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## Introduction

The first two decades of the twenty-first century have seen a large increase in the scale of covert operations involving force. In particular, we have seen a significant increase in lethal attacks by unmanned armed vehicles (drones), as well as cyberattacks threatening the functioning and security of states.<sup>1</sup> The increased possibility of anonymity resulting from the use of remote warfare methods, in combination with increased public knowledge of covert operations through leaks and media reports, challenge existing understandings of the concept of ‘public’ state practice and raise questions as to the impact that covert or quasi-covert operations do and should have on the development of international law.<sup>2</sup> Recent changes in practice and communication call for closer attention to be paid to the concept of publicity in international lawmaking,<sup>3</sup> which, despite its importance, remains underexplored by international legal scholars.<sup>4</sup>

<sup>1</sup> For an overview of the drone strikes and casualties, see Bureau of Investigative Journalism, *Drone Warfare*, available at [www.thebureauinvestigates.com/projects/drone-war](http://www.thebureauinvestigates.com/projects/drone-war).

<sup>2</sup> Indeed, that the operations have been conducted in a covert manner does not preclude them from being publicly known. Covertness is rather based on the intent of the acting state, which plans and executes the operation in a way that ‘conceal[s] the identity of or permit[s] plausible denial by the sponsor’. See, United States (US) Department of Defense, ‘Department of Defense Dictionary of Military and Associated Terms’, (joint publication 1-02, 8 November 2012) (as amended through 15 March 2015) 55. While the term ‘covert’ is a term used by the United States and therefore not necessarily representative of the way in which similar operations would be described in other parts of the world, it is nonetheless widely used in debates regarding operations involving the use of force, and is, therefore, the one chosen here.

<sup>3</sup> It should be noted that ‘publicity’ as used here is different from ‘publicness’ as used in relation to debates around global institutions. See, e.g., Benedict Kingsbury and Megan Donaldson, ‘From Bilateralism to Publicness in International Law’ in Ulrich Fastenrath et al., *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011) 79; Nicholas Tsagourias and Nigel D White, *Collective Security: Theory, Law and Practice* (Cambridge University Press, 2013) 20–1.

<sup>4</sup> Though see Alexandra H Perina, ‘Black Holes and Open Secrets: The Impact of Covert Action on International Law’ (2015) 53 *Columbia Journal of Transnational Law* 507. One

The uncertain meaning of publicity is apparent in various studies on customary international law, such as the International Law Commission's (ILC) Draft Conclusions on the Identification of Customary International Law,<sup>5</sup> the 2000 report by the International Law Association's (ILA) Committee on Formation of Customary Law (ILA Report on Custom),<sup>6</sup> and the International Committee of the Red Cross' (ICRC) Study on International Humanitarian Law (ICRC Study).<sup>7</sup>

Starting with the former, the commentary to the Draft Conclusion 5 (Conduct of the State As State Practice), states that '[i]n order to contribute to the formation and identification of rules of customary international law, practice must be known to other States (whether or not it is publicly available). Indeed, it is difficult to see how confidential conduct by a State could serve such a purpose *unless and until it is known to other States*'.<sup>8</sup> The ILA Report on Custom on the other hand states that

important exception is the debate around to what extent the US drone strikes in Pakistan constitute state practice. Still, these engagements do not resolve the question of the role of covert action in the development of the law regulating the use of force, but rather illustrate the need to explore it further. See Philip Alston, 'The CIA and Targeted Killings beyond Borders' (2011) 2 *Harvard National Security Journal* 283, 326; Christoph Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc A/68/382 (4 September 2013) 5 [15]–[16]; Andrea Ó Súilleabháin, 'Interview with Mary Ellen O'Connell, International Law Expert, on US Drone Policy', *Global Observatory* (8 February 2013), available at <http://theglobalobservatory.org/interviews/432-interview-with-mary-ellen-oconnell-military-expert-on-us-drone-policy.html>. Relevant discussions concerning covert operations as state practice have also concerned the 2007 Israeli attack on the Syrian al-Kibar nuclear facility. See Andrew Garwood-Gowers, 'Israel's Airstrike on Syria's Al-Kibar Facility: A Test Case for the Doctrine of Pre-emptive Self-Defence?' (2011) 16 *Journal of Conflict and Security Law* 263; Christine Gray, 'Use of Force to Prevent the Proliferation of Nuclear Weapons' (2009) 2009 *Japanese Yearbook of International Law* 101; Tom Ruys, 'Armed Attack' and Article 51 of the UN Charter – *Evolutions in Customary Law and Practice* (Cambridge University Press, 2010) 35; Marty Lederman 'Question on 2007 Strike against Syria and Anticipatory Self-Defense' on *Opinio Juris* (6 April 2012) <http://opiniojuris.org/2012/04/06/question-on-2007-strike-against-syria-and-anticipatory-self-defense>.

