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International Law: Explaining International Acts

Chimène I. Keitner

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In international law as in domestic law, the *why* of State action matters, not just the *what* of State action. The "culture of justification" that exists at the international level includes an expectation that States will articulate the legal and policy bases for their actions, particularly when such actions depart from accepted norms of State behavior.[2] In a variety of contexts, States are expected—and seek—to explain their international acts.

Although deliberative processes that lead to international acts may not be judicially reviewable to the same extent as those that lead to purely domestic acts, the push for transparency among domestic constituencies, as well as other oversight mechanisms, create *ex ante* incentives for integrity in decision-making processes and rationales in the conduct of foreign affairs. In addition, *ex post* explanations of international acts may themselves carry legal significance as expressions of a State's *opinio juris*, or sense of legal obligation. Scholars and practitioners should not discount the culture of justification that exists at the international level, even outside international courts and tribunals.

Forms and Functions of International Legal Justification

International legal rules can create, shape, and constrain policy options in the conduct of foreign affairs. In government as in the private sector, policy clients want to understand what the rules are, why and how they apply, and what courses of conduct are legally available. They may also seek to identify opportunities to shape the legal environment in which they operate, in order to maximize the material and nonmaterial benefits enjoyed by stakeholders. Articulating public

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1. Summarized and excerpted from Chimène I. Keitner, *Explaining International Acts*, 63 MCGILL L.J. 1 (2018). The author served as Counselor on International Law in the U.S. Department of State in 2016-2017. This article was written after she left that position and does not necessarily reflect the views of the U.S. government.

2. Étienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31 (1994) (introducing the term "culture of justification").

justifications for their international acts enables States to shape the understandings and expectations of other actors in the international legal system.

Foreign ministry legal advisers act as intermediaries between the domestic and international legal realms by translating international law for domestic decisionmakers, and by conveying a State's international legal positions to foreign counterparts. Internally, foreign ministry legal advisers identify what actions a State can take consistent with its international (and, at times, domestic) legal obligations. Certain actions may be, in the words of former U.S. State Department Legal Adviser Harold Koh, "lawful but awful."[3] Others fall squarely within the range of legally available options, and legal advisers can help policy clients map out the potential implications and repercussions of different approaches. Yet other actions may, in rare circumstances, be deemed "illegal but legitimate,"[4] such as the NATO air campaign in Kosovo in the spring of 1999. The legal reasoning underpinning this *ex ante* advice is generally shielded from public view, at least at the time it is issued, to promote comprehensiveness and candor.

Publicly articulating the international legal rationales that underpin a State's actions may serve a variety of functions, in addition to clarifying and crystallizing the rules of customary international law, which are formed by nearly uniform state practice accompanied by a sense of legal obligation. U.S. Secretary of State Elihu Root, who was later awarded a Nobel Peace Prize for his work on international arbitration, posited in 1907 that "[t]he more clearly and universally the people of a country realize the international duties and obligations of their country, the less likely they will be to resent the just demands of other countries that those obligations and duties be observed."[5]

U.S. State Department Legal Advisers have long engaged in "legal diplomacy" with U.S. partners, and have also endeavored to explain the international legal framework governing U.S. actions to a wider audience. For example, in 2016, State Department Legal Adviser Brian Egan stated that "[l]egal diplomacy builds on common understandings of international law, while also seeking to bridge or manage the specific differences in any particular State's international obligations or

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3. Harold Hongju Koh, *The State Department Legal Adviser's Office: Eight Decades in Peace and War*, 100 GEO. L.J. 1747, 1758 (2012).

4. THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000).

5. Elihu Root, *The Need of Popular Understanding of International Law*, 1 AM. J. INT'L L. 1, 2 (1907).

interpretations."[6] Egan emphasized that "[e]ven if other governments or populations do not agree with our precise legal theories or conclusions, we must be able to demonstrate to others that our most consequential national security and foreign policy decisions are guided by a principled understanding and application of international law."[7]

In the United States, the role of setting forth such explanations often falls to the State Department Legal Adviser, whose ability to speak authoritatively on behalf of the U.S. Government is buttressed by his or her status as a Senate-confirmed official. Although the task of public explanation may fall to different officials in different countries, States routinely use legal terms to describe their own actions and characterize other States' behavior. Even if some of this "international law talk" is strategic, reference to international law has become embedded in States' decisionmaking and shapes their assessment of legally available courses of conduct, whether or not that conduct is judicially reviewable.

