

SYMPOSIUM ON MEGAN DONALDSON, “THE SURVIVAL OF THE SECRET TREATY:
PUBLICITY, SECRECY, AND LEGALITY IN THE INTERNATIONAL ORDER”

THE SUBSTANCE OF SECRET AGREEMENTS AND THE ROLE OF GOVERNMENT
LAWYERS

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Megan Donaldson’s *The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order* recounts the ways in which lawyers played an important but complicated role in governmental decisions about whether and when to register secret agreements.¹ On the one hand, these lawyers urged their governments to comply with the League of Nations and UN Charter registration processes. On the other hand, these same lawyers used their drafting and interpretive skills to enable their governments to employ secrecy where necessary, while helping their clients minimize the fact and size of any legal violations that occurred. They thus urged legal compliance on the front end and reduced the extent of noncompliance on the back end.

These two roles for lawyers—urging legal compliance and minimizing the scope of legal violations—shed light on a paradox related to the substantive content of the underlying secret agreements. Many secret agreements that have come to light, particularly those to which the United States is a party, are consistent with international legal norms contained in the UN Charter.² Why, if nations sought to keep some agreements secret, did they nevertheless avoid substantive violations of international law in those agreements? The answer is likely based in part on the role of lawyers: Just as lawyers played an important role in helping their states minimize outright *procedural* violations of international law during the treaty registration process, so too do lawyers seem likely to have played an important role in avoiding or minimizing such violations during the crafting of the underlying *substantive* commitments themselves.

Secret Agreements and the UN Charter

Because Donaldson’s focus is on the history and process of treaty registration and the challenges that secret agreements posed to that procedural rule, she spends little time discussing the *content* of secret treaties. Yet the content of secret treaties is integrally connected to the reason that states established treaty registration requirements in the first place. The *early concerns* about secret treaties that prompted the initial turn to treaty registration in the League of Nations and then the UN Charter were driven by evidence that states employed secret treaties to

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¹ Megan Donaldson, *The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order*, 111 AJIL 575 (2017).

² This essay focuses on the substance of U.S. secret agreements, because the United States is very likely overrepresented in the number of secret agreements it concludes and because an active U.S. press has produced more information about those agreements than about those of other states.

conceal their expansionist ambitions and enhance their capacity to commit aggressive acts, which in turn extended the length of World War I and fostered deep distrust among states.³

How harmful, then, has it been to international law or the world order that states continue to conclude secret agreements with each other? How many treaties look like the “radically irregular” 1956 Protocol of Sèvres, which facilitated an Israeli attack on Egypt, or like the unsavory agreement between the United Kingdom and Soviet Union on the repatriation of liberated Soviet citizens?⁴ As it turns out, only a few of the more recent secret agreements look like those two examples, which enabled acts of aggression and human rights violations. In fact, in the post-Charter era, most of the secret agreements that have come to light are consistent with the Charter’s provisions on the use of force and respect for human rights. States—notably the United States, but also the United Kingdom and others—have used secret agreements to enhance their capacity to exercise their rights of self-defense, minimize conflict between powerful nuclear states, and advance the protections contained in human rights and law of armed conflict treaties.⁵ The United States has used secret agreements (or secret nonbinding arrangements), for instance, to ensure that states purchasing U.S. weapons use them in a manner consistent with the law of armed conflict, and to regulate the number, types, and testing of nuclear weapons in the U.S. and Russian arsenals.

This poses a puzzle: Why do states comply with their substantive international law obligations in documents that they intend to keep secret? Why do they not take advantage of that secrecy to circumvent international legal rules that might be inconvenient or that fail to advance their short-term interests? Some of the most common explanations for [treaty compliance](#) among states, including the ideas that states comply because they want to preserve their reputation among a range of states as reliable treaty partners or because they seek to avoid direct sanctions, do not apply to cases in which the treaty—and thus any violation of it—is not expected to come to light.⁶ If these familiar reasons for compliance do not explain why states comply with the Charter and other principles of international law in their secret treaties, what does?

Theories About Charter Compliance

There are several possible explanations for the fact that U.S. secret agreements are usually substantively consistent with the Charter. First, there may be instances in which a state’s treaty partner insists on international law compliance, thus pressuring the first state into acting consistent with international law. But that will not always be the case, especially where acting consistent with international law will render the underlying deal less potent or effective. Second, a state’s officials may have made a government-wide normative commitment to international law compliance. Donaldson indicates that France, the United Kingdom, and the United States were “unusually committed” to treaty publicity, for instance.⁷ But various scholars have challenged the idea that states comply with international law for truly aspirational or magnanimous reasons, and even these three states sometimes flouted the publication rule.

