

PUBLICITY IN INTERNATIONAL LAWMAKING

This book explores 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. Recent changes in practice and communication call for closer attention to be paid to the requirement of publicity for state practice, since they challenge the perception of the concepts ‘public’ and ‘covert’, and thus raise questions as to the impact that covert and quasi-covert acts do and should have on the development of international law. It is argued that, in order to qualify as such practice, acts must be both publicly known and acknowledged. The book further examines how state silence around covert and quasi-covert operations has opened up significant space for legal scholars and other experts to influence the development of international law.

Marie Aronsson-Storrier is a lecturer at the School of Law, University of Reading. She holds a PhD from the University of Melbourne (2017) and a Master of Laws from the University of Gothenburg (2011). Aronsson-Storrier is one of the editors of the *Cambridge Handbook of Disaster Risk Reduction in International Law* (2019) and has published in numerous areas of international law, including the law on the use of force, human rights, disaster prevention and management, and international lawmaking.

Cambridge University Press
978-1-108-49438-0 — Publicity in International Law-Making
Marie Aronsson-Storrier
Frontmatter
[More Information](#)

PUBLICITY IN
INTERNATIONAL
LAWMAKING

Covert Operations and the Use of Force

MARIE ARONSSON-STORRIER
University of Reading



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-108-49438-0 — Publicity in International Law-Making
Marie Aronsson-Storrier
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108494380

DOI: 10.1017/9781108637671

© Marie Aronsson-Storrier 2020

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2020

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Aronsson-Storrier, Marie, author.

Title: Publicity in international lawmaking covert operations and the use of force / Marie Aronsson-Storrier, University of Reading.

Description: Cambridge, United Kingdom ; New York, NY : Cambridge University Press, 2019. | Includes index.

Identifiers: LCCN 2020018635 (print) | LCCN 2020018636 (ebook) | ISBN 9781108494380 (hardback) | ISBN 9781108714501 (paperback) | ISBN 9781108637671 (epub)

Subjects: LCSH: Intervention (International law) | Aggression (International law)

Classification: LCC KZ6368 .A725 2019 (print) | LCC KZ6368 (ebook) | DDC 341.5/84–dc23

LC record available at <https://lcn.loc.gov/2020018635>

LC ebook record available at <https://lcn.loc.gov/2020018636>

ISBN 978-1-108-49438-0 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

CONTENTS

<i>Acknowledgements</i>	viii
1 Introduction	1
2 The Use of Force and the Scope for Dynamic Development	13
2.1 Introduction	13
2.2 Dynamic Interpretation of the UN Charter Rules on the Use of Force	15
2.2.1 The UN Charter Rules and Customary International Law	19
2.2.2 Contentious Issues in the Interpretation of Article 2(4) UN Charter	21
2.3 Actors within the Interpretation of the UN Charter Rules	26
2.4 Covert Operations and the Development of <i>Jus ad Bellum</i>	33
2.5 Conclusion	35
3 Customary International Law and the Requirement of Publicity	37
3.1 Introduction	37
3.2 Customary International Law	40
3.2.1 Addictive Addition: State Practice and <i>Opinio Juris</i>	40
3.2.2 Alternative Approach: The Turn to Normativity	48
3.2.3 Silence and Acquiescence	51
3.3 The Requirement of Publicity	56
3.3.1 Positioning Publicity within International Law	56
3.3.1.1 'Public' and 'Secret' Agreements: Creating the In- and Outside of International Law	56
3.3.2 Publicity in Contemporary Debates on Customary International Law	59
3.4 Justifications, Acknowledgements, and Public Knowledge	70
3.4.1 Justifications	70
3.4.1.1 Necessity of Justifications for Physical Acts	70
3.4.1.2 The Nature of Justifications	72

3.4.2	Acknowledgements	74
3.4.3	Public Knowledge of Acts in the Absence of Acknowledgements and Justifications	76
3.5	Different Levels of Covertness and Publicity	78
3.5.1	Communication by the Acting State	79
3.5.2	Public Knowledge	81
3.6	Conclusion	87
4	Quasi-Covert Operations and the Identification of Claims	88
4.1	Introduction	88
4.2	Delayed Acknowledgements	89
4.2.1	Delayed Acknowledgement of Completed Operations	90
4.2.2	Delayed Acknowledgement of Ongoing Operations	91
4.3	Hypothetical Justifications	92
4.4	Partial Acknowledgements	94
4.5	Illustration: The United States Drone Strikes in Pakistan	97
4.5.1	Background	98
4.5.2	The Road towards Transparency	99
4.5.3	Reactions to the Strikes and the Justifications	104
4.5.3.1	States and International Governmental Organisations	105
4.5.3.2	Academic Commentary	108
4.5.4	United States Drone Strikes and the Development of the <i>Jus ad Bellum</i>	111
4.5.4.1	United States Drone Strikes and the Right to Use Self-Defence against Non-State Actors	113
4.5.4.2	United States Drone Strikes and Temporality of Self-Defence	123
4.6	Conclusion	129
5	Unacknowledged Operations	130
5.1	Introduction	130
5.2	Different Levels of Publicity of Unacknowledged Acts	131
5.2.1	Unacknowledged Operations Triggering Reactions by Other States	132
5.2.2	Publicly Known, but Unacknowledged, Acts to Which States Remain Silent	137
5.2.2.1	Acquiescence to Unacknowledged Acts	137
5.2.2.2	Public Debate and Interpretation of the Charter Rules	141
5.3	Illustration: Cyberattacks	141
5.3.1	Cyberattacks against Estonia and Iran	143
5.3.2	Cyberattacks and the Definition of 'Force'	147

