

RESEARCH ARTICLE

When intelligence accountability backfires: How states' strategic legal justifications undermine international law

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Abstract

This article examines the paradoxical effects of international legal accountability processes on the international law of intelligence. In response to increasing exposure of their intelligence activities, liberal democracies have shifted from a national security culture of secrecy to one of legal rationalisation, offering legal justifications to defend and legitimate contested practices. Rather than improving compliance, accountability processes have enabled states to strategically reshape legal norms to accommodate their preferred policies. Focusing on how legal justifications affect international law's constraining function, the article analyses the effects of legal justifications on three dimensions of legal norms: obligation, precision and delegation. Intertwining doctrinal legal analysis with International Relations scholarship on rhetorical and justificatory approaches to international law, it identifies four causal mechanisms through which strategic legal justifications decrease law's constraining power on state behaviour and facilitate norm evasion. The article demonstrates how strategic uses of international law for legitimisation purposes can gradually alter legal norms without formal changes to legal texts or institutions, ultimately decreasing international law's constraining power. Shedding light on the limits and risks of legalisation as a regulatory strategy, these findings raise important questions about the effectiveness and adequacy of legal accountability strategies, particularly strategic litigation, in inducing behavioural change.

Keywords: intelligence; international law; legitimisation; norm evasion; strategic uses of law

Introduction

With the increased exposure of intelligence activities,¹ states are now expected to use legal arguments to explain, justify or contest intelligence acts and policies. Historically, states

¹This article purposefully adopts a broad definition of intelligence to encompass both mainstream intelligence collection and the various forms of active measures conducted in the name of safeguarding national security. Intelligence is, therefore, defined 'the mainly secret activities – targeting, collection, analysis, dissemination and action – intended to enhance security and/or maintain power relative to

mostly remained silent on their intelligence practices, at best uttering ‘neither confirm nor deny’. In recent years, however, processes of international legal accountability² have provided states with an opportunity to change the law informally through their legal interpretations and justifications.³ Rather than adapting their behaviour to the demands of international law, liberal democracies respond to claims that their intelligence activities are unlawful with justifications defending their lawfulness. This article argues that states’ strategic legal justifications may undermine international law’s constraining function.

During the Cold War and in its immediate aftermath, intelligence was widely considered to be an extra-legal matter. Apart from a single case about domestic surveillance,⁴ international courts had made no explicit pronouncement on the legality (or lack thereof) of intelligence activities.⁵ States also abstained from using words like ‘intelligence’ or ‘espionage’ in international law-making and generally refrained from commenting on the matter.⁶ As Simon Chesterman summarised it, during the Cold War, intelligence existed in a ‘legal penumbra, lying at the margins of diverse legal regimes and at the edge of international legitimacy’.⁷ The national security culture of the time was one of secrecy, characterised by plausible deniability.⁸

During the same timeframe (roughly 1944–2001), states adopted and ratified most of the treaties constituting the current international legal order. The legal obligations stemming from these treaties were recognised as binding on all state organs by the ratifying states. However, the secrecy surrounding intelligence activities and states’ reluctance to publicly acknowledge the applicability of international law to intelligence led to instances of non-compliance not being made public. Intelligence activities stayed mostly secret and were almost exclusively dealt with diplomatically rather than legally. Legal norms existed, but they were not enforced.

The advent of the ‘war on terror’ as a response to the attacks of 11 September 2001 (9/11), coupled with technological advances, triggered an increase in leaks and (in) voluntary disclosures. Such transparency about non-compliant behaviour created the

competitors by forewarning of threats and opportunities’. P Gill and M Phythian, *Intelligence in an Insecure World* (Wiley, 2012) 19.

²International legal accountability refers to a process that ‘involves the *legal* justification of an *international* actor’s performance *vis-à-vis* others, the assessment or judgment of that performance against *international legal* standards, and the possible imposition of consequences if the actor fails to live up to applicable *legal* standards’ (emphases in original). J Brunnée, ‘International Legal Accountability through the Lens of the Law of State Responsibility’ (2005) 36 *Netherlands Yearbook of International Law* 21, 24.

³S Duroy, ‘The Intelligence Community as a Normative Actor under International Law’ in R Buchan and I Navarrete (eds), *Research Handbook on Intelligence and International Law* (Cheltenham: Edward Elgar Publishing, 2025).

⁴ECtHR, *Klass v. Germany*, App. No. 5029/71, 6 September 1978, para 50.

⁵The ICJ declined to pronounce itself on the legality of espionage, despite several opportunities to do so. United States Diplomatic and Consular Staff in Tehran (*United States v Iran*) [1980] ICJ Reports 1980 3 (ICJ), para 40; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States*) (1986) ICJ Reports 1986 14 (ICJ), paras 123, 136–40.

⁶This is referred to as the ‘Policy of Silence’: I Navarrete and R Buchan, ‘Out of the Legal Wilderness: Peacetime Espionage, International Law and the Existence of Customary Exceptions’ (2019) 51 *Cornell International Law Journal* 897, 928.

⁷S Chesterman, ‘The Spy Who Came in from the Cold War: Intelligence and International Law’ (2006) 27 *Michigan Journal of International Law* 1071, 1130.

⁸R Sanders, *Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror* (New York: Oxford University Press, 2018) 11–12.

evidence of non-compliance and the opportunity for enforcing legal norms.⁹ Through processes of legal accountability, the international law applicable to intelligence activities has been clarified to include, in addition to the principles of territorial sovereignty¹⁰ and non-intervention,¹¹ the right to private and family life¹²; the prohibition of torture and complicity thereof¹³; the rights to access to information, to a fair trial, equal protection, and judicial protection¹⁴; the right to life¹⁵; the right to security and liberty of the person¹⁶; or the prohibition of enforced disappearance.¹⁷ It is now established that international law applies to intelligence in the same way that it applies to all other state activities.¹⁸ Furthermore, it does not distinguish between domestic and foreign intelligence agencies, both of which are state organs whose actions can engage state responsibility for an internationally wrongful act.¹⁹

By focusing on legal accountability processes, civil society actors sought to improve compliance, that is, induce a change in intelligence services' behaviour towards more respect for international law. But while these processes forced states to defend and justify their practices, they also enabled states to reshape applicable international law through strategic legal justifications. Legal justifications are claims made by competent state officials regarding the lawfulness of a given state activity or policy. Because they constitute a legitimisation strategy, these legal justifications may range from a genuine (if interested) interpretation of the law to a deceptive and misleading one, depending on how controversial the practice being legitimated is.

Legal justifications are key in a national security culture of legal rationalisation, i.e., one in which 'public authorities produce detailed legal justifications for controversial policies'.²⁰ Such a culture is characterised by a 'lawyerization' of policy-making²¹ and the use of legal rhetoric to justify and legitimate state practices. Empirically, 'international law has become the controlling discourse in inter-state legitimisation of state actions'²² and the most socially acceptable justificatory discourse in a 'rules-based international order'.

⁹S Duroy, *The Regulation of Intelligence Activities under International Law* (Cheltenham: Edward Elgar Publishing, 2023) 42–45.

¹⁰E.g., UNSC Res. 138 (23 June 1960) UN Doc. S/RES/138(1960), 'Question Relating to the Case of Adolf Eichmann'.

¹¹E.g., ICJ, *Nicaragua v. United States of America* (n 5).

¹²E.g., ECtHR, *Szabo and Vissy v. Hungary*, App. No. 37138/14, 12 January 2016.

¹³E.g., ECtHR, *Al-Nashiri v. Poland* (Judgment) App. No. 28761/11, 24 July 2014, para. 516; *Husayn (Abu Zubaydah) v. Poland* (Judgment) App. No. 7511/13, 24 July 2014, para 511.

¹⁴E.g., IACtHR, *Asociación Civil Memoria Activa v. Argentina* (Merits, Reparations and Costs) Serie C No. 516, 26 January 2024.

¹⁵E.g., Human Rights Council, 'Use of Armed Drones for Targeted Killings. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (15 August 2020) UN Doc. A/HRC/44/38, Annex, para 82.

¹⁶E.g., ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39639/09, 13 December 2012.

¹⁷E.g., IACtHR, *Goiburú et al. v. Paraguay* (Merits, Reparations and Costs), Series C No. 153, 22 September 2006.

¹⁸Duroy (n 9).

¹⁹International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, Article 4.

²⁰Sanders (n 8) 12.

²¹F Nuñez-Mietz, *The Use of Force under International Law: Lawyerized States in a Legalized World* (New York: Routledge, 2018).

²²*Ibid.*, 2.

Moreover, it is the sole discourse that – if persuasive to the relevant audience – can both legitimate states’ preferred outcomes and legally empower them to pursue their chosen policies. Importantly, strategic legal justifications may also result in a reconstruction of the law to ‘accommodate contentious practices’.²³ While International Relations (IR) scholarship has dedicated significant resources to understanding what makes a legal justification effective as a political tool,²⁴ it has thus far mostly ignored the effects of strategic uses of law *on international law*.

In this article, I analyse the effects on international law of states’ legal justifications for legitimation purposes. Because strategic legal justifications aim at making justified conduct *lawful*, my analysis focuses on how the discursive construction of lawfulness in legal practice affects international law and what the implications are for law’s constraining function. By analysing states’ justifications and interpretations as set out in legal processes (court cases, monitoring obligations, legal memoranda, etc.) and the legal outcomes (what is considered lawful, by whom, under which conditions), I assess the effects of strategic legal justifications on three key dimensions (obligation, precision, delegation) of legal norms. For this purpose, strategic legal justifications in intelligence matters constitute an excellent case study. Where plausible deniability previously prevailed, the expansion of intelligence accountability after 9/11 gave rise to a national security culture of legal rationalisation in liberal democracies.²⁵ Because the demand for compliance with international law in intelligence matters is recent, and posterior to the widespread acceptance of applicable international law by states, the effects of strategic legal justifications on this law can be readily identified and attributed to states’ legal justifications.

