

# Black Holes and Open Secrets: The Impact of Covert Action on International Law

ALEXANDRA H. PERINA\*

*Governments maintain secrecy over a range of conduct in order to protect national security, but in no area is secrecy more likely to impact foreign relations and destabilize the international political order than in the use of force. Although the political costs of secrecy are widely discussed, there has been virtually no attention in scholarship to how secrecy influences the law itself. This Article considers how secrecy and covert conduct shape the development of international law. Focusing on the area of the use of force, it examines how international law-making processes are affected when a state acts covertly—that is, when a state does not publicly acknowledge its conduct—and that covert conduct comes—partially or fully, accurately or inaccurately—to public light.*

*Despite widespread public perception that covert conduct necessarily violates international law, states act covertly for a range of legitimate political, diplomatic, and strategic reasons. Covert behavior may be—though certainly is not always—consistent with international law. I consider how covert actors' non-engagement in public discourse distorts the landscape of evidence that informs other actors' legal judgments. Where states view their conduct as lawful, acting covertly diminishes their ability to reinforce or develop the law, ceding that ground to third parties. I*

---

\*Attorney Adviser, U.S. Department of State; 2013–2014 International Affairs Fellow, Council on Foreign Relations. The views presented here are my own and do not necessarily reflect the views of the U.S. Department of State or the U.S. Government. I wish to thank John B. Bellinger, Ashley Deeks, Steven Fabry, Monica Hakimi, Rebecca Ingber, Harold Hongju Koh, Marty Lederman, Amnon Lev, Mira Rapp-Hooper, David Pozen, Philip Spector, and Chuck Sturtevant for their time, comments, and insights at various stages of this project.

*address whether secret and covert practice can count as evidence of customary law, and suggest that violating the law covertly may be less damaging to legal rules than overt violation, by denying the act precedential value. I also argue that unacknowledged conduct has an inherently corrosive effect on the law by casting doubt on whether the operative legal rules have obligatory effect, potentially contributing to the rules' desuetude. Although one might assume that covert conduct is simply negligible to the evolution of the law, this Article shows how secrecy and covertness in fact shape law-making processes, and their substantive outcomes.*

*States will continue, often legitimately, to act covertly and maintain secrecy over aspects of their conduct. It is crucial for governments to understand the legal consequences and costs of secrecy and covertness, in order to manage their programs more strategically and potentially mitigate some of the pernicious effects on the law.*

|  |     |
|--|-----|
| INTRODUCTION .....                                 | 509 |
| A. Terminology.....                                | 511 |
| B. Scope.....                                      | 513 |
| I. SECRECY, FOREIGN POLICY, AND THE LAW .....      | 514 |
| A. Secrecy and Foreign Policy .....                | 514 |
| B. Covert Action and Foreign Policy.....           | 516 |
| C. Covert Conduct Under International Law.....     | 520 |
| 1. Jus Ad Bellum.....                              | 522 |
| 2. Jus In Bello .....                              | 525 |
| 3. International Law Permits Covertness .....      | 527 |
| D. Covert Conduct Under Domestic Law.....          | 529 |
| 1. The United States .....                         | 529 |
| 2. The United Kingdom .....                        | 536 |
| 3. Israel.....                                     | 537 |
| II. ASSESSING COVERT CONDUCT .....                 | 539 |
| A. Establishing Covert Facts .....                 | 540 |
| 1. Development of a Public Factual Narrative ..... | 540 |

|   |     |
|---|-----|
| 2. Court Adjudication of Covert Facts .....                 | 549 |
| B. Assessing the Legality of Covert Conduct.....            | 555 |
| 1. The Covert Actor’s Secret Legal Theories.....            | 555 |
| 2. Legal Judgments by Third States and Other<br>Actors..... | 562 |
| III. THE EFFECTS OF SECRECY AND COVERTNESS ON THE LAW ..... | 565 |
| A. Black Holes in State Practice .....                      | 567 |
| 1. Internationally Lawful Covert Conduct .....              | 568 |
| 2. Internationally Unlawful Covert Conduct.....             | 573 |
| B. Secrecy and Desuetude .....                              | 576 |
| C. Perpetually Deep Secrets.....                            | 579 |
| D. The Example of Cyber Activity .....                      | 580 |
| CONCLUSION .....  | 583 |

## INTRODUCTION

Consider the following scenario: An individual with ties to a terrorist group is killed in a targeted strike in East Africa. Media reporting of the incident trickles out gradually; some reports speculate that the operation was conducted by the United States, but U.S. officials offer “no comment” when asked about the matter. Other sources suggest that the attack was perpetrated by local rivals acting as proxies for another foreign government. The strike is never authoritatively attributed, nor any justification offered. Though the reported facts are sparse and murky, it is widely denounced by human rights groups and academic commentators as unlawful and unethical. How should states assess whether it reflects a lawful use of force or a violation of the U.N. Charter to which they should object? Should they be concerned that it portends unilateral action within their own borders by a state relying on undisclosed legal theories? And should the responsible state be concerned that others will cite it as precedent for future bad acts?

While governments maintain secrecy over a broad range of activities, the benefits and risks of secrecy in international affairs are greatest in the context of the use of force. With advances in technology, states can employ force far from home with increasing stealth and ease. They can conduct precision strikes remotely with unmanned aircraft, and inflict damage using cyber tools that victim states may not recognize for years, or ever be able to attribute accurately.

The political implications of secrecy in matters of national security—such as the potential for eroding public confidence and diplomatic relationships—are widely discussed. But there has been scant attention to the consequences for international law of the lack of public acknowledgement and accounting of state uses of force. To be sure, secrecy has been generally viewed as undermining the rule of law by casting doubt on whether governments comply with their legal obligations. But the issue of how secrecy affects international law itself—potentially shaping the substantive content of legal rules and *in extremis* undermining the vitality of the international legal framework—has been unexamined in legal scholarship. This Article takes up that issue.

This Article explores how secrecy influences international law by considering how international law-making processes are altered when a state acts “covertly”—a term used herein to identify when a state does not publicly acknowledge its conduct<sup>1</sup>—and that covert conduct comes—partially or fully, accurately or inaccurately—into public light. It takes as a starting point that states sometimes conduct lawful conduct secretly and will continue legitimately to conduct operations outside of the public eye. However, future policy decisions about whether and how much to reveal about such activities should be made with an understanding of the consequences of coyness and secrecy for the international legal order.

Part I discusses the dynamics of secrecy in government policy, including the legitimate purposes and the costs of policies of secrecy. It also considers the use of covert action in foreign policy, noting that political or diplomatic interests—rather than primarily or exclusively legal interests—may lead governments to act in ways that they do not intend to acknowledge publicly. It then addresses the status of covert action under international law, arguing that there is nothing *per se* unlawful about conducting otherwise lawful conduct covertly, and that in the area of the use of force, international legal obligations for disclosure are limited and not necessarily incompatible with covert action. Finally, Part I briefly surveys the domestic legal frameworks for covert action in the United States, the United Kingdom, and Israel, with a particular focus on the discernable posture of each toward compliance with international law.

Part II examines how the public record relating to

---

1. The definition of covert action in the U.S. National Security Act, 50 U.S.C. § 3093(e) (2014), is consistent with but not exhaustive of the kind of conduct I am concerned with in this Article. *See infra* Part I.D.

unacknowledged government conduct, including factual allegations and legal judgments, is shaped in the absence of the covert actor's acknowledgment.<sup>2</sup> It recognizes the difficulties of credibly establishing facts and assessing the international lawfulness of covert uses of force in light of the absence of authoritative factual or legal claims by the responsible state and the possibility of misinformation from many sources.

Part III turns to how the resulting public record—however impoverished it may be—shapes international law. It establishes that secret and covert acts cannot constitute evidence of state practice that forms customary international law or reflects states' interpretations of treaty obligations. It then considers the scenario in which covert conduct is in fact justifiable under international law, arguing that in such cases, the greatest cost to the responsible state of acting covertly is that secrecy and non-acknowledgment severely diminish its ability to shape public discourse effectively. As a result, in choosing policies of secrecy and covertness, a state effectively cedes its privileged position in articulating and developing the law to third parties.

Part III also considers the scenario in which covert actions violate international law, and argues that covert violations may be less damaging to legal rules than overt violations because they cannot constitute a legal precedent that legitimates future conduct. In addition, ambiguity about a state's own view of its compliance with the law is inherently corrosive to the controlling legal rules, contributing to perceptions that such rules are not obligatory and undermining a culture of legal compliance. Finally, Part III discusses cyber conduct as illustrative of many of these dynamics.

This Article aims to begin a deeper conversation than has been had to date about the substantive impact of secrecy and covertness on the law. It does not purport to address exhaustively the structural consequences of secrecy and covert action, and the theses presented herein no doubt are subject to refinement and elaboration, which I hope others will take up.

### *A. Terminology*

The term “covert” is used here generically to denote conduct that is officially unacknowledged by the responsible state, reflecting

---

2. The scenarios, factual allegations, legal theories, and judgments discussed herein are based on public sources, including press reporting, which may or may not be accurate. This Article neither assumes nor takes a position on the accuracy of any of the press sources cited.















A covert actor's non-acknowledgment of a use of force may also offer the victim state and the international community latitude to avoid escalation. An overt attack and the public rhetoric that would attend it could put greater political pressure on a victim state to respond in some fashion. Acting covertly thus may achieve a discrete military aim while otherwise preserving the strategic status quo.<sup>25</sup> For example, the media has speculated that the Israeli government declined to confirm reported strikes in Syria in recent years in order "to avoid embarrassing Assad and sparking a potential response."<sup>26</sup> Because transparency typically enhances stability by putting parties on notice of others' policies, a state acting covertly for this reason is likely to have signaled its objectives and intentions to avoid misunderstandings.<sup>27</sup> Moreover, if the victim of a use of force knows that it was effectively caught in a wrong, it may be harder to complain about a covert act that was undertaken in response to that wrongful conduct.<sup>28</sup>

---

Yemen. SANGER, *supra* note 23, at 259.

25. See ABRAM N. SHULSKY & GARY J. SCHMITT, *SILENT WARFARE: UNDERSTANDING THE WORLD OF INTELLIGENCE* 75 (2002); REISMAN & BAKER, *supra* note 9, at 77 (Covert operations may "minimize the risk of arena escalation" and "minimize destruction of total values in dispute between elites regarding elite objectives."); Schwebel Dissent, *supra* note 21, ¶ 210 ("[C]overt measures may in some circumstances be more modest, and more readily terminated, than overt applications of the use of force."). However, the volume and pace of covert activity bear on the level of political pressure on the international community to respond. An isolated strike may be easier for the victim and the international community willfully to ignore than a full-scale covert campaign. The more extensive—or at least extensively reported—the conduct, the more difficult it is politically for other actors to turn a blind eye to it. See, e.g., STIMSON DRONE POLICY REPORT, *supra* note 18, at 19, 28.

26. Zeina Karam & Mike Corder, *Israel Strikes Russian Weapons Shipment in Syria*, ASSOCIATED PRESS, Oct. 31, 2013, <http://bigstory.ap.org/article/official-syria-destroys-chemical-arms-equipment>; Isabel Kershner & Michael R. Gordon, *Israeli Airstrike in Syria Targets Arms Convoy, U.S. Says*, N.Y. TIMES, Jan. 30, 2013, [http://www.nytimes.com/2013/01/31/world/middleeast/syria-says-it-was-hit-by-strikes-from-israeli-planes.html?\\_r=0](http://www.nytimes.com/2013/01/31/world/middleeast/syria-says-it-was-hit-by-strikes-from-israeli-planes.html?_r=0) ("Israel has long maintained a policy of silence on pre-emptive military strikes . . . . [T]he ambiguity allowed the event to pass without Damascus feeling pressure to retaliate.").

27. For example, in Operation Orchard (the 2007 Israeli covert bombing of a nuclear facility in Syria), Israeli Prime Minister Ehud Olmert reportedly called Turkish Prime Minister Tayyip Erdogan immediately after the strike and asked him to convey to Syrian President Bashar al-Assad that the Israelis planned no further military action and would not publicize the event, if Syria would not. Erich Follath & Holger Stark, *The Story of "Operation Orchard": How Israel Destroyed Syria's Al Kibar Nuclear Reactor*, DER SPIEGEL, Nov. 2, 2009, available at <http://www.spiegel.de/international/world/0,1518,658663,00.html> (translated by Christopher Sultan) [hereinafter Der Spiegel Report].

28. It was assessed that Syrian officials were unlikely to respond overtly to the 2007 Israeli strike on the al-Kibar nuclear facility because doing so would further expose the fact that they were in violation of their international obligations. See *infra* Part II.A.1; see also

Even where covert conduct has been reported widely in the media and the public has well-founded bases to infer attribution, official non-acknowledgement preserves ambiguity about the ultimate intentions of the covert actor, and can protect sources, methods, and future opportunities for action.<sup>29</sup>

Finally, certain types of conduct, such as disinformation, financial subsidization of media or dissident actors, or blackmail, may violate a foreign state's domestic law even though it would not be contrary to international law.<sup>30</sup> In such cases, acting covertly may be essential to the effectiveness of the operation and allows the acting state to avoid acknowledging that it has violated the host state's law and exposing its agents to culpability.

The reasons why a state chooses to act covertly and the ultimate targets of the covertness—that is, the specific audience whose potential awareness motivates non-disclosure—are likely to shape the state's posture toward eventual disclosure. For example, if State A acts covertly because its conduct violates international law, the factors motivating covertness might be the desires not to incur legal and political sanctions or to avoid setting a public precedent, so the target of covertness would be the international community at large. In contrast, if State B believes its conduct is lawful but is bound not to acknowledge its actions publicly by agreement with State C, it might signal a theory that would justify such conduct to the public, share information with its allies in classified channels, or revise its nondisclosure commitments to State C as circumstances change over time.

---

Amos Harel, *Five Years On, New Details Emerge About Israeli Strike on Syrian Reactor*, HAARETZ, Sept. 10, 2012, <http://www.haaretz.com/news/diplomacy-defense/five-years-on-new-details-emerge-about-israeli-strike-on-syrian-reactor-1.464033>.

29. See *Wilson v. CIA*, 586 F.3d 171, 197–99 (2d Cir. 2009) (Katzman, C.J., concurring) (Official disclosures of unofficial publicly reported information may hinder national security by undermining the benefits of ambiguity that attend plausible deniability; provoking foreign retaliation; and impeding future intelligence gathering capabilities.). In August 2014, the White House invoked the need to preserve future opportunities in justifying its earlier non-disclosure of an attempted rescue of U.S. national James Foley and other hostages held in Syria. An official spokeswoman stated that the administration “never intended to disclose this operation” and did so only under threat of media revelations. Michael Shear & Eric Schmitt, *In Raid to Save Foley and Other Hostages, U.S. Found None*, N.Y. TIMES, Aug. 20, 2014, <http://www.nytimes.com/2014/08/21/world/middleeast/us-commandos-tried-to-rescue-foley-and-other-hostages.html>.

30. For examples of covert activities by strategy, see REISMAN & BAKER, *supra* note 9, at 11–12. While this paper focuses on the covert activity involving the use of force, certain non-violent covert activity, such as financial assistance to dissident political actors, may implicate international law principles of sovereignty and non-interference.

Covert conduct has been a historical mainstay of many states' foreign policies, at least since the Second World War,<sup>31</sup> and there is reason to believe states will rely on covert activities increasingly in the future. Covert operations have become a preferred tool both of powerful states and of traditionally weaker states, who seek to increase their leverage and "level the playing field" by drawing upon new weaponry and information capabilities that are ever more widely available to more nations.<sup>32</sup> Admiral James Stavridis has argued that a "new triad" of security capabilities—special operations forces, unmanned vehicles, and cyber systems—valued for their precision, flexibility, and stealth, are the kinetic tools of choice in the future.<sup>33</sup> These systems enhance the capabilities of states to project power and influence abroad in targeted, discreet ways; they lower the risks to nationals of the acting state; and in some cases they can be more cost effective than traditional systems. But the very attributes of these tools that are so appealing present corresponding costs; by taking their conduct out of the public realm, states cede their influence in shaping international public opinion about their conduct, with consequences not only for the legitimacy of their actions but for the law.

### C. Covert Conduct Under International Law

Is covert conduct necessarily unlawful? Richard Falk argued in 1975:

---

31. David F. Rudgers, *The Origins of Covert Action*, 35 J. CONTEMP. HIST. 249, 249 (2000) ("Despite attempts to give covert action a venerable lineage, it is primarily a product of the unusual circumstances arising in the early Cold War years and a mindset developed . . . during the second world war.") (internal citation omitted). Quantitatively substantiating the proposition that covert action is growing in prevalence is difficult, if not impossible, as it would require reliable data over time about the volume and scope of covert activity that remains effectively concealed from public disclosure. While as noted below technological developments favor increased use of covert capabilities, it may also simply be more difficult to maintain absolute secrecy over many kinds of covert activity, so any increased *reporting* of alleging covert conduct does not necessarily indicate more widespread occurrence in absolute terms. See Jack Goldsmith, *A Partial Defense of the Front Page Rule*, HOOVER INSTITUTION (Jan. 22, 2014), <http://www.hoover.org/research/partial-defense-front-page-rule>.

32. Daniel Wagner, *The Globalization of Covert Action*, WORLDPOST (Sept. 9, 2012, 6:15 PM), [http://www.huffingtonpost.com/daniel-wagner/globalization-of-covert-action\\_b\\_1869134.html](http://www.huffingtonpost.com/daniel-wagner/globalization-of-covert-action_b_1869134.html) (arguing that covert action is an increasingly popular tool for achieving state economic, political, and military objectives, alleging a rise in covert actions in the Middle East, Africa, and Asia).

33. James Stavridis, *The New Triad*, FOREIGN POL'Y (June 20, 2013), [http://www.foreignpolicy.com/articles/2013/06/20/the\\_new\\_triad](http://www.foreignpolicy.com/articles/2013/06/20/the_new_triad).

The international law case is, in a sense, self-evident and is partially conceded by the CIA's insistence upon secrecy and the related practice of defending itself against allegations by cover stories (i.e., lies). The secrecy/deception pattern arises in part because the behavior is inherently objectionable to a segment of domestic and, even more so, world public opinion. There is also an implicit awareness that CIA covert activities in foreign societies violate their fundamental international law rights as sovereign states.<sup>34</sup>

Falk is certainly correct that covert conduct sometimes violates basic tenets of international law, but not that it necessarily does. Indeed, unless it would be inherently unlawful to undertake covertly an otherwise lawful act, covert conduct should be judged by the same legal standards that apply to overt conduct. Without disputing the fact that history is replete with examples of covert state activity that breach international law, the issue of legality is better isolated by asking whether international law mandates disclosure. From that point of departure, there is no *general* rule of law that requires states to acknowledge and justify their conduct publicly.<sup>35</sup>

While secrecy has been a longstanding, historically accepted feature of international politics and diplomatic relations, the concept of transparency as an "unconditional virtue" has taken cultural root in many contemporary Western societies.<sup>36</sup> The cultural proclivity toward transparency has permeated legal expectations as well, driven by human rights law and the promise of enhancing the legitimacy and effectiveness of public law. But, although "it has occasionally been qualified as a general principle of law," the content of any such principle remains elusive, lacking in granularity sufficient to render it operational or enforceable, and "no one has (so far) had the temerity

---

34. Richard A. Falk, *CIA Covert Action and International Law*, 12 *SOC'Y* 39, 40 (1975). He cites the principles of sovereignty and non-intervention as commonly affronted, and states that even in cases where a foreign state acts covertly in concert with the territorial host, it may be argued that "secret authorization of foreign military and para-military action violates the principle of national self-determination that inheres in a state (or society) rather than in its government."

35. See Reisman, *Covert Action*, *supra* note 19, at 420 (concluding that "international legal process . . . frequently accepted or accommodated itself to . . . [covert actions]. This accommodation was most likely to occur when the evaluators held that, the covert character of the operation notwithstanding, the application of the instrument was otherwise lawful under international law.").

36. See Andrea Bianchi, *On Power and Illusion: The Concept of Transparency in International Law*, in *TRANSPARENCY IN INTERNATIONAL LAW* 1, 1-2 (Andrea Bianchi & Anne Peters eds., 2013).

to characterize transparency as a rule of customary international law.”<sup>37</sup>

Although transparency as a general rule of international law could, as such, be characterized at most as emerging, it has taken firmer legal root in treaty obligations in specific areas of practice.

### 1. *Jus Ad Bellum*

In the area of the use of force, Article 51 of the U.N. Charter requires that states “immediately” report to the U.N. Security Council “measures taken . . . in the exercise of [the] right of self-defence,” to give the Council an opportunity itself to take action to restore international peace and security.<sup>38</sup> But states have enormous latitude in determining how much detail to report. If actions in self-defense signal the start of an armed conflict, there is no expectation of—or state practice supporting—further notification of all subsequent conduct in the prosecution of the conflict.

For example, in October 2001, the United States reported to the Security Council, citing Article 51, that it and other states were taking actions in exercise of the rights of individual and collective self-defense in response to the September 11 attacks on the United States. The letter stated, “we may find that our self-defense requires further actions with respect to other organizations and other States,”<sup>39</sup> effectively encompassing future conduct of uncertain scope, including the actions of other, unidentified partner states, with respect to undetermined parties. The United States has not since that time provided additional written notifications under Article 51 on its counter-terrorism operations related to the 9/11 attacks, including, for example, after the May 2011 U.S. operation in Pakistan that killed Osama bin Laden. This absence suggests that the United States may view the October 2001 notification as continuing to satisfy the reporting requirement with respect to its conduct in self-defense related to that conflict.<sup>40</sup> Thus, states may view a broadly-framed

---

37. *Id.* at 4–5.