CONTENTS

vii

5.3.3	Attribution of Responsibility for Cyberattacks	151
5.3.4	Cyberattacks and the Right to Self-Defence	154
5.3.4.1	Cyberattacks and the Definition of ‘Armed Attack’	154
5.3.4.2	Cyberattacks and Temporality	155
5.3.4.3	Cyberattacks and Necessity	157
5.3.4.4	Cyberattacks and Proportionality	158
5.4	Cyberattacks and the Dynamic Interpretation of <i>Jus ad Bellum</i>	159
5.5	Conclusion	160
6	Concluding Remarks	162
	<i>Index</i>	169

ACKNOWLEDGEMENTS

I am incredibly thankful to all the people around the world who have supported me throughout the journey that has led to the publication of this book. The book is based on my PhD dissertation and I am first and foremost deeply grateful to my PhD supervisor Anne Orford for her invaluable intellectual guidance. I would also like to thank my secondary supervisor Kevin Jon Heller and the rest of my academic committee at Melbourne Law School, Dianne Otto, Adrienne Stone, and Shaun McVeigh, as well as my PhD examiners, Nigel White and Pål Wrangé. I truly appreciate all their advice and support through my PhD process and beyond. I would also like to give a special thank you to my wonderful friends and colleagues in Melbourne and Reading for endless encouragement, laughs, and support. You know who you are.

My PhD research was generously supported by the Melbourne International Research Scholarship and Melbourne International Fee Remission Scholarship. In addition to this primary source of PhD funding, Melbourne Law School Research Support Funds allowed me to present my research at the University of Liverpool, University of Nottingham, University College London, King's College London, and the University of Hull. Funding from the Asia Pacific Centre for Military Law and the Australia and New Zealand Society of International Law (ANZSIL) also provided me with the opportunity to present at the 2014 ANZSIL Conference in Canberra.

The research project benefitted from the opportunity to present initial thoughts and ideas at the Melbourne Law School (MLS) Research Support Seminar series led by Kirsty Gover, and at doctoral roundtables at the University of Melbourne with Martti Koskeniemi, James Crawford, and Ralph Zacklin, as well as at the 2013 Future Lawyers Tackling Tomorrow's Legal Challenges Conference at the University of Liverpool. I also had the pleasure of presenting early drafts of what is now Chapter 3 at a roundtable with Mark Antaki at Melbourne Law School in 2013, and at the 2013 Melbourne Doctoral Forum on Legal Theory. The argument

in Chapter 4 around quasi-covert operations and United States drone strikes was strengthened by discussions at a 2013 MLS Graduate Research Workshop and at a 2014 seminar at the Security Group at the University of Nottingham. Section 4.5 of Chapter 4 was published in an earlier format as part of Marie Aronsson, 'Remote Law-Making? American Drone Strikes and the Development of *Jus ad Bellum*' (2014) 1 *Journal of Use of Force and International Law* 273. The arguments in Chapter 5, as well as the core arguments of the book, have benefitted greatly from discussions around papers I presented at the 2014 Society of Legal Scholars Conference in Nottingham, the 2014 UCL Laws Post-graduate and Early Careers Conference, the 2015 International Graduate Research Conference at King's College, London, and the 2015 Making International Custom More Tangible Conference at the University of Hull. I am grateful to everyone who engaged with my work at any of these events.

I am indebted also to the reviewers of my book proposal whose comments I found invaluable, and to Tom Randall for his fantastic encouragement and support.

I am fortunate to have many homes, and there are not enough words in the world to thank my friends and family for being so wonderful and supportive, even if we are rarely in the same country. In particular, I would like to thank my parents Louise and Hans, and my sister Susanne, for giving me the most amazing start in life, and for continuing to make me feel as though I can achieve anything I set my mind to. I am incredibly lucky to have them in my life.

Finally, I would like to thank Adrian, my partner in life, for always believing in me, and for tirelessly reading my drafts and engaging with my ideas. More importantly, while constantly reminding me of the importance of my research, he also keeps finding ways to make me laugh and remember the importance of all other aspects of life. This journey has been his just as much as it has been mine.

Cambridge University Press
978-1-108-49438-0 — Publicity in International Law-Making
Marie Aronsson-Storrier
Frontmatter
[More Information](#)