Third, states may ensure that the substantive obligations contained in their secret agreements are consistent with international law because they have determined that compliance is in their best long-term interest. But surely there are cases in which states might think that they can obtain the best of both worlds: a short-term advantage from a secret agreement and the long-term advantage of appearing to publicly act in a manner consistent with

³ Ashley S. Deeks, *A (Qualified) Defense of Secret Agreements*, 49 ARIZ. ST. L.J. 714, 732–35 (2017).

⁴ Donaldson, *supra note* 1, at 615.

⁵ Deeks, *supra note* 3, at 761–66.

⁶ See Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1830–36 (2001) (discussing range of theories about why states comply with international law).

⁷ Donaldson, *supra note* 1, at 622.

international law. Secret agreements must be tantalizing because they seem to allow states to secure both advantages at once.

A fourth reason that many modern secret agreements appear to be consistent with the Charter is that states may fear the possibility of leaks, and thus seek to minimize the political, diplomatic, and legal blow-back that would occur if it came to light that they had entered into secret agreements that were in direct tension with the UN Charter or other international laws. It might be that states are conscious of violating a procedural provision of international law by concluding a secret agreement in the first place, and that they seek to minimize additional violations of international law in the body of the agreement. A fifth and related reason may be that government lawyers are habituated to law compliance as part of their training and culture. Lawyers are almost always present when states are negotiating and drafting international agreements (or nonbinding arrangements). Indeed, it often falls to lawyers to shape a document to ensure that it either is or is not a binding international agreement. Although lawyers cannot always prevent policy-makers from violating international law, it seems more likely that the default posture will be to comply with international law if a foreign ministry lawyer is in charge of crafting the text in the first instance.

Lawyering in the Secret Agreement Landscape

Donaldson's work, and her attention to the role of government lawyers in the treaty formation and registration process, may shed light on which of those theories best explains why states have not generally crafted secret agreements that run afoul of substantive international rules. In the history she describes, government lawyers seemed to guide the state they were advising towards outcomes that avoided violations of that state's international law obligations and, where it was politically impossible to achieve an outcome that was fully consistent with international law, those same lawyers guided the state toward outcomes that minimized the violation. It is reasonable to think that a similar phenomenon accounts for the limited number of Charter violations that appear in secret agreements. Indeed, there is little reason to believe that executive branch lawyers (and foreign ministry lawyers in particular) would take different approaches to violations of procedural and substantive norms.

Survival of the Secret Treaty describes several situations in which government lawyers and their diplomatic clients sought to promote the registration of treaties, consistent with the rules in the Covenant and Charter. Donaldson notes, "Legal advisers were often among those who upheld strong readings of publicity requirements, and tried to entrench them in bureaucratic practice."⁸ This seems consistent with the modern-day role and self-image of legal advisers. A [conference report](#) from a 2015 meeting of international law legal advisers affirmed that the "principal role of the Legal Adviser is to ensure the government (or other body) complies with international law. The Legal Adviser is 'both counsellor and conscience.'"⁹ When faced with one policy proposal that is consistent with international law and another proposal that is not, the going-in position of most legal advisers would be to recommend that a client pursue the former.

Donaldson also highlights how the existence of particular offices within the bureaucracy might drive a government toward a particular default course of action. For instance, officials within the UK Foreign Office's treaty department, who were in charge of transmitting treaty texts to Parliament, "had a certain pride in the accuracy of their work, making them (usually) voices in favor of registration."¹⁰ Likewise, most officials within a legal office whose job is to develop and interpret international law believe in the value of that body of law, at least as a general

⁸ *Id.* at 625.

⁹ British Institute of International and Comparative Law, Conf. Report, *The Role of Legal Advisers in International Law* 2 (Feb. 26, 2015).

¹⁰ Donaldson, *supra* note 1, at 597.

matter. Once hired into that office, those individuals generally want to (and may feel pressure to) perform that job in a manner consistent with the office's ethos.