38. U.N. Charter art. 51.

39. Permanent Representative of the United States to the U.N., Letter dated Oct. 7, 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001).

40. The United States’ letter to the Security Council in September 2014 notifying military actions in Syria presented a variation in this practice. That letter presents notice of and justification for U.S. actions against the Islamic State of Iraq and the Levant (ISIL). It further states, “[i]n addition, the United States has initiated military actions Syria against al-



report to the Security Council identifying a situation necessitating measures in self-defense as encompassing future related conduct, overt and covert.<sup>41</sup> Moreover, nothing in Article 51 requires a state's report to be written or explicitly styled as pursuant to Article 51, and it has been at least suggested that oral statements might satisfy the requirement.<sup>42</sup> As a result, states' actual Article 51 reporting practices—through implementation or noncompliance<sup>43</sup>—appear to have preserved considerable latitude for secrecy.

What if a state does not file an Article 51 letter? In *Nicaragua v. United States*, the International Court of Justice addressed the legal implications of a state's failure to file a written report in connection with alleged U.S. covert activity in Central America in support of the opposition to the Nicaraguan Sandinista government, or *contras*, between 1981 and 1985.<sup>44</sup> The United States claimed before the Court that it provided assistance to El Salvador, Honduras, and Costa Rica upon the request of each state and in exercise of their collective self-defense.<sup>45</sup> Noting that no state

---

Qaida elements in Syria known as the Khorasan Group . . . .” Permanent Representative of the United States to the U.N., Letter dated Sept. 23, 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) (The author of the letter requests that it be circulated as a document of the Security Council.). The absence of greater factual or legal discussion of measures taken against the Khorasan Group suggests that the USG may have addressed it because of its temporal and geographic convergence with measures against ISIL, but viewed the predicate justifications as having already been conveyed in the 2001 notice concerning measures against al-Qaeda and related organizations.

41. See, e.g., Permanent Representative of Kuwait to the U.N., Letter dated Aug. 12, 1990 from the Permanent Representative of Kuwait addressed to the President of the Security Council, U.N. Doc. S/21498 (Aug. 12, 1990) (notifying exercise of its individual and collective right of self-defense pursuant to Article 51 by requesting “some nations to take such military or other steps as are necessary to ensure the effective and prompt implementation of Security Council Resolution 661 (1990)”).

42. Schwebel Dissent, *supra* note 21, ¶ 225 (noting U.S. statements in Security Council sessions between in March 1982 and February 1984 indicating that the United States was taking “responsive” action to safeguard U.S. security interests from Nicaraguan conduct and providing assistance to friendly states in Central America).

43. Ashley Deeks, *A Call for Article 51 Letters*, LAWFARE (June 25, 2014, 6:30 PM), <http://www.lawfareblog.com/2014/06/a-call-for-article-51-letters/> (noting the lack of Article 51 letters justifying state uses of force even in cases of acknowledged conduct).

44. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua Merits Judgment*].

45. Counter-Memorial of the United States of America (Questions of Jurisdiction and Admissibility), *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. Pleadings 2, ¶ 202 (Aug. 17, 1984) [hereinafter *U.S. Counter-Memorial 2*]. The United States withdrew from participation in the litigation prior to the merits phase and

had reported measures taken in self-defense at the time of the events alleged, the Court treated the lack of written notification contemporaneous with the initiation of measures as a point of evidence undercutting the plea as a matter of fact, but not foreclosing the legal availability of the defense.<sup>46</sup>

While the political and functional importance of Article 51 reporting should not be minimized, Judge Schwebel pointed out in his dissent to the *Nicaragua* judgment that the failure to report a use of force in self-defense does not necessarily render the defensive conduct unlawful. The reporting provision creates a procedural rather than a substantive legal requirement for the use of force under the Charter, with the consequence that while a failure to report would constitute a violation of Article 51, it would not “deprive” a state of its right of self-defense.<sup>47</sup> He observed that “it is by no means clear . . . that covert actions in self-defense are prohibited,” citing United Nations covert assistance during the Korean War and covert support by the United Kingdom to Malaysia against Indonesia in the 1960s as examples of such “legitimate” defensive measures.<sup>48</sup> The requirements of Article 51 therefore appear to have accommodated covert action, despite the reporting requirement’s aim of transparency.

---

did not address this issue in the proceedings. Correspondence, Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Doc. 114, at 408 (Jan. 18, 1985).

46. *Nicaragua Merits Judgment*, *supra* note 44, ¶ 200 (“the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defense”), ¶¶ 121–22, 235 (1986). The United States took a similar approach in citing the lack of notification to the Security Council under Article 51 as “evidence of the hollowness” of the Soviet Union’s claim that its military incursion into Afghanistan in 1979 was in furtherance of collective self-defense. Statement of U.S. Representative McHenry, Meeting of the Security Council, U.N. Doc. S/PV.2187 at 3 (Jan. 6, 1980). The *Nicaragua* Court was limited to applying customary international law in the case as a result of the U.S. multilateral treaty reservation, and acknowledged that the reporting requirement arose only as a matter of treaty obligation, so did not opine on whether a failure to file precludes the legality of the use of force. *Nicaragua Merits Judgment*, *supra* note 44, ¶ 56.

47. Schwebel Dissent, *supra* note 21, ¶ 227 (failure to report does not transform the character of measures taken from defensive into aggressive), ¶ 230 (failure to report cannot deprive a state of its inherent right to self-defense; doing so would “invest a procedural provision, however important, with a determinative substantive significance which would be unwarranted”).

48. *Id.* ¶ 223.

## 2. *Jus In Bello*

There is no general obligation in the law of armed conflict<sup>49</sup> to publicly disclose specific military operations, although it has been persuasively argued that transparency is important to the political legitimacy of military conduct by demonstrating compliance with the law.<sup>50</sup> Indeed, commentators who argue that there is a legal obligation mandating public disclosure tend to conflate transparency with accountability.<sup>51</sup> For example, former U.N. Special Rapporteur on extrajudicial, arbitrary, or summary executions Philip Alston argued in his extensive critique of U.S. “targeted killings” that international humanitarian law requires transparency. Noting obligations in the Geneva Conventions to ensure respect for the Conventions and to investigate and prosecute violations, he concludes that “governments *must* specifically disclose the measures that they have put in place to ensure respect for their obligations.”<sup>52</sup>

---

49. The “law of armed conflict” is used interchangeably with the “law of war” in this paper. Many commentators also refer to “international humanitarian law” (IHL) for the law of war; in some contexts, however, international humanitarian law denotes a broader field that encompasses law applicable to contexts of grave humanitarian concern which may occur outside of armed conflict, such as genocide and crimes against humanity.

50. Lesley Wexler, *International Humanitarian Law Transparency* 13 (Illinois Public Law Research Paper No. 14-11, Sept. 6, 2013) (“[O]ne might plausibly argue that transparency is a necessary precondition for ensuring respect for the . . . [law of war], but as a matter of *lex lata*, states have not understood IHL this way.”); Laurie Blank, *Drones, Transparency, and Legitimacy*, THE HILL (May 28, 2014, 6:02 AM), <http://thehill.com/blogs/pundits-blog/defense/207352-drones-transparency-and-legitimacy>; Mike Lewis, *There is No Transparency Requirement for Drone Strikes*, LAWFARE (June 2, 2014, 3:05 PM), <http://www.lawfareblog.com/2014/06/mike-lewis-on-the-lack-of-an-ihl-transparency-requirement-for-drone-strikes/>; see also Declan Walsh, *In Pakistan, Drone Strike Turns a Villain Into a Victim*, N.Y. TIMES, Nov. 3, 2013, [http://www.nytimes.com/2013/11/04/world/asia/in-pakistan-death-by-drone-turns-a-villain-into-a-martyr.html?\\_r=0](http://www.nytimes.com/2013/11/04/world/asia/in-pakistan-death-by-drone-turns-a-villain-into-a-martyr.html?_r=0) (“Drone strikes, for all their antiseptic appeal, will always struggle for legitimacy because the covert program operates in the shadows of international law—no matter how big the target it takes out.”).

51. For a critique of the conflation of transparency with governmental accountability in public discourse, see Steve Vladeck & Andy Wright, *Why (Some) Secrecy is Good for Civil Liberties*, JUST SECURITY (July 24, 2014, 8:18 AM), <http://justsecurity.org/13189/secrecy-civil-liberties/#more-13189>.

52. Philip Alston, *The CIA and Targeted Killing Beyond Borders*, 2 HARV. NAT’L SEC. J. 283, 312 (2011) (emphasis added). Former State Department Legal Adviser John Bellinger observed in a 2006 speech about U.S. counterterrorism activity, “I have found that our critics often assert the law as they wish it were, rather than as it actually exists today.” John B. Bellinger III, Legal Adviser, U.S. Department of State, Legal Issues in the War on Terrorism, Speech at the London School of Economics (Oct. 31, 2006), available at <http://www.state.gov/s/l/2006/98861.htm>.

But the substantive obligations cited can be fully discharged without public disclosure of implementing measures or specific conduct; Alston's substantial inference of a disclosure obligation has no basis in the text of the Conventions or in state practice. In fact, the virtual "silence" on disclosure obligations in the law of war reflects "a presumption favoring a State's right to secrecy" in wartime,<sup>53</sup> and it is hardly surprising that states have not undertaken treaty obligations mandating general public disclosure of their military conduct. Put simply, nondisclosure of the ways in which a government complies with its obligations under the law of war does not violate the laws of war.

Although the *lex lata* in the use of force does not currently entail overarching disclosure requirements, there are sparse but significant disclosure obligations in certain law of war treaties. Additional Protocol I to the Geneva Conventions requires precautionary measures in the conduct of hostilities, including that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."<sup>54</sup> For state parties bound by this instrument or states which are not party to the treaty but support the principle, such as the United States,<sup>55</sup> the qualification permitting derogation of advance disclosure provides operational flexibility that would likely accommodate covert conduct.<sup>56</sup>

The strongest argument for an international obligation of

---

53. Orna Ben-Naftali & Roy Peled, *How Much Secrecy Does Warfare Need*, in TRANSPARENCY IN INTERNATIONAL LAW, *supra* note 36, at 321 ("in times of war the State's right to secrecy assumes priority"). For a discussion of the kinds of information that states legitimately protect in conflict, see *id.* at 329 (at the "core of 'national security'" is . . . "any piece of information which offers a substantial operative advantage to military rivals,"), 343 ("concealment and even misinformation are acceptable cornerstone of war tactics").

54. Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 57(2)(c), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; see also Naftali & Peled, *supra* note 53, at 344.

55. Michael Matheson, *United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 427 (1987).

56. The commentary to this article indicates that the qualification was included in contemplation of the need for operational secrecy, "when the element of surprise in the attack is a condition of its success." Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 2223, available at <https://www.icrc.org/ihl/COM/470-750073?OpenDocument> [hereinafter AP I Commentary]. In some cases, covert operations may require such an operational element of surprise. In others, covert actors might view the policy of covertness as itself a circumstance precluding advance warning.

disclosure stems from the concept of the “right to truth” in human rights law, a corollary of which was incorporated into the law of war in Additional Protocol I. Article 32 of that Protocol addresses the “right of families to know the fate of their relatives,”<sup>57</sup> presented as a general animating principle that frames further specific obligations relative to missing persons and remains of the deceased. The commentary acknowledges uncertainty as to whether it entails any operational requirements beyond those enumerated in the text of the convention.<sup>58</sup> While there are clear limits on the intended scope of the right—it does not impose obligations on state parties relative to their own nationals or create any private right of action<sup>59</sup>—it is difficult to square the spirit of principle with state policies that, through secrecy, misinformation, or non-acknowledgment, would deprive families members of any knowledge of “the fate of their relatives” in armed conflict.

### 3. International Law Permits Covertress

The challenges of disentangling the political, legal, and moral aspects of a covert action may be considerable. But as the Court in *Nicaragua* stressed, the international lawfulness of state conduct does not hinge on the internal, often ultimately unknowable political motives of a state. In response to Nicaragua’s claim that the United States’ assertion of self-defense was pretextual, the Court stated that if the legal conditions to act in self-defense were met, “the possibility of an additional motive, one perhaps even more decisive . . . other than that officially proclaimed by the United States, could not deprive the [United States] of its right to resort to collective self-defense.”<sup>60</sup>

International law neither prohibits covert conduct *per se* nor

57. Additional Protocol I, *supra* note 54, art. 32. The United States, though not a party to Additional Protocol I, has expressed support for this principle. See Matheson, *supra* note 55, at 424; *Panel Discussion on the Right to Truth: Statement by the Delegation of the United States of America, Human Rights Council 13th Session*, U.S. MISSION GENEVA (Mar. 9, 2010), <https://geneva.usmission.gov/2010/03/10/right-to-truth/> (declaring support for the principle that “families have a right to know the fate of their missing family members”).

58. AP I Commentary, *supra* note 56, ¶ 1212 (“[A]lthough there may be a right, the content of the obligation imposed on States, on other Parties to the conflict, and on the organizations concerned, is not easy to determine.”).

59. *Id.* (“[I]t cannot be denied that there is no individual legal right for a representative of a family to insist that a government or other organization concerned undertake any particular action”); see also *id.* ¶ 1195 (affirming the provisions on missing and deceased persons do not apply relative to a state party’s own nationals).

60. *Nicaragua Merits Judgment*, *supra* note 44, ¶ 127.

exempts it from legal purview.<sup>61</sup> Covert actions may frequently violate international law, including principles of sovereignty and non-interference, and, in the context of the use of force, Article 2(4) of the U.N. Charter, among other obligations.<sup>62</sup> But they may not. Falk was right to flag the importance of bringing established international legal principles to bear on covert conduct. But his question “whether international law forecloses the CIA option” when it “acts to destabilize constitutionally elected governments” should be answered not by reference to the government agency actor or the lack of public acknowledgment, but to the legality of the underlying conduct. Whereas some, like Falk, seem to presume illegality from secrecy, or, like Michael Reisman, tend to treat covert activity as a species of state behavior necessitating a unique legal system of valuation,<sup>63</sup> this Article approaches covertness as a feature of behavior that presents challenges for evaluating the legality of the conduct. Covertness is simply an attribute of execution, a political posture of the state toward certain of its own acts—and one that is often imperfectly maintained and in all cases reversible. When covert conduct violates the law, it is the underlying activity that runs afoul of legal requirements, not the secrecy of the matter.<sup>64</sup> If there is nothing inherently unlawful about secrecy or non-acknowledgment, then covert conduct must be assessed by the same standards as apply to overt conduct.

---

61. Surveillance and espionage, though often conducted covertly in the colloquial sense, are distinct from the type of conduct considered here. For a discussion of the debate about the international lawfulness of surveillance, see Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT’L L. (forthcoming 2015).

62. Falk’s assertion that “authoritative legal guidelines exist and are incompatible with carrying-out in foreign societies covert operations of the sort associated with the CIA” is correct insofar as the “sort” of operations he contemplates is assassination, impermissible interventions in internal affairs, and other conduct that is internationally unlawful, without regard to whether it is undertaken secretly or publicly. Richard A. Falk, Comment, *President Gerald Ford, CIA Covert Operations, and the Status of International Law*, 69 AM. J. INT’L L. 354, 357 (1975).

63. REISMAN & BAKER, *supra* note 9, at 77 (“[T]he legality of any proactive covert operation should be tested by whether it promotes the basic policy objectives of the Charter, for example, self-determination; whether it adds to or detracts from minimum world order; whether it is consistent with contingencies authorizing the *overt* use of force; and whether covert coercion was implemented only after plausibly less coercive measures were tried.”).

64. Indeed, a great deal of secrecy often attends the ultimate motives, operational details, and legal rationales of states’ overt conduct as well. See, e.g., Naftali & Peled, *supra* note 53, at 356–57 (discussing how secrecy and noncooperation by the government of Israel impeded international efforts to assess the facts and legality of Operation Cast Lead in Gaza in 2009).

#### D. Covert Conduct Under Domestic Law

Given that at least some states act covertly in ways that violate international law, are the responsible governments simply indifferent to international law? Do their domestic systems permit, prohibit, or simply ignore these breaches?

As discernable from public sources, domestic legal regimes range from those that explicitly recognize the state's authority to conduct covert action, like the U.S. statutory scheme, to those that address it implicitly, as in the United Kingdom, to those that do not, at least publicly, regulate covert action, such as in Israel.<sup>65</sup> This section briefly examines each in turn, as reflective of the variety of domestic legal approaches toward covert action among states that are, by media accounts, reported to engage in covert conduct.

##### 1. The United States

The National Security Act of 1947 established the Central Intelligence Agency (CIA) for the purpose of coordinating intelligence activities of the U.S. government.<sup>66</sup> In addition to assigning the Agency the duties of evaluating intelligence relating to national security and protecting intelligence sources and methods, *inter alia*, the statute authorizes the Agency “to perform such other functions and duties relating to intelligence affecting the national security as the National Security Council may from time to time direct.”<sup>67</sup> This catchall provision—enumerated fifth and thus often referred to as the CIA’s “fifth function”—was understood at the time by both the Congress and the Executive to include covert action, which was not identified explicitly, according to one of the chief drafters, because it was viewed as “injurious to our national interest to advertise the fact that we might engage in such activities.”<sup>68</sup>

Since the inception of the CIA, debate within the United States concerning covert action “has focused not on the lawfulness of covert action but on the constitutional allocation of competence to control it.”<sup>69</sup> Constitutional authorities over intelligence activities

---

65. A broader comparative survey of domestic regulatory treatment of covert action, to the extent feasible, would be a worthwhile area of further inquiry.

66. National Security Act of 1947, Pub. L. No. 80-253, § 102(d), 61 Stat. 495, 498 (1947).

67. *Id.* § 102(d)(5).

68. Rudgers, *supra* note 31, at 249; *see also* Chesney, *supra* note 4, at 586–87.

69. REISMAN & BAKER, *supra* note 9, at 2.

generally and covert action in particular are not specifically enumerated. The President's powers in this area derive from constitutional authorities with respect to foreign affairs and national defense, while Congress' relevant powers include its power of the purse.<sup>70</sup> Congressional bursts of regulation of covert action over the years, typically following on the heels of public controversy caused by the disclosure of covert conduct that is viewed as unlawful, have largely taken the form of procedural and oversight requirements rather than substantive restrictions. For example, the Hughes-Ryan Amendment of 1974 required that no congressional appropriation could be spent on covert activities "unless and until the President finds that each such activity is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress . . . ."<sup>71</sup> Through the 1980s, the requirements of notice to Congress were refined through legislation<sup>72</sup> and "gentlemen's agreements" between oversight committees and the Director of Central Intelligence.<sup>73</sup>

The Iran-Contra affair sparked public and congressional outrage that led to the reforms of the 1991 Intelligence Authorization Act, which established the modern statutory framework for covert action. The statute, which has subsequently been amended several times, defines covert action as "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly," excluding certain categories of conduct that are regulated otherwise.<sup>74</sup> Under the statute, the President must determine that the

---

70. *Id.* at 117; SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTERIM REPORT, S. REP. NO. 94-465, at 38-39 (1975), available at <http://www.intelligence.senate.gov/churchcommittee.html> [hereinafter CHURCH COMMITTEE INTERIM REPORT].

71. Foreign Assistance Act of 1961, Pub. L. No. 93-559 sec. 32, § 661, 1795, 1804 (amended 1974); see also Chesney, *supra* note 4, at 588.

72. Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, 94 Stat. 1975 (1980) (replacing the Hughes-Ryan Amendment with more detailed reporting requirements reflecting the creation of the Senate Select Committee on Intelligence in 1976 and the House Permanent Select Committee on Intelligence in 1977); see also MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., RL33715, COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS 2 (2013), available at <https://www.fas.org/spp/crs/intel/RL33715.pdf>.

73. *Id.*; REISMAN & BAKER, *supra* note 9, at 131-32.

74. 50 U.S.C. § 3093(e); see Chesney, *supra* note 4, at 593-97. The definition and its exclusions were intended to reflect, rather than redefine, the contemporary practice and



covert action is “necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States,” and record those determinations in a written “finding,” which must also identify which agencies of government other than the CIA, and any non-governmental parties, are authorized to fund or participate in the covert program.<sup>75</sup> Findings must be reported to the congressional intelligence committees in advance of the commencement of the covert activity, except in extraordinary circumstances, and the committees must also be kept “fully and currently informed” of all covert activities, including “significant failures.”<sup>76</sup> The executive must also furnish information about the legal basis of covert conduct, and provide additional written notification of any “significant change” or new undertaking pursuant to previously approved programs.<sup>77</sup>

Section 503(a)(5) of the National Security Act addresses compliance with the law in its requirement that a finding “may not authorize any action that would violate the Constitution or any statute of the United States.”<sup>78</sup> But what posture toward international law does that signify?

Notably, the CIA’s General Counsel Caroline Krass confirmed the executive’s view that as a matter of U.S. domestic law, covert action may violate certain international legal obligations. When asked about the circumstances under which covert uses of force must comply with U.S. treaty obligations, she stated:

---

understandings of conduct treated as reportable covert action. H.R. REP. NO. 102-166, at 28 (1991) (Conf. Rep.), *available at* <http://www.intelligence.senate.gov/pdfs102nd/102166.pdf>.

