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THE SPY WHO CAME IN FROM THE COLD WAR: INTELLIGENCE AND INTERNATIONAL LAW

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ABSTRACT

International law has traditionally had little to say on the subject of intelligence—in large part because outraged rhetoric has long been contradicted by widespread practice. This article surveys efforts to regulate the collection of intelligence in international law before turning to more recent checks on the manner in which intelligence has been invoked in international organizations. Long a "dirty word" within the United Nations, intelligence is now being used to justify military strikes, target financial sanctions, and indict war criminals. While there is little prospect for limiting collection of intelligence beyond activities that can be physically intercepted or prevented, increasing recourse to intelligence in multilateral forums is beginning to impose procedural constraints on the purposes for which that intelligence may be employed.

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INTRODUCTION

[T]he fact spying on other countries violates their law is far different from the assertion that the activity itself is illegal, as if some skulking shame of criminality were attached to the enterprise. Our spies are patriots.

—Commander Roger D. Scott, Assistant Legal Advisor,
United States European Command, 1999[1]

Spying, as the cliché has it, is the world's second-oldest profession,[2] yet a profusion of state practice has been tempered by the regular denunciation of intelligence gathering, expulsion or execution of agents, and sporadic demands for non-repetition of such activities.[3] This is due in part to the non-reflexive manner in which governments approach the subject: we and our friends merely gather information; you and your type violate sovereignty. Most domestic legal systems thus seek to prohibit intelligence gathering by foreign agents while protecting the state's own capacity to conduct such activities abroad.

What, then—if anything—does international law have to say about the subject? A surprising amount, though the surprise comes largely from the fact that the issue tends to be approached indirectly: intelligence is less a lacuna in the legal order than it is the elephant in the room. Despite its relative importance in the conduct of international affairs there are few treaties that deal with it directly.[4] Academic literature typically omits the subject entirely, or includes a paragraph or two defining espionage and describing the unhappy fate of captured spies.[5] For the most part, only special regimes such as the laws of war address intelligence explicitly. Beyond this, it looms large but almost silent in the legal

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1. Cmdr Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 AIR FORCE L. REV. 217, 218 (1999).

2. Chinese military strategist Sun Tzu gives the first known exposition of espionage in war and affairs of state around 500 B.C.E. in his famous work "Art of War." *See* 1 ENCYCLOPEDIA OF INTELLIGENCE AND COUNTER-INTELLIGENCE xv (Rodney P. Carlisle ed., 2005); ARTHUR S. HULNICK, KEEPING US SAFE: SECRET INTELLIGENCE AND HOMELAND SECURITY 43 (2004).

3. Under the laws of state responsibility, a state responsible for an internationally wrongful act is obliged to cease that act and, "if circumstances so require," to offer appropriate assurances and guarantees of non-repetition: International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session, UN Doc. A/56/10 (Supp.) (November 2001), *at* http://www.un.org/law/ilc, art. 30.

4. The major exception to this is a small number of classified agreements governing intelligence sharing between allies. *See infra* note 92.

5. *See, e.g.*, Richard A. Falk, *Foreword*, *in* ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW v (Roland J. Stanger ed. 1962).

regimes dealing with diplomatic protection and arms control. Whether custom can overcome this dearth of treaty law depends on how one considers the disjuncture between theory and practice noted above: if the vast majority of states both decry it and practice it, state practice and *opinio juris* appear to run in opposite directions.

How one defines intelligence is, of course, crucial. Clearly, where espionage (running spies or covert agents) or territorially intrusive surveillance (such as aerial incursions) rises to the level of an armed attack, a target state may invoke the right of self-defense preserved in Article 51 of the UN Charter.[6] Similarly, covert action that causes property damage to the target state or harms its nationals might properly be the subject of state responsibility.[7] Some classified information might also be protected as intellectual property under the World Trade Organization-brokered agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[8] It might also conceivably be protected by the right to privacy enshrined in some human rights treaties.[9] By contrast, intelligence analysis that relies on open source information is legally unproblematic.

