role of Geneva law in the culture and self-image of the US Armed Forces.[57]

On 10 February 2003, Mora met with Haynes and objected to the Working Group's draft report, which reflected OLC's reasoning. Mora expected the report to be issued anyway, but, to his knowledge, the report was never produced.[58] It was in May of 2004, after the Abu Ghraib scandal,

[52] Memorandum from Donald Rumsfeld to James Hill, *Counter-Resistance Techniques* (15 January 2003), and Memorandum from Donald Rumsfeld to William Haynes, *Detainee Interrogations* (15 January 2003), both reprinted in Greenberg and Dratel, *The Torture Papers*, pp. 238–9. Also US Senate, *Inquiry into the Treatment of Detainees*, p. xxi.

[53] Memorandum from John Yoo to William Haynes, *Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (314 March 2003) (hereinafter *Interrogation II*).

[54] Memorandum from Major General Jack Rives to Mary Walker, *Final Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the Global War on Terrorism* (5 February 2003) (hereinafter *Air Force JAG memo I*), para. 3; Memorandum from Maj. Gen. Jack Rives to Mary Walker, *Comments on Draft Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the Global War on Terrorism* (6 February 2003) (hereinafter *Air Force JAG memo II*), paras 1.a and 1.c; Memorandum from Brigadier General Kevin Sandkhuler to Mary Walker, *Working Group Recommendations on Detainee Interrogations* (27 February 2003) (hereinafter *Marine Corps JAG memo*), para. 1; Memorandum from Rear Admiral Michael Lohr to Mary Walker, *Comments on the 6 March Detainee Interrogation Working Group Report* (13 March 2002), paras 2, 11, 13, and 17.

[55] *Air Force JAG memo I*, paras 2 and 3; *Air Force JAG memo II*, para. 1.c; *Marine Corps JAG memo*, para. 3.b.

[56] *Air Force JAG memo I*, para. 4; *Air Force JAG memo II*, para. 2; *Marine Corps JAG memo*, para. 3.c. Also memorandum from Major General Thomas Romig to Mary Walker, *Draft Report and Recommendations of the Working Group to Access the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism* (3 March 2003), para. 4; memorandum from Rear Admiral Michael Lohr to Mary Walker, *Working Group Recommendations Relating to Interrogation of Detainees* (6 February 2003) (hereinafter *Navy JAG memo I*), para. 3.

[57] *Air Force JAG memo I*, para. 5; *Air Force JAG memo II*, para. 1.b; *Marine Corps JAG memo*, para. 3.d; *Navy JAG memo I*, para. 4.

[58] *Mora memo*, p. 20.

that Mora found out that Rumsfeld had signed the Working Group final report a year earlier.[59] The report, which reflected the legal opinion of *Interrogation II* and included a list of 35 interrogation techniques,[60] had been issued without the knowledge of the critical legal advisers from the Pentagon and had been used, together with *Interrogation II*, to back Rumsfeld's memorandum of 16 April 2003, which authorised the use of 24 of those techniques – and which had not been shared with the Pentagon lawyers.[61] The Working Group final report did mention that 'other nations and international bodies may take a more restrictive view [on the requirements of international law]'.[62] Similarly, the new interrogation policy memorandum cautioned that differing legal views should be considered prior to the application of the interrogation techniques.[63] Rumsfeld's order was a 'yellow' compromise, recommended by his top lawyer, between OLC's 'green light' and the Pentagon's 'red light'.[64]

Mora was pleased that no detainee abuses by the military were reported since 15 January 2003 (when the original policy memorandum was suspended by Rumsfeld). The battle to correct legal advice had been lost, for the most part, but their efforts had apparently paid off as far as the actual treatment of Guantánamo detainees was concerned.[65] Notwithstanding this, Mora refused to leave the Working Group report and *Interrogation II* as the standing legal advice. On 7 July 2004, he submitted his dissenting memorandum.