75. 50 U.S.C. § 3093(a). The requirement that the President record these determinations in a written instrument was intended to curtail earlier practice in which a Special Group of senior advisors assessed and authorized covert programs, and had the discretion to decide which required Presidential consultation. It foreclosed the problem of so-called “internal plausible deniability,” which diffused internal accountability by permitting the President and senior staff to obfuscate their decision-making and fostered internal miscommunication. CHURCH COMMITTEE INTERIM REPORT, *supra* note 70, at 9–12. Exec. Order No. 12,333, 3 C.F.R. 200 (1981) [hereinafter EO 12,333], section 1.7(a)(4), provides that all covert actions shall be conducted by the CIA (or the armed forces in time of war) unless the President determines otherwise.

76. 50 U.S.C. § 3093(b), (c).

77. 50 U.S.C. § 3093(c), (d).

78. 50 U.S.C. § 3093(a)(5). This mandate of compliance with the Constitution and U.S. statutes is itself unusual, as most legislative authorizations presume rather than explicitly require conformity with the Constitution and U.S. statutes. A related exception is Executive Order 12,333, which regulates U.S. intelligence activities generally and similarly states: “Nothing in this Order shall be construed to authorize any activity in violation of the Constitution or statutes of the United States.” EO 12,333, *supra* note 75, § 2.8.

[T]he President may direct covert action to the extent authorized by Article II of the Constitution and . . . within the limits imposed by Congress . . . . [B]y [Section 503(a)(5)], Congress did not prohibit the President from authorizing a covert action that would violate a non-self-executing treaty or customary international law . . . . I am not aware of any provisions in the U.N. Charter or the Geneva Conventions that are self-executing as a matter of U.S. domestic law.<sup>79</sup>

She noted that certain non-self-executing treaty provisions may nevertheless be reflected in domestic statutes, such as the criminalization of certain violations of the 1949 Geneva Conventions in the War Crimes Statute,<sup>80</sup> and would thus constrain covert conduct under section 503(a)(5).

The executive's rationale for limiting obligatory performance of U.S. international legal obligations in the covert action context to self-executing treaties remains opaque. Is the omission of an explicit reference to international law in section 503(a)(5) an implicit congressional authorization to violate it?<sup>81</sup> Does the reference to the Constitution and U.S. statute somehow capture self-executing treaty law, but filter out customary international law and non-self-executing treaties?<sup>82</sup>

A 1989 Justice Department opinion offered one executive branch view—albeit a deeply contested one—of the President's

---

79. *Additional Prehearing Questions for Ms. Caroline D. Krass Upon Her Nomination to be the General Counsel of the Central Intelligence Agency Before the S. Comm. on Intelligence*, 113th Cong. 6–7 (2013), available at <http://www.intelligence.senate.gov/131217/krassprehearing.pdf>. If one assumes that the CIA would ordinarily be the agency undertaking covert action, this view of the Charter might explain why “the [U.S.] government appears to think the [U.N.] Charter can more readily be breached by the CIA than DOD.” Jack Goldsmith, *Two Notes on Secrecy v. Transparency in the National Security World*, *LAWFARE* (Oct. 13, 2013, 12:24 PM), <http://www.lawfareblog.com/2013/10/two-notes-on-secrecy-v-transparency-in-the-national-security-world>; see also Chesney, *supra* note 4, at 617.

80. 18 U.S.C. § 2441; see *Additional Prehearing Questions*, *supra* note 79.

81. A package of amendments proposed by Senator Barbara Boxer that would have added the words “any treaties, such as the United Nations Charter, which under the Constitution are the Supreme Law of the Land, Art. VI, cl. 2,” to this section after reference to the Constitution was defeated, evidencing that Congress' exclusion of a reference to international law was deliberate. 136 CONG. REC. H10020-04, H10084 (1990).

82. The Constitution's Supremacy Clause, which states that Treaties are “the Supreme Law of the Land,” U.S. CONST. art. VI, cl. 2, makes no distinction between self-executing and non-self-executing provisions.

Article II authority to violate international law in the conduct of foreign affairs. The opinion addressed whether the FBI could violate international law by forcibly abducting a fugitive abroad without the consent of the territorial host state, thereby violating customary international law principles of sovereignty and potentially also the prohibition on the use of force in Article 2(4) of the U.N. Charter.<sup>83</sup> The Department of Justice advised that the President has inherent constitutional authority to violate customary international law, a proposition now fairly widely accepted.<sup>84</sup>

The opinion also addressed the President's authority to override non-self-executing provisions of treaties, stating:

Treaties that are self-executing can provide rules of decision for a United States court, but when a treaty is non-self-executing, it addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court . . . . Accordingly, the decision whether to act consistently with an unexecuted treaty is a political issue rather than a legal one, and unexecuted treaties, like customary international law, are not legally

---

83. Authority of the Federal Bureau of Investigations to Override Customary International Law in Extraterritorial Law Enforcement Actions, 13 Op. O.L.C. 163 (1989), available at [http://www.fas.org/irp/agency/doj/fbi/olc\\_override.pdf](http://www.fas.org/irp/agency/doj/fbi/olc_override.pdf) [hereinafter OLC FBI Opinion]. The opinion overturned a 1980 OLC opinion that decided that the FBI did not have legal authority to undertake extraterritorial law enforcement actions that violated customary international law. Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B Op. O.L.C. 543 (1980).

84. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. c (1987); Jonathan Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913 (1986) (President's constitutional authorities, including over the conduct of foreign affairs, entail the power to violate customary international law, which is intrinsic to the evolution of customary international law.); Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930 (1986) (President may act within his constitutional authorities to supersede certain international legal obligations; authorities as Commander in Chief and sole organ of foreign affairs "perhaps" permit presidential acts that violate international law.). *But see* Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923 (1986) (Congress' constitutional powers to define and punish limit the President's constitutional authorities, including to violate international law without congressional authorization.). The OLC opinion appears to track Charney's approach. See OLC FBI Opinion, *supra* note 83, at 169–77. Where a state acts covertly and does not intend its conduct to be acknowledged, however, the justification that an act in violation of customary international law may be taken under the authority to effect progressive developments of the law is less compelling. See Ashley Deeks, *Covert Action and International Law Compliance*, LAWFARE (Dec. 18, 2013, 3:35 PM), <http://www.lawfareblog.com/2013/12/covert-action-and-international-law-compliance/>.

binding on the political branches. The President, acting within the scope of his constitutional or statutory authority, thus retains full authority to determine whether to pursue action abridging the provisions of unexecuted treaties.<sup>85</sup>

Whether or not the logic of this opinion is still controlling in the executive branch, its conclusion is consistent with the apparent current approach that treats compliance with both customary international law and non-self-executing treaty obligations as issues of presidential discretion. When pressed about how the United States decides “when to abide by international law” in its covert conduct, Krass stated that senior U.S. government lawyers, including from the Departments of Justice, State, and Defense, review a proposed activity to ensure compliance with U.S. domestic law “and to identify any potential violations of international law.”<sup>86</sup> Where an activity is assessed to be in breach of customary international law or non-self-executing treaty law, “the Director [of the CIA] is informed of the international law implications . . . to enable *policy* discussions regarding whether to recommend that the President nonetheless authorize the covert action.”<sup>87</sup>

But even if the President does have constitutional authority to cause the United States to violate certain types of international law, that in and of itself would not explain a distinction between overt and covert conduct. Why, for example, is it commonly assumed that CIA covert action could more readily violate the U.N. Charter than may overt action undertaken by the Department of Defense? If the President’s discretion to breach certain provisions of international law stems wholly from Article II authorities, presumably that authority would apply equally in the direction of military operations and of covert conduct.

One possibility is that in areas where the President and the Congress have concurrent constitutional authorities, such as in the conduct of foreign intelligence activities, Congressional “inertia, indifference, or quiescence” enables the executive to assert its powers

---

85. OLC FBI Opinion, *supra* note 83, at 178–79 (internal citations omitted).

86. *Questions for the Record, Caroline D. Krass*, 113th Cong. 3 (2013), available at <http://www.intelligence.senate.gov/131217/krasspost.pdf> [hereinafter Krass QFRs].

87. *Id.* at 3 (emphasis added); see also Stephen W. Preston, CIA General Counsel, Remarks at Harvard Law School (Apr. 10, 2012), available at <https://www.cia.gov/news-information/speeches-testimony/2012-speeches-testimony/cia-general-counsel-harvard.html> (describing legal review of hypothetical proposed covert action to “ensure that it satisfies applicable U.S. and international law”).

more strongly.<sup>88</sup> Through the National Security Act of 1947 and subsequent legislation, Congress regulated the exercise of Presidential authority in conducting covert action.<sup>89</sup> Congressional silence with respect to international law in section 503(a)(3) of the National Security Act could be viewed either minimally, as indifference to the violation of international law in the conduct of covert action, or more strongly as signaling ratification of such executive discretion. On such a theory, the executive's authorities to act in violation of international law through covert action would be stronger than those available to the President acting overtly, including under traditional military authorities.

Whatever its provenance, domestic legal latitude to violate international obligations does not relieve the United States of responsibility for any breaches as a matter of international law, of course. The United States remains fully responsible for covert violations of international law, notwithstanding that they may be permissible under U.S. domestic law.<sup>90</sup>

Krass' statements suggest that where a presidential policy decision is made to undertake covert conduct inconsistent with international law, there has been consideration of the potential international legal consequences. The popular perception that acting covertly permits the U.S. government to avoid compliance with international law,<sup>91</sup> therefore, reflects significant oversimplification.

88. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

89. See SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, S. REP. NO. 94-755, at 39 (1976), available at <http://www.intelligence.senate.gov/churchcommittee.html> [hereinafter CHURCH COMMITTEE FINAL REPORT].

90. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED § 115(1)(b) (1987). The question of the Senate Intelligence Committee to Caroline D. Krass—"how does the U.S. decide when to abide by international law and when it does not apply?"—underscores the importance of decoupling domestic and international legal requirements in evaluating the legal status and implications of U.S. covert actions. Krass QFRs, *supra* note 86, at 3. Krass' statements indicated that the U.S. government always abides by international law in its covert conduct where the law in question is a self-executing treaty or otherwise incorporated into U.S. domestic statute—that is, where U.S. domestic law mandates compliance. *Id.* at 3–4. *Compliance* with customary international law and non-self executing treaty law that is not otherwise incorporated into domestic law, however, is treated under U.S. domestic law as a matter of policy discretion for the President. But international law *applies* in all circumstances, and the United States can be held liable under international law for *any* covert breaches.

91. See, e.g., Mark Mazzetti, Robert F. Worth & Michael R. Gordon, *Obama's Uncertain Path Amid Syria Bloodshed*, N.Y. TIMES, Oct. 22, 2013, <http://www.nytimes.com/2013/10/23/world/middleeast/obamas-uncertain-path-amid-syria-bloodshed.html> (reporting that the White House was disinclined toward overt intervention in

U.S. domestic law does not permit the United States to ignore international law wholesale in the conduct of covert action and acting covertly does not absolve the United States of international responsibility for its conduct.<sup>92</sup>

## 2. The United Kingdom

In the United Kingdom, the Intelligence Services Act of 1994 identifies two functions of the Secret Intelligence Service (SIS), its external intelligence agency: “to obtain and provide information relating to the actions or intentions of persons outside the British Islands” and “to perform other tasks relating to the actions or intentions of such persons.”<sup>93</sup> The functions are exercisable only “in the interest of national security, with particular reference to . . . defense and foreign policies,” for economic interests, or to prevent or detect “serious crime.”<sup>94</sup> The Secretary of State must be satisfied that authorized activities are necessary within the mandate of the Intelligence Service, and that the “nature and likely consequences” of such acts will be “reasonable”; authorizations may have effect for six months and are extendable.<sup>95</sup> Significantly, section 7 of the Act exempts from civil and criminal liability those individuals who commit acts outside the British Islands that are authorized by the Foreign Secretary and would otherwise incur legal liability in the United Kingdom.<sup>96</sup>

The broad residual function of the SIS to perform “other tasks” related to foreign persons roughly resembles the “fifth function” authority underlying the CIA’s mandate to engage in covert action. Coupled with the immunity provisions in section 7, it has been understood to create a permissive legal framework that

---

Syria because “too many legal hurdles stood in the way of the United States’ openly supporting the overthrow of a sovereign government” but supporting Syrian opposition factions covertly “circumvented the legal issues”); *see also* Chesney, *supra* note 4, at 617; Goldsmith, *supra* note 31.

92. The international law effects of acting covertly are discussed further. *See infra* Part III.

93. Intelligence Services Act, 1994 (as amended), c. 13, §1(1) (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1994/13/contents>.

94. *Id.* § 1(2).

95. *Id.* § 7(3–7); *see also* John Wadham, *The Intelligence Services Act of 1994*, 57 MOD. L. REV. 914, 918–19 (1994) (noting that proposals to include clear, guiding principles explicitly in the act were debated in both the House of Lords and the House of Commons but were rejected by the Government).

96. Intelligence Services Act 1994, § 7(1).

empowers the government to authorize individuals to engage in conduct that would otherwise violate the law.<sup>97</sup> In contrast to the U.S. National Security Act, the Intelligence Services Act does not identify whether there are any laws—domestic or international—that are in effect non-derogable in the performance of “other tasks” for purposes of section 7 immunity. The statutory framework thus appears to permit the Secretary of State to direct actions that would otherwise violate the law, including international law.<sup>98</sup>

### 3. Israel

If the United Kingdom’s public acknowledgement and regulation of covert activity are considerably more discreet than the U.S. statutory framework, Israel’s contemporary posture is remarkably candid about the function and objectives of its covert programs while maintaining almost complete opacity about their legal status and internal regulation.

Israel’s Mossad, also called the Israeli Secret Intelligence Service, is responsible for foreign intelligence collection and “special covert activity outside Israel’s borders.”<sup>99</sup> Established by Prime Minister Ben Gurion in 1949, ostensibly by secret fiat, it was originally administratively embedded in the Foreign Ministry because Ben Gurion “objected in principle to public acknowledgment of the existence of a security and intelligence service,” but its director took instructions from and reported to the Prime Minister only.<sup>100</sup>

In contrast, the Mossad today is hardly coy about its mission and objectives. Its website identifies its “most prominent” areas of work as including “[c]overt intelligence gathering beyond Israel’s borders”; “[p]reventing the development and procurement of non-

---

97. See Wadham, *supra* note 95, at 922–23 (describing section 7 as “the statutory equivalent of James Bond’s ‘license to kill’”); Shlomo Shpiro, *Parliamentary and Administrative Reforms in the Control of Intelligence Services in the European Union*, 4 COLUM. J. EUR. L. 545, 573–574 (1998).

98. It is of course possible that there are nonpublic regulations or policies that further limit the Secretary’s discretion under the statute. The Foreign Secretary’s grants of immunity under section 7 are “normally limited to specific acts such as theft, payment to an agent and bribery,” according to media reports. Duncan Gardham, *Does MI6 Have a License to Kill?*, TELEGRAPH, Dec. 3, 2012, <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/9699795/Does-MI6-have-a-licence-to-kill.html>.

99. *Director’s Word*, MOSSAD, <https://www.mossad.gov.il/eng/about/Pages/DirectorsWord.aspx> (last visited May 17, 2015).

100. *History*, MOSSAD, <https://www.mossad.gov.il/eng/history/Pages/default.aspx> (last visited May 17, 2015).

conventional weapons by hostile countries”; “[d]eveloping and maintaining special diplomatic or other covert relations”; and “[p]lanning and carrying out special operations beyond Israel’s borders.”<sup>101</sup>

The legal foundation of and limits on the Mossad are less transparent. The authority of the government to conduct foreign intelligence collection and activities derives from the Israeli Basic Law, which authorizes the government to carry out functions not “entrusted to any other authority,” but does not identify specific agencies or their mandates.<sup>102</sup> Public reporting indicates that the appointment of the Mossad’s director, as well as oversight of the agency’s operations, remain the sole purview of the prime minister. The Knesset’s Subcommittee for Intelligence and Secret Services is notified of activities after the fact and may undertake review of specific operations but its authority appears limited to issuing recommendations.<sup>103</sup>

There have been periodic calls for legislation to govern the Mossad, including in 2002 when comprehensive legislation was enacted addressing, for the first time, the internal security and intelligence agency, known as the Shabak or Shin Bet.<sup>104</sup> Despite

---

101. *About Us*, MOSSAD, <https://www.mossad.gov.il/eng/about/Pages/default.aspx> (last visited May 17, 2015).

102. Basic Laws of Israel: The Government, 5728, SH 540 p. 226, ¶ 29 (“The Government is authorized to carry out on behalf of the State, in accordance with any law, any act whose implementation is not lawfully entrusted to any other authority.”), available at [https://www.jewishvirtuallibrary.org/jsource/Politics/Basic\\_Law\\_Government68.html](https://www.jewishvirtuallibrary.org/jsource/Politics/Basic_Law_Government68.html); see also Ze’ev Segal, *A Legal Framework for the Mossad*, HAARETZ, Mar. 1, 2010, <http://www.haaretz.com/print-edition/opinion/a-legal-framework-for-the-mossad-1.263907>. Among the documents retrieved from the U.S. Embassy in Tehran after it was overtaken by protesters in 1979 were a classified CIA assessment of Israel’s intelligence services. The document, among others, was eventually published in western media. CENTRAL INTELLIGENCE AGENCY, ISRAEL: FOREIGN INTELLIGENCE AND SECURITY SERVICES 9 (1979), reprinted in COUNTERSPY, May–June 1982, at 34–54 [hereinafter CIA Report].

103. See Segal, *supra* note 102. For example, the Subcommittee conducted an investigation of a 1997 operation in Amman, in which Mossad agents poisoned Hamas leader Khaled Mashal, but were apprehended afterward by Jordanian security services; the director of Mossad flew to Amman with an antidote and negotiated the return of the agents in exchange for the release of a number Hamas’ prisoners. JERUSALEM GOVERNMENT PRESS OFFICE, REPORT OF THE COMMISSION CONCERNING THE EVENTS IN JORDAN SEPTEMBER 1997 (1998), available at <http://fas.org/irp/world/israel/ciechanover.htm>.

104. See Ze’ev Segal, *A Law for the Mossad*, HAARETZ, Sept. 30, 2002, <http://www.haaretz.com/print-edition/opinion/a-law-for-the-mossad-1.32931>. For legislation governing the Shin Bet, see General Security Service Law, 5766-2002, SH No. 1832, 179, available at [https://www.jewishvirtuallibrary.org/jsource/Politics/General\\_SecurityServicesLaw.pdf](https://www.jewishvirtuallibrary.org/jsource/Politics/General_SecurityServicesLaw.pdf); *ISA Statute Chronology*, ISRAEL SECURITY AGENCY [SHIN BET],



occasional efforts in the Knesset to advance such legislation, regulation of the Mossad remains either classified or absent.<sup>105</sup> The legal parameters of Israeli covert conduct, including whether compliance with international law is required, therefore remain unclear to the public.

## II. ASSESSING COVERT CONDUCT

In an ideal case, a state using force or otherwise intervening in foreign countries would offer a public justification, asserting the salient facts it relied upon in deciding to act and its legal claim of right.<sup>106</sup> When a state acts covertly, no such explicit, comprehensive justifications are forthcoming. But covert conduct is of course hardly always a well-kept secret.<sup>107</sup>

Covert programs and conduct that successfully evade public reporting are “deep secrets,” or matters about which those who are unwitting do not know they do not know.<sup>108</sup> Even if covert action results in known effects—say, a ship burns down or a weapon malfunctions—it remains deeply secret if there is no public speculation about the state’s involvement. In contrast, “shallow

---

<http://www.shabak.gov.il/English/about/Pages/TheISASatute.aspx> (last visited May 17, 2015).

105. See, e.g., Gideon Alon, *MK David Magen: New law to Monitor the Mossad is on the Way*, HAARETZ, Dec. 20, 2001, <http://www.haaretz.com/print-edition/news/mk-david-magen-new-law-to-monitor-the-mossad-is-on-the-way-1.77776>; see also CIA Report, *supra* note 102, at 9.

106. Consider, for example, the presentation given by State Department Legal Adviser John Stevenson justifying U.S. operations in Cambodia against North Vietnamese troops and bases, which detailed the factual context of the decision to use force, efforts exhausted to avoid forceful means, the international legal rationale, and the limited scope, nature, and duration of the measures undertaken. Press Release, U.S. State Dep’t, U.S. Statement on Issues of International Law in Cambodian Incursion (May 30, 1970) (No. 166), *reprinted in* 9 I.L.M. 840 (1970).

107. To borrow from a characterization of U.S. counterterrorism operations, covert conduct ranges on a spectrum of public awareness from “truly secret,” “mostly secret and unacknowledged,” “widely known but still unacknowledged,” “everybody knows and the . . . government talks about it under a shredded fig leaf” to, “finally, merely preposterously unacknowledged.” Kenneth Anderson, *Secrecy, Accountability, and the CIA’s “Covert” Drone Strikes*, HOOVER INSTITUTION (Jan. 29, 2014), <http://www.hoover.org/research/secracy-accountability-and-cias-covert-drone-strikes>.