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6. Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L L. 53 (1984). Note, however, that a mere territorial incursion may be insufficient to satisfy the requirement of an armed attack within the meaning of article 51 of the Charter. *Cf.* Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (International Court of Justice, Merits, 27 June 1986) ICJ Rep (1986), *at* http://www.icj-cij.org, paras. 230–31 (discussing territorial incursions not amounting to an armed attack).

7. *See generally* W. MICHAEL REISMAN AND JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW (1992).

8. Article 39(2) of TRIPS, for example, provides that "[n]atural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret." A broad exception in article 73, however, states that nothing in the agreement shall be construed (a) as requiring a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; (b) as preventing a Member "from taking any action which it considers necessary for the protection of its essential security interests", specifically with regard to fissionable materials, arms trafficking, or "in time of war or other emergency in international relations"; or (c) as preventing a Member from taking action pursuant to its obligations under the UN Charter for the maintenance of international peace and security: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, WTO Agreement, Annex 1C, *at* http://www.wto.org, arts. 39(2), 73.

9. Article 17(1) of the International Covenant on Civil and Political Rights, for example, provides that no one shall be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." Insofar as human rights law might limit surveillance it generally—but not always—does so on the basis of the infringement of an individual's rights rather than on the basis that information itself is protected. Case law in this area is most developed in the European Union. *See, e.g.*, Francesca Bignami, *Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network*, 26 MICH. J. INT'L L. 807 (2005). A distinct approach, with its foundations in a dissenting judgment by Justice Brandeis, holds that it is private information itself that must be protected, rather than constraining the collection powers of the state: Olmstead v. U.S., 277 U.S. 438 (1928), 478 (Brandeis J., dissenting).

"Secret intelligence,"—information obtained through covert collection activities—includes two forms of intelligence that have remained essentially unchanged since World War II: information individuals divulge either wittingly or unwittingly , known as human intelligence (HUMINT), and communications intercepts or other electronic intelligence, known as signals intelligence (SIGINT). A newer subcategory is photographic or imagery intelligence (IMINT), now dominated by satellite reconnaissance. Other specialized -INTs exist, but these three will comprise the focus of the present Article.[10]

The foregoing definition of intelligence exists alongside a broader understanding of the term as the analytical product of intelligence agencies that serves as a risk assessment intended to guide action. This reflects an important distinction that must be made between intelligence collection and analysis. Though collection may be covert, analysis generally draws upon a far wider range of sources, most of which—frequently the vast majority—are publicly available, or "open." The structure of most Western intelligence services reflects these discrete functions: the principle has evolved that those who collect and process raw intelligence should not also have final responsibility for evaluating it. The top-level products of such analysis are known in the United States as estimates; in Britain and Australia they are labeled assessments. Intelligence analysis, in turn, is distinct from how such analysis should inform policy—a far broader topic.[11]

This Article will focus on the narrower questions of whether obtaining secret intelligence—that is, without the consent of the state that controls the information—is subject to international legal norms or constraints, and what restrictions, if any, control the use of this information once obtained. Traditional approaches to the question of the legitimacy of spying, when even asked, typically settle on one of two

10. *See* MICHAEL HERMAN, INTELLIGENCE POWER IN PEACE AND WAR 61–81 (1996). Wider definitions of intelligence are sometimes used, such as "information designed for action", but this would appear to encompass any data informing policy at any level of decision-making. *See generally* Michael Warner, *Wanted: A Definition of Intelligence*, 46(3) STUDIES IN INTELLIGENCE (UNCLASSIFIED EDITION) (2002), *at* http://www.cia.gov/csi/studies/vol46no3/article02.html.

11. *See* HERMAN, *supra* note 10, at 111–12.

positions: either collecting secret intelligence remains illegal despite consistent practice,[12] or apparent tolerance has led to a "deep but reluctant admission of the lawfulness of such intelligence gathering, when conducted within customary normative limits."[13] Other writers have examined possible consequences in terms of state responsibility of intelligence activities that may amount to violations of international law.[14] Given the ongoing importance to states of both intelligence and counter-intelligence, such issues may never be resolved conclusively. There is little prospect, for example, of concluding a convention defining the legal boundaries of intelligence gathering, if only because most states would be unwilling to commit themselves to any standards they might wish to impose on others.[15]