By intertwining doctrinal legal analysis with IR scholarship on rhetorical and justificatory approaches to international law, I show how legal justifications can affect the obligation, precision, and delegation of norms and, thereby, facilitate norm evasion, that is, ‘intentional compliance with the letter of the law but not its purpose in order to minimize inconvenient legal obligations in an arguably legal fashion’.²⁶ In particular, my analysis allows me to identify four theoretical mechanisms: (1) absent or selective practices of strategic legal justification can decrease a norm’s obligatory character when the conduct is not widely condemned by other states; (2) contested legal justifications can decrease the norm’s precision, facilitating norm evasion; (3) successful (accepted) legal justifications can increase the norm’s precision while also making it more permissive and facilitating norm evasion; and (4) when endorsed by courts, legal justifications can decrease delegation by proceduralising the law, facilitating both further strategic legal justification and norm evasion. On this basis, I argue that, in intelligence matters, strategic legal justifications may decrease law’s constraining power on state behaviour.

My argument and findings only apply to intelligence. While the definition of intelligence²⁷ adopted in this article is purposefully broad and includes active measures such as drone strikes and assassination when performed by intelligence agencies, national security intelligence still possesses several specificities compared to other areas of

²³Sanders (n 8) 14.

²⁴See overview in K Reed, ‘Strategic Use of Law in Global Politics’ *Oxford Research Encyclopedia of International Studies* (2023).

²⁵Sanders (n 8) 12–15.

²⁶ZI Búzás, ‘Evading International Law: How Agents Comply with the Letter of the Law but Violate Its Purpose’ (2017) 23 *European Journal of International Relations* 857, 862.

²⁷*Supra* (n 1).

international politics, among them states' lack of fairness and altruistic considerations, their absolute prioritisation of the 'national interest' and the relative lack of interstate accountability.²⁸ Additional research exploring the effects of states' strategic legal justifications in other areas of international politics will be needed to put forward a broader theory of the effects of strategic legal justifications on international law.

This article's main contribution is a novel appraisal of the effects of legal practice on norms. States' strategic uses of international law for legitimation purposes can gradually transform the meaning and function of legal norms, thereby undermining international law's capacity to constrain state behaviour. Importantly, this informal transformation of treaty norms²⁹ occurs in a manner reminiscent of the evolution of customary international law,³⁰ without any formal change to legal texts and institutions. Despite legal texts and institutions staying identical, the very process of legitimating controversial policies by invoking legal norms, even when ultimately unsuccessful at changing these norms' content, can decrease law's constraining power. What states present (or abstain from presenting) as lawful matters for law's constraining function.

Second, my findings have significant implications for intelligence governance. Strategic litigation constitutes civil society's preferred means to improve compliance with international law by intelligence services.³¹ My analysis of the processes and outcomes of such litigation warns that legal arguments should not crowd out other forms of criticism and resistance to intelligence in activists' toolkits. While I concur with recent sociological work that draws attention to the pitfalls of strategic litigation in legitimating governments' positions,³² I also show that strategic litigation may lastingly decrease law's constraining power. In addition, because the lawyerisation of intelligence decision-making has relegated considerations of propriety and effectiveness to the background, governments' success in making their intelligence activities lawful through strategic legal justification may end up being detrimental to the effectiveness of intelligence.

Finally, since his re-election as US President, Donald Trump's lack of engagement in the 'dishonest profession of respect for norms'³³ that characterised previous administrations (including his own) essentially signals a refusal to play the game of international law – prefiguring a possible return to a world order where 'might is right'.³⁴ As this article demonstrates, this is worrisome because a lack of legal justification where it has become expected can, if other conditions are present, effectively decrease the obligatory character of norms so much that they become optional. In parallel, liberal democracies' legal

²⁸ S Duroy, 'State Compliance with International Law in Intelligence Matters: A Behavioural Approach' (2022) 13 *Journal of International Dispute Settlement* 233.

²⁹ As Rapp notes, states tend to prefer referring codified legal norms over custom as these are more rhetorically effective. K Rapp, 'Justifying Force: International Law, Foreign Policy Decision-Making, and the Use of Force' (2022) 28 *European Journal of International Relations* 337.

³⁰ E Cannizzaro, 'How Custom Evolves' (2024) 13 *ESIL Reflections*.

³¹ B Léon-Reyes, 'An Analysis of Post-Snowden Civil Society Accountability' in D Bigo, E McCluskey and F Tréguer (eds), *Intelligence Oversight in Times of Transnational Impunity: Who Will Watch the Watchers?* (London: Routledge, 2023).

³² D Bigo, E McCluskey and F Tréguer, *Intelligence Oversight in Times of Transnational Impunity: Who Will Watch the Watchers?* (London: Routledge, 2023); C Aradau and E McCluskey, 'Making Digital Surveillance Unacceptable? Security, Democracy, and the Political Sociology of Disputes' (2022) 16 *International Political Sociology* 1.

³³ T Stevenson, 'Exquisite Americana' (2024) 46 *London Review of Books*.

³⁴ OA Hathaway and SJ Shapiro, 'A World Without Rules' (2026) *Foreign Affairs*, available at <<https://www.foreignaffairs.com/united-states/world-without-rules>>.

justifications in matters of national security intelligence have made norms so easy to evade that international law can no longer serve a constraining function in this realm. As we struggle to make sense of the shift away from a US-backed international order that was characterised by legalisation and institutionalisation,³⁵ this article's findings about the effects of strategic legal justifications on the existing international legal order should invite us to think creatively about alternatives to the binary between a resurgent 'might is right' and the dying liberal international order.

State of the art: Using international law to legitimate intelligence

Previous work on international law and intelligence has focused on how – if at all – international law constrains decision-making and action in the realm of intelligence.³⁶ Very little attention has been paid to how and to what effects international law may be used to justify and legitimate intelligence. IR scholarship on rhetorical and justificatory approaches to international law provides a theoretical starting point for understanding why and how states use international law in the intelligence realm.

The legalisation of an area of international politics – the codification of a norm into international law and its subjection to legal processes – implies that discourses seeking to justify and legitimate related actions will need to reference international law.³⁷ In other words, when an area of international politics is legalised, successful (de-)legitimation of related conduct comes to depend on the strategic use of international law.³⁸ The rationale behind the need for a legal justification is that, in a legalised international system, if an action is exposed, state actors will feel compelled to portray their behaviour as lawful.³⁹ They will do so foremost to avoid the costs of being perceived as hypocritical and untrustworthy,⁴⁰ but also to shape the interpretation of the legal norm at stake.⁴¹ Indeed, international legal norms are, by nature, subject to contestation over their 'correct' interpretation.⁴² Interpretative claims are necessary to give meaning to legal norms and can also be strategically employed by various actors in pursuit of policy goals.⁴³

With the increased exposure of intelligence activities, states are now expected to use legal arguments to explain, justify or contest intelligence acts and policies.⁴⁴ Intelligence services often prefer to act covertly as a matter of course. However, given the

³⁵M Hakimi and JK Cogan, 'The End of the U.S.-Backed International Order and the Future of International Law' (2025) 119 *American Journal of International Law* 279.

³⁶See Duroy (n 9) 33–42 for a literature review.

³⁷Reed (n 24); A Bower, 'Norms Without the Great Powers: International Law, Nested Social Structures, and the Ban on Antipersonnel Mines' (2015) 17 *International Studies Review* 347, 352–53.

³⁸F Nuñez-Mietz, 'Legalization and the Legitimation of the Use of Force: Revisiting Kosovo' (2018) 72 *International Organization* 725, 725; I Hurd, *How to Do Things with International Law* (Princeton: Princeton University Press, 2017) 134.

³⁹Rapp (n 29) 337.

⁴⁰M Poznansky, 'Feigning Compliance: Covert Action and International Law' (2019) 63 *International Studies Quarterly* 72.

⁴¹AH Perina, 'Black Holes and Open Secrets: The Impact of Covert Action on International Law' (2014) 53 *Columbia Journal of Transnational Law* 507; Búzás (n 26) 860.

⁴²DB Hollis, 'The Existential Function of Interpretation in International Law' in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (Oxford: Oxford University Press, 2015).

⁴³Hurd, *How to Do Things with International Law* (n 38); Reed (n 24).

⁴⁴M Schlanger, 'Intelligence Legalism and the National Security Agency's Civil Liberties Gap' (2015) 6 *Harvard National Security Journal* 112.

multiplication of leaks and disclosures, even policies that are to remain secret must be capable of (*ex-post*) legitimation to a wider public.⁴⁵ This tension leads to what Rebecca Sanders conceptualizes as a shift from a national security culture of secrecy to one of legal rationalisation, whereby public authorities are pressed to produce detailed legal justifications for controversial policies.⁴⁶ Without justifications, states forfeit their privileged position to legitimate their activities and shape the law.⁴⁷ Other states and non-state actors may then shape the factual and legal narrative as suits them. Furthermore, should courts get involved, the void created by a silent state or a state incapable of justifying its activities in the accepted rhetoric of international law legitimates these alternative sources.⁴⁸

Historically, justifications based on morality, religion or ideology may have been sufficient to legitimate intelligence activities to a domestic audience and foreign allies. In modern times, however, states are expected to abide by international law and appeals to other normative values will rarely suffice to legitimate their activities if these are perceived as unlawful.⁴⁹ The legalisation of international politics has induced a shift in the acceptability of non-legal legitimacy discourses, and non-legal claims will often fail to resonate with an international audience.⁵⁰ Further, other actors' use of legal rhetoric and legal processes to criticize states' activities limits states' ability to choose which discourse to respond with.⁵¹ States thus use international law to justify and legitimate (some of) their intelligence activities.