108. Pozen, *supra* note 8, at 260. In the now-famous parlance of Donald Rumsfeld, deep secrets are, to those who are unwitting, the “unknown unknowns.” *DoD News Briefing, Sec’y Rumsfeld and Gen. Myers*, U.S. DEP’T. OF DEF. (Feb. 12, 2002, 11:30 AM), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636>.

secrets,” are secrets the existence of which is known, or at least suspected, while the specific content remains obscured.<sup>109</sup> Media reporting that discusses alleged covert conduct elevates deep covert secrets to shallow ones, putting the public on notice that there is—or may be—a category of government practice and policy that is being concealed from them. Accretions of information or allegations may incrementally diminish a secret’s depth, until in some cases it may be considered an “open secret” even if it continues to be unacknowledged.<sup>110</sup> Thus, covertness and secrecy are distinct characteristics, but the latter has traditionally attended the former as secrecy facilitates the masking of unacknowledged programs.<sup>111</sup>

Even when covert conduct becomes an “open secret,” the responsible actor cannot—at least publicly and for attribution—offer any explanation of the justification for the action, or any description of what occurred, why, under what circumstances, and to what effect. This part considers the composition of the public record of factual allegations and legal judgments when covert conduct ascends from the depths to shallower levels of secrecy. The public record in such cases—accurate or inaccurate—has dynamic effects on international law.

#### *A. Establishing Covert Facts*

##### 1. Development of a Public Factual Narrative

In the absence of the acting state’s announcement and explanation of its use of force, the media typically have the lead in developing and disclosing a narrative about covert conduct. Reports may draw from local eyewitnesses, government sources, former government officials, victim and third state reactions, and other investigative sources, such as nongovernmental organizations. The challenges of obtaining and corroborating information are likely to be significant. Information may be provided selectively or inaccurately, and actors may condemn publicly what they condone or even

---

109. Pozen *supra* note 8, at 274 (“A state secret is shallow if ordinary citizens understand they are being denied relevant information and have some ability to estimate its content.”).

110. *Id.* at 271 n.45 (Open secrets are “those about which the entire community knows a tremendous amount but has no official confirmation . . . . These are still secrets, in the thin sense that the government will not substantiate the information.”).

111. See Lederman, *supra* note 4. Governments often keep information about overt conduct secret as well, such as intelligence upon which military judgments are made and the legal judgments and factual details relating to specific operations.

privately assist. Third party providers of misinformation may be aware that the covert actor is ill-positioned—by its own design, of course—to refute such claims effectively. In sum, reports of covert conduct may be incomplete or replete with disinformation.<sup>112</sup>

Victim states are naturally strategic in their public reaction to a covert incident. While in some circumstances they may be best served to ignore or disavow an incident altogether,<sup>113</sup> they might falsely or selectively characterize events to favor their political interests. After the reported Israeli covert strike on al-Kibar in 2007, Syria underreported the damage wrought in an attempt to mask the fact that it was constructing a nuclear facility in violation of its commitments under the Treaty on the Nonproliferation of Nuclear Weapons. When Syria complained to the United Nations that Israel had breached its airspace and committed acts of “aggression,” it stated that “[a]s the Israeli aircraft were departing they dropped some munitions but without managing to cause any human casualties or material damage.”<sup>114</sup> But imagery of the area and an investigation by the International Atomic Energy Agency—which concluded the structure was “very likely” a nuclear reactor<sup>115</sup>—indicated that a sizable installation had been bombed and later demolished, and subsequent press reports estimated that there were at least ten casualties.<sup>116</sup>

Friendly governments who are privy to shared intelligence may leak information, with or without the covert actor’s approval. In some cases a friendly state may seek to serve as a proxy defender of the act; in others such leaks may merely sour relations with the covert actor. U.S. officials have reportedly provided the media information about alleged Israeli covert strikes, both at the time of the 2007

112. See REISMAN & BAKER, *supra* note 9, at 48.

113. See *supra* Part I.B.

114. Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated 9 Sept. 2007 from the Permanent Rep. of the Syrian Arab Republic to the U.N. addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/61/1041-S/2007/537 (Sept. 10, 2007).

115. Int’l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic*, at 2, IAEA Doc. GOV/2012/42 (Aug. 30, 2012), available at <https://www.iaea.org/sites/default/files/gov2012-42.pdf>.

116. According to some reports, there were up to three dozen civilian casualties, including North Korean nationals who were advising Syria on the development of the facility. RONEN BERGMAN, *THE SECRET WAR WITH IRAN* 361 (2008); David Makovsky, *The Silent Strike*, NEW YORKER, Sept. 17, 2012, available at <http://www.newyorker.com/magazine/2012/09/17/the-silent-strike>. In 2009, Syrian President Assad conceded that the Israelis bombed a military installation but continued to deny that it was a nuclear plant. Der Spiegel Report, *supra* note 27.

strikes in Syria and more recently.<sup>117</sup>

Acting covertly diminishes—though does not eliminate—the responsible state’s ability to establish and shape the factual narrative. If public interest in covert allegations of covert conduct gathers steam, the covert actor will come under increasing pressure to address the matter. Historically, governments were loath even to acknowledge that they engaged in covert activity, especially in peacetime.<sup>118</sup> Since the Second World War, however, the United States and Israel at least have reversed course and openly defended their capability and willingness to undertake covert action.<sup>119</sup>

When it comes to specific allegations, however, the hallmark of covert conduct is that the acting state does not acknowledge it and indeed may deny it. Some states, including the United States and Israel, typically offer “no comment” in responding to specific allegations of intelligence activities or certain military conduct.<sup>120</sup> Many public officials are loath to lie affirmatively on the record, which would invite countervailing leaks and ruin personal

---

117. See, e.g., Mark Mazzetti & Helene Cooper, *U.S. Confirms Israeli Strikes Hit Syrian Target Last Week*, N.Y. TIMES, Sept. 12, 2007, <http://www.nytimes.com/2007/09/12/world/middleeast/12syria.html>; Harriet Sherwood, *U.S. Claims Israel Attacked Russian Missile Shipment in Syria*, GUARDIAN, Nov. 1, 2013, <http://www.theguardian.com/world/2013/nov/01/us-israel-attack-syria-missiles> (Israeli “officials are privately furious . . . the U.S. statement had caused ‘senior officials in Jerusalem to tear out their hair.’”).

118. See *supra* Part I.D.

119. In 1974, President Ford stated, “It’s a recognized fact that historically as well as presently, [covert] actions are taken in the best interests of the countries involved.” REISMAN & BAKER, *supra* note 9, at 7. President Reagan echoed this statement in 1983: “I do believe in the right of a country when it believes that its interests are best served to practice covert activity.” *Id.* The Chief of Staff of the Israeli Defense Forces has spoken publicly about the reach of Israeli forces, intimating “dozens of secret activities” ongoing, “close range operations and long-range ones—Iran, and so on. These are not areas that are beyond the IDF’s reach.” Adiv Sterman, *Israel Can Operate in Iran If It Needs To, IDF Chief Says*, TIMES OF ISRAEL, Mar. 19, 2014, <http://www.timesofisrael.com/israel-can-operate-in-iran-if-it-needs-to-idf-chief-says/>.

120. The standard practice of both the Defense Department and the Central Intelligence Agency appears to be to decline to comment on allegations about specific operations. See Marty Lederman, *Major Development Concerning Transparency of the Use of Force in Yemen*, JUST SECURITY (May 14, 2014, 9:07 AM), <http://justsecurity.org/10821/major-development-transparency-force/> (noting that since Vietnam the Defense Department will not issue false denials but continues, like the CIA, neither to confirm nor deny its involvement in certain cases). Israel also maintains a “policy of ambiguity.” See Amir Oren, *Israel’s Military Censorship Died When Barak Opened His Mouth About Syria*, HAARETZ, Feb. 4, 2013, <http://www.haaretz.com/opinion/israel-s-military-censorship-died-when-barak-opened-his-mouth-about-syria.premium-1.501431> (“[D]on’t confirm, but don’t lie.”).

credibility.<sup>121</sup> Maintaining a blanket “no comment” policy therefore both avoids putting officials in a position where they must lie to avoid acknowledgment and maintains strategic ambiguity.

Nevertheless, states acting covertly have a complex range of incentives. Policymakers may wish to act covertly and “at the same time want the world—and often need the world—to know of their successes.”<sup>122</sup> To address both desires, states have a variety of tools to transmit information to the public record, often while maintaining formal covertness: Leaks, plants, “pleaks,” partial disclosures, and denials.

Government officials can surreptitiously filter facts to the public through leaks, plants, and what David Pozen has dubbed *pleaks*. Leaks are unauthorized disclosures, and plants are disclosures approved—at least informally—at senior levels. Pleaks, inhabiting a gray zone between the two, are “quasi-authorized” disclosures that are not explicitly blessed but may be understood to fall within the pleaker’s discretionary purview, and are often tolerated.<sup>123</sup> Disclosures of these kinds may serve a variety of functions. They permit the government to keep the public “minimally informed” and to characterize events “in a manner designed to build support”; they may also “signal [the government’s] respect for international law” by suggesting a legal theory or the cooperation of other states.<sup>124</sup>

The lack of official public acknowledgement, however, avoids revealing more than desired—and, more importantly, ensures compliance with agreements with foreign governments that are conditioned on covertness. Unofficial disclosures also permit foreign governments who wish not to engage on the matter to ignore it.<sup>125</sup> Such disclosures permit governments to contribute to the factual record and manage certain dimensions of the public’s need for information and accountability “without incurring the full diplomatic, legal, or political risks that official acknowledgement may entail.”<sup>126</sup>

---

121. As a matter of personal reputation and credibility, government officials are generally likely to be reluctant to make false denials of specific allegations if questioned by host governments abroad or by diplomatic interlocutors. Instead, they may resort to evasive tactics, such as avoidance, feigning ignorance, or deferring a response “pending consultations with Washington.”

122. Glennon, *supra* note 7, at 383.

123. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 565–68 (2013).

124. *Id.* at 560.

125. *Id.*

126. *Id.* at 561.

Leaks may also stem from insiders who disagree with the chosen policy and seek to bring public attention and political pressure to bear to change course. At least in the United States, a general disinclination to prosecute leakers—in part perhaps due to the cost of exposing classified material during litigation—coupled with the difficulty of identifying the leaker in many cases, effectively preserves ambiguity about whether the disclosure is sanctioned or rogue.<sup>127</sup>

In some circumstances, governments may make careful official disclosures that bear on alleged covert conduct, such as statements of fact attenuated from any particular conduct. Information may be presented at a high level of generality, such as the United States' acknowledgement that it conducts targeted lethal operations against al-Qaeda and associated forces outside of areas of active military hostilities.<sup>128</sup>

Officials may also publicly assert specific facts that could support a political or legal justification for a particular action, without acknowledging it. When Anwar al-Aulaqi was reported killed in September 2011, President Obama publicly acknowledged his death and described Mr. al-Aulaqi's leadership role in al-Qaeda in the Arabian Peninsula and certain specific actions in furtherance of attacks on U.S. citizens. The same facts were cited when the United States ultimately acknowledged a role in his death and offered a legal justification in 2013.<sup>129</sup> Formal disclosures may be carefully crafted to support a public political objective while preserving the covertness of any related program.<sup>130</sup>

---

127. *Id.* at 562–63.

128. President Barack Obama, Remarks by the President at National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>; *see also* John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Wilson Center Speech: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012), <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>. Refusing to comment on specific allegations maintains covertness as to particular operations and features of reported U.S. counterterrorism activity.

129. President Barack Obama, Remarks by the President at the Change of Office, Chairman of the Joint Chiefs of Staff Ceremony (Sept. 30, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony>; *cf.* Letter from Attorney General Eric H. Holder, Jr., Attorney General of the U.S., to The Honorable Patrick J. Leahy (May 13, 2013), *available at* <http://www.justice.gov/slideshow/AG-letter-5-22-13.pdf>.

130. Some civil society groups have criticized rather than welcomed fragmentary formal disclosures, concerned that they are misleading in their selectivity. *See, e.g.*, Jameel Jaffer, *Selective Disclosure About Targeted Killing*, JUST SECURITY (Oct. 7, 2013, 9:25 AM),

For governments that typically offer “no comment,” it is notable when they affirmatively deny a particular allegation. For example, Israel’s policy of strategic ambiguity generally extends to its nuclear capability, targeted killings abroad, and other external counterterrorism operations. Notably, however, when Hezbollah publicly attributed the death of its leader Hassan Lakkis to Israel, the Israeli government formally disavowed its involvement; the Foreign Ministry spokesman flatly told the media, “Israel has nothing to do with this.”<sup>131</sup>

Denials are unlikely to be made lightly as they undercut the future efficacy of the “no comment” policy, recasting it from a position of inscrutability which maintains factual neutrality to one imbued, if ever so slightly, with affirmation. Certainly there may be political reasons why it is more important to address some allegations than others—in the case of Lakkis, the risk of Hezbollah’s retaliation may have been compelling—but the cost may be to suggest to some observers that a state tacitly accepts the publicly drawn narrative, when it does not deny it.

Governments naturally resist compulsory disclosures about covert activity—records relating to covert conduct are generally exempt from “freedom of information” laws<sup>132</sup>—but may voluntarily, in their discretion, declassify information about covert activities well after the fact. The CIA has indicated that it continually reviews its materials for declassification and contribution to the *Foreign Relations of the United States* (FRUS) series published by the U.S.

---

<http://justsecurity.org/1704/selective-disclosure-targeted-killing/>.

131. Responsibility for his death remains unclear; Lakkis was reportedly one of five highest-priority names on Mossad’s “kill list,” but Saudi intelligence, Lebanese Sunni militants, al-Qaeda fighters, Syrian insurgents, and even Hezbollah comrades have also been suggested as plausible perpetrators. Anne Barnard, *Mystery in Hezbollah Operative’s Life and Death*, N.Y. TIMES, Jan. 3, 2014, [http://www.nytimes.com/2014/01/04/world/middleeast/mystery-in-hezbollah-operatives-life-and-death.html?\\_r=0](http://www.nytimes.com/2014/01/04/world/middleeast/mystery-in-hezbollah-operatives-life-and-death.html?_r=0); Arutz Sheva Staff & AFP, *Following Assassination, Israel Warns Hezbollah Against Attack*, ARUTZ SHEVA, Dec. 4, 2013, <http://www.israelnationalnews.com/News/News.aspx/174812>. Such incidents also illustrate how permeable the public record of covert conduct can be to misinformation, whether through exploitation or confusion.

132. In the United Kingdom, information supplied or relating to the SIS is exempted from the Freedom of Information Act. The Freedom of Information Act, 2000, c. 36 §23 (Eng.). In the United States, properly classified national security and foreign policy information, including that relating to covert action, is also generally exempt from disclosure through FOIA. 5 U.S.C. § 552(b)(1); Exec. Order No. 13,526, 3 C.F.R. § 1.4 (Dec. 29, 2009) (identifying covert action information as properly withheld under § 552(b)(1)). Litigation efforts by journalists and civil society groups to compel disclosure relating to U.S. covert conduct have historically been rejected, though recent litigation indicates that voluntary government disclosures can waive those protections. See *infra* Part II.B.

Department of State.<sup>133</sup> Such declassification policies appear, at least sometimes, to bear fruit.<sup>134</sup>

In the United States, engagement with the Congress yields significant disclosures, not only through congressional leaking but also through formal oversight investigations of covert action, which may be released publicly. The 1975 Church Committee Report, which led to the executive ban on assassinations,<sup>135</sup> and the congressional investigation into the Iran-Contra affair are pre-eminent examples of extensive congressional investigations that yielded substantial public reports.<sup>136</sup> The report of the Senate Select Committee on Intelligence on CIA detention and interrogation after 9/11, portions of which were released in late 2014, will likely be viewed as the contemporary analogue.<sup>137</sup> Such congressional investigations have the benefit of information and access provided by the executive, though they nevertheless have limitations, due to both intentional and inadvertent evidentiary deficiencies. For example, the Church Committee noted that its fact-finding was impeded in part

---

133. The CIA and the State Department agreed to a “general presumption that [the FRUS series] will disclose for the historical record major covert actions undertaken as a matter of U.S. foreign policy” and that decisions not to declassify particular cases “will be made only if there is reason to believe that disclosure would cause damage to current national security interests or reveal intelligence sources and methods or otherwise reveal information protected by law.” Remarks of Brian Latell, Director, Center for the Study of Intelligence, CIA Support for *Foreign Relations of the United States*, in NAT’L ARCHIVES (July 24, 1996), available at <http://fas.org/sgp/othergov/latell.html>. The SIS is also generally exempt from legislation that requires government records to be transferred to the National Archive, though it has permitted disclosure of some material despite a general policy against doing so. See *SIS Archive and Records Policy*, SIS, <https://www.sis.gov.uk/our-history/archive.html> (last visited May 17, 2015).

134. For example, in 2013, following a review that took almost twenty years, the FRUS published an extensive collection of internal government documents concerning U.S. covert activity in the Congo between 1960 and 1968. FOREIGN RELATIONS OF THE UNITED STATES (FRUS), 1964–1968, VOLUME XXIII, CONGO, 1960–1968, available at <http://history.state.gov/historicaldocuments/frus1964-68v23>; see also Stephen R. Weissman, *What Really Happened in Congo*, 23 FOREIGN AFFAIRS 14–15 (2014) (noting importance of FRUS disclosures in supplementing and revising accounts of U.S. covert activity).

135. See CHURCH COMMITTEE INTERIM REPORT, *supra* note 70; CHURCH COMMITTEE FINAL REPORT, *supra* note 89.

136. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 100–216, H.R. REP. NO. 100–433 (1987), available at <https://archive.org/stream/reportofcongress87unit#page/n5/mode/2up> [hereinafter IRAN-CONTRA REPORT].

137. SENATE SELECT COMM. ON INTELLIGENCE, COMM. STUD. OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM (2014), available at <http://www.intelligence.senate.gov/study2014/sscistudy1.pdf>.



due to lapses of time, the challenge of distinguishing officials' recollections from speculation, and that "ambiguities in the evidence result from the practice of concealing CIA covert operations from the world and performing them in such a way that if discovered, the role of the United States could be plausibly denied."<sup>138</sup> While such reports may not necessarily be viewed by the executive as definitive or impartial accounts, they are likely to be the most complete record available to the public.

Finally, former government officials often supplement the record in important ways. They can shed light on the facts as understood by government policymakers at the time, the political considerations and power struggles intrinsic to policy decisions, and the relevant understandings with other states. They are often willing not only to share their recollections with journalists to help produce "insider" accounts of secret government deliberations, but often also to address such matters explicitly in their own names.<sup>139</sup> Drawing again from Operation Orchard, while earlier journalists' accounts asserted that the United States and Israel acted jointly, or at a minimum that the United States consented to the Israeli strike given its proximity to Turkish military bases,<sup>140</sup> more recent former official disclosures suggest that the United States balked at the operation and Israel ultimately acted unilaterally.<sup>141</sup> Such variations in accounts are

---

138. CHURCH COMMITTEE INTERIM REPORT, *supra* note 70, at 3; *see also* IRAN-CONTRA REPORT, *supra* note 136, at xvi (noting that NSC shredding of documents and the death of CIA director Casey foreclosed crucial evidence that might have clarified discrepancies in witness testimony).

139. The public record is replete with examples of U.S. officials speaking openly about counterterrorism operations within months of leaving government. *See, e.g., Face the Nation Transcripts November 10, 2013: Netanyahu, Christie, Panetta*, CBS NEWS (Nov. 10, 2013, 2:23 PM), *available at* <http://www.cbsnews.com/news/face-the-nation-transcripts-november-10-2013-netanyahu-christie-panetta/> (discussing lethal CIA operations against al-Qaeda); Nicholas Schmidle, *After Pakistan*, NEW YORKER, Nov. 26, 2012, *available at* <http://www.newyorker.com/magazine/2012/11/26/after-pakistan> (discussing remarks by former U.S. Ambassador to Pakistan Cameron Munter to a law school class). The bibliography of memoirs discussing secret and covert activities is extensive.

140. Follath & Stark, *supra* note 27; *see also* BERGMAN, *supra* note 116, at 360 (describing the affirmative decision to strike as being taken by both Israel and the United States).

141. In 2013, former deputy National Security Adviser Elliot Abrams wrote that "[t]he Israelis did not seek, nor did they get, a green or red light from us. Nor did they announce their timing in advance; they told us as they were blowing up the site. Olmert called the president on September 6 with the news." ELLIOT ABRAMS, TESTED BY ZION: THE BUSH ADMINISTRATION AND THE ISRAELI-PALESTINIAN CONFLICT (2013), *reprinted in Bombing the Syrian Reactor: The Untold Story*, COMMENTARY, Feb. 1, 2013, <http://www.commentary.com/article/bombing-the-syrian-reactor-the-untold-story/>; GEORGE W. BUSH,

relevant not only to political history, but bear on fundamental legal questions of liability.

While according to some, the United States has a history of “permissive neglect” in sanctioning leaks,<sup>142</sup> some states have taken more stringent measures to discipline unauthorized disclosure of classified material. In Israel, longstanding censorship laws require any media outlets that originate in Israel to vet publications addressing certain national security topics with the Office of the Military Censor. The government’s discretion was significantly limited in 1988, when the Israeli Supreme Court ruled that censorship must be based on “near certainty” that disclosure would tangibly harm national security.<sup>143</sup> Censorship has reportedly decreased considerably since that ruling, though the procedures remain in place. In any event, many media outlets circumvent the censor by citing foreign media accounts of alleged covert conduct.<sup>144</sup> The Israeli government has also been criticized for enforcing nondisclosure standards selectively to permit acknowledgment of covert conduct when it serves the government’s political interests.<sup>145</sup>

One consequence of a covert posture is that public factual narratives relating to an event are often shaped in the first instance by third parties, including critics and, if any, proxy defenders. The covert actor can compensate partially for public silence with

---

DECISION POINTS 420–22 (2010).