A re-examination of this topic is overdue, nonetheless, for two discrete reasons. The first is that indirect regulation, as will be argued is the case with intelligence, is an increasingly important phenomenon in international affairs. Treaties and customary international law are now supplemented by various non-traditional forms of normative pronouncements, ranging from standards set by expert committees or coalitions of non-governmental organizations to the activities of less formal networks of government or trade representatives.[16] It is possible that academic treatment of intelligence may illuminate some of these more recent developments and vice-versa. Part One of this Article examines these issues by first sketching out what legal regimes define the normative contours of intelligence

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12. *See, e.g.*, Quincy Wright, *Legal Aspects of the U-2 Incident*, 54 AM. J. INT'L L. 836, 849 (1960); Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, *in* ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW 12, 12 (Roland J. Stanger ed. 1962); Manuel R. García-Mora, *Treason, Sedition, and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT. L. REV. 65, 79–80 (1964–65) (peacetime espionage is an "international delinquency"); Delupis, *supra* note 6, at 67 (espionage in peacetime is contrary to international law if it involves the presence of agents in the territory of another country, even if it does not involve any "trespass").

13. Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman, *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365, 394 (1973) ("The more traditional doctrinal view has been that intelligence gathering within the territorial confines of other states constitutes an unlawful intervention, under both customary and conventional international law. In terms of the actual volume of this activity, however, the number of formal protests which have been lodged have been relatively insignificant. This latter practice suggests a somewhat ambivalent perspective upon the part of national elites in regard to such activities and may indicate a deep but reluctant admission of the lawfulness of such intelligence gathering, when conducted within customary normative limits"); Scott, *supra* note 1.

14. Delupis, *supra* note 6, at 61–63.

15. Similar argument might have been made concerning human rights or the laws of war—and demonstrably contradicted in the existence of elaborate international regimes in each area. Collection of intelligence as it is understood here is unusual, however, in that it explicitly or implicitly tolerates the violation of the laws of other states. This may be contrasted with the emerging practices governing the use of intelligence discussed in Part Two.

16. *See generally* Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

collection—prohibiting it, preserving it, and establishing the consequences for being caught doing it—before turning to the issue of whether less hierarchical regulatory structures may be emerging.

While Part One considers the collection of intelligence, Part Two discusses questions of how intelligence can and should be used. A second reason why the status of intelligence in international law is important concerns the manner in which its products are increasingly invoked in multilateral forums such as the United Nations. Though during the Cold War the United Nations regarded intelligence as a "dirty word,"[17] international cooperation in counter-terrorism today depends on access to reliable and timely intelligence that is normally collected by states. Long undertaken discreetly in support of conflict prevention or peace operations, the practice of sharing intelligence with the United Nations has risen in prominence following its explicit use in justifying the war in Iraq in 2003. Intelligence information has also begun to affect the rights of individuals through the adoption of targeted sanctions regimes intended to freeze the assets of named persons, with limited disclosure of the basis on which such individuals are selected. Problems have also emerged in the context of international criminal prosecutions, where trials must be concluded under procedural rules that call for disclosure of the sources of evidence presented against defendants.

In an anarchical order, understanding the intentions and capacities of other actors has always been an important part of statecraft. Recent technological advances have increased the risks of ignorance, with ever more powerful weapons falling into ever more unpredictable hands. At the same time, other advances have lowered the price of knowledge—vastly more information is freely available and can be accessed by far larger numbers than at any point in history. Secret intelligence is thus both more and less important than during the Cold War, though for present purposes the key issues are the changed manner in which it is being used and by whom. The patchwork of norms that had developed by the end of the Cold War provided few answers to such new and troubling questions; they tended to emphasize containing the threat posed by intelligence collection rather than exploiting it as an opportunity. This reflected the relatively stable relationships of the Cold War between a limited number of "players" in a game that was,

17. *See* INTERNATIONAL PEACE ACADEMY, PEACEKEEPER'S HANDBOOK 39, 59–62, 120–21 (1984).

at least in retrospect, relatively well understood. Recent practice has seen the emergence of new actors and new norms that govern the use of intelligence in multilateral forums, as the purposes to which intelligence may be employed continue to change.