## Organisational imperatives and reversal of course

John Yoo resigned from OLC in the summer of 2003. In May, President Bush nominated Jack Goldsmith as head of OLC. Goldsmith, who took office in October, recognises himself as a conservative intellectual who is 'skeptical about the creeping influence of international law on American law'.[66] His scholarship testifies to this self-characterisation.[67] The role he played during his short stay at OLC has therefore little to do with a particular sensitivity or deferential predisposition towards the international legal system. Quite the contrary, his 'new sovereigntism' was very much in line with the War Council's views on international law.[68] Unlike Yoo, however, Goldsmith consciously deferred to the organisational norms of the policymaking apparatus.

[59] Mayer, *The Dark Side*, pp. 233–4.
[60] *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (6 March 2003) (hereinafter *Working Group Report*), reprinted in Greenberg and Dratel, *The Torture Papers*, pp. 241–359. The list of recommended techniques excluded waterboarding.
[61] *Mora memo*, p. 21, fn. 15.
[62] *Working Group Report*, p. 241.
[63] Memorandum from Donald Rumsfeld to James Hill, *Counter-Resistance Techniques in the War on Terrorism* (16 April 2003), reprinted in Greenberg and Dratel, *The Torture Papers*, pp. 360–5.
[64] Goldsmith, *The Terror Presidency*, p. 154.
[65] *Mora memo*, p. 21.
[66] Goldsmith, *The Terror Presidency*, p. 21.
[67] See, for example, Curtis Bradley and Jack Goldsmith, 'Customary international law as federal common law: a critique of the modern position', *Harvard Law Review*, 110:4 (1997), pp. 815–76; Jack Goldsmith, 'Should international human rights law trump US domestic law?', *Chicago Journal of International Law*, 1:2 (2000), pp. 327–39; Jack Goldsmith, 'Liberal democracy and cosmopolitan duty', *Stanford Law Review*, 55:5 (2003), pp. 1667–96.
[68] This is not to deny significant differences between Jack Goldsmith and John Yoo on constitutional law, for example in relation to Presidential powers *vis-à-vis* Congress.

This implied ceasing the secretive short-circuiting of legal advising, a deviant practice which had generated strong resistance from much of the legal advising corps. In his own words, he 'always insisted that the State Department chime in on issues of international law, even if the issues were highly classified. And though the process was often painful, it always improved my work. I also insisted, sometimes in the face of White House resistance, that more lawyers in the Justice Department be given access to classified programmes so that we had the manpower to do a proper legal analysis'.[69]

When Goldsmith read *Interrogation I* and *II*, he was astounded to see 'the unusual lack of care and sobriety in their legal analysis', that they had 'no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law'.[70] In short, for Goldsmith 'OLC's analysis of the law of torture [in *Interrogation I and II* …] was legally flawed, tendentious in substance and tone, and overbroad and thus largely unnecessary'.[71] The professional parameters of the 'interpretive community' of legal advisers had been ignored. Reversing OLC opinions, however, is no easy task, as it is contrary to the office's institutional culture.[72] In spite of this, Goldsmith decided that *Interrogation I* and *II* must be withdrawn, corrected, and replaced. He reached that decision in December 2003 based only on the opinion's errors, before he knew about any abuse of prisoners.[73]

When Yoo's opinions on interrogation techniques were put to scrutiny, very few inside the Administration were willing to defend them.[74] Goldsmith first withdrew *Interrogation II* but allowed the Defense Department to continue to employ the 24 techniques approved by Rumsfeld earlier that year.[75] In a letter to CIA General Counsel Scott Muller, Goldsmith suspended *Interrogation I*'s authorisation of waterboarding (which had not been used since early 2003 anyway).[76] Wary of their possible criminal liability, CIA officials had preventively begun to curb their practices: no one was waterboarded after March 2003, and the other enhanced interrogation methods were gradually abandoned since July 2003 and shelved altogether in 2007.[77] In June 2004, Goldsmith finally withdrew *Interrogation I* and resigned. His dismantling of the War Council's machinations, rather than the actual content of his legal opinions, generated tensions with the White House that Goldsmith was not willing to put up with.[78]