142. See Pozen, *supra* note 123, at 534–42; see also Jack Goldsmith, *Extraordinary U.S. Press Freedom to Report Classified Information*, LAWFARE (Dec. 2, 2013, 8:05 AM), <http://www.lawfareblog.com/2013/12/extraordinary-u-s-press-freedom-to-report-classified-information/>.

143. HCJ 680/88 Schnitzer v. Chief Military Censor 42(4) PD 617 (1988) (Isr.); see also Avner Cohen, *Israel*, in GOVERNING THE BOMB 152, at 160–62 (Hans Born, Bates Gill & Heiner Hänggi eds., 2010).

144. See, e.g., Amos Harel & Gili Cohen, *Reports: Israeli Planes Attack Hezbollah Targets on Lebanon-Syria Border*, HAARETZ, Feb. 25, 2014, <http://www.haaretz.com/news/diplomacy-defense/.premium-1.576210> (“Israeli warplanes attacked targets on the border between Lebanon and Syria on Monday night, according to the Lebanese national news agency. In Jerusalem, officials refused to comment on the reports.”).

145. See Oren, *supra* note 120. Another example of the government’s selective censorship is its apparent approval of a broadcast disclosing that Netanyahu had undertaken covert operations in Egypt. Following public criticism of Netanyahu as an indecisive and “reluctant” leader, an Israeli news channel (which would be subject to censorship rules), ran a flattering story which stated Netanyahu’s covert operations in Egypt “exhibited a great ability to take bold decisions in unusual circumstances.” *Netanyahu Ordered Covert Operations in Egypt After the Revolution, Report*, MIDDLE EAST MONITOR (June 15, 2014, 1:54 PM), <https://www.middleeastmonitor.com/news/middle-east/12123-netanyahu-ordered-covert-operations-in-egypt-after-the-revolution-report>.

disclosures that are selective or surreptitious, but these will lack the weight, credibility, and impact of formal, thorough explanations. Reporters and non-governmental organizations must work with the information made available to them, and, acting in good faith, may become pawns for replicating partial truths or misinformation, or characterize allegations in ways that reflect their own agendas. A more comprehensive record of covert events may take years, even decades, to emerge. In the interim, however, the public record that takes shape—however flawed or incomplete—will form the basis for legal judgments by third states, the public, and even, in some cases, courts.

## 2. Court Adjudication of Covert Facts

For a variety of jurisdictional and evidentiary reasons, it is rare for covert conduct to be adjudicated in court. However, there is a small—and growing—body of cases in which litigation produces a factual record of covert action with the authoritative imprimatur of judicial decision. Covert actors facing such litigation, if they are not in a position to acknowledge and defend their conduct, forfeit their ability to shape the court's factual and legal judgments.

The *Nicaragua* case in the International Court of Justice (ICJ) is the pre-eminent example and stands as a stark warning to any state that may think its covert conduct can be absolutely shielded from judicial scrutiny. The ICJ there had the unenviable task of adjudicating alleged U.S. covert activity in the wake of the United States' withdrawal from proceedings before the merits phase.<sup>146</sup> While the Court had been faced with non-appearing state parties previously,<sup>147</sup> *Nicaragua* presented unusually complex factual challenges and the Court adopted evidentiary methodologies—including its reliance on media reporting and treatment of a

---

146. The United States was careful to separate discussion of intelligence matters from its explanation for withdrawing, but it pointed to the difficulty of adjudicating the case in light of the classified dimensions by stating that its evidence of Nicaragua's aggression was "of a highly sensitive intelligence character," which it would not disclose to the public or before the two judges on the Court from Warsaw Pact nations. DEPT. OF STATE, DEP'T ST. BULL. No. 2096, MAR. 1985, STATEMENT ON THE U.S. WITHDRAWAL FROM THE PROCEEDINGS INITIATED BY NICARAGUA IN THE INTERNATIONAL COURT OF JUSTICE, Jan. 18, 1985, at 64, reprinted in 24 I.L.M. 246, 248 (1985).

147. See *Nicaragua Merits Judgment*, *supra* note 44, ¶ 27 (noting non-appearing State parties in the *Fisheries*, *Nuclear Tests*, *Aegean Continental Shelf*, and *Diplomatic and Consular Staff in Iran* cases). For a comprehensive and detailed analysis of the Court's evidentiary powers and practice through the *Nicaragua* decision, see Keith Highet, *Evidence, the Court, and the Nicaragua Case*, 81 AM. J. INT'L L. 1 (1987).

government's refusal to comment as an admission—of particular significance to future litigation involving covert conduct.

Following the U.S. withdrawal from the litigation, the Court was permitted to render a judgment for Nicaragua so long as it could “satisfy itself . . . that the claim is well-founded in fact and law.”<sup>148</sup> U.S. nonparticipation “depriv[ed] the Court of the benefit of its complete and fully argued statement regarding the facts”<sup>149</sup> and was widely viewed as having “forced the Court into an impossible corner.”<sup>150</sup> Nevertheless, the Court has broad evidentiary powers and discretion to make ad-hoc determinations about admissibility, suitability, and probative value of evidence.<sup>151</sup> It stated that it sought to consider fairly the positions of both parties, without prejudicing Nicaragua or offering advantage to the United States.<sup>152</sup>

Nicaragua's evidence consisted largely of U.S. sources, including witness testimony of a former CIA official, leaked classified U.S. government documents, and statements of U.S. officials reported in the media.<sup>153</sup> The Court also drew upon submissions of the United States in the preliminary phase of proceedings and other public U.S. statements,<sup>154</sup> and it accepted material transmitted by the United States to the Court outside of regular procedures.<sup>155</sup> It recognized the need to exercise “necessary critical scrutiny” and sought to act as a “counter-advocate” to Nicaragua in order to test the evidence.<sup>156</sup>

---

148. Statute of the International Court of Justice art. 53(2), June 26, 1945, 59 Stat. 1055. The Court interpreted this standard to require that the claims be factually supported by “convincing evidence.” Nicaragua Merits Judgment, *supra* note 44, ¶ 29.

149. *Id.* ¶ 57.

150. Highet, *supra* note 147, at 36.

151. *Id.* at 9, 17.

152. Nicaragua Merits Judgment, *supra* note 44, ¶ 31.

153. *Id.* ¶¶ 66–68; Thomas M. Franck, *Some Observations on the ICJ's Substantive and Procedural Innovations*, 91 AM. J. INT'L L. 116, 117 (1987) (noting Nicaragua's allegations were substantiated “almost entirely with evidence provided by Americans, ranging from statements made by the President to assertions by members of Congress, a former CIA agent, journalists, academics and human rights investigators”).

154. Nicaragua Merits Judgment, *supra* note 44, ¶¶ 70–73.

155. *Id.* ¶ 73 (U.S. representatives delivered a State Department report concerning U.S. policy toward Nicaragua to the Court's Registry “to be made available to anyone at the Court interested in the subject.”). The Court observed such contributions were common among State parties who declined to appear: a non-appearing State party “frequently submits to the Court letters and documents, in ways and by means not contemplated by the Rules.” *Id.* ¶ 31.

156. Nicaragua Merits Judgment, *supra* note 44, ¶ 69; Highet, *supra* note 147, at 2.

In evaluating the evidence, the Court relied on a sort of hierarchy of sources, with what it called “matters of public knowledge” at the top, identified largely through press reporting.<sup>157</sup> It stated that it viewed media reports “not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact,”<sup>158</sup> a distinction that eluded clear application in its treatment of the evidence. Nicaragua’s counsel rightfully observed that “there is no rule, as Justice Frankfurter used to say, that judges must pretend to be ignorant of what everyone else knows.”<sup>159</sup> When the conduct in issue is alleged covert activity, however, the public narrative that “everyone knows” is due a healthy skepticism.<sup>160</sup>

The United States had raised concerns about the availability of reliable, probative evidence in its jurisdictional submission, arguing that neither party in an ongoing armed conflict can be expected to disclose sensitive information, and alluded to heightened complexity of source credibility and motives in situations where covert conduct is alleged.<sup>161</sup> But the void created by a silent state compels courts to turn to other sources,<sup>162</sup> with the perverse result that media accounts, which might not rate admission in a traditional

---

157. Nicaragua Merits Judgment, *supra* note 44, ¶ 63; Highet, *supra* note 147, at 33, n.160 (describing such matters to be “notorious or universally known,” of which the Court can effectively take judicial notice). The Court’s willingness to find facts of “public knowledge” based on press reporting had been applied to the favor of the United States in the *Hostages* case. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 9–10, ¶¶ 11–12 (May 24) [hereinafter *Hostages Case*]. In *Nicaragua*, the Court was less comfortable where it was asked to impute legal liability and, for example, declined to find the evidence sufficient to conclude that the United States exercised such control over the *contras* to impute U.S. liability, or that the CIA was responsible for publication of *Freedom Fighter’s Manual* based solely on press reports. Highet, *supra* note 147, at 41.

158. *Id.* at 20; Nicaragua Merits Judgment, *supra* note 44, ¶ 62.

159. Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445, 1468 (1985).

160. *See supra* Part II.A; *see also* Counter-Memorial of the United States (Questions of Jurisdiction and Admissibility), 1984 I.C.J. Pleadings 3, ¶ 523 (maintaining “newspaper accounts concerning what may or may not be taking place are inherently unsatisfactory even as historical, let alone legal, evidence”) [hereinafter U.S. Counter-Memorial 3].

161. *Id.*

162. In recent FOIA litigation, a U.S. district court chastised the United States for failing to provide certain classified material about Anwar al-Aulaqi, which not only antagonized the judge by “[making] this case unnecessarily difficult,” but jeopardized the ruling, as the Court indicated it would have denied the government’s motion to dismiss, had it “not [been] able to cobble together enough judicially-noticeable facts from various records.” *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 81 (D.D.C. 2014).

adversarial contest, were legitimated through the Court's reliance on them.

Next in the hierarchy, the Court credited statements deemed to be admissions. It declined to treat the U.S. claim of collective self-defense in the preliminary phase as itself constituting a full admission of all the conduct alleged, as Nicaragua had urged.<sup>163</sup> Rather, it recognized that while self-defense is typically asserted to excuse otherwise wrongful conduct, the United States had not identified the specific measures it had taken in self-defense and could not simply be deemed to have admitted any and all actions alleged.<sup>164</sup> Nevertheless, the Court went on to note that the self-defense claim was "certainly a recognition as to the imputability of some of the activities complained of."<sup>165</sup>

In evaluating particular allegations, the Court held that statements against interest made by senior government officials could be considered admissions. The Court's assessment of what constituted an admission included U.S. *non-denials* of allegations made by media or other public sources<sup>166</sup>—an approach that rejects the neutrality of the no-comment posture and effectively forecloses its function. In its most astonishing inference, the Court treated a "no-comment" by President Reagan when asked about a specific alleged attack as an admission of U.S. involvement in the event.<sup>167</sup>

The U.S. decision not to participate in the merits proceedings—a self-inflicted and likely decisive handicap, perhaps intended to delegitimize the entire proceedings—precluded it from presenting and challenging evidence directly. It is difficult to fault the Court's increased reliance on circumstantial evidence and inference in these circumstances.<sup>168</sup> While some commentators have

---

163. Nicaragua Merits Judgment, *supra* note 44, ¶ 74.

164. *Id.* The U.S. Counter-Memorial acknowledged that it had provided certain assistance, largely economic but including military assistance, to El Salvador, but nowhere addressed specific allegations of military or covert activities. U.S. Counter-Memorial 3, *supra* note 160, ¶ 195 n.2.

165. Nicaragua Merits Judgment, *supra* note 44, ¶ 74.

166. *Id.* ¶ 89; Highet, *supra* note 147, at 33, 36–37, 37 n.177.

167. Nicaragua Merits Judgment, *supra* note 44, ¶ 83 ("[T]he President's refusal to comment . . . can, in its context, be treated as an admission that the United States had something to do with the Corinto attack."). The Court generally declined to credit either government's official statements favorable to their claims, however. Highet, *supra* note 147, at 38.

168. Highet, *supra* note 147, at 30–31 (noting the ICJ's finding against Albania in the Corfu Channel case based on circumstance evidence, in the "absence of any forthcoming explanation").

suggested that the Court gave an “uncharacteristically broad benefit of the doubt”<sup>169</sup> to the United States, others—including the lengthy and detailed dissent of Judge Schwebel—found it applied its articulated methodology inconsistently, to prejudicial effect against the United States.<sup>170</sup>

Tribunals faced with adjudicating allegations of covert conduct might well take cues from the *Nicaragua* Court’s methodology—particularly those with broad discretion to fashion their own rules of evidence, such as the European Court of Human Rights (ECHR).<sup>171</sup> Indeed, the ECHR, in its judgment in *El-Masri v. Macedonia*, has cited *Nicaragua*’s treatment of admissions in crediting statements by a former government official relating to alleged covert conduct.<sup>172</sup> In that case, a German national brought claims against Macedonia, alleging violations of his rights arising from his apprehension and detention by the government, and transfer to and mistreatment by the CIA.<sup>173</sup> The Court imposed a burden-shifting framework in which, “where the events in issue lie within the exclusive knowledge of the authorities,” an applicant’s establishment of government custody or control shifts the burden to the state to provide a “plausible and satisfactory explanation as to what happened.”<sup>174</sup> The Court noted that it “attache[d] particular significance” to material in the public record, including media and non-governmental organization reports.<sup>175</sup> Finally, in contrast to common law jurisdictions, international tribunals and civil law jurisdictions generally do not automatically exclude leaked or otherwise unlawfully obtained evidence, though their provenance

---

169. *Id.* at 32.

170. Schwebel Dissent, *supra* note 21, ¶ 266–67 (“I find the Court’s statement of the facts to be inadequate, in that it sufficiently sets out the facts which have led it to reach conclusions of law adverse to the United States, while it insufficiently sets out the facts which should have let it to reach conclusions of law adverse to the Nicaragua.”). Judge Schwebel’s dissent runs 261 pages and includes a 227 paragraph factual appendix that painstakingly reviews and critiques the Court’s factual analysis.

171. See *El-Masri v. Former Yugoslav Republic of Macedonia*, 57 Eur. H.R. Rep. 25, ¶ 151 (2012) (“[T]here are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment” in the ECHR.).

172. *Id.* ¶ 163. The former Minister of the Interior’s statements were the only direct evidence received by the Court. *Id.* ¶ 161.

173. *Id.* ¶¶ 1–36.

174. *Id.* ¶¶ 152–53. The Court found the government had failed to meet that burden. *Id.* ¶ 166.

175. *Id.* ¶ 160.

may bear on the reliability of the material.<sup>176</sup>

Both the *Nicaragua* Court's treatment of evidence and emerging case law from the ECHR suggest a waning tolerance for deference to state secrecy by international courts.<sup>177</sup> States acting covertly should not discount the potential *legal* import of press reporting, leaks, and even refusals to comment, as courts charged with adjudicating such conduct will necessarily work with the record accessible to them.

Jack Goldsmith has argued that intelligence activities are increasingly difficult to keep secret, in part due to an expanding "intelligence bureaucracy" which gives more people access to classified information, as well as technological developments that increase opportunities for unauthorized dissemination by insiders and facilitate the public's ability to synthesize relevant information.<sup>178</sup> Leaks have been so pervasive in recent years that in 2012 the U.S. House of Representatives proposed to amend the covert action statute to require the President to develop advance plans for responding to unauthorized public disclosure of all types of covert conduct.<sup>179</sup> Though defeated, the proposal reflects legislative concern with the extent of dissemination of highly classified information, and the perceived ineffectiveness of the executive in addressing unauthorized disclosures.

But others welcome the porous wall. James Reston observed with relief that "the United States wasn't very good at the cloak-and-dagger business. Government by dirty tricks went against the American grain. The Congress didn't like to be ignored or deceived, the press didn't like to be lied to, and some official, outraged by the deception, was always giving the game away."<sup>180</sup> These democratic

---

176. William Thomas Worster, *The Effect of Leaked Information on the Rules of International Law*, 28 AM. INT'L L. REV. 443, 462–63 (2013). For U.S. court treatment of leaked documents, see *infra* Part II.B.1.

177. Adjudication of covert conduct in domestic courts is an area worthy of further study. U.S. courts have, to date, declined to adjudicate alleged covert activity on a variety of grounds, including state secrets. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc), *cert. denied*. Courts have done so even when the U.S. government has later acknowledged the activity; see *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014) (finding "special factors," namely separations of powers and concern of interfering in national security operations and foreign affairs, precluded inferring a remedy against federal agents).

178. Goldsmith, *supra* note 31 (citing the example of public access to flight data supporting allegations of CIA renditions).

179. H.R. REP. NO. 113-277, at sec. 307 (2013).

180. JAMES RESTON, DEADLINE: A MEMOIR 377–78 (1991), *cited in* Rudgers, *supra* note 31, at 261.



structures and sensibilities create an environment inhospitable to secrecy, which should hearten its critics, even if, as Thomas Franck observed in light of the *Nicaragua* judgment, such open societies are disadvantaged in a contest of fact based on public discourse.<sup>181</sup>

### B. Assessing the Legality of Covert Conduct

Once allegations of covert conduct receive public airing, discussion of legality is rarely far behind. As the preceding sections discuss, access to reliable information about covert allegations relating to covert conduct may vary widely and create differing factual narratives, which inform the basis for legal judgments. This section considers how variously situated audiences develop and disseminate legal opinions about covert conduct.

#### 1. The Covert Actor's Secret Legal Theories

In the areas of national security and international relations, much government practice and lawyering “is for the most part utterly invisible to the outside world,” though done “properly and legitimately.”<sup>182</sup> Internal, often confidential legal work extends far beyond the area of covert programs to relatively routine matters, including the interpretation of treaties, the content of customary international law, and the legal consequences and risks of proposed policies.<sup>183</sup> Daniel Bethlehem compellingly likened the vast body of internal, secret government practice to a black hole, invisible but nevertheless perceptible in its effects on the public aspects of the law.<sup>184</sup>

As discussed above, some states may view international law compliance in their covert conduct as discretionary, at least in some circumstances. But it is unlikely that most states simply ignore international law in their covert practice; at a minimum, there are prudential reasons to assess the possible legal consequences if covert conduct becomes disclosed and credibly attributed. The extent to which states actually do legally vet their covert activities is generally as opaque as the extent of covert practice itself. The United States is a notable exception because the statutory requirement that covert

---

181. Franck, *supra* note 153, at 117.

182. Daniel Bethlehem, *The Secret Life of International Law*, 1 CAMBRIDGE J. INT'L & COMP. L. 23, 34 (2012).

183. *Id.* at 27.

184. *Id.* at 36.

action comply with the U.S. Constitution and statutes necessitates legal review.<sup>185</sup> Indeed, U.S. government lawyers have affirmed that proposed covert actions are “thoroughly,” extensively lawyered, with input from multiple agencies.<sup>186</sup>

As in all areas of government practice, legal opinions concerning covert activities are likely to accrete into a body of internal jurisprudence. The theory and judgments relating to a particular act will become incorporated, refined, and reinforced in the lawyers’ future decision-making about similar proposals. The substance of these secret theories may influence the government’s legal positions more broadly when the lawyers involved turn their sights on overt matters. Just as a government’s positions about overt conduct—for example, what constitutes an imminent threat that could justify measures in self-defense, or who qualifies as a targetable enemy combatant in an armed conflict<sup>187</sup>—would inform the perspectives of lawyers analyzing covert proposals that implicate those questions, so may covert precedents dynamically shape future overt positions.

The body of covert practice on a particular legal issue is likely to be small relative to the overt practice, and only a small circle of government lawyers may be privy to it. For covert precedents actually to influence overt practice, certain conditions need to be in place. Pollination will occur only through government lawyers who have access to both areas of decision-making, and such points of overlap may be relatively few. (Covert programs are secret not only to the public, after all, but internally to most government officials who do not have appropriate clearances.)

The influence, if any, of a covert data point will also depend on its legal significance. Covert practice that is squarely within the established fold of a state’s traditionally held positions will offer no unique precedential value; at most, it would reinforce the existing

---

185. 50 U.S.C. § 3093(a)(5). Section 503(b)(2) of the National Security Act, as amended in 2010, requires that Congress be provided information about “the legal basis under which the covert action is being or was conducted.”

186. See Krass QFRs, *supra* note 86; Remarks by CIA General Counsel Stephen W. Preston, *supra* note 87 (covert operation against Osama bin Laden was “thoroughly” lawyered); Goldsmith, *supra* note 31 (intelligence actions receive “extensive lawyer approval” and congressional consultation, in part “to shield against recriminations once the action becomes public”); see also 9/11 COMMISSION REPORT, *supra* note 14, at 133 (discussing lawyers’ revisions to the scope of use of force authorized against Osama bin Laden in a draft 1998 Memorandum of Notification).

187. See, e.g., Preston Harvard Speech, *supra* note 87 (discussing legal analysis of a hypothetical proposed covert use of force, which could be justified under international law as an act in self-defense or as part of an armed conflict).

rule. But if the covert practice represents a question of first impression or progressive application of the rule, refining a gray zone or pushing a boundary in the law, then it has the potential to be more influential.<sup>188</sup> Lawyers who opined on the covert matter will inevitably be guided intellectually by the example in their overt practice.<sup>189</sup> Legal jurisprudence that develops internally around covert uses of force may thus dynamically, if incrementally, shape a state's legal positions more widely.