<sup>5</sup> ILC, *Identification of Customary International Law: Text of the Draft Conclusions on the Identification of Customary International Law*, UN Doc A/73/10 (2018) (*Draft Conclusions on the Identification of Customary International Law*).

<sup>6</sup> Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law* (Report of the 69th Conference 1, ILA, London, 2000) 15 [5] ('ILA Report on Custom').

<sup>7</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, International Committee of the Red Cross (Cambridge University Press, 2005) xl.

<sup>8</sup> *Draft Conclusions on Identification of Customary International Law*, UN Doc A/73/10, 133, conclusion 5, commentary [5] (emphasis added).

‘[a]cts do not count as practice if they are not public’,<sup>9</sup> but continues by stating that ‘a secret physical act . . . is *probably* not an example of the objective element. And if the act is discovered, it *probably* does not count as State practice *unless* the State tries to *assert that the conduct was legally justified*.’<sup>10</sup> Finally, in the ICRC Study, ‘in order to count, practice has to be *public or communicated to some extent*’.<sup>11</sup> The rationale for this is that undisclosed ‘acts are not known to other States and, consequently, do not give them an opportunity, if they so wished, to react to them’.<sup>12</sup> According to the authors, this requirement of publicity can be fulfilled as soon as the practice is ‘communicated to one other State or relevant international organisation, including the ICRC’, which, interestingly enough, would include confidential ‘communications to the ICRC’ as such acts would not be ‘purely private’.<sup>13</sup> This is striking considering that confidential communications to the ICRC would not be ‘known to other states’ and thus would not provide states with the possibility to react.

Already, the confusion can be seen in the alternating focus on public knowledge and on the communication by the acting state. Given the uncertainty around the requirement of publicity, scholars have offered different rationales for excluding covert operations from the development of customary international law. The first argument is that there is ‘a shared understanding among States that such actions which States deny or attempt to conceal do not constitute State practice capable of

<sup>9</sup> ILA Report on Custom’, n 6, 15 [5].

<sup>10</sup> Ibid. 15 [5] commentary (a) (emphasis added). This is discussed in some detail in Chapter 3, Section 3.3.2. It is interesting here that the records of the meetings leading up to the report show no evidence of the Committee discussing the question of publicity before including Section 3.5 and its commentary into the report, and it also does not provide any sources for its conclusions. See Committee on Formation of Customary (General) International Law, *The Formation of Rules of Customary (General) International Law: First Interim Report of the Committee* (Report of the 63rd Conference 935, ILA, Warsaw 1988); Committee on Formation of Customary (General) International Law, *The Formation of Rules of Customary (General) International Law: Second Interim Report of the Committee* (Report of the 65th Conference 366, ILA, Cairo, 1992); Committee on Formation of Customary (General) International Law, *The Formation of Rules of Customary (General) International Law: Third Interim Report of the Committee* (Report of the 67th Conference 623, ILA, Helsinki, 1996); Committee on Formation of Customary (General) International Law, *The Formation of Rules of Customary (General) International Law: Fourth Interim Report of the Committee* (Report of the 68th Conference 321, ILA, Taipei, 1998).

<sup>11</sup> Henckaerts and Doswald-Beck, n 7, xl (emphasis added).

<sup>12</sup> Ibid.