Yet, not all states engage in strategic legal justification. Exposure of intelligence activities triggers acknowledgement and legitimation attempts predominantly from liberal democracies.⁵² This empirical observation may be explained by two interrelated factors. First, in intelligence matters, democracies will often endeavour to 'distinguish themselves from authoritarian regimes by taking very seriously the question of legitimacy'.⁵³ Liberal democracies, whose reputation as such rests on a commitment to the rule of law (however superficial), cannot be perceived as acting arbitrarily and unlawfully, as being perceived as hypocritical or untrustworthy would be too costly. They thus have a clear interest in legitimising their intelligence activities through international law. Second, a key driver of the need for legitimation is an audience's insistence that officials explain themselves.⁵⁴ Whereas authoritarian regimes may only need to justify their intelligence practices to partner intelligence communities (if at all), liberal democracies may face three audiences simultaneously: the general public (including civil society), foreign states, and partner intelligence communities. While these audiences might be more sensitive to different types of legitimation (e.g., national interest, international law, effectiveness), imperatives of argumentative consistency constrain states to use similar rhetoric to satisfy

⁴⁵Sanders (n 8) 13.

⁴⁶Sanders (n 8).

⁴⁷Perina (n 41) 549; A Stimmer, *The Politics of International Norms: A Rhetorical Approach* (Cambridge: Cambridge University Press, 2025) 13.

⁴⁸Perina (n 41) 551.

⁴⁹I Hurd, 'The Empire of International Legalism' (2018) 32 *Ethics & International Affairs* 265.

⁵⁰Nuñez-Mietz (n 21).

⁵¹T Risse, "'Let's Argue!': Communicative Action in World Politics' (2000) 54 *International Organization* 1.

⁵²I have yet to come across a legal justification for an intelligence activity issued by a non-democratic state. However, non-democratic states do use law to de-legitimize other states' intelligence activities.

⁵³Bigo, McCluskey and Tréguer (n 32) 10.

⁵⁴SE Goddard and RR Krebs, 'Rhetoric, Legitimation, and Grand Strategy' (2015) 24 *Security Studies* 5, 18.

all audiences.⁵⁵ In this context, international law is the sole discourse recognised as authoritative by all three audiences.

The fact that states might have to justify their intelligence activities retrospectively forces them to evaluate options and strategies from a legal perspective, necessarily taking some options off the table because they are not publicly defensible.⁵⁶ Preparing a legal justification in case of exposure is thus pragmatically sound, even if it means renouncing activities that cannot be publicly justified. While this appears constraining, there remains a permissive effect of international law in this context. First, because law formally constrains intelligence only inasmuch as it limits states' options to those that can be justified in legal terms.⁵⁷ Second, because there is productive power in the invocation of international law.⁵⁸ As a discursive resource, law can thus produce legitimacy even for behaviour that is *prima facie* restrained by law.⁵⁹

In intelligence matters, states might assess the plausibility of legal justifications in deciding whether to carry out a policy or operation, or they might scramble for a legal justification during the operation or when exposure has become unavoidable. In the first situation, legal advisers may be tasked with producing recommendations, drafting *ex ante* legal justifications for the executive's preferred policy,⁶⁰ or they may have the power to veto or authorize the operation.⁶¹ In the latter two situations, lawyers' role is to provide *post hoc* justifications, 'attempting to turn a *fait accompli* into a lawful action'.⁶² In all these situations, legal advisers are recognised as legitimate, and often indispensable, participants in the decision-making process, evidencing what Fernando Nuñez-Mietz called the 'lawyerization' of decision-making⁶³ in intelligence matters. Regardless of the extent of lawyerisation,⁶⁴ legal advisers are the ones exercising the administration's normative role in a national security culture of legal rationalisation. Without their memoranda, legal seals of approval, and *post hoc* justifications, states would be unable to claim that their intelligence activities are lawful and, therefore, legitimate.

When confronted with the pressures to provide a legal justification for their state's intelligence policies, government lawyers may face conflicting allegiances – to the community of legal practice and to the executive. Relevant professional guidelines highlight that legal advisers have a duty to provide 'an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies'.⁶⁵ In most

⁵⁵RD Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 *International Organization* 427, 435.

⁵⁶Nuñez-Mietz (n 21) 75.

⁵⁷Sanders calls this characteristic of law the 'permissive constraint' on state practice. Sanders (n 8) 16.

⁵⁸Hurd, *How to Do Things with International Law* (n 38) 51–55; Nuñez-Mietz, 'Legalization and the Legitimation of the Use of Force' (n 38).

⁵⁹Rapp (n 29) 340.

⁶⁰See, e.g., the 'Torture Memos' (n 122).

⁶¹See, e.g., the case studies discussed in Rapp (n 29).

⁶²F Nuñez-Mietz, 'Lawyering Compliance with International Law: Legal Advisers in the "War on Terror"' (2016) 1 *European Journal of International Security* 215, 224.

⁶³Nuñez-Mietz, 'Lawyering Compliance with International Law' (n 62).

⁶⁴As Nuñez-Mietz explains, lawyerisation admits degrees, determined by the levels of empowerment of legal advisers. *Ibid* 221.

⁶⁵W Dellinger, et al., 'Principles to Guide the Office of Legal Counsel', available at <https://scholarship.law.duke.edu/faculty_scholarship/2302> Principle 1; see also H Aitken, 'The Duties of a Government International Legal Adviser' (*EJIL: Talk!*, 2 June 2020), available at <<https://www.ejiltalk.org/the-duties-of-a-government-international-legal-adviser/>>; L Parsi, 'Fabricated Legality: The Role of Legal Advisers in the Commission of International Crimes' (2024) 22 *Journal of International Criminal Justice* 19, 30.

cases, advisers' allegiance to the community of legal practice – their professional quality as legal advisers – serves as a shield against political pressures to provide interpretations of legal norms that would be clearly invalid.⁶⁶ However, beyond those cases where the criminal responsibility of legal advisers has been alleged, if not always sanctioned,⁶⁷ there are myriad instances in which legal advisers have engaged in 'creative interpretations' of international law to provide legal clearance to the administration's pre-existing policy choices.⁶⁸ Hence, far from being objective interpreters of the law, legal advisers play a key role in shaping legal norms – generally by making them more permissive.⁶⁹ They rationalise the administration's policy choices by giving intelligence activities an 'imprimatur of lawfulness'.⁷⁰

The legal justifications drafted by legal advisers and put forward by states on the international scene aim to convince an audience that the behaviour at stake complies with international law.⁷¹ If this audience is an international one, the justification can effectively shape international law and legally empower the state to pursue its interests. Such law-shaping effect provides legitimation not only for the situation at stake, but also for future, similar, situations. Importantly, for legal change to occur, the contestation process surrounding the initial legal justification must involve at least partial acceptance of the interpretation by other states and/or international courts.⁷² Without acceptance from these actors, strategic legal justification leaves the content of the law intact.⁷³ In contrast, successful strategic legal justification implies that previously unregulated, borderline or unlawful behaviour is now considered lawful, which means that the legal justification changed the legal norm's content.

Beyond the effects of successful legal justification on legal norms' content, the very process of legal justification may also affect the constraining function of norms. The causal mechanisms through which law's constraining power may decrease have not yet been theorised as such. Recent IR norm research has focused on how contestation may affect the robustness and validity of norms,⁷⁴ as well as their underlying values.⁷⁵ However, the impact of legal practice on various dimensions of legal norms has not been explored yet.

Towards a theory on the effects of strategic legal justification on international law

To analyse the effects of strategic legal justification on international law itself, I use the dimensions of obligation, precision and delegation as a reflection (however imperfect)⁷⁶ of the constraining function of legal norms. Obligation refers to the legally binding

⁶⁶Nuñez-Mietz (n 62) 225.

⁶⁷Parsi (n 65).

⁶⁸C Peever, *The Politics of Justifying Force: The Suez Crisis, the Iraq War, and International Law* (Oxford: Oxford University Press, 2013) 246.

⁶⁹Nuñez-Mietz (n 62) 237.

⁷⁰Schlanger (n 44) 184.

⁷¹Rapp (n 29) 340.

⁷²N Krisch and E Yildiz, 'The Many Paths of Change in International Law: A Frame' in Nico Krisch and Ezgi Yildiz (eds), *The Many Paths of Change in International Law* (Oxford: Oxford University Press, 2023).

⁷³Stimmer (n 47) 4.

⁷⁴Stimmer (n 47); L Zimmermann et al., *International Norm Disputes: The Link between Contestation and Norm Robustness* (Oxford: Oxford University Press, 2023).

⁷⁵H Krieger and A Liese, *Tracing Value Change in the International Legal Order: Perspectives from Legal and Political Science* (Oxford: Oxford University Press, 2023).

⁷⁶M Finnemore and SJ Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 *International Organization* 743, 747–50.

character of a norm; precision to the lack of ambiguity regarding its content; and delegation to the authority of third parties (e.g., courts or monitoring bodies) to implement, interpret and apply the norm.⁷⁷ In the following subsections, I examine how strategic legal justifications (absent/selective, present) and various reactions by the international community (no reaction, rejection, contestation, acceptance, endorsement by courts) in the realm of national security intelligence affect these three dimensions.