In circumstances in which a state views its covert conduct as defensible under international law, government officials may find it useful, even necessary, to share their legal theories about covert activity, confidentially, with trusted allies and partners. Doing so might serve to legitimize the state's conduct among its peers, or facilitate its requests for assistance in its covert programs. Confidential engagement with external interlocutors expands awareness of the legal case and may provide important feedback, potentially mitigating the risk of insular group-think that has been a recognized consequence of secrecy. It also increases the possibility of second-order dissemination, such as through leaks, or partners taking public positions that affirm or discount (explicitly or implicitly) the legal theory that would justify the covert conduct.

If allegations of covert conduct air publicly, the covert actor may in some circumstances be inclined to signal to the public a legal justification. Doing so while maintaining covertness—that is, not acknowledging responsibility—is, of course, a delicate act. One approach is simply to assert conclusions of legality; an example of this kind of statement would be the U.S. Secretary of State's declaration in the *Nicaragua* litigation that the United States “considers its own policies and activities to be fully consonant with its international obligations.”<sup>190</sup> States might also suggest a theory at

---

188. Critiques of the effects of secrecy on decision-making suggest that an expectation of covertness and future secrecy might lead to riskier, more aggressive positions, which an expectation of public scrutiny would discourage. See *supra* Part I.A; see also Ashley S. Deeks, *Intelligence Communities and International Law: A Comparative Approach* (unpublished manuscript) (on file with author).

189. If they are senior lawyers within their agencies, as those dealing with covert programs are likely to be, their views imported from the covert context may also be less likely to be challenged—both by virtue of their senior status and because classification restrictions in the covert context may preclude discussion and reconsideration of the precedent with other lawyers internally.

190. U.S. Counter-Memorial 2, *supra* note 45, Annex 1 at 188; see also *id.* at 177 (“the United States recognizes and respects the prohibitions concerning the threat or use of force set forth in the Charter of the United Nations, and . . . considers its policies and activities in Central America, with respect to Nicaragua in particular, to be in full accord with the

a high level of generality, such as the U.S. assertion in the preliminary phase of the *Nicaragua* litigation that its conduct was justified in the exercise of individual and collective self-defense.<sup>191</sup> Nowhere did the United States acknowledge or address the specific allegations of covert conduct presented in that case.

Situations where a state is engaged in parallel or related overt operations present greater flexibility to make legal arguments that could also justify covert conduct, without actually acknowledging any concurrent covert activity. The United States has long acknowledged that its counterterrorism efforts against al Qaeda and associated forces entailed military operations in Afghanistan,<sup>192</sup> and in recent years in Yemen and Somalia as well.<sup>193</sup> Starting in 2006, U.S. officials have given a series of speeches presenting legal theories justifying these activities.<sup>194</sup> Such presentations do not address particular operations, though in some cases posit hypothetical factual scenarios, such as in a Justice Department's "White Paper" that addressed the legality of targeting a U.S. citizen abroad.<sup>195</sup> Through these disclosures, the United States has presented legal theories that could serve to justify a range of conduct, while maintaining a posture that permits it to decline public engagement on specific allegations. These disclosures present in aggregate a "mosaic" of the U.S. government's legal case justifying counterterrorism activities.<sup>196</sup> In some cases, an actor can maintain a covert defense while presenting piecemeal elements that observers,

---

provisions of the Charter of the United Nations.").

191. *Id.* ¶ 202.

192. See Permanent Representative of the United States to the U.N., *supra* note 39.

193. See, e.g., President Barack Obama, Presidential Letter—2012 War Powers Resolution 6-Month Report (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>.

194. See, e.g., Bellinger, *supra* note 52; Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at Annual Meeting of the American Society of International Law: The Obama Administration and International Law (May 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>; Eric H. Holder, Attorney General, U.S. Dep't of Justice, Remarks at Northwestern Law School (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

195. U.S. DEP'T OF JUSTICE, WHITE PAPER, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (Nov. 22, 2011) [hereinafter DOJ WHITE PAPER], available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf>.

196. See Kenneth Anderson, *What Should the Administration Say? The Canonical National Security Law Speeches of the Obama Administration Senior Officials and General Counsels*, LAWFARE (Apr. 9, 2012, 10:52 AM), <http://www.lawfareblog.com/2012/04/readings-the-national-security-law-speeches-of-the-obama-administration-general-counsels/>.

by connecting the dots, can compile to adjudge its actions. Consider, for example, the staggered U.S. disclosures addressing elements of fact and law that taken together present a justification for lethal action against Anwar al-Aulaqi—each disclosed before the United States acknowledged a role in his death.<sup>197</sup>

Legal disclosures serve many of the same purposes as factual disclosures,<sup>198</sup> and likewise have a number of limits. They may offer general statements of law divorced from specific practice. They may posit hypothetical facts, as the Department of Justice’s White Paper does, but leave considerable room for interpretation and ambiguity. In addition, speeches and similar public statements serve many functions, including explaining policy and assuaging political constituencies; as a result, they may contain mixed statements of policy and law that can be difficult for audiences interested in distilling the legal claims to disentangle.<sup>199</sup> Further, there may be legitimate skepticism about the credibility and weight that statements of legal principle can bear when sanitized of facts and divorced from acknowledged conduct—that is, whether they are merely “cheap talk.”<sup>200</sup>

Selective official disclosures about classified legal theories also carry some risk, at least in the U.S. context, that too much will tip the scales toward waiver in the eyes of courts. In 2014, a U.S. appeals court found that the U.S. government’s *official* disclosure of the White Paper—released by the government on the heels of its leak—amounted to a waiver of privilege about its legal theory related to certain lethal counterterrorism operations. It ordered the

---

197. See President Obama, Remarks, *supra* note 129 (addressing al-Aulaqi’s activities and status in al-Qaeda); Attorney General Holder, Northwestern Speech, *supra* note 194 (addressing targeting of U.S. citizens); DOJ WHITE PAPER, *supra* note 195 (addressing lethal operation in a specific hypothetical scenario that might encompass the circumstances of Aulaqi).

198. See *supra* Part II.A.1.

199. For example, on the issue of whether the United States considers infeasibility of capture options to be a legal precondition to the targeted use of force in some or all circumstances, or merely a policy consideration, compare Attorney General Holder’s 2012 speech at Northwestern, *supra* note 194, with the White House fact sheet released in 2013 outlining presidential policy standards on counterterrorism targeting which states “the *policy* of the United States is not to use lethal force when it is feasible to capture a terrorist suspect.” *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, WHITE HOUSE, May 23, 2012, available at [http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23\\_fact\\_sheet\\_on\\_ppg.pdf](http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf).

200. See Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 976–77 (2005); *infra* Part III.A.1.

government to disclose parts of a classified internal legal memorandum by the Department of Justice's Office of Legal Counsel.<sup>201</sup> This ruling will undoubtedly shape future government deliberations about whether and how to share its views—potentially discouraging official disclosures in favor of surreptitious ones, to avoid the risk of losing control over related internal, classified materials.<sup>202</sup>

Moreover, the disclosure of general theories, sanitized of facts, has been met by calls from civil society groups for original, internal products. Release of original, internal products begets clamor for more original, internal products.<sup>203</sup> The public's interest in the government's theories and application of the law is legitimate, but unwaning appetite for disclosure may leave policymakers with the sense that more will never be enough, and that the actors agitating for unfettered transparency fail to appreciate the legitimacy of *any* claim to secrecy in its conduct—including in the confidentiality of the deliberative process and legal advice—thereby discouraging policymakers' efforts to seek reasonable compromises.

Finally, legal judgments from the other branches of government can contribute importantly to the public perception and discourse about the legality of covert conduct. The judgments of legislative oversight bodies may be particularly significant because they are likely to—indeed, their function presupposes that they will—have information about covert conduct not available to the public at large.<sup>204</sup> Upon learning that the President had authorized

---

201. *New York Times v. Dept. of Justice*, 752 F.3d 123 (2d Cir. 2014).

202. See Jane Chong, *The Al-Awlaki Decision: No Triumph for Transparency?*, LAWFARE (Apr. 24, 2014, 7:37 AM), <http://www.lawfareblog.com/2014/04/the-al-awlaki-decision-no-triumph-for-transparency/>; Steve Vladeck, *The Second Circuit and the Vices of Selective Disclosure*, JUST SECURITY (Apr. 22, 2014, 2:28 PM), <http://justsecurity.org/9706/circuit-vices-selective-disclosure/>.

203. Letter from American Civil Liberties Union, et al., to President Obama, Statement of Shared Concerns Regarding U.S. Drone Strikes and Targeted Killings (Apr. 11, 2013), available at <http://www.hrw.org/news/2013/04/11/joint-letter-president-obama-us-drone-strikes-and-targeted-killings> (calling for “[r]elease to the public [of] all Department of Justice, Central Intelligence Agency and Department of Defense memoranda that reflect the administration's interpretation of operative law and policy concerning the lethal targeting of any person”) (emphasis added); Jameel Jaffer, *Obama's "Drone Memo" Is Finally Public. Now Show Us the Library of Secret Law*, GUARDIAN, June 24, 2014, <http://www.theguardian.com/commentisfree/2014/jun/24/obama-drone-memo-secret-law-transparency> (calling for disclosure of factual predicate for OLC al-Aulaqi Memo and other internal legal memoranda cited therein).

204. While the acts of legislative bodies may have significance in international law, the acts of individuals rarely do, unless speaking for the state. INT'L LAW ASS'N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW,

covert mining of harbors in Nicaragua, then-chairman of the Senate Select Committee on Intelligence Barry Goldwater sent a letter—leaked almost immediately—to CIA director William Casey, decrying the operation as “an act violating international law. It is an act of war.”<sup>205</sup> More recently, senators on the Committee wrote to the Attorney General in a publicly released letter and, after reviewing the government’s classified opinions, they concluded “the decision to use lethal force against Anwar al-Aulaqi was a legitimate use of the authority granted to the President.”<sup>206</sup> They nevertheless urged greater disclosure by the administration, stating “we do not believe it is appropriate for the Executive Branch to rely on secret laws and standards.”<sup>207</sup>

International law can be a powerful legitimating force for government conduct. Abram Chayes wrote in the aftermath of the Cuban Missile Crisis, during which he served as the State Department’s Legal Adviser, that “[f]ailure to justify in terms of international law warrants and legitimizes *disapproval* and negative responses” from other states.<sup>208</sup> Compelling legal theories may permit decision makers to sleep soundly at night, but they cannot legitimate a state’s conduct or further its cause with the public or the international community if they remain locked inside secure government vaults. Bethlehem notes that “in very many cases one cannot make assumptions about what the law is, or reach considered conclusions on whether conduct is lawful or unlawful, until one has considered the invisible conduct as well as the visible.”<sup>209</sup> It is hard to deny that a state’s perspective of the legality of its conduct is privileged by its internal knowledge. But echoing Senator Wyden, a formidable public objection will be that it is simply democratically unacceptable not to know *what the law is* unless one is an insider.

---

REPORT OF THE SIXTY-NINTH CONFERENCE 16–17 (2000), available at [http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C\\_4CA30217F376](http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C_4CA30217F376) [hereinafter ILA Principles].

205. *Text of Goldwater’s Letter to the Head of C.I.A.*, N.Y. TIMES, Apr. 11, 1984, <http://www.nytimes.com/1984/04/11/world/text-of-goldwater-s-letter-to-the-head-of-cia.html>. Goldwater was furious both about the reported operation and that he had not been briefed earlier about it. He subsequently resigned from the Committee amid administration insinuations that he had in fact been notified. MOYNIHAN, *supra* note 12, at 210–11.

206. Letter from Senators Wyden, Udall, and Heinrich to Attorney General Holder (Nov. 26, 2013), available at <http://media.katu.com/documents/Wyden+Udall+Heinrich+Letter.pdf>.

207. *See id.*

208. ABRAM CHAYES, THE CUBAN MISSILE CRISIS 44 (1974) (emphasis in original).

209. Bethlehem, *supra* note 182, at 36.

Bethlehem offers a partial response when he goes on to suggest that internal, secret practice can be discerned by careful scholars and observers. And, in the case of U.S. counterterrorism activity, there is a veritable industry of academics and commentators who seek to do so.<sup>210</sup> But piecing together shreds of information with speculative glue is unsatisfactory to the public, and it should be to governments as well: it cedes the state's role of articulating the law and characterizing its conduct to outsiders.

## 2. Legal Judgments by Third States and Other Actors

Public opinion about the legality of covert action tends to cluster around two positions: discomfited observers who denounce its unlawfulness and discomfited observers who, as Alston lamented, “lamelessly accept that there is insufficient information in the public domain to enable existing policies and practices to be meaningfully assessed.”<sup>211</sup> Observers might choose to turn a blind eye to allegations of covert conduct, depending on the politics of the situation and, to a lesser extent, the sanctity of the legal norms perceived to be violated.<sup>212</sup> But there are a range of reasons why they might independently assess allegations of covert conduct. Against a backdrop of the covert actor's silence, credible actors who do opine publicly are likely to have enhanced influence to shape the arc of public commentary.

An aggrieved state may wish to go on the record with legal denunciations in protest of an action, with statements to the media, or by official state act,<sup>213</sup> or through recourse to the Security Council.<sup>214</sup>

---

210. See, e.g., Benjamin Wittes, *Whence Imminence In that Drone Memo? A Puzzle and a Theory*, LAWFARE (June 24, 2014, 11:19 AM), <http://www.lawfareblog.com/2014/06/whence-imminence-in-that-drone-memo-a-puzzle-and-a-theory/#more-36384> (speculating on the provenance of “imminence” in legal justifications of U.S. lethal counterterrorism operations through examination of executive branch disclosures); Marty Lederman, *Understanding the OLC Torture Memos (Part II)*, BALKINIZATION (Jan. 7, 2005, 9:10 AM), <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part.html> (speculating that Department of Justice memoranda addressed, and thereby revealed the existence of, an undisclosed CIA interrogation program which evaded other legal constraints).

211. Alston, *supra* note 52, at 299.

212. REISMAN & BAKER, *supra* note 9, at 67–73 (Reisman's assessment of the factors conditioning the international community's response finds greater tolerance for covert conduct where the activity did not substantially alter power relations among states, was diplomatic or economic in nature, or directed against a private party rather than a state (even where a state's legal interests were incidentally compromised)).

213. For example, the Pakistani parliament has passed multiple resolutions condemning and demanding cessation of alleged U.S. covert drone strikes. See Richard Leiby, *Pakistan*



Positive signals of acquiescence, particularly by directly affected states, are rarer.<sup>215</sup>

Third states may assess the legality of reported events in order to bolster political positions—either as a legal buttress to political condemnation of the conduct, or to evaluate whether statements of political support would cut against their legal values. Third states might also internally assess legality if they have been asked to cooperate in the covert activity. Although international law prescribes no general duty to inquire about the legality of conduct assisted,<sup>216</sup> assisting states could be culpable for aiding and assisting unlawful conduct,<sup>217</sup> may have domestic requirements that mandate compliance with certain laws, or may assess legality simply as a matter of prudence. For example, if an ally sought U.S. covert assistance for a use of force, the United States would need to ensure that its support would not constitute assassination or conspiracy to commit assassination, which is banned without exception by executive order.<sup>218</sup> Covert cooperation does not necessarily imply

---

*Calls for End to Drone Strikes*, WASH. POST, Apr. 12, 2012, [http://www.washingtonpost.com/world/pakistan-calls-for-end-to-us-drone-attacks/2012/04/12/gIQAN1ZFDT\\_story.html](http://www.washingtonpost.com/world/pakistan-calls-for-end-to-us-drone-attacks/2012/04/12/gIQAN1ZFDT_story.html).

214. Reisman counted 208 instances between 1969 and 1988 of alleged covert conduct brought to the attention of the Security Council. See REISMAN & BAKER, *supra* note 9, at 144–52.

215. One such example is the statement of New Zealand’s prime minister in response to reports that a U.S. strike in Yemen killed an Australian-New Zealand dual national. According to press reports, he indicated both that he viewed drone strikes as legitimate counterterrorism tools in some circumstances, and that he “suspect[ed]” the particular strike reported was “legitimate.” *Kiwi “foot soldier” for al-Qaeda killed in Yemen by Drone*, NEW ZEALAND HERALD, Apr. 1, 2014, [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11239185](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11239185).

216. See Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT’L L. J 1, 31 (2013).

217. Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 16, *in*, Rep. of the Int’l Law Comm’n, 53d Sess., Apr. 23–June 1, July 10–Aug. 10, 2001, U.N. Doc. A/56/10, at 43, 47; GAOR, 56th Sess., Supp. No. 10 (2001).

218. EO 12,333, *supra* note 75, § 2.11 (“No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”); see SANGER, *supra* note 23, at 144 (reporting that the assassination ban prohibited U.S. officials from providing information or other assistance for Israeli operations against Iranian nuclear scientists). The role of the assassination ban in legal review of U.S. covert action proposals may be reflected in the *9/11 Commission Report’s* discussion of President Clinton’s December 1998 authorization of covert use of force to kill Osama bin Laden, where the administration took the position “that under the law of armed conflict, killing a person who posed an imminent threat to the United States would be an act of self-defense, not an assassination.” 9/11 COMMISSION REPORT, *supra* note 14, at 132 (2007).

that states acting in concert share a position, much less theory, on legality, so the public cannot assume that cooperation signals a convergence of legal views.<sup>219</sup>

Nongovernmental organizations, because of their perceived impartiality and independent fact-finding efforts, are often among the most publicly influential contemporary commentators. In addition to factual reporting, they may opine on both the legal framework they view as applicable to the conduct in issue and the legality of particular acts.<sup>220</sup>

Finally, the legal equivalent of former policy officials' memoirs are former government lawyers' academic contributions. They are unlikely to disclose secret practice, but may discuss theories that could have relevant application. For example, Daniel Bethlehem, shortly after leaving the post of legal adviser to the U.K. Foreign and Commonwealth Office, published an article in his personal capacity that indicated that it reflected the convergence of internal state views on principles relating to self-defense against non-state actors. The principles, developed through confidential discussions among unidentified states with relevant operational experience, thus offered into the public discourse a composite sketch of certain states' internal legal views.<sup>221</sup>

Third-party characterizations of the legality of particular, alleged covert activity hold increased weight, if, in the covert actor's silence, they are the only legal opinions on specific factual predicates. For example, with the exception of the 2011 operation against Osama bin Laden, the United States has not acknowledged or addressed specific allegations of covert counterterrorism activity in Pakistan. But a range of other actors have opined about the legality of alleged U.S. operations, importantly shaping the thrust of prevailing public opinion. The Pakistani Ministry of Foreign Affairs has publicized its diplomatic protests to the United States,<sup>222</sup> in May

---

219. See Bethlehem, *supra* note 182, at 31 (noting multiplicity of legal justifications for use of force in Afghanistan). The legal theory chosen may entail some differences in the scope of permissible use of force and the applicable rules of conduct, but there is no legal reason that states acting in concert must share the same theory, so long as the operations undertaken are permissible under each participant's theory.

220. See, e.g., HUMAN RIGHTS WATCH, BETWEEN A DRONE AND AL-QAEDA: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN (2013), available at [http://www.hrw.org/sites/default/files/reports/yemen1013\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/yemen1013_ForUpload.pdf); AMNESTY INTERNATIONAL, "WILL I BE NEXT?" U.S. DRONE STRIKES IN PAKISTAN (2013) <http://www.amnestyusa.org/sites/default/files/asa330132013en.pdf>.

221. Daniel Bethlehem, Notes and Comments, *Self-defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 769, 773 (2012).

222. Press Briefing, Pakistan Ministry of Foreign Affairs (Jan. 23, 2014), available at

2013, the High Court in Peshawar issued a decision holding that drone strikes violated Pakistani sovereignty and the U.N. Charter, among other law;<sup>223</sup> Pakistan's National Assembly passed resolutions condemning drone strikes;<sup>224</sup> a U.N. special rapporteur suggested that particular alleged conduct was unlawful,<sup>225</sup> and human rights groups have raised concerns about the lawfulness of specific reported incidents.<sup>226</sup>

Whether or not the covert actor views its conduct as lawful, secrecy compromises its ability to shape the record effectively; it undermines informed public discourse by denying others the factual basis and legal theories (if any) underpinning the covert actor's conduct. In that respect, secrecy also privileges and protects the covert actor's position by frustrating the standing of others' judgments: it leaves open the possibility that there may always be a game-changing—which is to say, legally decisive—fact known to the covert actor alone.

### III. THE EFFECTS OF SECRECY AND COVERTNESS ON THE LAW

The processes of international law-making—the adversarial contest of litigation, the negotiation of treaties, the dynamic discourse of claim-and-response that shapes customary international law—presuppose that states will participate with a degree of transparency sufficient to protect their interests. Indeed, the discernable discourse among relevant actors has been conceived of as the essential mechanism of law-making, “a process of communication in which the mobilization of authority and control creates and sustains

---

<http://www.mofa.gov.pk/pr-details.php?prID=1264> (reporting demarche of U.S. Charge d'Affairs and condemning “the drone strikes which are a violation of Pakistan's sovereignty and territorial integrity”).

223. *Foundation for Fundamental Rights v. Federation of Pakistan*, Judgment on Writ Petition No. 1551-P/2012 (Peshawar High Court), at 17–18 (May 9, 2013), available at <http://www.peshawarhighcourt.gov.pk/images/wp%201551-p%2020212.pdf>.