States' practice of justification extends beyond foreign ministries. Government lawyers across agencies may also coordinate directly regarding their respective legal interpretations and craft public communications setting forth shared legal views. International law thus not only shapes—and is shaped by—interactions and negotiations among States, but also by interactions and negotiations among different agencies within States, each with its own institutional culture, equities, perspective, and personnel. Although such interactions are more likely to characterize deliberations in liberal democracies than authoritarian States, they illustrate a convergence between domestic and international decisionmaking processes, and the role of law in each, across a range of issue-areas.

Justifying Uses of Force

When a State engages in acts that are not self-evidently reconcilable with accepted international legal rules, that State has three basic options with regard to public explanation: (1) offering a legal rationale and attempting to persuade relevant audiences that its actions can be accommodated within existing legal rules, or that the legal rules should be modified; (2) offering a policy rationale, while attempting to

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6. Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations*, 92 INT'L L. STUD. 235, 244 (2016).

7. *Id.* at 247.

preserve the integrity and binding force of potentially conflicting legal rules; and (3) remaining silent.

By way of illustration, the United Kingdom and the United States adopted different approaches in justifying their respective participation in the NATO bombing campaign in Kosovo in 1999. The United Kingdom chose the first option, embracing humanitarian intervention as internationally lawful in certain circumstances, even absent Security Council authorization. The United States, by contrast, chose the second option. As Acting Legal Adviser Michael Matheson explained, "[t]here was broad consensus within NATO that armed action was required to deal with intolerable atrocities by the Federal Republic of Yugoslavia (FRY) in Kosovo, but also a shared concern that the chosen justification not weaken international legal constraints on the use of force."[8] As a result, "NATO decided that its justification for military action would be based on the unique combination of a number of factors that presented itself in Kosovo, without enunciating a new doctrine or theory."[9] He acknowledged that "[t]his process was not entirely satisfying to all legal scholars," but in his view "it did bring the Alliance to a position that met our common policy objectives without courting unnecessary trouble for the future."[10]

The problem of "courting unnecessary trouble for the future" is difficult to avoid in a legal system in which norms are shaped by behavior, as underscored by Jack Goldsmith's later assessment of "the precedential value of the Kosovo non-precedent precedent for Crimea."[11] Regardless of accompanying disclaimers, the rationale offered for past actions will, predictably, be invoked by other actors in defense of their own conduct. This does not, however, mean that precedents are infinitely malleable. When Vladimir Putin cited the "well-known Kosovo precedent" to justify the annexation of Crimea,[12] many observers rejected this as spurious. As with any system of argumentation and legitimation, the mere ability to advance an argument does not mean that the argument will be accepted as valid by other participants in the system.

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8. Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 ASIL PROC. 301 (2000).

9. *Id.*

10. *Id.*

11. Jack Goldsmith, *The Precedential Value of the Kosovo Non-Precedent Precedent for Crimea*, LAWFARE (Mar. 17, 2014); *see also* Jack Goldsmith, *The Kosovo Precedent for Syria Isn't Much of a Precedent*, LAWFARE (Aug. 24, 2013).

12. Address by President of the Russian Federation (Mar. 18, 2014).

When the United Nations Security Council declines to exercise its power to authorize intervention in situations of mass atrocities under Chapter VII of the U.N. Charter, States that are unwilling to forego the use of force as a foreign-policy tool must either craft theories of humanitarian intervention or invoke (and possibly seek to expand) definitions of permissible acts of self-defense. Some States articulate *ex ante* legal rationales, whereas others may let the *ex post* reactions of other States (whether in the form of condemnation or acquiescence) serve as a barometer of the perceived conformity of an act with the applicable legal framework. Although the constraining function of law and its accompanying culture of justification are more visible when actors offer legal rationales explicitly, actors' sensitivity to the reactions of other community members also attests to the character of the international community as one governed by norms and not just sheer power.

Lawyers, Policymakers, and Public Discourse

The distinction between what countries say and do *as a legal matter*, and what they say and do as a matter of policy, carries significant weight in a system of customary international law built on evidence of state practice accompanied by *opinio juris*. Some have expressed the view that, in the words of former U.K. Foreign Secretary Jack Straw, "the range of reasonable interpretations [of international law] is always almost greater than in respect of domestic law."[13] This overstates the case. In domestic as in international law, however, the test of an interpretation's "reasonable[ness]" lies in the reactions of the relevant interpretive community, which may include a range of domestic government actors, foreign governments, and international bodies.