When strategic legal justification is absent or selective: Effects on obligation

In a legalised international system, the absence of a compliance claim for a controversial act can be perceived as an admission that the state does not consider the act to align with international law. In this context, the absence of legal justification might be motivated by three overlapping factors: (1) the state does not feel bound by international law and, therefore, not compelled to justify its conduct in international law; (2) the conduct is too egregious to be framed as lawful, even under a questionable legal interpretation; and (3) the state does not wish its conduct to shape or influence the development of the legal norm at stake. Particularly when motivated by (1) and (2), legal silence by the sponsoring state tends to raise doubts about the obligatory character of applicable norms. This is especially so as liberal democracies now frequently provide legal justifications to legitimate their intelligence activities. Hence, when these same states abstain from providing legal justifications for other exposed activities, instead relying on extra-legal arguments or abstaining from any attempt at legitimation, their silence is meaningful. In this context, states' lack of legal justification is telling not only regarding how they assess the legality of their own activities but also regarding their perception of the obligatory character of applicable norms.⁷⁸

The US' 2022 strike on Ayman Al-Zawahiri, which killed him while he was standing on his balcony in Kabul, constitutes a recent example of an act for which the justificatory process did not involve any reference to international law.⁷⁹ In contrast with other contemporary strikes for which the US has articulated a legal justification,⁸⁰ there was no claim that the killing of Al-Zawahiri was lawful in President Biden's remarks acknowledging and justifying it.⁸¹ A state's refusal to offer a legal justification for its exposed intelligence activities, as in this instance, can call into question whether the state really feels bound by applicable norms or only complies when doing so is convenient, thus undermining the norms' obligatory character.

Importantly, this effect is compounded by the lack of condemnation from other states.⁸² In this case, apart from the Taliban government of Afghanistan denouncing

⁷⁷KW Abbott et al., 'The Concept of Legalization' (2000) 54 *International Organization* 401.

⁷⁸Bower (n 37) 355.

⁷⁹Remarks by President Biden on a Successful Counterterrorism Operation in Afghanistan, 1 August 2022, available at <<https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/01/remarks-by-president-biden-on-a-successful-counterterrorism-operation-in-afghanistan/>>.

⁸⁰E.g., following a strike in Syria on 25 February 2021, President Biden sent a War Powers report to Congress and the US submitted an Article 51 letter to the UN stating that the strike was taken in self-defense. See, respectively: <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/27/a-letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-consistent-with-the-war-powers-resolution/>>; <<https://www.justsecurity.org/wp-content/uploads/2021/02/united-states-of-america-letter-to-united-nations-on-27-february-2021-syria-strike-under-article-51.pdf>>.

⁸¹Biden (n 79).

⁸²Bower (n 37) 355.

the strike as a ‘clear violation of international principles and the Doha Agreement’,⁸³ other states have either praised the killing or remained silent.⁸⁴ A state’s ambiguity about the legality of its intelligence activities may facilitate political tolerance by the international community. Even in situations of ‘implausible deniability’,⁸⁵ non-acknowledgement by the sponsoring state entertains uncertainty about its identity and generally tends to decrease the risk of escalation and retaliation.⁸⁶ The lack of legal justification also prevents other states from contesting the legal argument or its factual basis. This is particularly relevant regarding drone strikes, as their legality hinges on the recognition that an armed conflict exists or defensive force is permitted, *and* that the victim is a legitimate target under the laws of war.⁸⁷ In the case of Al-Zawahiri, both claims would be extremely difficult to sustain.⁸⁸ By abstaining from articulating a legal justification for killing Al-Zawahiri, the US thus shields itself from contestation regarding its highly contentious interpretation of applicable legal standards in similar cases.⁸⁹ Furthermore, the US’ lack of legal justification and other states’ absence of clear statements regarding the strike’s (il)legality continue to destabilize the norms.⁹⁰

A lack of condemnation by the international community also increases the risk that other actors will be incentivised to use similar practices, as it shows that the political costs of non-compliance are low,⁹¹ further undermining the norm’s obligatory character. Israel’s practice of assassinating Hamas and Hezbollah leaders in foreign states is a case in point.⁹² Tolerance or ambiguity by the international community might even legitimize the practice, effectively rendering the norm optional.⁹³ Barring clear condemnations of the conduct as a violation of international law by other states, only a judicial or quasi-judicial process of accountability would be able to redress and rehabilitate the breached norm. In this sense, state accountability might mitigate the negative effects of unacknowledged or unjustified intelligence activities on the norm’s obligatory character.

By refusing to engage in legal justification for an exposed intelligence activity, the sponsoring state renounces its role in shaping international law, ceding this power to

⁸³CNN Politics, ‘US Kills al Qaeda Leader Ayman Al-Zawahiri in Drone Strike in Afghanistan’ CNN (1 August 2022) <<https://www.cnn.com/2022/08/01/politics/joe-biden-counter-terrorism/index.html>>.

⁸⁴Al Jazeera, ‘Ayman Al-Zawahiri Killed: How the World Reacted’ *Al Jazeera* (2 August 2022) <<https://www.aljazeera.com/news/2022/8/2/al-qaeda-leader-ayman-al-zawahiri-killed-how-the-world-reacted>>.

⁸⁵R Cormac and RJ Aldrich, ‘Grey Is the New Black: Covert Action and Implausible Deniability’ (2018) 94 *International Affairs* 477.

⁸⁶C Bloch and RW McManus, ‘Denying the Obvious: Why Do Nominally Covert Actions Avoid Escalation?’ (2024) 78 *International Organization* 600.

⁸⁷Hurd (n 38) 95.

⁸⁸B Saul, ‘The Unlawful U.S. Killing of Ayman al-Zawahiri’ (2023) *Lawfare*, available at <<https://www.lawfaremedia.org/article/unlawful-us-killing-ayman-al-zawahiri>>.

⁸⁹*Ibid.*

⁹⁰P Martínez Esponda, ‘Norm-Instability as a Strategy in International Lawmaking: The Case of Self-Defence against Non-State Actors’ in N Krisch and E Yildiz (eds), *The Many Paths of Change in International Law* (Oxford: Oxford University Press, 2023).

⁹¹Perina (n 41) 579.

⁹²According to as-yet-unpublished data collected and triangulated by James Worrall, Israel performed at least 1278 such assassinations between 1980 and 2017. Very few have been explicitly acknowledged. As Israel’s practice of state-sponsored assassinations is not widely condemned by its allies, the political costs of the practice appear low enough to justify its use by other states – as has been the case since 9/11.

⁹³L Trenta, E Archambault and S Duroy, ‘The Killing of Hassan Nasrallah and How the West Legitimised Its Use of Assassination’ *The Conversation* (3 October 2024), available at <<http://theconversation.com/the-killing-of-hassan-nasrallah-and-how-the-west-legitimised-its-use-of-assassination-240247>>.

other states and non-state actors. The principle of sovereignty in cyberspace provides a contemporaneous example of a norm that is explicitly *not* being shaped by the states whose cyber operations are exposed. States are usually wary of framing their claims regarding specific incidents in cyberspace in legal terms. No state has ever claimed credit, openly or privately, for a cyber-espionage operation⁹⁴ and other states also tend to refer to (voluntary) ‘norms of responsible behaviour in cyberspace’ to complain about foreign states’ malicious cyber operations.⁹⁵ Current law-making initiatives concerning cyberspace further exemplify starkly divided positions concerning the degree of obligation to be achieved through negotiation efforts.⁹⁶ Nevertheless, the same states that favour voluntary norms, and thus a low level of obligation, sometimes claim that the principle of sovereignty has been breached by cyber operations.⁹⁷ States have also started issuing general statements about the applicability of international law in cyberspace,⁹⁸ thus providing a framework against which to issue statements about specific incidents. Altogether, this process is slowly clarifying and/or changing the scope and content of the principle of sovereignty, but without the participation as such of the states whose cyber operations have been exposed. While non-acknowledgement estops states from relying on their own or others’ conduct as evidence that defines or shapes the law, it also allows them to continue discussions regarding the degree of obligation attached to the norm unencumbered by considerations of hypocrisy.

In this case, the absence of legal justification seems motivated by a wish not to see specific conduct as shaping or influencing the (still uncertain) development of the norm. These instances of state silence exemplify a discrepancy between states’ normative desires and their cyber practices. In such situations, the absence of legal justification only minimally affects the norm’s obligatory character. Indeed, through their positions and statements in other contexts, states have clearly expressed their belief that the principle of sovereignty is applicable to cyber operations, even if its precise content in cyberspace and the level of obligation it entails are still contested. In contrast, an overt, acknowledged violation could have destructive effects on the legal development and obligatory character of the norm.⁹⁹ Hence, unlike when silence is motivated by either the impossibility of making a credible legal claim or a perception and/or posture that the conduct at stake is not regulated by international law, silence motivated by a wish for one’s conduct not to shape the law may be less damaging for norms’ obligatory character.

⁹⁴See, for various examples, F Delerue, *Cyber Operations and International Law* (Cambridge: Cambridge University Press, 2020) ch 5.

⁹⁵E.g., ‘Statement by the North Atlantic Council Concerning the Malicious Cyber Activities Against Albania’, (2022) 118 *Press Release* (8 September 2022), available at <https://www.nato.int/cps/en/natohq/official_texts_207156.htm>.