224. See, e.g., *Resolutions*, NAT'L ASSEMBLY OF PAKISTAN (Dec. 10, 2013), available at [http://www.na.gov.pk/en/resolution\\_detail.php?id=140](http://www.na.gov.pk/en/resolution_detail.php?id=140).

225. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, at 12–14, Human Rights Comm'n, U.N. Doc. A/HRC/25/59, (Mar. 10, 2014) (by Ben Emmerson) (discussing a “sample” of alleged U.S. drone strikes in Pakistan from 2006 to 2012 where the absence of comment by the United States “arguably raises a reasonable suspicion that the action taken may have been unlawful”).

226. See *supra* note 220.

expectations about what types of behavior and what contingencies shall be deemed lawful and unlawful.”<sup>227</sup>

In areas where international law is particularly ambiguous or contentious, state practice and publicly articulated interpretations are critical in defining the substantive content of the rules. The international law governing when force may be used in another state’s sovereign territory—the *jus ad bellum*—is such an area: its rules are notoriously (and intentionally) vague and flexible, with wide variation among states’ views about what they mean.<sup>228</sup> What constitutes a prohibited use of force? Is an “armed attack” synonymous with a use of force? Does self-defense permit anticipatory strikes? Even—or especially—where states disagree, transparency of legal positions and practice both confirms the rules’ fundamental applicability and promotes stability by putting all states on notice of the differences in others’ interpretations.

But what if states do not make their practice or legal views public? Do the murky, fragmented public records of covert facts, and the legal opinions or inferences that become associated with them, matter to the law? Can a state’s unilateral dissociation from its conduct somehow cabin that conduct from impacting the dynamic international legal order? When state practice and legal interpretations are obscured by secrecy and non-acknowledgement, both the content and the relevance of the legal rules are called into question. Secrecy in international relations has long been both a strategic tool in forming and an impediment to identifying international law.<sup>229</sup> This Part examines the impact of covertness and

---

227. REISMAN & BAKER, *supra* note 9, at 21; *see also* W. Michael Reisman, *International Law-making: A Process of Communication*, 75 AM. SOC’Y INT’L L. PROC. 102 (1981).

228. Glennon, *supra* note 200, at 963 (“the Charter’s use of force rules are extraordinarily malleable . . . and vast differences of opinion exist as to what constitutes a violation”); REISMAN & BAKER, *supra* note 9, at 9 (“assessing the lawfulness of certain [even overt] actions is difficult given the “multiplicity of versions of contemporary international law”). Certain aspects of the *jus in bello*, or the law of war governing the conduct of hostilities, are similarly vague and must be developed through state practice. One example would be the issue of what civilian conduct constitutes direct participation in hostilities within the meaning of the law of war to forfeit protection from attack. *See* Additional Protocol I, *supra* note 54, art. 51(3); *see also* Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT’L L. & POL. 637 (2010).

229. Bianchi, *supra* note 36, at 18 (“The different epistemic communities that create the discourse in various areas of international law make use of transparency or of its opposite to shape their discursive policies.”).

secrecy on those processes.

### A. Black Holes in State Practice

Bethlehem asked, “Does conduct need to be public in order to inform the law?”<sup>230</sup> To count as a precedent in the interpretation of a norm or an instance of state practice that can contribute to the development of customary international law, it does.

The customary rules of international law are flexible, adaptive to continuously evolving state practice and legal theories.<sup>231</sup> Through the iterative process of claim and response, customary international law is created, affirmed, altered, undermined, and in some cases, rendered obsolete and dispatched to the archives of history.<sup>232</sup> In an archetypal case, the facts surrounding a state act and its corresponding *opinio juris* (assertion of legal obligation or right) would be detailed publicly, thereby providing all states a fully informed opportunity to consider and assert their legal positions. In reality, of course, states participate in this process with less than perfect information.

The International Law Association (ILA) has opined that for purposes of forming custom, “acts do not count as practice if they are not public.”<sup>233</sup> Moreover, if secret conduct is discovered, it “probably” only counts if the acting state asserts that the conduct was justified.<sup>234</sup> Though the ILA cites no authority for these propositions, they flow logically from the nature of custom, which, “as evidence of a general practice accepted as law,”<sup>235</sup> requires identification of a legal proposition and its communal acceptance. As a result, evidence of the practice and the status of acceptance must be public.<sup>236</sup>

230. Bethlehem, *supra* note 182, at 35–36.

231. Rep. of the Int’l Law Comm’n, 64th Sess., May 7–June 1, July 2–Aug. 3, 2012, at 114, U.N. Doc. A/67/10; GAOR, 67th Sess., Supp. No. 10 (2012), available at <http://legal.un.org/ilc/reports/2012/2012report.htm> (A “central characteristic” of customary law, “one of its strengths, that it is formed through a flexible process.”).

232. See ILA Principles, *supra* note 204. The ILA report noted that state practice evidences the emergence of a rule, strengthens it, and serves as declaratory evidence of it. It is therefore somewhat artificial to distinguish too starkly between the formation of a rule and evidence of an existing rule. See *id.* at 9 n.21.

233. *Id.* at 15.

234. *Id.*

235. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055.

236. See Worster, *supra* note 176, at 476; see also Marty Lederman, *Question on 2007 Strike Against Syria and Anticipatory Self-Defense*, OPINIO JURIS (Apr. 3, 2012, 3:07 PM), <http://opiniojuris.org/2012/04/06/question-on-2007-strike-against-syria-and-anticipatory->

Secrecy and covertness defeat the evidence of custom in different ways. Secrecy may obscure the practice itself or any related, internally held *opinio juris*. Covertness, in contrast, formally denies the attribution of particular practice to a state. Thus, even if the covert conduct is an open secret—the facts of an event widely and credibly reported, and a putatively responsible state has articulated a legal position that could justify it—non-acknowledgement precludes the responsible state from relying on that conduct as evidence that defines or shapes the law. Unless and until a state acknowledges its conduct, there is, in the process of custom, no “claim.”<sup>237</sup>

What then are the consequences for the law, the costs and benefits, of a state of acting covertly or otherwise through secrecy denying the public a legal justification for its acts?

### 1. Internationally Lawful Covert Conduct

Where a state views its covert conduct as legally justified, the principal legal cost of covertness is that the state cedes its voice and the weight of its practice in the development of the law. These omissions may render the articulated law less accurately reflective of actual (but obscured) state practice and legal positions.

Imagine that State A views humanitarian intervention as a lawful exception to the prohibition on use of force, while recognizing that this position is not widely accepted. State A decides to intervene with limited strikes in a foreign civil war, justifying it internally as a humanitarian intervention. However, for political reasons or to avoid escalation, it acts covertly. Because covertness precludes it from publicly “claiming” its practice, State A would be foregoing the opportunity—unless and until it acknowledges its conduct—to establish through its conduct a precedent that supports the rule.

Even when states acknowledge their conduct, a refusal to offer a legal justification undermines the law. Consider, for example, the legality of a state using force without consent in a foreign state to

---

self-defense/ (querying what role covert conduct can play in the evolution of customary international law). The ILC has suggested that disclosures between as few as two states may contribute to the formation of localized or specialized custom. Rep. of the Int'l Law Comm'n, Second Report on Identification of Customary International Law, 66th Sess., May 5–June 6, July 7–Aug. 8, 2014, U.N. Doc. ¶ 47 A/CN.4/672 (May 22, 2014).

237. Acknowledgment, after all, does not presume that all states will agree with the acting state's justification—only that normal law-making processes can be applied to evaluate and assimilate the conduct into the legal order, as evidence of a rule or of its breach.

rescue its nationals, which remains debated.<sup>238</sup> Some states, like the United States, have historically asserted that it is a legitimate aspect of the right of self-defense; indeed, the United States notified the Security Council under article 51 following its attempt to rescue U.S. hostages in Iran in 1980.<sup>239</sup> In recent hostage rescue operations, however, the United States has declined to assert an international law justification, even where it ultimately acknowledged its conduct.<sup>240</sup> Without public claims of right under international law, however, its current conduct cannot stand for any specific legal proposition to which other states may react. Secrecy stalls the reinforcement or development of the norm.

Moreover, secrecy and covertness cede to third parties, including non-state actors, the state's typically predominant role in articulating and developing the law. States historically enjoy "unique relevance in the formation and interpretation of international law."<sup>241</sup>

---

238. See Kristen Eichensehr, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues*, 48 VA. J. INT'L L. 451 (2008); see also REISMAN & BAKER, *supra* note 9, at 63 (noting divided expressions of legality after the Iran hostage rescue). Hostage rescue attempts, even if undertaken in secrecy to preserve operational security, are typically not covert actions because the rescuing state acknowledges—and expects to acknowledge—them after the fact.

239. Letter from James Carter, Jr., President of the United States, to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Reporting on the Operation (Apr. 26, 1980), available at <http://www.lawfareblog.com/wp-content/uploads/2013/10/Letter-from-James-Carter-Jr.-Apr.-26-1980.pdf>; Hostages Case, *supra* note 157, at 18 (reflecting article 51 notification).

240. In 2012, the United States disclosed a successful hostage recovery of two aid workers held in Somalia. Karen DeYoung & Greg Jaffe, *Navy SEALs Rescue Kidnapped Aid Workers Jessica Buchanan and Poul Hagen Thisted in Somalia*, WASH. POST, Jan. 25, 2012, [http://www.washingtonpost.com/world/national-security/us-forces-rescue-kidnapped-aid-workers-jessica-buchanan-and-poul-hagen-thisted-in-somalia/2012/01/25/gIQA7WopPQ\\_story.html](http://www.washingtonpost.com/world/national-security/us-forces-rescue-kidnapped-aid-workers-jessica-buchanan-and-poul-hagen-thisted-in-somalia/2012/01/25/gIQA7WopPQ_story.html). Its war powers notification to the Congress did not address international law, nor did the United States submit an article 51 letter to the U.N. Security Council, leaving unclear whether it viewed the operation to be an exercise of self-defense, or done with the consent of Somali authorities, or whether there was another, or no, international law basis. See Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the War Powers Act for Somalia (Jan. 26, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/01/26/letter-president-speaker-house-representatives-and-president-pro-tempore>. The United States also did not assert an international law basis for its 2014 attempt to rescue U.S. journalist James Foley in Syria, even though the facts of that case might have presented a particularly compelling case with which to reinforce a legal claim of right. See Shear, *supra* note 29.

241. Sean Watts, *Reviving Opinio Juris and Law of Armed Conflict Pluralism*, JUST SECURITY (Oct. 10, 2013, 4:45 PM), <http://justsecurity.org/1870/reviving-opinio-juris-law-armed-conflict-pluralism-2/> ("State *opinio juris* remains the critical bellwether for the degree of consensus, acceptance, and therefore effectiveness and legitimacy of any international

Non-state actors have traditionally also had a role in articulating emerging customs,<sup>242</sup> and there are an increasing number of actors on the international stage—from jurists to non-governmental organizations to treaty bodies to U.N. special rapporteurs—who opine about the substance and application of the law with varying claims of authority. When states decline to participate in these conversations, either to affirm certain views or to offer corrective disclosures, they risk abdicating their “special role.”<sup>243</sup>

The roles of third parties are potentially further amplified—and the costs and risks to states of secrecy commensurately increased—when one considers trends in methodologies of identifying customary international law that assign greater weight to *opinio juris* and input from non-state actors.

Ascertaining customary international law is an inherently challenging endeavor. As Reisman observed, “the always imprecise methods of inferring custom from a flow of practice have become more difficult to apply, when the behavior of more than 160 actors, each composite and incorporating many other actors, and much of the behavior, either unrecorded or inaccessible, must be accounted for.”<sup>244</sup> And states may hold genuinely competing, legitimate views of what the law is.<sup>245</sup> As a result, the process has always been more art than science, conclusions not uniform, and methodologies of assessing custom themselves disputed and changeable.

In the sixteenth and seventeenth centuries, the emergence of customary international law as a scientific discipline favored a naturalist, deductive method for assessing its content.<sup>246</sup> The

---

legal rule.”).

242. Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 775 (2001).

243. Sean Watts has decried the recent dearth of official government statements of *opinio juris* about the law of armed conflict, noting particularly a “retreat” by the United States in this area that results in an “impoverish[ed]” public dialogue. Watts, *supra* note 241.

244. REISMAN & BAKER, *supra* note 9, at 18.

245. Rules on the use of force have always been “unstable,” characterized by “vast differences as to what conduct is prohibited by international rules governing the use of force, as well as the lack of consensus about what those rules should be.” Glennon, *supra* note 200, at 986. Calls for “consensus” in this field, therefore, set unrealistically high expectations and bars for legitimacy. Where legal questions are so entangled with politics and policy, the allure of “definitive answers” will always be beyond reach; international law is “better understood . . . as a set of more and less ‘plausible’ interpretations, in a world of sovereign states in which there is no final adjudicator to say yes and no.” Anderson, *supra* note 19.

246. Georg Schwarzenberger, *The Inductive Approach to International Law*, 60 HARV.



deductive method resulted in part from the effects of secrecy in obscuring state practice; secrecy was “a normal aspect of international relations that simply had consequences on the techniques for finding the law.”<sup>247</sup> The naturalist method, however, was unsatisfying; it produced vague principles and “was soon detected to be not so much law-finding as law-making in disguise.”<sup>248</sup>

In its stead, beginning in the eighteenth century, jurists influenced by positivism and the proliferation of public documentation from parliaments, courts, and conferences began to favor an inductive approach to deriving the law from the conduct of states.<sup>249</sup> Inductive assessment of the law requires a “fair amount of case law from which plausible generalizations may be attempted.” As a result, the identification and development of law was limited by the transparency of states.<sup>250</sup> This approach—now viewed as the “traditional” approach—induces the law from state practice supported by *opinio juris*. It has been criticized, however, as anachronistic and inappropriate in the contemporary international legal architecture.<sup>251</sup>

An emergent “modern” alternative, driven partly by the field of international human rights law, returns to the deductive method by crediting as custom high-level statements of rules that are supported by a smaller corps of state practice.<sup>252</sup> In privileging *opinio juris*, “modern” custom enhances opportunities to “disguise”—as Schwarzenberg might say—statements of *lex ferenda*, the law as one thinks it should be, as *lex lata*, the law as it is.<sup>253</sup>

---

L. REV. 539, 540 (1947).

247. Worster, *supra* note 176, at 451.

248. Schwarzenegger, *supra* note 246, at 543.

249. *Id.* at 544–45.

250. *Id.* at 541. In its first study on customary law in 1950, the International Law Commission recognized the importance of public statements and state transparency “to make evidence of their practice more accessible,” and recommended the publication of national digests relating to conduct with respect to international law. This led to the creation of several important publications of practice, including U.N. Legislative Series and Reports of International Arbitral Awards. Rep. of the Int’l L. Comm’n, First Report on Identification of Customary International Law, 65th Sess., May 6–June 7, July 8–Aug. 9, 2013, U.N. Doc. A/CN.4/663, ¶ 9 (May 17, 2013).

251. Roberts, *supra* note 242, at 759.

252. *Id.* at 758, 765.

253. The distinction between *lex lata* and *lex ferenda* is never so crisp as would be analytically convenient; states seeking to change the law assert their new claims of customary right in the language of *lex lata*, hoping to push the law in that direction. ILA

The International Court of Justice's judgment in the *Nicaragua* case is often cited as a notable application of modern custom. Though the Court recited the methodology of the "traditional" test for finding customary law, it followed a more modern approach in its actual assessment of the law on the use of force and nonintervention. It largely dispensed with any review of state practice, and relied on treaty text and U.N. General Assembly resolutions—including those containing legally nonbinding language—as evidence of *opinio juris* reflecting customary law.<sup>254</sup> Its approach has been criticized for failing to give even "minimal deference" to state practice, with the result that the rules it purported to identify bear little relation to state behavior.<sup>255</sup>

The emphasis on, and elevation of, *opinio juris* over state practice presents the possibility of amplifying the weight accorded to non-state sources of evidence, such as U.N. treaty body opinions, U.N. special rapporteurs, or other non-state actors, which purport to characterize the *lex lata* but may assert their own preferences of *lex ferenda*.<sup>256</sup> For example, the seminal customary international humanitarian law study undertaken by the International Committee of the Red Cross, nearly 3,000 pages, is widely cited as an authoritative reflection of custom,<sup>257</sup> though the United States has flagged serious concerns with the study's methodology and objected to some of its

---

Principles, *supra* note 204, at 56 ("it is quite common for States to assert that something is the law in the hope that this will help to bring about the desired state of affairs"); Charney, *supra* note 84, at 916 ("States will rarely, if ever, admit that they have violated customary international law, even in order to change it. Rather, they will argue that their behavior is consistent with the traditional law, or that the law has already changed.").

254. *Nicaragua Merits Judgment*, *supra* note 44, ¶¶ 186–91; Jonathan Charney, *Customary International Law in the Nicaragua Case Judgment on the Merits*, [1988] 1 HAGUE Y.B. INT'L L. 16, 17–19; Roberts, *supra* note 242, at 758, 763; Franck, *supra* note 153, at 116 (the Court's finding of customary rules based on the "attitude" of states toward aspirational U.N. G.A. resolutions seeks "to harden this soft law") (internal quotation omitted).

255. Glennon excoriates the court for its "aversion to empirical data and its concomitant predilection for abstract moralizing" and approaching the issues without "a modicum of intellectual honesty." Michael J. Glennon, *The Fog of Law: Self Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 555 (2002).

256. Reisman has noted that "the international system produces documents in the legislatistic genre with promiscuous abandon," and that "the scholar and practitioner must be able to distinguish effective law from the enormous legislatistic babble of international politics." Reisman, *International Law-Making*, *supra* note 227, at 102.

257. Watts, *supra* note 241; *see also* *Hamdan v. Rumsfeld*, 548 U.S. 557, 632 (2006) (citing the ICRC customary international law study for a proposition of customary law).

substantive conclusions.<sup>258</sup>

A state's secrecy and silence compounds the risks that third state and non-state actors' articulations of the law with which it disagrees will dominate international legal discourse and unduly influence the judgments of other states or courts assessing the law. A reversion to deductive methodology in identifying customary law is in one sense an effective compensation for contemporary secrecy in state conduct. If the deductive methodology continues to take root, states may see an opportunity to offset secrecy in practice with contributions of statements of the law—if they can do so credibly, backed by practice sufficient to make their talk valuable.

For a covert actor or otherwise secretive state, secrecy represents a foregone opportunity to contribute to articulating and shaping the law. As a result, the law will less closely reflect state practice and legal positions than it would in a scenario of perfect information. Law-abiding states with a wealth of secret practice would be well served to develop more sustained, creative ways of engaging in public discourse. Incremental changes that favor transparency may have significant, positive repercussions over time.

For example, when acting covertly, states should consider whether there are disclosures that can be made that do not reach the ultimate target of covertness, such as classified disclosures of legal theory to trusted partner states, or relevant facts to the public that will not jeopardize sources and methods. They should also consider the long-term consequences of covert agreements on their ability to shape public legal discourse, particularly for covert programs with expansive temporal or geographic scope that may be difficult to keep secret. Finally, states should not discount the benefits of eventually acknowledging and justifying their acts, even years later, when the conditions requiring covertness—including covert agreements—may have abated.

## 2. Internationally Unlawful Covert Conduct

States violating the law covertly seek to avoid the institutional

---

258. The methodological objections raised included failing to cite “extensive and virtually uniform” practice; crediting written materials excessively relative to actual operational practice; and “giving undue weight to statements by non-governmental organizations and the ICRC itself, when those statements do not reflect whether a particular rule constitutes customary international law accepted by States.” John B. Bellinger, III & William J. Haynes, II, *A U.S. Government Response to the International Committee of the Red Cross study Customary International Humanitarian Law*, 89 INT’L REV. RED CROSS 443, 444–45 (2007).

consequences of their breaches.<sup>259</sup> But what are the consequences of shallowly secret covert violations of law *on* the law? By refusing to acknowledge its conduct, a state is declining to endorse or defend it. A covert event cannot serve as a legitimizing precedent for other states' behavior, and in that respect, it may be less destructive than an overt, acknowledged violation.

Consider the 1999 NATO intervention in Kosovo, where the United States asserted that the air campaign was "legitimate" but did not advance a legal justification,<sup>260</sup> effectively conceding that it did not square with Article 2(4) of the U.N. Charter. Although intended to provide political justification in a way that would not be precedential, it presented the pernicious possibility of *unlawful but politically legitimate* exceptions to the Charter and customary rules on the use of force for "special cases."<sup>261</sup> Unsurprisingly, the exceptional "special case" has proven over time to be an attractive precedent. Not only was it invoked by Russia with respect to its intervention in Crimea, but its precedential potential was reportedly revisited within the U.S. government as a "possible blueprint for acting without a mandate from the United Nations" in Syria.<sup>262</sup>

States seeking to justify their behavior naturally look for legitimating, historical examples to demonstrate that their acts are not outside the normative standards of the international community. They will consider both the plausibility of a rationale and the precedential value that their justification may have. Indeed, in the Kosovo case, the United States presumably viewed non-legal justification as preferable to endorsing an inchoate legal norm of

---

259. Glennon, *supra* note 7, at 382 ("Anonymity makes violation cost-free . . . because the assignment of responsibility and the imposition of penalties are impossible.").

260. Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC'Y INT'L L. PROC. 301 (2000).

261. Falk might have been writing about the legality of the Kosovo intervention rather than covert activity when he stated, "[a] country like the United States is especially important; its noncompliance influences the whole climate within international society and undermines any effort to take international law seriously as a restraint on others." Falk, *supra* note 34, at 44.