The replacing opinion on interrogation techniques would be issued in December 2004 by Goldsmith's temporary successor at OLC.[79] The memorandum – *Interrogation III* – was to supersede *Interrogation I* in its entirety and was subjected to an inclusive review within the Justice Department, furthering the return to procedural normalcy. The new memorandum returned to a conventional definition of torture and explicitly stated that there was 'no exception under the statute

[69] Goldsmith *The Terror Presidency*, p. 167.
[70] Ibid., pp. 148–9.
[71] Ibid., p. 151.
[72] Trevor Morrison, 'Stare decisis in the Office of Legal Counsel', *Columbia Law Review*, 110 (2010), pp. 1448–525; Bruff, *Bad Advice*, p. 81.
[73] Goldsmith, *The Terror Presidency*, p. 146.
[74] Ibid., pp. 157–8.
[75] Ibid., p. 153.
[76] Letter from Jack Goldsmith to Scott Muller (27 May 2004).
[77] US Senate, *Committee Study*, Executive Summary, pp. 116, 134–9.
[78] Goldsmith, *The Terror Presidency*, pp. 161–4.
[79] Memorandum from Daniel Levin to James Comey, *Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A* (30 December 2004) (hereinafter *Interrogation III*).

permitting torture to be used for a "good reason" … [to protect national security, for example]'.[80] The new OLC legal position on interrogations prompted Secretary Rumsfeld to revise the military's interrogation programme, as intended. In March 2005, he declared 'non-operational' the Working Group final report of April 2003 – the one based on *Interrogation II* and approving several harsh interrogation techniques. The updated interrogation policy did not undergo any further substantive changes since then. Unlike its predecessor, the new policy represented an institutional equilibrium.

## IV. Discussion of findings and alternative explanations

### How lawyerised was the policymaking process?

The case study shows that in the formulation of the interrogation programme the presence of legal advisers was pervasive. Legal advisers, occupying different legal offices integrated with equally decentralised policy bureaus, were consulted *before* decisions were made and their approval was sought by policymakers at all times. Legal advice functioned as a required authorisation for action. So much so that the bulk of the interrogation programme was based on the legal advisers' input, particularly on that issued from OLC. It is quite safe to conclude that the programme would have been different if the legal input had been different. In Goldsmith's words:

> The lawyers weren't necessarily expert on al Qaeda, or Islamic fundamentalism, or intelligence, or international diplomacy, or even the requirements of national security. But the lawyers … seemed to 'own' issues that had profound national security and political and diplomatic consequences. They [and, after October 2003, we] dominated discussions on detention, military commissions, interrogation, GTMO, and many other controversial terrorism policies.[81]

### Why did the initial deviation from international law compliance occur?

If lawyerisation was high throughout the period of study, why was there variation in compliance? Two factors explain the initial deviation from compliance with international legal expectations. First, there were profound differences of legal opinion within the legal advising team. These disagreements were particularly irreconcilable because some legal interpretations did not reflect the conventional interpretive practice of the legal profession. The War Council offered advice on the legality of certain policies that failed to meet the standards of validity of the lawyerly interpretive community. This need not lead to legal advising failure when lawyerisation is high. In effect, if the process of legal advising is centralised, transparent, inclusive, and thus tends to result in an interpretive compromise, the *collective* enterprise of producing legal advice should push the 'invalid' advice to the wayside. However – and this is the second factor – if these structural remedies are lacking, then deviant legal interpretations may be presented to policymakers as valid legal advice, breaking a crack in the compliance fence and thus allowing for noncompliance to ensue.

Secrecy and short-circuiting in the legal advising process were key factors that undermined the ability of the existing compliance fences to halt the War Council's legal advice. The fact that precautions were taken on a regular basis to prevent the free circulation of legal memoranda throughout the

[80] *Interrogation III*, p. 17.
[81] Goldsmith, *The Terror Presidency*, p. 130.