⁹⁶See S Duroy and L Khasanova, ‘Cyberespionage and Human Rights: A Disappointing Balance’ in AS Serrano (ed), *Global Cybersecurity and International Law* (Routledge, 2024).

⁹⁷This is particularly the case of states victims of cyber operations. See examples in P Roguski, ‘Russian Cyber Attacks against Georgia, Public Attributions and Sovereignty in Cyberspace’ *Just Security* (6 March 2020), available at <<https://www.justsecurity.org/69019/russian-cyber-attacks-against-georgia-public-attributions-and-sovereignty-in-cyberspace/>>.

⁹⁸A compilation of published national positions is available at: <https://cyberlaw.ccdcoe.org/wiki/List_of_articles#National_positions>.

⁹⁹Perina (n 41) 574. See also AS Deeks, ‘Intelligence Communities and International Law’ in A Roberts et al. (eds), *Comparative International Law* (New York: Oxford University Press, 2018) 268 arguing that the US’ lack of justification ‘preserves the integrity of the “ordinary rules” of international law but at the expense of suggesting that certain areas of action remain unregulated by that law’.

Still, liberal democracies' absent or selective legal justifications create a pattern of behaviour readily adopted by authoritarian regimes that (justifiably) see it as a relaxation of the obligation attached to norms.¹⁰⁰ Furthermore, as the second Trump administration does not seem to engage much in legal justification, whether domestically or internationally, findings concerning obligation bear particular relevance to the shift that our current international order is undergoing. The 'withdrawal of the justificatory ideology of American power'¹⁰¹ will likely have extensive effects on the obligatory character of the norms at the core of the international order.

When strategic legal justifications trigger contestation: Effects on precision

In all domains of international law, states' efforts to develop, assert, and persuade others of their interpretation of a legal norm can effectively (re-)shape the law.¹⁰² This change usually takes place through an ongoing process of claims and counter-claims regarding the international legality of specific conduct.¹⁰³ When intelligence activities are exposed and justified, the sponsoring state's legal justification might be accepted, decisively rejected, or contested only partially or by some actors. Accepted justifications change the content of the legal norm being invoked as justification, while rejected justifications usually have no direct effect on its content.¹⁰⁴ Justifications that are not decisively rejected or accepted in this initial contestation process do not (instantaneously) change the law's content. However, these contested justifications may affect the legal norm's precision. A contested justification temporarily erodes the norm's precision by creating doubt about the boundaries of permissible conduct. It thereby creates a precedent, providing a justification for future action, whereby the contestation process may resolve in either acceptance or rejection of the claim.¹⁰⁵ Should a protracted contestation process remain unresolved, however, the norm's precision will be lastingly eroded.

In the aftermath of Edward Snowden's 2013 revelations about bulk data collection (also known as electronic mass surveillance),¹⁰⁶ the right to privacy was the subject of a heightened contestation process.¹⁰⁷ Starting immediately after Edward Snowden exposed widespread practices of bulk data collection, states have made claims concerning the compatibility (or lack thereof) of the practices with the right to privacy in the UN General Assembly,¹⁰⁸

¹⁰⁰D Bigo, 'Transformations of the Transnational Field of Secret Services: The Reasons for a Systemic Crisis of Legitimacy?' in D Bigo, E Mc Cluskey and F Tréguer (eds), *Intelligence Oversight in Times of Transnational Impunity: Who Will Watch the Watchers?* (London: Routledge, 2023) 75.

¹⁰¹Stevenson (n 33).

¹⁰²Hurd (n 38).

¹⁰³W Sandholtz, 'Dynamics of International Norm Change: Rules against Wartime Plunder' (2008) 14 *European Journal of International Relations* 101; K Rapp, 'By Word, Not Deed: Advancing a Theory of Rhetorical Compliance in International Law' (PhD Thesis, University of Southern California, 2022) 24, 136.

¹⁰⁴Rapp (n 104) 136.

¹⁰⁵Ibid 172; Stimmer (n 47) 23–24.

¹⁰⁶For a catalogue of Edward Snowden's revelations regarding the United States' surveillance activities, see: <https://www.lawfaremedia.org/article/catalog-snowden-revelations/>.

¹⁰⁷Z Bauman et al., 'After Snowden: Rethinking the Impact of Surveillance' (2014) 8 *International Political Sociology* 121; Duroy and Khasanova (n 96).

¹⁰⁸E.g., right after Snowden's revelations, Germany and Brazil introduced a draft resolution in the UN General Assembly that envisaged the extraterritorial applicability of the right to privacy in surveillance activities. The US strongly objected. UNGA 'The Right to Privacy in the Digital Age', UN Doc A/C.3/68/L.45 (November 2013).

through diplomatic channels,¹⁰⁹ and before human rights courts and tribunals.¹¹⁰ States' repeated justificatory claims led to the progressive normalisation and legitimisation of bulk data collection and retention, eventually confirmed even by human rights courts.¹¹¹ A decade on, the contestation process surrounding the precise scope and meaning of the right to privacy has broadly settled in favour of states' permissive legal interpretations. Whereas during the contestation process, the scope and content of the legal norms guaranteeing the right to privacy were blurred, states' progressive agreement and courts' increasing acceptance of states' legal justifications curbed these claims' effects on precision – albeit to the detriment of meaningful privacy protections.¹¹²

In contrast, the contestation process surrounding the US' legal justifications concerning its drone strikes during the so-called war on terror remains largely unsettled. CIA strikes remained unacknowledged for several years until, in 2013, US President Barack Obama claimed that 'America's actions are legal. ... Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces. ... [T]his is a just war – a war waged proportionally, in last resort, and in self-defense'.¹¹³ Obama's claim that the US' strikes are internationally lawful rests on a 2010 memorandum drafted by David Barron.¹¹⁴ As pertains to international law, various claims can be identified in the memorandum, most of them a simple reiteration of the US' legal stance in its global war on terror. For ease of reading, in Table 1, I reformulate and classify these legal claims under three headings: self-defence; international humanitarian law (IHL) and international human rights law (IHRL).

These various claims have fared differently since their first invocation. Those alleging IHRL's lack of applicability (during armed conflicts and extra-territorially) have been rejected by a large majority of states¹¹⁵ and international courts and tribunals.¹¹⁶ Consequently, they hold very little legitimating power today and have had no impact on the legal norms' precision. In contrast, claims under Article 51 UN Charter (self-defence) and under IHL have not been subjected to the same level of scrutiny by (quasi-) judicial bodies. It bears noting that, as there are fewer opportunities for such review than

¹⁰⁹See, for a summary and analysis, J Smith-Colin and N Kleinhenz, 'Analyzing Public and State Reactions to Global Surveillance Disclosures: Using Ethical Frameworks to Gain Understanding' in ME Kosal (ed), *Technology and the Intelligence Community* (Springer International Publishing, 2018).

¹¹⁰See, e.g., the pleadings and participation of the governments of the United Kingdom, France, Norway, and the Netherlands in ECtHR, *Big Brother Watch and Others v. The United Kingdom* [GC], Applications Nos. 58170/13, 62322/14 and 24960/15, 25 May 2021.

¹¹¹See next section.

¹¹²Ibid.

¹¹³B Obama, Remarks by the President at the National Defense University, 23 May 2013, available at <<https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>> (emphasis added).

¹¹⁴DJ Barron, *Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi*, 16 July 2010.

¹¹⁵The US' position is closest to that advanced by Israel, along with those of Canada and the United Kingdom. Still, most states have accepted at minima the extraterritorial applicability of IHRL under the spatial and personal models of extraterritorial jurisdiction established by human rights courts and bodies.

¹¹⁶E.g., UN Human Rights Committee, 'General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) CCPR/C/21/Rev.1/Add.13 31; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (2004) ICJ Reports 2004, 136, paras 109–11; ECtHR, *Al-Skeini and Others v. The United Kingdom*, App. No. 55721/07, 7 July 2011, para 136; UNCAT, 'Conclusions and recommendations: United Kingdom of Great Britain and Northern Ireland', UN Doc. CAT/C/CR/33/3, 10 December 2004, para 4(b).

Table 1. The United States' legal claims regarding CIA drone strikes

Self-defence (<i>jus ad bellum</i>)	IHL (<i>jus in bello</i>)	IHRL
The threshold of gravity for self-defence is lower than a full-strength armed attack	The existence of a deterritorialised global armed conflict against al Qaeda justifies killing operatives on any territory	Because IHL constitutes a <i>lex specialis</i> , IHRL does not apply
Self-defence is possible against non-state actors	Any member of an organised armed group is a legitimate target	IHRL obligations do not apply extra-territorially
Anticipatory self-defence is permissible	Civilian deaths, on any territory, are legitimate collateral damages	
The unable or unwilling doctrine justifies striking on a foreign state's territory	Military necessity should be interpreted as justifying the killing of a political or moral leader not involved in combat activities	

for IHRL, states possess more leeway in their interpretations of *jus ad bellum* and *jus in bello*. Further, some of the US' claims have been positively endorsed by other states.¹¹⁷ As a result, these claims have expanded the range of defensible interpretations, thereby expanding the range of arguably permissible conduct under relevant legal norms. Because these contestation processes blur the boundaries of authorised versus proscribed conduct, they affect the norms' precision. As long as the contestation processes surrounding these claims remain unsettled, they will continue to erode the precision of the norms invoked.