262. Mark Landler & Michael Gordon, *Air War in Kosovo Seen as Precedent in Possible Response to Syria Chemical Attack*, N.Y. TIMES, Aug. 23, 2013, [http://www.nytimes.com/2013/08/24/world/air-war-in-kosovo-seen-as-precedent-in-possible-response-to-syria-chemical-attack.html?\\_r=0](http://www.nytimes.com/2013/08/24/world/air-war-in-kosovo-seen-as-precedent-in-possible-response-to-syria-chemical-attack.html?_r=0); Jack Goldsmith, *The Precedential Value of the Kosovo Non-Precedent Precedent for Crimea*, LAWFARE (Mar. 17, 2014, 10:00 AM), <http://www.lawfareblog.com/2014/03/the-precedential-value-of-the-kosovo-non-precedent-precedent-for-crimea/>; see also Anthea Roberts, *Legality vs. Legitimacy: Can Uses of Force be Illegal but Justified?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 179 (Philip Alston & Euan Macdonald eds., 2008).

humanitarian intervention.<sup>263</sup> Because covert behavior remains normatively illegitimate, effectively disowned by the responsible state, it cannot become a legitimizing reference point. Consequently, a state that wishes to preserve an existing rule of law but in a particular case breaches it may do less damage to the rule's stature by acting covertly than by acknowledging its violation.<sup>264</sup>

While flouting the law covertly may be inherently less corrosive to the rule than doing so overtly, from the perspective of international law, a breached norm is rehabilitated most fully through accountability. A state's dissociation from its conduct through non-acknowledgment does not assure impunity, of course, and on rare occasions, states have been held liable by the international community for brazen, covert breaches of international law. One example is the international community's response to the 1960 abduction of the Nazi war criminal Adolf Eichmann in Argentina, which Israel, maintaining the thinnest of covert veneers, claimed had been conducted by Israeli "volunteers."<sup>265</sup> Although many states were sympathetic to the political motivations behind the abduction, the Security Council, while mild in tone, characterized the act as a violation of international law and called on Israel to make reparations to Argentina.<sup>266</sup> The Security Council's formal judgment on covert violations of law reinforces the vitality of the breached legal rule by affirming that the international community broadly values the norm and will exact a penalty to foster compliance.<sup>267</sup>

---

263. The United Kingdom, for example, advocated a humanitarian intervention justification. See Adam Roberts, *NATO's "Humanitarian War" over Kosovo*, 41 SURVIVAL 102 (1999).

264. A third alternative—seeking to justify the conduct through recourse to strained, non-credible interpretations—risks the worst of both worlds: effectively conceding violation and setting an undesirable precedent. Recounting the internal U.S. government deliberations about how to justify the blockade of Cuba during the Cuban Missile Crisis, then State Department Legal Adviser Abram Chayes noted the United States ultimately declined to advance a self-defense rationale because to do so could not credibly have legitimated U.S. conduct, and "would have signaled that the United States did not take the legal issues involved very seriously . . ." CHAYES, *supra* note 208, at 66.

265. REISMAN & BAKER, *supra* note 9, at 51, 56; LOUIS HENKIN, *HOW NATIONS BEHAVE* 270 (2d ed. 1978). The United States maintained a similar posture on attribution after the Bay of Pigs invasion. Attorney General Robert Kennedy, in his defense of the legality of the operation under U.S. law, maintained that it was undertaken by refugees, acting in their private capacity, asserting their right of self-determination.

266. S.C. Res. 138, ¶¶ 5, 6, U.N. Doc. S/RES/4349 (June 23, 1960). The Security Council characterized the international law offense as affecting sovereignty, though a non-consensual abduction in foreign territory could arguably also constitute a violation of the prohibition on the use of force. See 13 Op. O.L.C., *supra* note 83, at 178.

267. This is not to suggest that the Security Council's practice in addressing alleged

*B. Secrecy and Desuetude*

Regardless of whether a state internally views its conduct as compliant with international law, its refusal to acknowledge and justify reported covert conduct casts doubt on whether it views itself as having complied with the relevant international rules. This uncertainty about the acting state's legal position is itself corrosive to the law.

The legal pragmatist Michael Glennon has argued that international legal rules lose their binding character through repeated violation. When a critical mass of states “emit conflicting signals as to whether they have become unaccustomed to, or intend no longer to be bound by, a given rule,” that rule can no longer be said to have obligatory force as law and falls into desuetude.<sup>268</sup> In turn, the rule will either be superseded by an alternative directive or replaced by the freedom principle, the default permissive condition of the international environment.<sup>269</sup> A rule that has thus lost its obligatory character—its legal character, in the pragmatist sense of law as those norms that effect compliance—may still influence government decision-making as a diplomatic or strategic consideration, but cannot be considered law. It becomes a “paper rule” rather than a “real rule.”<sup>270</sup> Thus, although no state has abrogated the U.N. Charter, the prohibition on the use of force in Article 2(4) has, as a result of many violations over the years, famously been declared “dead.”<sup>271</sup>

In assessing the legal vitality of a rule, evidence of noncompliance—that is, overt violations—carries greater weight than instances of compliance. After all, how does one identify a salient *non-use* of force, much less causally show that its non-occurrence was effected by the rule? The fact that Canada did not attack Mongolia last year, Glennon observes, and similar non-events, hardly validate that Article 2(4) commands compliance.<sup>272</sup> The most significant reflection of a rule's status, therefore, will be the disconfirming evidence.

---

covert conduct is driven primarily by legal interests rather than the political and security dimensions of particular cases.

268. Glennon, *supra* note 200, at 942.

269. *Id.* at 940.

270. *Id.* at 953, 956.

271. *Id.* at 959; Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 544 (1971).

272. Glennon, *supra* note 200, at 972.

Covert uses of force may present genuinely ambiguous legal cases. Consider, for example, reports of unconfirmed Israeli strikes against Hezbollah in Syria in recent years.<sup>273</sup> One can imagine legal theories that could be offered to justify such conduct. Perhaps Israel considers itself in an ongoing armed conflict with Hezbollah, and the strikes were directed against legitimate military targets? Or Israel was responding in self-defense to an imminent threat from Hezbollah, identified through classified intelligence, which the Syrian government was unable or unwilling to address? A fair assessment of the legal plausibility of either theory would require more information than is in the public record. Of course, it may be that the government did not believe it had a credible legal justification and—allegedly—acted anyway. Secrecy and covertness call into question whether the putative state actor felt bound by the prohibition on the use of force in a particular case, and thus whether it views Article 2(4) as obligatory.<sup>274</sup>

This Article has argued that illegality cannot be imputed from covertness, but it does not deny that a suspicion of illegality hovers around allegations of covert conduct. The instinct that a state would admit and defend its conduct if it were defensible is powerful.<sup>275</sup> When a state declines to do so, observers are likely to count alleged covert incidents—if, perhaps, in pencil—as instances of presumed noncompliance. Allegations about covert uses of force that remain unconfirmed, un-defended, and un-reconciled with the law cast lingering doubt about whether Article 2(4) was heeded or viewed as a

---

273. See, e.g., Anne Barnard & Eric Schmitt, *Hezbollah Moving Long-Range Missiles From Syria to Lebanon, An Analyst Says*, N.Y. TIMES, Jan. 2, 2014, [http://www.nytimes.com/2014/01/03/world/middleeast/hezbollah-is-said-to-transfer-missiles.html?\\_r=0](http://www.nytimes.com/2014/01/03/world/middleeast/hezbollah-is-said-to-transfer-missiles.html?_r=0) (reporting at least five unacknowledged Israeli strikes in Syria in 2013); Isabel Kershner & Michael R. Gordon, *Israeli Airstrike in Syria Targets Arms Convoy, U.S. Says*, N.Y. TIMES, Jan. 30, 2013, <http://www.nytimes.com/2013/01/31/world/middleeast/syria-says-it-was-hit-by-strikes-from-israeli-planes.html>.

274. The ambiguities are compounded when reports about attribution for an alleged covert act conflict. Consider media reports on strikes against Islamist militias in Libya in August 2014. U.S. sources attributed them to Egypt and the United Arab Emirates; Libyan sources attributed them to the United States; and a local Libyan anti-Islamist faction publicly claimed credit, though others doubted the credibility of its assertion. David D. Kirkpatrick & Eric Schmitt, *Arab Nations Strike in Libya, Surprising U.S.*, N.Y. TIMES, Aug. 25, 2014, <http://www.nytimes.com/2014/08/26/world/africa/egypt-and-united-arab-emirates-said-to-have-secretly-carried-out-libya-airstrikes.html>. A military operation by a party within the context of a civil war would raise significantly different international legal issues than non-consensual intervention by foreign states.

275. See, e.g., Alston, *supra* note 52, at 438 (“If the United States firmly believes, as the State Department’s Legal Adviser insists it does, that it is acting in full compliance with the international law, it should not hesitate to provide the evidence thereof.”).

“paper rule.” In a world in which states *never* acknowledged or justified their use of force, the relationship between international law and states’ actual conduct would be unknowable. International law would no longer guide and reflect states’ expectations of mutual behavior; it would quickly become irrelevant in international relations. The accumulation of allegations about covert uses of force in the international order toward this unstable world.

For those who view Article 2(4) as already extinct, ambiguous covert uses of force may simply confirm its disqualification as law. But Article 2(4) still has believers, who defend its status despite its incontestable historical breaches.<sup>276</sup> David Wippman has pointed out that all states “still accept it as a general standard of expected conduct powerful enough to constrain state behavior”; whether the norm is described as “social” or “legal” is a semantic distinction without much practical salience.<sup>277</sup>

Defenders of 2(4)’s legal vitality also emphasize that the trajectory of a norm is not necessarily linear, with violations constituting a “one-way ratchet” toward its demise.<sup>278</sup> Instead, the meaning of a rule can adapt over time in ways that facilitate its core relevance in evolving contexts. For example, communal understandings of the right of self-defense reflected in Article 51 of the U.N. Charter, such as what constitutes an armed attack that may permit measures of self-defense,<sup>279</sup> or interpretations of the concept of imminence in assessing a threat of armed attack,<sup>280</sup> have not been static. Such adaptation, however, occurs only when states develop, assert, and persuade others of new interpretations—processes which secrecy and non-acknowledgement generally foreclose. When a state that views its conduct as lawful acts covertly, it forgoes an opportunity to reinforce the rule, or to persuade others of its evolving interpretations.

Legal signaling—such as through conclusory assertions of lawfulness or disclosure of potentially applicable legal theories at a high level of generality<sup>281</sup>—may, in some cases, mitigate the

---

276. David Wippman, *The Nine Lives of Article 2(4)*, 16 MINN. J. INT’L L. 387, 390 (2007) (“[I]t not only stubbornly refuses to die, but sometimes emerges stronger than before.”); HENKIN, *supra* note 265, at 146.

277. Wippman, *supra* note 276, at 395–96.

278. *Id.* at 390.

279. *Id.* at 395 (noting the evolution of views on whether an “armed attack” can be perpetrated by non-state actors).

280. Bethlehem, *supra* note 221, at 770–72.

281. *See supra* Part II.B.



presumption of noncompliance. But the effect and weight of such signals will depend on the credibility of the state actor—a perception that may vary widely among audiences. Such signals cannot in any event fully dispel the corrosive effects of ambiguous covert conduct both because they remain suggestions attenuated from specific conduct by non-acknowledgment, and because they cannot *demonstrate* compliance.

Finally, the proliferation of allegations of covert conduct may well beget more unacknowledged, unjustified conduct. Glennon observed that a “self-amplifying” littering effect may accelerate the erosion of a legal rule through fostering violations. Just as littering increases when would-be litterers see litter and decide that the costs of violating anti-littering laws are low, so do “observable incidents of noncompliance” deteriorate the “psychological threshold” to violation of legal rules by other actors.<sup>282</sup> Shallowly secret covert activity that is tolerated by the international community encourages in both the covert actor and third states the practice of covert behavior, as it confirms that the political costs of covertness are low.

Where is the accumulating litter? Covert litter is, of course, by its nature not entirely “observable” or quantifiable. But there are assessments that covert behavior is on the rise.<sup>283</sup> And media reports of repeated, ongoing patterns of alleged covert activity suggest that the putative state actor perceives its conduct, even if shallowly secret, to be tolerated. Ambiguity about lawfulness, as it erodes general respect for compliance with the law, may also facilitate political tolerance by the international community.

### C. *Perpetually Deep Secrets*

Finally, although this Article focuses on covert conduct that is shallowly secret, it is worth noting that perpetually deep covert secrets leave virtually no trace on the law. Covert conduct that remains undiscovered—that is, unknown to the public and international community, or without any suspected link to the covert actor—simply leaves no residue of practice on the international scene. Its influence on the development of public international law, if any, will be incremental through effects on the acting state’s internal legal views and policies.

For example, if the covert actor believes the action was lawful, its internal legal justification might become assimilated more

---

282. Glennon, *supra* note 200, at 956.

283. See Stavridis, *supra* note 33; Wagner, *supra* note 32.

broadly into its internal legal thinking, and eventually filter into public legal discourse.<sup>284</sup> If the responsible state views the covert act as inconsistent with international law, however, its internal legacy may be to vindicate the policy of acting covertly, by validating that covertness can successfully circumvent the political and legal repercussions of breaching the law. In either case, a covert “success”—in the sense of achieving the state’s policy goal—that remains deeply secret may increase the responsible state’s confidence that it can act covertly cost-free, emboldening it to favor covert options in the future.

#### *D. The Example of Cyber Activity*

It is admittedly difficult to ascertain the magnitude of these hypothesized effects on the vitality of the law, and impossible to project what the substantive content of the law *would have been* had there been greater disclosure and engagement by states on particular topics. It seems logical, however, that in areas where the law is nascent and practice sparse, the impacts of secrecy and covertness are magnified. Nowhere are the consequences of secrecy for the law more apparent today than in the context of state cyber activity.

States’ cyber practice is almost wholly shrouded in secrecy. To date not a single state has acknowledged conducting specific cyber-attacks on another country, and the challenges of establishing an authoritative factual record of states’ cyber activity are difficult to understate. They include the technical challenges of accurate attribution and the use of private proxies to attenuate and obscure state responsibility; the fact that the some effects of cyber operations may never be publicly observable; the reluctance of states to risk jeopardizing their cyber sources and methods; the unwillingness of victim states to admit publicly that they have suffered an attack (or perhaps to reveal to the attacker that they detected its conduct); and the variable incentives for states to misrepresent—depending on the circumstances, either deny or aggrandize—their capabilities, among others. It is easy to imagine that states have undertaken cyber activities that could remain perpetually deep secrets, and difficult to see how such practice could ever inform the law.

Allegations about cyber-attacks, such as the virus dubbed Stuxnet that reportedly disrupted Iranian nuclear facilities and has been attributed in media reports to Israel and the United States, illustrate the difficulty of establishing facts in these circumstances.<sup>285</sup>

---

284. See *supra* Part II.B.1.

285. See, e.g., Ralph Langner, *Stuxnet’s Secret Twin*, FOREIGN POL’Y, Nov. 19, 2013,

Iran formally objected to cyber-attacks on its nuclear facilities in the U.N. Security Council, asserting that nuclear terrorism, including “sabotage in nuclear facilities,” is “a grave violation of principles of the U.N. Charter and international law.”<sup>286</sup> The relevant facts remain uncertain, however, and no actor has advanced a legal justification. Public commentary has generally coalesced around the view that the operation was likely unlawful as a matter of international law.<sup>287</sup>

Concerning as reports of such cyber-attacks may be, the legal precedent that would have been set by such a cyber-operation—assuming *arguendo* the accuracy of facts widely alleged—would likely be significantly more dangerous had it been overt. As it is, the reported conduct relating to Stuxnet does not establish a legitimizing precedent for future state conduct, or count as state practice evidencing the law, at least unless and until a state were to acknowledge responsibility for it. Nevertheless, the general tolerance by the international community of the alleged incident may embolden actors to pursue covert cyber practice.

In light of the paucity of verified practice of cyber uses of force, states’ *opinio juris* becomes an increasingly important indicator of states’ views about the international law applicable to cyber conduct. But while there has been much clamor to develop international norms for cyber conduct, states’ public discussion of international law has remained at a fairly high level of generality.<sup>288</sup> Moreover, even if state discussion of the law develops in greater specificity, it may seem like “cheap talk” unless backed by verifiable practice. There have been indications that at least some elements of the U.S. government are willing to risk greater transparency in cyber

---

[http://www.foreignpolicy.com/articles/2013/11/19/stuxnets\\_secret\\_twin\\_iran\\_nukes\\_cyber\\_attack](http://www.foreignpolicy.com/articles/2013/11/19/stuxnets_secret_twin_iran_nukes_cyber_attack).

286. Statement of Dr. Ali Akbar Salehi, Foreign Minister of the Islamic Republic of Iran, in New York (Sept. 28, 2012), *available at* <http://iran-un.org/en/2012/09/28/28-september-2012-2/>.

287. *See, e.g.*, John F. Murphy, *Cyber War and International Law*, 89 INT’L L. STUD. 309 (2013).

288. Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, Transmitted by Note of the Secretary-General, at 8, U.N. Doc. A/68/98 (June 24, 2013); GAOR, 68th Sess., Supp. No. 49. Perhaps the most detailed official statement to date on the application of international law to cyberspace, a speech by the U.S. State Department Legal Adviser Harold Hongju Koh in 2012, did not disclose specific practice. Harold Hongju Koh, Legal Adviser, U.S. Department of State, Remarks at Ft. Meade, MD USCYBERCOM Inter-Agency Legal Conference (Sept. 18, 2012), *available at* <http://www.state.gov/s/l/releases/remarks/197924.htm>.

practice,<sup>289</sup> though it is far from certain that other states would follow such a lead in any event.<sup>290</sup>

In light of the resounding silence of states, the most comprehensive and detailed application of international law in cyber contexts is an academic treatise, the Tallinn Manual, which presents ninety-five “black letter rules” of international law governing cyber warfare.<sup>291</sup> Most states reportedly informally welcomed the manual as a resource, though none has clearly affirmed or rejected its substantive claims; however, Russia, voiced concern that the rules facilitate the militarization of cyber conduct.<sup>292</sup> In the absence of comparably detailed state articulations of the law, it is likely to be the resource of first resort in its field to practitioners and scholars alike.

The law in this area cannot be significantly clarified or developed without a pool of publicly acknowledged state practice. Indeed, there is growing awareness of the need to drive the development of norms through state practice; there have been calls, for example, for cyber tools to be used in support of humanitarian intervention in Syria.<sup>293</sup> It is possible, however, that some powerful states’ interests may in fact favor ambiguity in the law governing cyber conduct.<sup>294</sup> If that is the case, secret and covert engagement in

---

289. See, e.g., Matthew Waxman, *Snowden Disclosures and Norms of Cyber-Attacks*, LAWFARE (Mar. 20, 2014, 11:00 AM), <http://www.lawfareblog.com/2014/03/snowden-disclosures-and-norms-of-cyber-attacks/>; Scott Shane, *Cyberwarfare Emerges From Shadows for Public Discussion by U.S. Officials*, N.Y. TIMES, Sept. 26, 2012, <http://www.nytimes.com/2012/09/27/us/us-officials-opening-up-on-cyberwarfare.html?pagewanted=all>.

290. U.S. efforts to foster greater transparency with China on cyber matters appear to have been rebuffed. David E. Sanger, *U.S. Tries Candor to Assure China on Cyberattacks*, N.Y. TIMES, Apr. 6, 2014, <http://www.nytimes.com/2014/04/07/world/us-tries-candor-to-assure-china-on-cyberattacks.html>.

291. TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE, (Michael N. Schmitt ed., 2013), available at <http://www.ccdcoe.org/tallinn-manual.html>. The manual was developed by a group of independent experts, including scholars and government practitioners acting in their personal capacities.

292. Elena Chernenko & Kommersant-Vlast, *Russia Warns Against NATO Document Legitimizing Cyberwars*, RUSSIA BEYOND THE HEADLINES, May 29, 2013, [http://rbth.com/international/2013/05/29/russia\\_warns\\_against\\_nato\\_document\\_legitimizing\\_cyberwars\\_26483.html](http://rbth.com/international/2013/05/29/russia_warns_against_nato_document_legitimizing_cyberwars_26483.html).

293. David E. Sanger, *Syria War Stirs New U.S. Debate on Cyberattacks*, N.Y. TIMES, Feb. 24, 2014, <http://www.nytimes.com/2014/02/25/world/middleeast/obama-worried-about-effects-of-waging-cyberwar-in-syria.html> (citing arguments for the United States to undertake overt cyber operations in Syria to establish a precedent for cyber humanitarian intervention).

294. See Alexandra Perina, *Countermeasures in Cyberspace*, 108 AM. SOC’Y INT’L L. PROC. 77 (2014).

cyber activities will serve states well by impeding the development of both the law and a culture of legality in cyberspace. The price, however, may be that actors who take a more prominent public role can shape legal obligations of those who are reticent.

#### CONCLUSION

Secrecy changes the dynamics of how state practice can be assessed. It alters the quality and culture of international legal discourse, which in turn shapes the law in indirect and incremental—but non-negligible—ways. States will continue to engage in conduct that they do not intend to acknowledge publicly. Governments considering the costs of secrecy and covert action in their national policies should be wary both of impoverishing international public discourse and of isolating internal legal theories from the reflective and corrective process of international engagement. If the law no longer reflects states' shared understandings, it fails to serve the purpose of organizing mutual expectations of conduct, and becomes only a tool of political rhetoric.