**Table 1.** Lawyerisation and the making of 'War on Terror' interrogation policy

| **Sources of lawyerisation** | | | |
|---|---|---|---|
| Centralisation | *low* | Decisional function | *informal authorisation* |
| Inclusiveness | *high** | Timing | *early (prior to decision)* |
| Transparency | *high** | Advising initiative | *by expected request*** |

*Notes*: *The War Council exploits decentralisation by temporarily restricting inclusiveness and transparency in order to disempower parts of the legal advising corps.
**Unsought, 'aggressive' advising when not requested (resistance to attempted exclusion by the War Council).

different legal offices comprised in the policymaking apparatus suggests two things. First, it suggests that OLC legal opinions were far from conventional – and were known to be so. Second, the secretive short-circuiting suggests that resistance from other legal advisers was expected and, more important, that this resistance was feared. In other words, the War Council was well aware of the institutional compliance fences they were facing, and planned accordingly. They knew that their peers would apply the institutionalised rules of valid legal interpretation to dismantle the authoritativeness of their legal advice. Hence their considerable efforts to disempower major parts of the legal-advising team.

This implies that, despite the structural empowerment of the legal staff as a whole, discretional disempowerment of particular legal advisers was successfully practised. Secrecy and short-circuiting weakened the causal mechanism that connects lawyerisation with compliance. In this way, the War Council's monopolisation of legal advising effectively neutralised the compliance effect of lawyerisation. However, this subversive practice was not organisationally sustainable, and so the compliance-push of legal advising was weakened only temporarily. The dispute in the Pentagon in the winter/spring of 2003 shows how legal advisers, supported by a well-established organisational culture, could fight for compliance with international law.[82] They succeeded in bringing about policy changes that better, if not fully, satisfied international legal expectations. Organisational imperatives finally trumped individual-level factors responsible for important, though short-lived, deviations from the institutionalised practice of policymaking. In brief, the compliance effect of legal advice was only *delayed*. It may take some time for the 'fencing' mechanisms of lawyerisation to get in motion and succeed in keeping policy within the boundaries of the legally permissible. It took legal advisers a few months to restore the inclusiveness and transparency of normal legal advising, thus neutralising discretional disempowerment (see Table 1).

## What are the plausible alternative accounts of the reversal of policy?

The preceding analysis suggests that the changes in the interrogation policy were, to a significant extent, the product of organisational imperatives derived from the lawyerised structure of policy making within the Executive. These imperatives were instantiated by legal advisers who were originally excluded from the legal-advising process but who effectively pushed back for its reopening, restoring the transparency and inclusiveness mandated by the organisational culture. There are, however, alternative explanations that must be considered.

[82] Gregory McNeal, 'Organiational culture, professional ethics and Guantanamo', *Case Western Reserve Journal of International Law*, 42 (2009), pp. 125-49.

From a rationalist perspective, it may be argued that the policy shift responded to a change in the instrumental value of the alternative policy options. If 'enhanced interrogations' lost their attractiveness by 2003, this must have been because more information was revealed during this period about the available policies. For example, perhaps not until late in 2003 did the government realise that the original interrogation programme was legally problematic, or that these legal issues would be so costly in terms of public opinion and reactions from other states. When this information was revealed, the argument goes, switching to a more legally defensible policy became the best strategy. The facts do not support these arguments. For one, that the issue was legally problematic became apparent as early as January 2002, when an internal battle between State Department and OLC legal advisers broke out over the constraints imposed by the Geneva Conventions on the US government.[83] The War Council resorted to secrecy and short-circuiting precisely as a response to this early altercation. As for negative reactions from other states and the general public, these costs were not revealed until the mass release of pictures of the Abu Ghraib scandal, which occurred in April 2004. Audience costs most probably helped lock in the policy reversal, but by the time they were factored in, important changes in the interrogation programme had been under way for at least a year. It is still possible that the enhanced interrogation techniques ceased to be the preferred policy simply because, after being implemented for some time, they proved to be ineffective to obtain reliable information about terrorist attacks. However, the case study showed that the policy reversal was immediately preceded by requests of authorisation to use these techniques by CIA and military personnel, which disproves the argument that they had fallen in disrepute.