I. COLLECTING INTELLIGENCE

Espionage is nothing but the violation of someone else's laws.

—Mitchell Rogovin, Special Counsel to the Director of the Central Intelligence Agency, 1975[18]

The legality of intelligence-gathering activities is traditionally considered in three discrete jurisdictions: the domestic law of the target state, the domestic law of the acting state, and public international law. Prosecution or the threat of prosecution of spies by a target state under its own laws should not necessarily be understood as an assertion that the practice as such is a violation of international law; given that most states conduct comparable activities themselves, it may more properly be understood as an effort to deny information to other states or raise the costs of doing so effectively. Such inconsistencies have led some commentators to conclude that addressing the legality of intelligence gathering under international law is all but oxymoronic.[19]

At the most general level, this is probably true. It is instructive, however, to examine the manner in which intelligence has come to be approached indirectly as a subject of regulation. Most legal treatment of intelligence focuses on wartime espionage, which is considered below in section one. In addition, however, intelligence arises as an issue on the margins of norms of non-intervention and non-interference, as well as being tacitly accepted (within limits) as a necessary part of diplomatic activity. These cases are considered in sections two and three respectively. The fourth section examines a more

18. *U.S. Intelligence Agencies and Activities: Risks and Control of Foreign Intelligence, Part 5*, CIS-NO: 76-H961-8: *Hearing before the Select House Committee on Intelligence*, 94th Cong. 1767 (1975) (statement of Mitchell Rogovin, Special Counsel to C.I.A. Director).

19. Daniel B. Silver and (updated and revised by Frederick P. Hitz and J.E. Shreve Ariail), *Intelligence and Counterintelligence*, *in* NATIONAL SECURITY LAW 935, 965 (John Norton Moore and Robert F. Turner eds., 2005). *Cf.* Christopher Baker, *Tolerance of International Espionage: A Functional Approach*, 19 AM. U. INT'L L. REV. 1091, 1092 (2004) ("international law neither endorses nor prohibits espionage, but rather preserves the practice as a tool by which to facilitate international cooperation. Espionage functionally permits states not only to verify that their neighbors are complying with international obligations, but also to confirm the legitimacy of those assurances that their neighbors provide").

unusual situation in which some arms control treaties actually prohibit *counter*-intelligence efforts that might interfere with verification by one state of another's compliance. The fifth section explores the process of intelligence sharing between states. These rules do not map a complete normative framework for intelligence gathering. They do, however, sketch out some of the context within which intelligence gathering takes place, supplemented over time by emerging customary rules and, perhaps, a normative sensibility within the intelligence community itself.

A. *Wartime Treatment of Spies*

Hugo Grotius, writing in the seventeenth century, observed that sending spies in war is "beyond doubt permitted by the law of nations." If any state refused to make use of spies, it was to be attributed to loftiness of mind and confidence in acting openly, rather than to a view of what was just or unjust. In the event that spies were caught, however, Grotius noted that they were usually treated "most severely . . . in accordance with that impunity which the law of war accords."[20]

This apparent contradiction—allowing one state to send spies and another state to kill them—reflects the legal limbo in which spies operate, a status closely related to the dubious honor associated with covert activities generally.[21] The brutality of the response also reflected the danger posed by espionage and the difficulty of guarding against it.[22] Some authors thus argued that states, though they might conscript individuals to fight as part of a standing army, could not compel anyone to act as a spy.[23] From around the time of the U.S. Civil War, traditional rules were supplemented by an unusual and quite literal escape clause: if caught in the act of espionage, spies were subject to grave punishment, but if they

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20. HUGO GROTIUS, DE IURE BELLI AC PACIS LIBRI TRES ([1646] 1925), Book III, ch IV, xviii, 655.

21. GEOFFREY BEST, WAR AND LAW SINCE 1945 291 (1994).

22. This view continues today. *See, e.g.*, U.S. Army, Field Manual 27-10 The Law of Land Warfare (Department of the Army, Washington, DC, July 18, 1956), ch. 3, para. 77 (recognizing "the well-established right of belligerents to employ spies and other secret agents for obtaining information of the enemy. Resort to that practice involves no offense against international law. Spies are punished, not as violators of the laws of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible").