Precision might also be affected as a result of secret legal justifications, for intelligence activities that might not (yet) be exposed. The lack of a public claim and open contestation process makes secret justifications difficult to rebuke while allowing them to spread insidiously within the issuing state, coalescing into an internal jurisprudence.¹¹⁸ Beyond the infamous Bybee-Yoo memoranda authorising the use of 'enhanced interrogation techniques' amounting to torture,¹¹⁹ many other secret legal memoranda were drafted to justify the US' intelligence activities in its war on terror.¹²⁰ These memoranda invoked

¹¹⁷E.g., on self-defence against non-state actors, see the positions of states summarized by AA Haque, 'Self-Defense Against Non-State Actors: All Over the Map' *Just Security* (24 March 2021), available at <<https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map/>>; and a critical analysis in Esponda (n 81). On the 'unwilling or unable' doctrine, see states' positions summarized by E Chachko and A Deeks, 'Which States Support the "Unwilling and Unable" Test?' *Lawfare* (10 October 2016), available at <<https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test>>; and a critical analysis in J Brunnée and SJ Toope, 'Norm Robustness and Contestation in International Law: Self-Defense against Nonstate Actors' (2019) 4 *Journal of Global Security Studies* 73.

¹¹⁸Perina (n 41) 555–57; L Trenta, 'Death by Reinterpretation: Dynamics of Norm Contestation and the US Ban on Assassination in the Reagan Years' (2021) 6 *Journal of Global Security Studies* 1.

¹¹⁹August 1, 2002, *Memorandum for John A. Rizzo from Jay S. Bybee, re: Interrogation of al Qaeda Operative*; August 1, 2002, *Memorandum for Alberto S. Gonzalez from Jay S. Bybee, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A*. The memoranda were authored by J Yoo and signed by J Bybee. Together with the four memoranda authored by S Bradbury, they are known as the 'Torture Memos'.

¹²⁰E.g., J Yoo, *Memorandum for William J. Haynes II, General Counsel of the Department of the Defense: Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, 14 March 2003; J Yoo and RJ Delahunty, *Memorandum for William J. Haynes II, General Counsel, Department of Defense: Re: Application of Treaties and Laws to Al Qaeda and Taliban Detainees*, 22 January 2002.

norms less robust than the prohibition on torture,¹²¹ and for which the US' legal justifications were, when eventually made public, less contested. The memoranda's authors have pursued their reasoning and arguments in their other professional positions, as scholars,¹²² professors¹²³ and judges.¹²⁴ In this way, even if the activities had remained secret and unacknowledged (as many were meant to stay), the secret legal justifications developed for them would still have influenced the state's interpretation of international law through domestic courts, university teaching and scholarly literature. Given the heightened lawyerisation of intelligence decision-making and the dominance of national security cultures of legal rationalisation in liberal democracies,¹²⁵ one may reasonably surmise that many more legal memoranda are having a similar jurisprudence-shaping effect in various states.

Incrementally, secret legal justifications shape a state's legal positions as well as, when exposure becomes unavoidable, its overt policies.¹²⁶ At this stage, the state may publicly put forward a highly consolidated legal justification, which had thus far been shielded from external feedback and contestation. Because it serves as justification for a range of past controversial practices, the sponsoring state will usually refuse to adapt its legal justification when finally faced with contestation. As the United States' *jus ad bellum* and *jus in bello* claims regarding its targeted strikes in the war on terror illustrate, due to this inflexibility and the lack of an open contestation from the beginning, the disclosure of long-standing secret legal justifications usually leads to unresolved contestation processes, carrying detrimental effects for legal norms' precision.

Through their strategic legal justifications, states reshape international law to fit their immediate policy preferences, but with effects beyond national security intelligence.¹²⁷ If, as has been the case for bulk data collection under the right to privacy, states' justifications are eventually accepted as valid by the international community, the law and its interpretation will be strengthened in their precision.¹²⁸ The changes triggered by states' legal justifications may be considered desirable, as a legal norm can adapt to ensure its relevance to evolving contexts. These changes may also be considered regrettable when states distort the law so much that it loses its meaning or boundaries. Article 51 UN Charter on the right to self-defence is an unfortunate example of such an effect.¹²⁹ In the absence of consensus about whether a terrorist attack by a non-state actor could constitute an 'armed attack' capable of triggering the right to self-defence under Article 51 and what the minimum threshold of gravity should be in such cases, the US nevertheless invoked Article 51 to justify self-defence against non-state actors, in a sometimes anticipatory manner, on foreign states' territory.¹³⁰ The highly controversial nature of the policies

¹²¹L Zimmermann et al., 'International Torture Prohibition: A Contested Norm Endures' in L Zimmermann et al. (eds), *International Norm Disputes: The Link between Contestation and Norm Robustness* (Oxford: Oxford University Press, 2023).

¹²²J Yoo wrote many law review articles defending the legality of the US' policies in its war on terror.

¹²³E.g., Yoo has been a professor at the University of California, Berkeley, School of Law since 1993; Delahunty is a professor at the University of St. Thomas School of Law in Minneapolis, Minnesota.

¹²⁴E.g., Jay Bybee now serves as a senior U.S. circuit judge of the Court of Appeals for the Ninth Circuit.

¹²⁵Peevers (n 68); N Gordon and N Perugini, "Hospital Shields" and the Limits of International Law' (2019) 30 *European Journal of International Law* 439.

¹²⁶Perina (n 41) 556.

¹²⁷Deeks (n 100) 262.

¹²⁸Military and Paramilitary Activities in and against Nicaragua (n 5), para 186; Rapp (n 29) 356.

¹²⁹I Hurd, 'The Permissive Power of the Ban on War' (2017) 2 *European Journal of International Security* 1; Brunnée and Toope (n 120).

¹³⁰See Table 1. The United States' Legal Claims Regarding CIA Drone Strikes.

being justified prevented the consensus needed for legal change. Instead, these repeated invocations to legitimate the US' war on terror undermined international law constraints on the use of force, with effects well beyond the initial response to 9/11.¹³¹ Hence, rather than ensuring the norm's continued relevance to a context whereby non-state armed groups constitute a heightened threat to states' security, states' strategic legal justifications invoking Article 51 triggered decades-long, still unresolved, contestation processes that have lastingly eroded the precision of the legal norm.¹³² Importantly, as demonstrated by Pedro Martínez Esponda regarding self-defence against non-state actors, this 'norm-destabilization' effect was only possible because other states and bodies did not seek to unambiguously clarify legal expectations.¹³³

Whether successful or contested, strategic legal justifications facilitate norm evasion, i.e., 'the intentional compliance with the letter of the law but not its purpose in order to minimize inconvenient legal obligations in an arguably legal fashion'.¹³⁴ Actors who possess sufficient legal resources to create, identify and exploit this letter-purpose gap will frame their conduct as *lawful* through a discursive construction of what legality entails, so as to avoid accountability without having to adjust their behaviour. By making the law more precise, but also more permissive, successful legal justifications often create a letter-purpose gap that can be exploited by norm evaders, as in the case of bulk data collection and the right to privacy.¹³⁵ But protracted contestation over a legal norm, as in the case of Article 51 UN Charter, also enables norm evasion. Indeed, less precise legal norms provide the requisite flexibility to manipulate legal discourse¹³⁶ and exploit loopholes, creating the conditions for evasion. Under the cover of legal compliance, states can violate the law's purpose either because the law is too imprecise to effectively govern conduct, or because it is so precise as to become formulaic, procedural or simply ineffective in constraining behaviour.¹³⁷ In his original conceptualisation of norm evasion, Zoltán Búzás noted that 'when interpretation and implementation are delegated to purposivist courts, evaders could be held legally accountable'.¹³⁸ It is, therefore, worrisome that courts sometimes succumb to states' strategic legal justifications, decreasing delegation.

When courts succumb to states' strategic legal justifications: Effects on delegation

States' strategic legal justifications are interpretations of legal norms that serve their policy preferences. These interpretations are open to contestation by other states and/or civil society. Through their treaty ratifications, states may also have conferred upon international courts and bodies a specific competence and authority to evaluate and adjudicate

¹³¹OA Hathaway, 'How the Expansion of "Self-Defense" Has Undermined Constraints on the Use of Force' *Just Security* (18 September 2023) <<https://www.justsecurity.org/88346/the-expansion-of-self-defense/>>.

¹³²M Hakimi, 'Defensive Force against Non-State Actors: The State of Play' (2015) 91 *International Legal Studies* 1.

¹³³Esponda (n 90).

¹³⁴Búzás (n 26) 862.

¹³⁵See next section.

¹³⁶Nuñez-Mietz (n 21) 82–83.

¹³⁷ZI Búzás, 'Is the Good News About Law Compliance Good News About Norm Compliance? The Case of Racial Equality' (2018) 72 *International Organization* 351; SV Percy, 'Mercenaries: Strong Norm, Weak Law' (2007) 61 *International Organization* 367.

¹³⁸Búzás (n 26) 866.

their legal claims. Such delegation to implement, interpret and apply international law usually constitutes a protective factor against the undermining effects of strategic legal justifications on law's constraining function, as courts can authoritatively reiterate legal expectations.

Whereas interstate legal disputes regarding intelligence are rare, human rights courts and bodies are increasingly used by civil society to contest states' intelligence activities.¹³⁹ However, when human rights courts deal with intelligence, the contextual factors surrounding national security consistently elicit deference to governments.¹⁴⁰ Such deference reinforces the impression that interpreting, monitoring and implementing the international law of national security intelligence constitutes the exclusive purview of states, thereby reversing back to states the original delegation to judicial and monitoring bodies.