Another alternative explanation points to organisational factors outside the Executive. It may be argued that the US Supreme Court elicited the interrogation policy reversal through decisions that confirmed the applicability of the Geneva Conventions or otherwise provided an authoritative interpretation of the US international legal obligations as being incompatible with the enhanced interrogations programme. The sequencing of events, however, does not seem to support this argument. The first Supreme Court ruling that could (indirectly) compromise the legality of the original policy and thus prompt changes to it dates from 2006, a few years after the policy reversal occurred.[84]

It is important to admit that, since most of the international legal rules analysed here were incorporated into US law, legal advising was significantly oriented toward domestic law. The case study's focus on international law should not be taken to suggest that the role of domestic law was marginal. It was not. However, this does not mean that it was ultimately domestic law that solely influenced the decision-making process through legal advisers. The case study shows that the discursive force of international law (including customary law), albeit reinforced by its domestic sources, was not dependent on them. International law was extensively invoked on its own right, independently of the US legislation incorporating it into the domestic legal system.

[83] Memorandum from William Taft to John Yoo, *Your Draft Memorandum of January 9* (11 January 2002), and attached letter; memorandum from Colin Powell to Alberto Gonzales and Condoleezza Rice, *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan* (26 January 2002), reprinted in Greenberg and Dratel, *The Torture Papers*, p. 124; memorandum from William Taft to Alberto Gonzales, *Comments on Your Paper on the Geneva Convention* (2 February 2002), reprinted in Greenberg and Dratel, *The Torture Papers*, p. 133.

[84] Hamdan *v.* Rumsfeld, establishing the applicability of Common Article 3 of the Geneva Conventions to Guantánamo detainees. The initial ruling (District Court of Columbia) is from November 2004, still later than the policy reversal.

Finally, individual-level explanations should be considered. From both rationalist and normative angles, it may be argued that policies changed because policymakers changed, and with them the policy preferences that informed the decision-making process. However, the key policymakers remained the same during the period of major policy transformation (2001–3). Moreover, even though a key legal adviser (the leading adviser at OLC) did change in October 2003, his personal characteristics do not seem to be able to account for much. For one, Jack Goldsmith's legal views on international law constraints on US sovereignty do not differ significantly from John Yoo's. Besides, by October 2003 the process of policy reversal was already under way. In effect, the critical moment in this respect does not seem to be the incorporation of Goldsmith as head of OLC but rather the earlier resistance from legal advisers in the Pentagon, initially led by Alberto Mora (another conservative with no special predilection for international legal curtailments on US sovereignty).[85] That said, it would be a mistake not to recognise the importance that individual choices had in the process. Goldsmith's deference to organisational rules and Mora's resistance efforts, for example, were key elements for the process of policy reversal to unfold. The point remains, though, that these choices were made under heavy institutional pressure and, more importantly, were effective due to the lawyerised organisational context in which they occurred. In this sense, they speak less of the uniqueness of characters and more of the power of organisational imperatives.

## V. Conclusion

This article advanced an organisational-process theory of compliance with international law. In this account, the factor that explains compliance is the lawyerisation of policymaking, which, through the causal mechanism of legal advising, implicates institutional 'compliance fences' that make non-compliance difficult to carry through. This theory is an alternative to extant theories that focus on the instrumental or normative value of policy alternatives, where this value determines the incentives faced by the policymaker and thus her choice to comply (or not) with international law. It is also an alternative to theories that focus on other organisational factors, such as the enforcement of international law by domestic courts, which are external to the policymaking process and operate through reactive, rather than deterring, mechanisms of compliance.

