

The Relationship between State Secrecy and State Silence in International Law-Making

What is the relationship between secrecy and silence in the practice of states, and what place does international law play in managing the interplay between the two concepts?

First, I will explain the two concepts and how they differ

Second, I will show how in their practice States engage with secrecy and silence.

Third, I will argue that a main way in which international law manages the interplay between the practices of secrecy and of silence is through the concept of acquiescence in relation to international law-making.

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Starting with definitions,

By State silence, I mean the ‘verbal or physical inaction of a State’. This can be complete (the State does not do or say anything) or partial (the State may do or say something but it does not address the claim to which it responds to).

On the other hand, secrecy involves physical or verbal *action* which is covert or confidential. This means that different groups of States, other actors, and even some of the acting State’s organs may not be aware of the secret action.

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What is the relationship between secrecy and silence in the practice of States?

International law is heavily based on the communication between States. It is identified by observing what States do or say, and how other States react to these actions and statements. We are concerned with actions/inactions of some States and the reactions of other States.

Starting with secret action,

- States undertake covert action that is never revealed; or
- quasi-covert action, that is action that becomes known but that they do *not* acknowledge as being attributed to them; or
- States may not justify their initially covert and unacknowledged action by reference to international law when later it becomes publicly known through leaks in the press which State is behind a particular covert operation

Examples come in the field of (1) cyber operations and (2) target killings of individuals in the territory of other States.

Looking at the reactions of other States, including the directly affected State or third States,

- These may condemn publicly the covert conduct once they become aware of it;
- They may be completely silent about it;
- They may be completely silent vis-à-vis the wider public or other States, while they communicate confidentially their protest;
- they may react but they may be partially silent as to whether the covert action complained of is lawful or not. In other words, they do not use legal language.

So, the picture of the relationship between secrecy and silence in the practice of international law is complex and this has consequences for the formation of customary international law and the interpretation or modification of treaties over time.

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How does international law manage the interplay between secrecy and silence?

I would like to make two comments in this respect:

1. Those that are not aware of secrets/secret actions/communications/secret agreements are under the impression that the State or States involved are being silent.

For instance, for a period of time since 2006 when the US began its targeted killings in Pakistan, Pakistan's executive branch, which represents the State externally, had not protested. The question thus arose whether Pakistan had acquiesced to the US wrongful conduct. However, later international press revealed that the Pakistani government had expressly given consent to the US to conduct at least some of the targeted killings in its territory, but it had done so secretly. So, what may appear to be silence, in reality is secretly given consent or a secretly made agreement. And this is important because these legal questions would be treated differently in international law: in the former scenario, Pakistan's acquiescence means that there has been a wrongful act; in the latter case, secretly given consent means that the US had not been involved in wrongful act in the first place.

As a default, State Silence does not produce legal effects in international law. However, under specific conditions it can have multifaceted legal effects in

international law-making, in the law of State responsibility, and in relation to international dispute settlement.

- in international law-making:

State silence is a powerful mechanism for the formation and change of customary international law as well as for the interpretation or modification of treaties over time. This can happen when silence constitutes acceptance as law, *opinio juris*, for the identification of customary international law; or it may constitute acceptance of the practice of some treaty parties giving rise to an agreement between all treaty parties for the interpretation of a treaty over time.

But, for State silence to mean acceptance (or acquiescence), there must exist specific strict conditions. Namely, a State fails to react (to object/protest), despite the fact that:

- there are circumstances that call for a State's reaction (namely, it is faced with the conduct/claim of another State that threatens or unfavourably affects its rights and interests);
- it is in a position to react, in other words the silent State has knowledge of the conduct that calls for its reaction; and
- reasonable time passes from the time that the silent State acquires knowledge.

In order for some conduct to call for a State's reaction it must involve a consistent and sufficiently determinate legal claim: secret conduct is unlikely to meet this requirement.

In addition, the silent State must have knowledge – actual or construed – about the conduct that calls for its reaction. This can happen in the following scenarios:

1. by direct communication from the acting State to the silent State; here the actual knowledge threshold would be met.
2. the conduct and legal claim is publicly made either in one's domestic legal order, or through a press release or in a multilateral setting. In these situations, even if actual knowledge is not met, the construed knowledge threshold will be met.

In contrast, entirely covert action or action that is overt but not acknowledged is not opposable to the other States because there is no legal claim being made through such conduct and crucially because other States lack the requisite knowledge to be able to respond.

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So, a main way in which international law manages secrecy is through the rules on acquiescence in international law-making. Although secrecy as such is not prohibited in international law, secret conduct or claims cannot trigger the process of custom formation or the process of interpretation of a treaty over time.