23. *See, e.g.*, H.W. HALLECK, INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 406 (1st ed. 1861), quoting Emmerich de Vattel: "Spies are generally condemned to capital punishment, and not unjustly; since we have scarcely any other means of guarding against the mischief they may do us. For this reason, a man of honor, who would not expose himself to die by the hand of a common executioner, ever declines serving as a spy. He considers it beneath him, as seldom can be done without some kind of treachery."

managed to return to their armies before being captured, they were entitled treatment as prisoners of war and were immune from penalties meted out to spies.[24]

This was the position articulated in the Lieber Code, drafted by the jurist and political philosopher Francis Lieber at the request of President Abraham Lincoln and promulgated as a general order for the Union Army in 1863. A spy was a person who "secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy." Such persons were to be punished "with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy."[25] Treasonous citizens, traitors, and local guides who voluntarily served the enemy or who intentionally misled one's own army all were to be put to death.[26] This series of capital offenses precedes a remarkable coda: "A successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous."[27]

A similar position was adopted in the 1874 Declaration of Brussels, an effort at codifying the laws of war that was never ratified by participating states but was nonetheless an important step towards the eventual adoption of the Hague Regulations. "Ruses of war" and measures necessary for obtaining information about the enemy were considered permissible, but a person who acted clandestinely or on false pretenses to obtain such information received no protection from the laws of the capturing army.[28] A spy who managed to rejoin his own army and was subsequently captured, however, was to be treated as a

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24. Oppenheim notes an example that may suggest a longer history for this provision: "A case of espionage, remarkable on account of the position of the spy, is that of the American Captain Nathan Hale, which occurred in 1776. After the American forces had withdrawn from Long Island, Captain Hale recrossed under disguise, and obtained valuable information about the English forces that had occupied the island. *But he was caught before he could rejoin his army, and he was executed as a spy.*" Oppenheim vol 2, at 339 (para. 161) (emphasis added).

25. Instructions for the Government of the Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln (Lieber Code) (Adjutant Generals' Office, Washington, DC, Apr. 24, 1863), *at* http://www.icrc.org/ihl, art. 88.

26. *Id.* arts. 89, 91, 95, 97.

27. *Id.* art. 104.

28. Declaration of Brussels Concerning the Laws and Customs of War, adopted by the Conference of Brussels (never entered into force), Aug. 27, 1874, *at* http://www.icrc.org/ihl, arts 14, 19–20. Though the Lieber Code appears to set no limit on the field of operations, the Declaration of Brussels and subsequent documents limit the definition to clandestine activities "in the districts occupied by the enemy": *id*, art. 19.

prisoner of war and "incur[red] no responsibility for his previous acts."[29] Similar provisions are found in the Oxford Manual produced by the Institute of International Law in 1880.[30]

Both the 1899 and 1907 Hague Regulations largely reproduced the text of the earlier documents, though they made clear that even a spy "taken in the act cannot be punished without previous trial."[31] Further procedural safeguards were added in the Fourth Geneva Convention of 1949 on protection of civilians, which provided that protected persons accused of being spies in occupied territory lose those rights that would be prejudicial to the security of the occupying state, but require both a trial and a six-month waiting period before a death sentence can be carried out.[32] In any case, such persons were to be "treated with humanity."[33] The First Additional Protocol to the Geneva Conventions, adopted in 1977, broadly restated the basic position embraced since the Lieber Code: ruses of war are not prohibited,[34] but persons engaging in espionage are not entitled to the status of prisoner of war unless they return to their armed forces before being captured.[35] The Protocol added further fundamental guarantees that apply even to spies, such as being treated "humanely" and elaborating further guarantees for trials of alleged spies.[36]

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29. *Id.* arts 20–21.

30. The Laws of War on Land (Oxford Manual) (Institute for International Law, Oxford, Sept. 9, 1880), *at* http://www.icrc.org/ihl, arts 23–26, provides that individuals captured as spies cannot demand to be treated as prisoners of war, but no person charged with espionage shall be punished without a trial; moreover, it is admitted that "A spy who succeeds in quitting the territory occupied by the enemy incurs no responsibility for his previous acts, should he afterwards fall into the hands of that enemy."

31. Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (1899 Hague Regulations), done at The Hague, July 29, 1899, *at* http://www.icrc.org/ihl, art. 24 (ruses allowed), 29 (definition of spies), 30 (spies caught in the act to be tried before punishment), 31 ("A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."). Virtually identical provisions appear in Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (1907 Hague Regulations), done at The Hague, Oct. 18, 1907, 36 Stat 2277, 1 Bevans 631, *at* http://www.icrc.org/ihl, arts 24, 30, 31.

32. Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), done at Geneva, Aug. 12, 1949, *at* http://www.icrc.org/ihl, arts 5, 75 (the six month period may be reduced in "circumstances of grave emergency"). Note that the convention does not require a trial where the death penalty is not threatened.

33. *Id.* art. 5.

34. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), June 8, 1977, *at* http://www.icrc.org/ihl, art. 37(2).

35. *Id.* art. 46: "(1) Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy. (2) A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces. (3) A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as

Spies, therefore, bear personal liability for their acts but are not war criminals as such[37] and do not engage the international responsibility of the state that sends them.[38] This highly unusual situation is compounded by a kind of statute of limitations that rewards success if the spy rejoins the regular armed forces. Such apparent inconsistencies may in part be attributed to the unusual nature of the laws of war, a body of rules that exists in an uneasy tension between facilitating and constraining its subject matter. But it also reflects the necessary hypocrisy of states denouncing the spies of their enemies while maintaining agents of their own.

B. *Non-Intervention in Peacetime*

The laws of war naturally say nothing of espionage during peacetime. Espionage itself, it should be noted, is merely a subset of human intelligence: it would seem that SIGINT (such as intercepting telecommunications) and IMINT (such as aerial photography) are either accepted as ruses of war or at least not prohibited by the relevant conventions. Rules on air warfare were drafted by a commission of jurists in 1922-23 to extend the Hague Regulations to persons onboard aircraft, but this was an extension of jurisdiction to cover the activities of airborne spies rather than a prohibition of aerial surveillance as such.[39]

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engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage. (4) A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs."

36. *Id*. arts 45(3), 75.

37. *See, e.g.,* In re Flesche, 16 Ann. Dig. 266, 267 (Spec. Ct. Cass. 1949) (Holland) (espionage "is a recognized means of warfare and therefore is neither an international delinquency on the part of the State employing the spy nor a war crime proper on the part of the individual concerned").

38. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 8, 1977 TO THE GENEVA CONVENTIONS OF AUG. 12, 1949 562 (Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman eds., 1987). This bears out, perhaps, dramatic representations of the deniability that surrounds state-sponsored cover activities. *See, e.g.,* W. SOMERSET MAUGHAM, ASHENDEN; OR: THE BRITISH AGENT 4 ([1928] 1941): (" 'There's just one thing I think you ought to know before you take on this job. And don't forget it. If you do well you'll get no thanks and if you get into trouble you'll get no help. Does that suit you?' ").

39. Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (1923 Hague Rules) (Drafted by a Commission of Jurists at the Hague, The Hague, December 1922–February 1923), *at* http://www.icrc.org/ihl, Part II ("Rules of Air Warfare"), arts 27–29 (never adopted in legally binding form). *See* Lt. Col. Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT'L L. & POL'Y 321, 335 (1996). Part I of the 1923 Hague Rules, on "the Control of Wireless Telegraphy in Time of War," specifically does not extend the previous definition of espionage: 1923 Hague Rules, art. 11.