The article also probed the making of the interrogation programme implemented by the United States in the early years of the 'War on Terror'. The case study confirmed the high, albeit imperfect, level of lawyerisation in policymaking. It also corroborated the causal effects, via legal advising, of such a lawyerised organisational structure. There is little doubt that the interrogation programme compatible with international law, implemented gradually since 2003, became overdetermined once the Abu Ghraib scandal and the US Supreme Court entered the picture. These alternative explanations are thus certainly part of the story. But the timing and sequencing of the organisational process traced allow for the isolation (and corroboration) of the effect of legal advising on policymaking. The story of the legal advising process behind the interrogation programme is a story of the restorative push towards compliance with international law imposed by organisational structures and materialised through legal advisers. Because legal compliance is here conceived as a continuum rather than a dichotomy, the point of the case study was to show how legal advising enhanced compliance by transforming the interrogation policy, independently of whether said policy

[85] Mayer, *The Dark Side*, p. 213.

passed a satisfactory compliance threshold by 2004. Lawyerisation shrinks the gap between actual policy and legal prescription, but the actual level of compliance reached may also depend on other factors (exogenous to the theory advanced here). This is why alternative theories of compliance remain important complements to understand the phenomenon of compliance with international law even for lawyerised states.

What about other cases? How useful is this theoretical model for understanding the phenomenon of compliance writ large? Lawyerisation is not a necessary cause of state compliance with international law. In this sense, the claim is that the theory advanced here provides an alternative account of compliance *for those cases where policymaking is highly lawyerised*. It is alternative in the sense that it relies on a different causal mechanism, not in the sense that it refutes the applicability of extant theories. The push towards (and against) compliance may certainly result from the combination of different factors underscored by different theories. The purpose of this article was to add one more factor to the picture, in order to better understand the phenomenon of state compliance with international law. The compliance effect of legal advising is crucial only in lawyerised states, and many cases do not (yet) meet this condition, but the impressionistic literature on state legal advisers suggests that the historical trend is toward the diffusion of lawyerisation across states and its deepening within them. This should come as no surprise, since as world politics legalises[86] states are better off lawyering up. If this is the case, then the explanatory value of the theory advanced here for compliance writ large, compared to that of existing accounts, should increase over time. Be that as it may, the case study presented here confirms that the theory already does a good job in explaining compliance with international law by the global hegemon in the context of an international security crisis – certainly not an 'easy' or peripheral case in the compliance research agenda. This alone should make the theory a valuable explanatory tool. There is much to be gained by extending this empirical analysis to other states, and by comparing this first take on the relationship between lawyerisation and compliance with similar studies on other issue-areas within the United States.

Lawyered compliance is a special kind of compliance: it evokes both policy adjustments and discursive manipulation. Lawyerisation implies internal fences that keep state behaviour in compliance with its legal obligations, but it also implies a greater ability to discursively manipulate international law into accommodating pre-existing policy preferences. As states lawyerise, compliance becomes *shallower* (in the sense that law-induced behaviour is not so different from what states would have done in the absence of the law).[87] Behaviourally speaking, lawyered compliance is somewhat of a sham, in the sense that it describes a correspondence between international law and state behaviour, which is constructed by making the law more permissible, at least to a certain extent (limited by the professional parameters of the interpretive community). That said, lawyerly skills can also be used 'offensively' to constrain a partner's ability to renege on its commitments. In this sense, as states lawyerise, compliance becomes *deeper*. It is unclear whether, as states become more lawyerised, the result of the interplay of these two contradictory effects should be a lesser or a greater behavioural impact of international law on international politics, or what exogenous factors could tilt the balance one way or the other. This remains an open question, for which more work, both theoretical and empirical, should be welcome.

[86] Judith Goldstein, Miles Khaler, Robert Keohane, and Anne-Marie Slaughter (eds), *Legalization and World Politics* (Cambridge, MA: MIT Press, 2001).

[87] George Downs, David Rocke, and Peter Barsoom, 'Is the good news about compliance good news about cooperation?', *International Organization*, 50:3 (1996), pp. 379–406.

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