<sup>13</sup> Ibid. It should be noted that the ICRC study does not provide any basis for this apart from the ILA Report on Custom discussed previously.

contributing to the development, maintenance or change of customary rules'.<sup>14</sup> A second rationale is a presumption of illegality of covert operations, suggesting that the covert manner in which the acts are conducted demonstrate that the acting state does not consider itself to be acting in accordance with international law.<sup>15</sup> The third rationale for excluding covert operations from the international lawmaking process is an assumption that such acts are not known to other states and actors, which makes it impossible for those states and actors to react to them.<sup>16</sup>

These different rationales underlying the same concept can make it difficult to determine what it means for an act to be public. What is more, they do not all hold up to closer scrutiny. In particular, while the possibility of a state denying or concealing its involvement in an operation may be due to the operation being illegal, there are also a number of other possible reasons, such as operational strategy, minimization of diplomatic tensions, and the saving of trade relationships.<sup>17</sup> Further, covert operations can sometimes be widely reported and debated, just as knowledge about fully overt acts can be poorly disseminated.

In order to address the uncertainties mentioned, it is helpful to unpack the requirement of publicity to explore its separate purposes. First, there is the purpose of communication by the acting state of how it understands the conduct in relation to existing law. Such communication would ideally come in the shape of acknowledgement and legal justification of the act by the responsible state, but can, as we will see, also take different forms, such as partial or late acknowledgements and justifications. The second purpose of publicity concerns the dissemination of knowledge around the operation and the reactions it sparks. This can range from operations that are barely mentioned, via operations widely reported but not reacted to by states, to acts that are debated amongst states in the UN Security Council. In order to avoid confusion, it is argued here that the requirement of publicity should be replaced with

<sup>14</sup> Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999) 149.

<sup>15</sup> Anthony D'Amato, 'Custom and Treaty: A Response to Professor Weisburd' (1988) 21 *Vanderbilt Journal of Transnational Law* 459, 469.

<sup>16</sup> See, e.g., Michael Wood, Special Rapporteur, *Second Report on Identification of Customary International Law*, UN Doc A/CN.4/672 (22 May 2014) 32 [47].

<sup>17</sup> Abram N Shulsky and Gary James Schmitt, *Silent Warfare Understanding the World of Intelligence* (Brassey's, 2002) 75; Jack Goldsmith, 'More on Al-Aulaqi and Transparency' on *Lawfare* (5 October 2011), available at [www.lawfareblog.com/more-al-aulaqui-and-transparency](http://www.lawfareblog.com/more-al-aulaqui-and-transparency).

the two separate requirements for practice to be both *publicly known and acknowledged*<sup>18</sup>, with the latter concerning both the conduct itself as well as the acknowledgement thereof. Compared with the singular concept of ‘publicity’, this dual requirement will make clearer the identification of directly relevant practice by states.

The central aim of this book is to explore how best to recalibrate our understanding of international lawmaking through the lens of increased reporting and legal debate around covert and quasi-covert uses of force. As will be seen, an increase in public knowledge through reports of covert operations uncovers hypocrisies in diplomatic relations upon which much of contemporary custom – with its strong basis in verbal conduct – relies, as it becomes difficult to ignore conduct that states do not acknowledge, or even deny, to be part of. It is therefore argued here that recent changes in practice illuminate the importance of understanding international law as a communicative process,<sup>19</sup> and of building the debates of the development of the law through and around social interaction of a number of actors, rather than solely around strongly formalistic concepts.<sup>20</sup> It is well recognised that it is the use of legal concepts by various actors in the international system that shape and develop their meaning.<sup>21</sup> Still, it is argued that when assessing these interactions, it is necessary to distinguish between actors of various

<sup>18</sup> For a discussion on ‘public knowledge’, see Chapter 3, Section 3.4.3.

<sup>19</sup> For an early account of international law as ‘a process of continuous interaction’, see, especially, Myres S McDougal, ‘The Hydrogen Bomb Tests and the International Law of the Sea’ (1955) 49 *American Journal of International Law* 356, 357.