Members of civil society also belong to the interpretive community of international lawyers. In the absence of voluntary public communication or release of legal and policy justifications, governmental entities may be compelled to make certain documents public under applicable provisions of national freedom-of-information acts. There are, however, strict limits on compelled disclosure. For example, in *Corderoy & Ahmed*, the U.K. Upper Tribunal upheld the Information Commissioner's decision to deny requests for legal advice given to the Attorney General about a British drone attack in Syria in

13. Letter titled *Iraq: Second Resolution* from Foreign Secretary Jack Straw to Attorney General (Feb. 6, 2003).

2015 that killed two British citizens.[14] The event was significant in part because it was "the first time in modern times that a British asset ha[d] been used to conduct a strike in a country where [the United Kingdom] is not involved in a war."[15]

The *Corderoy* court appended to its opinion the April 27, 2016, Report of the Joint Committee on Human Rights of the House of Lords and House of Commons, which disavowed any desire "to see the Governments' confidential legal advice" while insisting that "considerations of transparency and democratic accountability require the Government to explain publicly its understanding of the legal basis on which it takes action which so seriously affects fundamental rights."[16] In the Joint Committee's view:

> When dealing with an issue of such grave importance, taking a life in order to protect lives, the Government should have been crystal clear about the legal basis for this action from the outset. They were not. Between the statements of the Prime Minister, the Permanent Representative to the UN and the Defence Secretary, they were confused and confusing.[17]

The Joint Committee's request for clarification from the government represents another contribution to international law's culture of justification, embedded within the U.K.'s domestic culture of legal justification and consultation of Parliament.

This and other examples illustrate the continuing relevance, and limits, of former U.S. State Department Legal Adviser Abram Chayes's observation that "the requirement of justification provides an important substantive check on the legality of action and ultimately on the responsibility of the decision-making process."[18] On the one hand, government lawyers must, as a general matter, be able to articulate a "reasonable" account of a proposed action's international lawfulness in order for that action to be considered. On the other hand, as illustrated by the Chilcot Inquiry into the United Kingdom's controversial decision to participate in military action in Iraq in 2003, legal advice is rarely insulated from perceived policy imperatives, and lawyers will

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14. *Corderoy & Ahmed v. IC, A-G & CO* [2017] UKUT 495 (AAC).

15. *Id.* at ¶ 12.

16. *Id.*, Schedule to Decision at ¶ 3.7.

17. *Id.* at ¶ 3.18.

18. ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 42 (1974).

often (although not invariably) endeavor to accommodate political decisionmakers' desired courses of action within available legal frameworks.[19] Public debate about the lawfulness of particular actions, both within other branches of government and among members of civil society, can help create pressures for more robust legal justifications (for example, raising the threshold for what counts as a "reasonable" interpretation) and impose additional costs on decisionmakers for taking actions that deviate too widely from accepted norms of behavior. International law does not, as a general matter, require States to offer affirmative public justifications for their actions. However, States routinely offer explanations (and respond to others' explanations) in various fora in response to community expectations, and in order more effectively to influence the evolution of standards of behavior within the community.

In the end, international law's culture of justification—comprised of the exchanges prompted by public interpretations and elucidations of applicable rules—provides the context within which international legal actors operate. In the international arena, the farther away an action falls from the agreed core of legally available options, the more likely it is to generate international condemnation, and to lead to the imposition of diplomatic and other costs on the offending actor. In the domestic sphere, at least in liberal democratic States, the absence of an acceptable international legal justification provides constituents with a basis for challenging and scrutinizing governmental actions. As Evan Criddle and Evan Fox-Decent have observed, "[t]he compulsion of legality, of course, provides no assurance against an executive determined to breach its international legal obligations, or (what is more likely) to interpret them in an unreasonable manner."[20] However, they continue, "the compulsion of legality is a necessary condition of constitutional democracy because it embodies the rule of law," including the State's "unwillingness to reject openly the legal basis of its legal and political authority."[21] While Criddle and Fox-Decent emphasize the important role of international courts, less formal mechanisms—such as domestic and supranational committees of inquiry, diplomatic correspondence, and the "court of public opinion"—also play a crucial role in setting the expectation that States will explain their international acts, and that their acts will, by and large, conform to generally accepted notions of legally justifiable

19. 5 THE REPORT OF THE IRAQ INQUIRY § 5 (July 6, 2016).

20. EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 330 (2016).

21. *Id.*

conduct. By speaking the language of international law, States engage in conversations that help define the terms of, and create the conditions for, their coexistence.