The best example of this process is that of electronic mass surveillance. Since Edward Snowden's 2013 revelations about the NSA's bulk data collection programmes, a paradoxical legitimisation of mass surveillance by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) has occurred.¹⁴¹ In matters related to national security before these courts, Western European states consistently advocate for a state-centric vision of the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU) based on subsidiarity, a low level of human rights commitments and the minimalisation of protection of vulnerable people.¹⁴² Whether as respondent states or third-party interveners, these states repeatedly demand an increased level of deference and subsidiarity from European courts.¹⁴³ Faced with Western states' repeated claims concerning the lawfulness of their bulk data collection and retention practices and the need for increased deference in national security matters, European courts gradually moved towards a 'balance' more deferential to states' national security arguments and claimed need for mass surveillance. In short, regarding mass surveillance, both the ECtHR and the CJEU have succumbed to states' strategic legal justifications and delegated a significant part of their role as authoritative interpreters back to states.

In its 2021 Grand Chamber judgments in *Big Brother Watch* (BBW) and *Centrum för rättvisa* (CFR),¹⁴⁴ the ECtHR considered that operating a bulk interception regime is not, in principle, unlawful and/or disproportionate. Notwithstanding the lack of public evidence concerning their actual performance,¹⁴⁵ the Court found that the British and

¹³⁹Duroy, *The Regulation of Intelligence Activities under International Law* (n 9).

¹⁴⁰C Jing, 'The ECtHR's Suitability Test in National Security Cases: Two Models for Balancing Human Rights and National Security' (2023) 36 *Leiden Journal of International Law* 295.

¹⁴¹Other regional and international courts have yet to pronounce themselves on cases involving mass surveillance.

¹⁴²See, e.g., the third-party interventions by the governments of France, the Netherlands, and Norway in *Big Brother Watch* (n 113), paras 300–310.

¹⁴³For an overview of debates regarding the ECtHR, see A Donald, J Gordon and P Leach, *The UK and the European Court of Human Rights* (Equality and Human Rights Commission, 2012); B Cali, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (2017) 35 *Wisconsin International Law Journal* 237.

¹⁴⁴*Big Brother Watch and Others v. The United Kingdom* (n 113); *Centrum för rättvisa v. Sweden* [GC], Application No 35252/08, 25 May 2021.

¹⁴⁵The only public effort to demonstrate actual benefits obtained through bulk surveillance is in D Anderson, 'A Question of Trust: Report of the Investigatory Powers Review' (Stationery Office, 2015), available at <<https://www.publicinformationonline.com/shop/82361>>. Annex 9 provides six short, security-redacted, descriptions of cases of bulk data interception being used successfully. However, in all six, bulk surveillance was applied to substantiate a pre-existing suspicion rather than to identify unknown threats.

Swedish bulk interception regimes were ‘valuable’¹⁴⁶ and of ‘vital importance’¹⁴⁷ to the security of Member States. On this basis, the Court held that national authorities enjoy a ‘wide margin of appreciation in choosing how best to achieve the legitimate aim of protecting national security’.¹⁴⁸ To assess the compatibility of bulk surveillance regimes with Article 8 ECHR, the Court established a new eight-part test.¹⁴⁹ This test focuses on the regulatory framework and procedural safeguards rather than on actual practice. It assesses exclusively the ‘in accordance with law’ prong of the broader permissibility assessment and assumes satisfaction of the ‘legitimate aim’, ‘necessity’ and ‘proportionality’ prongs. This ‘turn to proceduralism’ in proportionality assessments¹⁵⁰ effectively creates a letter-purpose gap in the law, enabling norm evasion (compliance with the letter of the law while violating its purpose).¹⁵¹

When it comes to privacy, provided states’ regulatory frameworks for bulk data collection respect the eight-part procedural test established by the Grand Chamber, the regime will be deemed ‘in accordance with law’.¹⁵² If a regime satisfies this test, states only need to declare it necessary and proportionate to ensure lawfulness. These efforts are made particularly easy by the Court’s blind trust in liberal democracies’ assessments, and its minimal scrutiny of their claims. Hence, a threat to national security need not be imminent, nor does it need to be identified. It may well be potential and cumulative, and described abstractly (‘national security threats’).¹⁵³ The means chosen by the state are also readily presumed as effective for achieving the declared aim of fighting terrorism, without any demonstration or justification required.¹⁵⁴ The proceduralisation of the law thereby facilitates both norm evasion and further strategic legal justifications.

The CJEU, originally more protective of privacy rights in its caselaw on bulk data collection and retention,¹⁵⁵ recently began aligning its caselaw to the ECtHR’s. In the 2020 cases of *Privacy International*¹⁵⁶ and *La Quadrature du Net and Others*¹⁵⁷ (*LQDN*), the

¹⁴⁶BBW para 323, CFR para 237.

¹⁴⁷BBW para 424, CFR para 365.

¹⁴⁸BBW para 228, CFR para 252.

¹⁴⁹BBW para 361, CFR para 275.

¹⁵⁰A Zysset, ‘A Culture of Justification or a Culture of Presumption? The Turn to Procedural Review and the Normative Function of Proportionality at the European Court of Human Rights’ in S Schiedermaier, A Schwarz and D Steiger (eds), *Theory and Practice of the European Convention on Human Rights* (Baden-Baden: Nomos Verlagsgesellschaft mbH & Co KG, 2022).

¹⁵¹Búzás (n 26).

¹⁵²BBW para 361, CFR para 275.

¹⁵³See, e.g., the UK government’s submission (e.g., para 287: ‘hitherto unknown threats’) in BBW, and the third-party interventions by France, the Netherlands, and Norway, paras 300–301. The Court itself uses abstract references to ‘new threats’ to find that states’ bulk interception regimes are ‘valuable’ (para 323).

¹⁵⁴BBW para 323, CFR para 237.

¹⁵⁵Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others* (C-293/12) and *Kärntner Landesregierung and Others* (C-594/12) [2014] ECLI:EU:C:2014:238; Joined Cases C-203/15 and C-689/15, *Tele2 Sverige AB v. Postoch telestyrelsen* (C-203/15) and *Secretary of State for the Home Department v. Tom Watson and Others* (C-689/15) [2016] ECLI:EU:C:2016:970; Cases No. C-362/14, *Schrems v. Data Protection Commissioner*, ECLI:EU:C:2015:650 and C-311/18 *Data Protection Commissioner v. Facebook Ireland Limited and Maximilian Schrems*, ECLI:EU:C:2020:559; Case Opinion 1/15, ECLI:EU:C:2016:656.

¹⁵⁶C-623/17, *Privacy International v. Secretary of State for Foreign and Commonwealth Affairs and Others*, ECLI:EU:C:2020:790.

¹⁵⁷Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v. Premier Ministre and Others*, ECLI:EU:C:2020:791.

CJEU was faced with claims by nine EU governments arguing the lack of applicability of EU law to national security in accordance with Article 4(2) of the Treaty on the European Union (TEU).¹⁵⁸ While rejecting the claim that EU law would be inapplicable in *Privacy International*, the CJEU partially succumbed to Member States' calls for a reversal of the original delegation in *LQDN*. In *LQDN*, the CJEU considered that the CFREU allows for general, indiscriminate preventive data retention when Member States are confronted with a 'serious threat [...] to national security which is shown to be genuine and present or foreseeable'.¹⁵⁹ States' repeated legal justifications have thus pressured the CJEU to recognize a wide national security exemption, justifying highly intrusive bulk interception and retention regimes that the CJEU previously deemed impermissible.

However, states' demands for an increased level of deference and subsidiarity did not stop with the recognition of a national security exemption. Before the French Conseil d'État, the French government argued against the applicability of *LQDN*,¹⁶⁰ putting forward a distorted interpretation of the national identity clause of Article 4(2) TEU¹⁶¹ by linking, for the first time, national constitutional identity to the protection of national security rather than fundamental rights.¹⁶² The Conseil d'État's resulting decision translates *LQDN* into the French legal order in a way that simultaneously minimizes inconvenient legal obligations for the government while avoiding a direct clash with the CJEU¹⁶³ – an implacable demonstration of how proceduralisation facilitates norm evasion. Further, faced with continued resistance from states, the CJEU confirmed and exacerbated its proceduralisation of the rights to privacy and data protection in several recent decisions.¹⁶⁴

In sum, through their caselaw, European courts have created a wide letter-purpose gap that permits norm evasion under the cover of technical compliance with the ECHR and CFREU. Compliance has been redefined as consisting of a procedural tick-box exercise, with any substantive legal assessment of necessity and proportionality delegated back to states. Further, since the ECtHR and the CJEU do not control the suitability, necessity, or proportionality of the measures taken by states under the declared aim of protecting national security, this 'legitimate aim' has become very vague and extremely potent. Both courts have signalled to states that, as long as they comply with procedural requirements, they enjoy the freedom and authority to determine how best to protect national security under the rights to privacy and to the protection of personal data. Through their repeated legal justifications in a context of heightened attention to national security matters, states have obtained near-absolute deference from European courts. As these courts made electronic mass surveillance lawful through the proceduralisation of the rights to privacy

¹⁵⁸ *Privacy International* (n 159), para 32; *LQDN* (n 160), para 89. The last sentence of Art. 4(2) TEU reads 'In particular, national security remains the sole responsibility of each Member State.'

¹⁵⁹ *LQDN* (n 160), para 137.

¹⁶⁰ Conseil d'État, Assemblée, 21/04/2021, N° 393099, ECLI:FR:CEASS:2021:393099.2021042, para 10.

¹⁶¹ Art 4(2) TEU reads 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. [...]'