<sup>20</sup> This builds upon the ‘normative practice’ approach promoted by Gerald Postema, and the ‘practice of legality’ promoted by Julia Brunnée and Stephen Toope, both notably building upon Lon Fuller’s account of law as ‘social interaction’. See Lon L Fuller, ‘Human Interaction and the Law’ (1969), 14 *The American Journal of Jurisprudence* 1; Gerald J Postema, ‘Custom in International Law: A Normative Practice Account’ in Amanda Perreau-Saussine and James B Murphy (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press, 2007) 279; Gerald J Postema, ‘Custom, Normative Practice, and the Law’ (2012) 62 *Duke Law Journal* 707; Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010) 67. For further discussion of these approaches see Chapter 3, Section 3.2.2.

<sup>21</sup> Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012); Ingo Venzke, ‘Contemporary Theories and International Lawmaking’ in Catherine Brölmann and Yannick Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar, 2016) 66; Vaughan Lowe, ‘The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?’ in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press, 2001)

authority; in the formal sense (where the distinction is often between ‘primary’ and ‘secondary’ actors),<sup>22</sup> as well as in the political sense. That is, it is important to pay attention to the political weight that formally ‘equal’ actors may have in any given context.

It is further necessary to adopt a fully articulated notion of publicity. The focus on publicity sheds light on the normative spaces created where states remain outside the debates about widely reported events and instead leave the debates to other actors, such as journalists, non-governmental organisations (NGOs), and legal scholars. This, as we will see, is of particular importance in situations where there is a need to update the interpretation of the law in light of novel developments where acknowledged and publicly known state practice is lacking, as is the case with significant aspects of the law regulating the resort to force.<sup>23</sup>

There is little doubt that there are several current challenges to the *jus ad bellum*, with the most prominent relating to the extended capacity of violent non-state actors, as well as the challenges posed by new technology allowing for greater distance and anonymity for the responsible actor. For example, the increased capacity of violent non-state groups emphasises the importance of a careful examination of the right to use force in self-defence against non-state actors.<sup>24</sup> Further, new technology

207; Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds.), *Interpretation in International Law* (Oxford University Press, 2015).

<sup>22</sup> Ian Johnstone, ‘Treaty Interpretation: The Authority of Interpretive Communities’ (1991) 12 *Michigan Journal of International Law* 371; Carsten Stahn and Eric De Brabandere, ‘The Future of International Legal Scholarship: Some Thoughts on “Practice”, “Growth”, and “Dissemination”’ (2014) 27 *Leiden Journal of International Law* 1, 3; Christian Henderson, *The Persistent Advocate and the Use of Force* (Ashgate, 2010) 24–5.

<sup>23</sup> With regard to the use of force, this is particularly clear in attempts to incorporate cyber attacks into the framework of *jus ad bellum*. This is discussed in some detail in Chapter 5.

<sup>24</sup> Debates concerning the attacks by a number of states against Islamic State in Syria illustrate the need of agreeing upon the status and parameters of the right to use self-defence against non-state actors. See, e.g., Christian Henderson, ‘Editorial Comment: The Use of Force and Islamic State’ (2014) 1 *Journal on the Use of Force and International Law* 209; Dapo Akande and Zachary Vermeer, ‘The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars’ on *EJIL: Talk!* (2 February 2015), available at [www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars](http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars); Kevin Jon Heller, ‘A “Broad Consensus” – of between Two and Four States’ on *Opinio Juris* (25 September 2015), available at <http://opiniojuris.org/2015/09/25/a-broad-consensus-of-between-two-and-four-states>; Kate Martin ‘UK’s Legal Rationale for Drone Strikes Differs Fundamentally from US Rationale’ on *Just Security* (25 September 2015), available at [www.justsecurity.org/26343/uk-rationale-drone-strikes-differs](http://www.justsecurity.org/26343/uk-rationale-drone-strikes-differs); Olivia Flasch, ‘The Legality of the Air Strikes against ISIL in Syria: New Insights on the

has brought several distinct, and mutually important, novelties that affect the way in which the law on the use of force is developed, and significant aspects of the debates around the right to self-defence against non-state actors have concerned operations that have not been publicly acknowledged and justified by the acting state.<sup>25</sup>