The foundational rules of sovereignty, however, provide some guidance on what restrictions, if any, might be placed on different forms of intelligence gathering that do not rise to the level of an armed attack or violate other specific norms.[40] The basic rule was articulated by the Permanent Court of International Justice in the 1927 *Lotus* case as follows: "the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State."[41] This would clearly cover unauthorized entry into territory; it would also cover unauthorized use of territory, such as Italian claims that C.I.A. agents abducted an Egyptian cleric in Milan in February 2003 in order to send him to Egypt for questioning regarding alleged terrorist activities,[42] as well as the use of airspace to transfer such persons as part of a program of "extraordinary renditions."[43]

A key question, therefore, is how far that territory extends. In addition to land, this includes the territorial waters of a country, which may extend up to 12 nautical miles from the coast. The UN Convention on the Law of the Sea, for example, protects innocent passage through the territorial sea but

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40. The general norm of non-intervention has evolved considerably over time: during the nineteenth century (at a time when war itself was not prohibited), it was considered by some to embrace everything from a speech in parliament to the partition of Poland: P.H. Winfield, *The History of Intervention in International Law*, 3 BRITISH YEARBOOK INT'L L. 130 (1922). *See further* SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 7–24 (2001).

41. Case of the SS "Lotus" (France v. Turkey) (Permanent Court of International Justice, Merits, 1927) PCIJ Series A, No 10, 18 (1927), *at* http://www.icj-cij.org. States may, however, exercise extraterritorial jurisdiction over acts by non-nationals directed against the security of the state, understood to include espionage: RESTATEMENT OF THE LAW THIRD, FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), § 402(3) ("a state has jurisdiction to prescribe law with respect to . . . certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests"). The commentary provides that "International law recognizes the right of a state to punish a limited class of offenses committed outside its territory by persons who are not its nationals—offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems, e.g., espionage, counterfeiting of the state's seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws."

42. *See, e.g., Italy Seeks Arrests in Kidnapping Case*, N.Y. TIMES, Dec. 24, 2005 (describing abduction of Hassan Mustafa Osama Nasr as part of the C.I.A.'s program of "extraordinary rendition" and claims that after his transfer to Egyptian custody he was tortured). The chances of an actual trial seem slim: Adam Liptak, *Experts Doubt Accused C.I.A. Operatives Will Stand Trial in Italy*, N.Y. TIMES, June 27, 2005 ("Of the 13 names mentioned in the warrants of people being sought for arrest, research indicates that 11 may be aliases. Public records show that some of the names received Social Security numbers in the past 10 years and that some had addresses that were post office boxes in Virginia that are known to be used by the C.I.A."). In 1960 the Security Council stated that forced transnational abduction is a "violatoin of the sovereignty of a Member State . . . incompatible with the Charter of the United Nations": S.C. Res. 138 (1960) (criticizing abduction of alleged war criminal Adolf Eichmann by Israel from Argentina, but imposing no formal sanction of the conduct).

43. *See, e.g.*, Ian Fisher, *Reports of Secret U.S. Prisons in Europe Draw Ire and Otherwise Red Faces*, N.Y. TIMES, 1 December 2005. For a critical view, *see* Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657 (2006). For a partial defense of the practice, *see* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183 (2004).

specifically excludes ships engaging in acts aimed at "collecting information to the prejudice of the defense or security of the coastal State."[44] On the high seas—that is, beyond the territorial waters—no such restriction exists.

The Chicago Convention on International Civil Aviation affirms that every state enjoys complete and exclusive sovereignty over the airspace above its territory, understood as the land and territorial waters.[45] Though the convention deals primarily with civilian aircraft, it includes a general prohibition on state aircraft flying over or landing on the territory of another state without authorization.[46] Deliberate trespass by military aircraft other than in cases of distress may, it seems, be met with the use of force without warning:[47] when the Soviet Union shot down a U.S. reconnaissance aircraft 20,000 meters above Soviet territory in 1960, the United States protested neither the shooting nor the subsequent trial of the pilot.[48] When a U.S. Navy EP-3 surveillance plane collided with a Chinese F-8 fighter jet over the South

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44. United Nations Convention on the Law of the Sea (UNCLOS), done at Montego Bay, Dec. 10, 1982 (in force Nov. 16, 1994), *at* http://www.un.org/Depts/los, art. 19(2)(c). *See, e.g.*, W. E. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 AM. J. INT'L L. 331 (1987) (discussing the passage of two U.S. warships in the Black Sea with the apparent intention of testing Soviet defenses).