In short, Donaldson's article highlights a multi-decade, bureaucratic legal commitment to procedural aspects of international law, at least as the favored position. This commitment strengthens the explanatory power of the idea that states generally conclude secret agreements that are substantively consistent with their international law obligations. Because government lawyers are habituated to law compliance as part of their training and culture, and because those lawyers often play a critical role in the crafting of the text of international agreements, there is a credible argument that [executive lawyers](#) bear an important responsibility for the substantive legality of secret agreements.¹¹

There are a variety of circumstances, however, in which policy-makers insist on pursuing policies that do not fall squarely within the four corners of what international law permits. Donaldson's article illustrates that here, too, lawyers play a critical role in managing the size of the violation. In the treaty registration context, the lawyers pursued three avenues. First, they tried (relatively unsuccessfully) to interpret the registration provisions in ways that would narrow the types of agreements that had to be registered. Second, they tried to minimize the parts of the texts that remained secret. Both the United Kingdom and France, for instance, used the technique of putting some of an agreement's text into a public document, while placing other parts of the text into secret ancillary (or "technical") documents. The alternative would have been to keep the entire agreement secret, but that would have magnified the procedural violation of the Covenant or Charter. Third, they employed constructive ambiguity in their drafting, as a better option than simply drafting clearly binding international agreements and refusing to register them. As Donaldson describes it, "[o]fficials [were] sometimes uncertain about the status of particular texts ... or consciously shaping textual forms to preserve ambiguity about legal status."¹²

There are other national security contexts in which government lawyers employ this kind of strategic ambiguity to minimize—or make less apparent—the extent to which a state is conducting activities that are in tension with international law. In the United States, for example, the [Central Intelligence Agency](#) has indicated that, "[a]s a general matter, and including with respect to the use of force, the United States respects international law and complies with it to the extent possible in the execution of covert action activities."¹³ This statement deliberately avoids articulating what international rules are relevant to such activities, but it also [identifies the value](#) that the United States puts on compliance with international law.¹⁴ It further suggests that the U.S. government—presumably with the assistance of its national security and international lawyers—attempts to minimize any violations that do ultimately occur. There undoubtedly are strategic reasons to do so, but lawyers and their customary commitment to international law adherence clearly play a role in achieving that outcome.

Conclusion

In short, the same mechanisms that drove France, the United Kingdom, and the United States to generally comply with Covenant Article 18 and Charter Article 102 likely also account, at least in part, for the apparent effort

¹¹ For a discussion of legality in the executive branch as a product of "internalized norms driving individual Hartian actors to exercise restraint," see Manik Suri, [Reorienting the Principal-Agent Frame: Adoption the "Hartian" Assumption in Understanding and Shaping Legal Constraints on the Executive](#), 7 HARV. L. & POL'Y REV. 443, 452 (2013).

¹² Donaldson, [supra note](#) 1, at 578. See also [id.](#) at 612, 626.

¹³ S. Select Comm. on Intel., [Additional Prehearing Questions for Ms. Caroline D. Krass Upon Her Nomination to Be the General Counsel of the Central Intelligence Agency](#) (emphasis added).

¹⁴ Ashley S. Deeks, [Intelligence Communities and International Law: A Comparative Approach](#), in, COMPARATIVE INTERNATIONAL LAW 251, 264–65 (Anthea Roberts et al. eds., 2018).

by those states to avoid secret agreements that ran afoul of international law, and to minimize the extent of such violations where they were impossible to avoid entirely. It is possible, in fact, that these lawyers (like today's lawyers) internalized the idea that substantive international law violations, such as violations of the UN Charter's rules on the use of force, are—or would be treated by other states and commentators as—legally worse than procedural violations of rules such as those on treaty registration. Further, international lawyers are undoubtedly aware of the various forms of sanctions that their governments might face for violating either set of rules, and surely would advise their clients that sanctions that could follow a violation of Charter Article 2(4) would be more severe than those that follow a violation of Article 102. Government lawyers may find it easier to justify the secrecy of an agreement when the underlying agreement itself appears to advance the substantive goals of international law (such as protecting the security of allies or the human rights of detainees). And they presumably recognize that in various cases the procedural violation of the registration norm is imperative to advance a more important substantive international law goal.¹⁵

Perhaps we should not be surprised, then, that the secret agreements that have come to light are generally international law-abiding, given the significant role that government lawyers play in their creation. The secret agreement phenomenon suggests that it is worth exploring more deeply the specific role of international lawyers as we continue to debate the broader question of why states comply with their international legal obligations. At the same time, the story of secret agreements also should remind us how hard government lawyers must sometimes work to avoid an international rule's death by a thousand cuts.

¹⁵ Donaldson, *supra note* 1, at 577 (“Some [officials and reformists] came to doubt whether secrecy was *always* inimical, for example, to peaceful ordering.”). *See generally* Deeks, *supra note* 3, at 751–55.