The increased possibilities of remote warfare allow states to conduct more large-scale operations than has been possible previously, while remaining anonymous. Not only can states (and non-state groups should they gain access to the technology) drop missiles from unmanned armed vehicles, but they may also be able to damage severely the infrastructure of a state through cyberattacks.<sup>26</sup> These developments challenge the law on the use of force in a number of ways. First of all, they require a re-examination of the definition of ‘force’ for the purpose of Article 2(4) of the UN Charter and customary international law. This is particularly so with regard to cyberattacks, but also concerning targeted killings through drone strikes. They further raise significant questions as to the scope of the right to self-defence, including around the definition of ‘armed attack’, the imminence of armed attacks, and the ‘unwilling or unable’ doctrine. The ongoing debates regarding how best to address these developments illustrate some significant difficulties, not made easier by significant aspects of state practice remaining covert.

Technology has not just changed the means of warfare, but also the dissemination of knowledge of operations. Pictures and videos of conducted operations, or their aftermath, can be spread quickly around the globe, with the spread and speed of information sharing being much greater than at any previous time in history.<sup>27</sup> This knowledge and awareness spark reactions from a number of actors, including other states, international governmental organisations, NGOs, and international legal scholars. In this way covert operations are pushed into a position where they form part of public debate despite the acting state not wishing the acts, or the state’s involvement in them, to be known.

Extraterritorial Use of Force against Non-state Actors’ (2016) 3 *Journal on the Use of Force and International Law* 37.

<sup>25</sup> See discussions and sources in Chapter 4, Section 4.5.4 and Chapter 5, Section 5.3.4.

<sup>26</sup> See, e.g., Russel Buchan, *Cyberspace, Non-State Actors and the Obligation to Prevent Transboundary Harm* (2016) 21 *Journal of Conflict and Security Law* 429.

<sup>27</sup> This development was for example acknowledged in the 2015 United States National Security Strategy, which held that access to technology provides civil society with greater tools to keep states accountable. See United States Department of State, *The National Security Strategy of the United States of America* (February 2015) 4.

For example, while the United States is still not speaking openly about its use of drone strikes on Pakistani territory, and the cyberattacks against Estonia (2007) and Iran (2010) are still surrounded by secrecy, these operations have been important focal points in international legal debates.<sup>28</sup> The covert nature of these acts does, however, affect the way in which they influence the development of international law.<sup>29</sup> An unpacked notion of publicity will make clear what acts are directly relevant as state practice for the contribution to the development of the law on the use of force, which will remove uncertainties around what acts contribute to this development. It also invites an examination into how debates around covert operations can help inform the interpretation of *jus ad bellum* in light of these challenges.

The argument of this book is built across four substantive chapters, followed by concluding reflections. In order to address properly the way in which covert and quasi-covert operations may affect the development of the law on the use of force, we must first address the extent to which the law is at all capable of development. The next chapter, therefore, introduces the debates regarding the development of *jus ad bellum*, with a particular focus on the development of the definition of force and the right to self-defence. It discusses the relationship between the rules of the UN Charter and customary international law and the way in which development of custom, as well as debates amongst other international actors, contributes to the dynamic interpretation of the Charter rules.

After having introduced the debates on the development of the law on the use of force, Chapter 3 turns to the development of customary international law and unpacks the requirement of publicity for state practice. It introduces the different levels of publicity and covertness, and closely examines the role of acknowledgement, justifications, and public knowledge within the requirement of publicity in the light of various approaches to the development of (customary) international

<sup>28</sup> For a discussion on the drone strikes, see, e.g., Alston, n 4; Mary Ellen O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009' (Legal Studies Research Paper, No 09-43, Notre Dame Law School, 2010); Amnesty International, 'As If Hell Fell on Me': *The Human Rights Crisis in Northwestern Pakistan* (Report, ASA 33/004/2010, Amnesty International, June 2010) 87–90. For cyberattacks, see Michael N Schmitt (general editor), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, 2017); Marco Roscini, *Cyber Operations and the Use of Force in International Law* (Oxford University Press, 2014).

<sup>29</sup> See, e.g., Perina, n 4.



law. The chapter illustrates how the requirement of publicity can be unpacked into two main parts, where the first relates to how a state communicates its understanding of its practice in relation to international law, and the second relates to how the act itself and – if available – the justifications provided for it, are known and reacted to by other states and international actors.