¹⁶² S Vallée and G Genevoix, 'A Securitarian Solange' 2021 *Verfassungsblog*, available at <<https://verfassungsblog.de/a-securitarian-solange/>>.

¹⁶³ V Mitsilegas et al., 'Data Retention and the Future of Large-Scale Surveillance: The Evolution and Contestation of Judicial Benchmarks' (2023) 29 *European Law Journal* 176, 198–200.

¹⁶⁴ Case C-817/19, *Ligue des Droits Humains v. Council of Ministers*, ECLI:EU:C:2022:491; Joined Cases C-793/19 (*SpaceNet AG*) and C-794/19 (*Telekom Deutschland*), ECLI:EU:C:2022:702; Case C-470/21, *La Quadrature du Net and Others v. Premier Ministre*, ECLI:EU:C:2024:370.

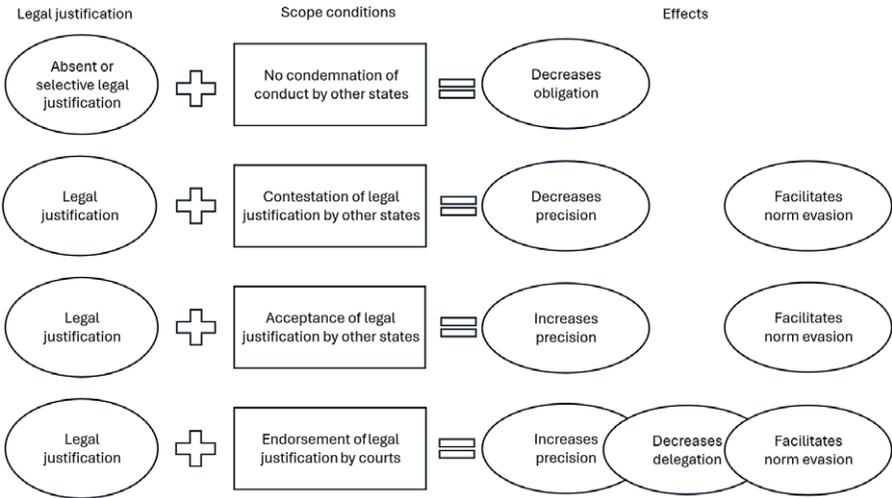


Figure 1. The effects of strategic legal justifications on international law.

and data protection, the substantive values protected by the legal norms lost most of their legal protection. In other words, even as the rights to privacy and to the protection of personal data remain formally legalised and institutionalised in the same manner, the law has been emptied of its substance.

Theoretical insights on the effects of strategic legal justifications on international law

This analysis of the effects of strategic legal justifications on international law in intelligence matters allows me to identify four possible mechanisms of change in how law constrains behaviour, depicted in Figure 1. By decreasing a norm's obligatory character, absent or selective legal justifications can effectively render the norm optional. In all cases where strategic legal justifications are not decisively rejected, they can facilitate norm evasion. In other words, it may become *lawful to violate the law's purpose*.

As the scope conditions for these mechanisms exemplify, due to the international order's horizontal nature, the effects of strategic legal justifications depend on the reactions of other members of the international community. Strong reactions by other states and/or courts constitute protective factors against the undermining effects of strategic legal justifications on international law. While not analysed in this article, other forms of contestation – including concerted push-back by non-state actors such as NGOs, journalists, or academics – may sometimes have similar effects.¹⁶⁵ These findings also highlight that some efforts at strategic legal justification, because they are uncontroversial or are decisively rejected by relevant actors, do not produce visible effects on law's constraining power. Future research could examine a wider range of pathways and test whether these findings extend beyond the realm of national security intelligence.

¹⁶⁵F Foley, 'The (de)Legitimation of Torture: Rhetoric, Shaming and Narrative Contestation in Two British Cases' (2021) 27 *European Journal of International Relations* 102.

Conclusion: Normative, legal and political implications

In the early years of the ‘war on terror’, civil society mobilised actively in favour of intelligence accountability, primarily through strategic litigation. Indeed, under the guise of fighting terrorism, the actions undertaken by liberal democracies’ intelligence services constituted blatant violations of some of the core norms of the liberal international order: the prohibition on the use of force; the prohibitions of torture and enforced disappearances; the rights to life, to liberty and security of the person and to privacy; and the principles of distinction, proportionality, and precaution in armed conflicts. Decisions issued by human rights courts and treaty-bodies provided formal recognition that intelligence activities are subject to international law.¹⁶⁶ Transparency increased as a result, and intelligence services were forced to reckon with expectations of compliance with international law from domestic and international audiences.¹⁶⁷ Unfortunately, these remain the sole positive effects of processes of intelligence accountability.

Before the international legalisation of intelligence was recognised through these accountability processes, intelligence had already undergone processes of domestic legalisation in many liberal democracies. Starting in the US in 1975 with the investigations and recommendations of the Church Committee,¹⁶⁸ the subjection of intelligence to domestic law and legal processes was slowly adopted as a standard by other liberal regimes facing intelligence scandals.¹⁶⁹ In other words, the subjection of intelligence to domestic law has always been conceived of as a response to a legitimacy crisis resulting from agencies’ unchecked abuses of their powers.¹⁷⁰ Analysing these processes, Felix Tréguer convincingly argues that ‘rather than a victory of the rule of law, intelligence law and oversight structures inherited from past surveillance scandals actually work to shield intelligence against its critiques’.¹⁷¹ The domestic legalisation of intelligence in liberal democracies only produces limited constraining effects while providing a veneer of legitimacy to intelligence services and activities.¹⁷²

As had happened with domestic law, international law quickly became a legitimating device for liberal democracies.¹⁷³ In the aftermath of the war on terror and Snowden’s revelations, while facing a transnational legitimacy crisis, liberal democracies seized the opportunity created by widespread exposure and litigation to shape the law applicable to their intelligence activities.¹⁷⁴ Put simply, as states lacked the desire to change their intelligence policies, attempts to hold them to account for these policies led states to the only possible alternative: strategic legal justifications.

¹⁶⁶Duroy (n 9) ch 2.

¹⁶⁷A Deeks, ‘Confronting and Adapting: Intelligence Agencies and International Law’ (2016) 102 *Virginia Law Review* 599.

¹⁶⁸United States, *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, Final Report, 29 April 1976.

¹⁶⁹F Tréguer, ‘From Radical Contention to Deference A Sociogenesis of Intelligence Oversight in the United States (1967–1981)’ in D Bigo, E Mc Cluskey and F Tréguer (eds), *Intelligence Oversight in Times of Transnational Impunity: Who Will Watch the Watchers?* (London: Routledge, 2023) 17.

¹⁷⁰This is sometimes referred to as ‘firefighting’. LK Johnson, ‘Intelligence Shocks, Media Coverage, and Congressional Accountability, 1947–2012’ (2014) 13 *Journal of Intelligence History* 1.

¹⁷¹Tréguer (n 172) 16.

¹⁷²Schlanger (n 44).

¹⁷³As noted by Nuñez-Mietz, often, ‘the legalization of legitimacy in world politics is the result of the internationalization of (legalized) domestic legitimacy’. Nuñez-Mietz, *The Use of Force under International Law* (n 21) 82.

¹⁷⁴Duroy (n 3).

The first consequence of these strategic uses of law can be seen in the widening scope of intelligence activities considered lawful. Practices more intrusive and violent than those that originally forced states to provide strategic legal justifications are now lawful. From states' perspective, their engagement with legal processes has been extremely successful. Crucially, the legitimisation of increasingly intrusive and violent intelligence activities is a consequence of them being made lawful through legal practice, without formal texts and institutions changing. This analysis also underscores the limits of law as a regulatory tool. By showing how states' strategic legal justifications can affect three dimensions of legal norms, this article contributes new insights to debates on the limits of legalisation as a regulatory strategy. In the case of intelligence, greater engagement with legal processes resulted in a decrease in law's constraining power.

Finally, the widening scope of (arguably) lawful intelligence activities facilitates the political legitimisation of these activities. The lawyerisation of intelligence decision-making has elevated legality as the supreme consideration, relegating morality, propriety and effectiveness to the background.¹⁷⁵ The legal seals of approval issued by legal advisers and courts have depoliticised intelligence policies.¹⁷⁶ Governments' legal claims crowd out other discourses and shape disputes about the propriety of intelligence in a purely legal way. This forces critics of intelligence to accept some (otherwise contestable) factual premises as a preliminary step to intervene in the dispute and restricts the range of arguments available to them.¹⁷⁷ As my analysis of litigation over bulk data collection and retention demonstrated, legal processes of accountability entail a risk for activists using them. Instead of accountability, these processes may well provide legal credence to states' legal justifications, and legitimacy to their policies. In turn, the increased lawfulness of intelligence makes it harder to use other discourses (e.g., adequacy, effectiveness, morality) for questioning intelligence practices and policies. In the realm of intelligence, too, law exerts a disciplining effect over political contestation.¹⁷⁸ This situation creates a paradoxical dilemma for government and intelligence practitioners. Their successful avoidance of accountability through strategic legal justifications allows them to pursue their chosen policies lawfully, but the conceptual merging of legality and appropriateness means that effectiveness will often suffer. Hence, despite their success in legitimating their policies through law, government and intelligence practitioners would also benefit from a revalorisation of political and moral considerations in intelligence decision-making.

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¹⁷⁵Sanders (n 8); Hurd (n 38) 51.

¹⁷⁶Tréguer (n 172) 47.

¹⁷⁷Aradau and McCluskey (n 32).

¹⁷⁸Peever (n 68) 245.