With Chapters 2 and 3 setting out the background and context for the analysis, Chapters 4 and 5 build upon this further and analyse state conduct of various levels of publicity. Chapter 4 examines quasi-covert conduct, that is, acts that are acknowledged and justified in part, hypothetical justifications not related to an acknowledgement of actual conduct, and acts that are acknowledged or justified after some time. Focusing primarily on the United States' drone strikes in Pakistan under the Obama administration, it will be demonstrated how quasi-covert operations pose significant challenges to the development of international law by creating uncertainty as to the way in which specific conduct may alter international law, and as to when states need to react in order to avoid their silence being interpreted as acquiescence.<sup>30</sup> These challenges are likely to become increasingly common as states are pushed towards transparency about aspects of national security that are not crucial to keep secret.<sup>31</sup>

Chapter 5 examines acts that are neither acknowledged nor justified by the acting state, which is of particular interest in relation to the debates concerning the inclusion of cyberattacks in the definition of 'force' and 'armed attack'. It demonstrates how covert operations differ significantly in their level of publicity and range from acts that remain secret, to acts that are the object of debates amongst states, legal scholars, and civil society, in and outside the settings of international organisations. It will be demonstrated that unacknowledged acts can affect the law in different ways depending on their level of publicity and covertness. It will also be shown that the necessity of the involvement of states in a debate around an operation can vary depending on the rule that it is informing. An

<sup>30</sup> Indeed, the US drone strikes have led scholars to ask about their potential effect on the development of the law on the use of force. See, especially, Alston, n 4, stating that 'the implications of the United States' policy in this area are of potentially major significance in the future in relation to the legal framework that will be applied to the actions of those other states': at 326. See also, Heyns, n 4, 5 [15]–[16].

<sup>31</sup> See, e.g., Orna Ben-Naftali and Roy Peled, 'How Much Secrecy Does Warfare Need?' in Andrea Bianchi and Anne Peters (eds.), *Transparency in International Law* (Cambridge University Press, 2013) 321.

unacknowledged act leading to extensive academic debate might prove very informative and play an important role in updating the already vague definition of ‘force’ in light of technological developments, but it would not have the same effect if arguing for a right to preventive self-defence against non-imminent threats, where states have been more active in the debate. It is further argued that the absence of states from certain events and debates opens up more influential participation by other international actors, such as legal scholars and other groups of experts. Using the example of the Tallinn Manual on the International Law Applicable to Cyber Warfare<sup>32</sup>, it will also be discussed how these developments, while in some ways more open and inclusive, risk further strengthening already existing power centres as the spaces provided by unacknowledged but publicly known conduct provide increased power for a small number of experts, who potentially also are involved in providing legal advice to already powerful players in the international security arena.<sup>33</sup>

The concluding chapter argues that conventional approaches addressing the development of customary international law relating to the use of force are unable to make sense of the changing practices and technologies that are explored in Chapters 4 and 5. Instead, three things are suggested. First of all, it is argued that rather than focusing on an ambiguously defined requirement of publicity, practice will meet the minimum qualitative requirement as soon as it is *publicly known and acknowledged*. As will be shown, the acknowledgement plays an important part in sending a signal to other states that this is conduct to which they will need to react in order for them not to be held to acquiesce.<sup>34</sup> Although the claim will be stronger, and reactions and non-reactions more easily interpreted, where the acknowledgement is clear and coupled with legal justifications, there should be no automatic exclusions based on a lack of legal justifications. It is further argued that, although there should be no need for acts to be of a physical nature in order to be relevant for the development

<sup>32</sup> Schmitt, n 28.

<sup>33</sup> The limitations in the membership of the group of experts has been acknowledged by, e.g., Yaroslav Radziwill, *Cyber-Attacks and the Exploitable Imperfection of International Law* (Brill Nijhoff, 2015) 8–9; Kristen E Eichensehr, ‘Book Review: Tallinn Manual on the International Law Applicable to Cyber Warfare’ (2014) 108 *American Journal of International Law* 585, 585.

<sup>34</sup> For a more detailed discussion on acquiescence, see Chapter 2, Section 2.2.3 and Chapter 5, Section 5.2.