45. Convention on International Civil Aviation (Chicago Convention), done at Chicago, Dec. 7, 1944 (in force Apr. 4, 1947), *at* http://www.icao.int, arts 1–2.

46. *Id.* art. 3.

47. Major John T. Phelps, *Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255, 291–92 (1985) ("it is apparent that civil and military aircraft are treated differently by custom and by necessity. In the case of military aircraft, there is a much lower threshold in terms of use of force. The unprotected U-2 incident in 1960 supports the proposition that force may be applied without warning against a military aircraft that has intruded into the territory of another state on a definite and deliberate military missions").

48. Designed in the 1950s to fly over restricted territory at an altitude of at least 70,000 feet, the U-2 was beyond the reach of the existing set of antiaircraft guns and missiles used by the U.S.S.R. or China. Francis Gary Powers had orders from the C.I.A. to take off from Pakistan with the intent to cross over Soviet territory and land in Norway. After Power's plane went missing, the U.S. announced on May 1, 1960, that one of two meteorological observation planes belonging to NASA was missing near Lake Van, close to the Soviet border. On May 5, Khrushchev announced to the Supreme Soviet in Moscow that a U-2 had been shot down; Lincoln White, a State Department spokesperson, made a statement that the plane referred to by Khrushchev may have been the missing NASA plane. White later stated on May 6: "There was absolutely no deliberate attempt to violate Soviet airspace and there has never been." Wright, *U-2 Incident*, *supra* note 12, at 836–37. Prior to the Powers incident, the U.S. had consistently denied that it was conducting such overflights. These claims retained some element of plausibility in light of government practice to disavow knowledge of action undertaken by their agents. Once it was clear that Powers had not been killed, however, the U.S. became caught in a lie. Demarest, *supra* note 39, at 340–41. On May 7, Khrushchev stated that "I fully admit that the President did not know that a plane was sent beyond the Soviet frontier and did not return." The State Department subsequently issued a statement that the flight "was probably undertaken by an unarmed civilian U-2 plane" and was justified because of the need "to obtain information now concealed behind the iron curtain" in order to lessen the danger of surprise attack on the free world, but, as a result of an inquiry ordered by the President, "it has been established that in so far as the authorities in Washington are concerned, there was no authorization for any such flights." Wright, *U-2 Incident*, *supra* note 12, at 838. A summit was canceled over the issue, which ended up briefly on the agenda of the UN Security Council. After much debate, a final resolution was adopted appealing to governments to "respect each other's sovereignty, territorial integrity and political independence, and to refrain from any action which might increase tensions": S.C. Res. 135 (1960), para. 2. The same resolution also requested the governments concerned to continue moves towards disarmament "as well as their negotiations on measures to

China Sea in April 2001, China claimed that such surveillance, even beyond its territorial waters, was a violation of the UN Convention on the Law of the Sea, which requires that a state flying over or navigating through the exclusive economic zone of a country (extending up to 200 nautical miles beyond the coastline) have "due regard to the rights and duties of the coastal State."[49] Chinese authorities allowed the distressed plane to land on Chinese territory but detained its crew for 11 days and dismantled much of the plane.[50] The same norms would apply to unmanned aerial vehicles, such as the two U.S. craft that crashed in Iran during 2005.[51]

There is no prohibition, however, on spying from orbit. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (the Outer Space Treaty), provides that "Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[52] The treaty therefore does

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prevent surprise attack, *including technical measures*": S.C. Res. 135 (1960), para. 3 (emphasis added). *Cf*. the shooting down of Korean Airlines 007 in 1983. *See, e.g.*, P. Martin, *Destruction of Korean Air Lines Boeing 747 over Sea of Japan, Aug. 31, 1983*, 9(3) AIR LAW 138 (1984); James Gollin, *Stirring Up the Past: KAL Flight 007*, 7(4) INT'L J. OF INTELLIGENCE AND COUNTERINTELLIGENCE 445 (1994). *Cf.* U.S. protests when North Korean fighter jets apparently locked onto a U.S. spy plane, an RC-135S Cobra Ball 150 miles off the North Korean coast: Eric Schmitt, *North Korea Mig's Intercept U.S. Jet on Spying Mission*, N.Y. TIMES, Mar. 4, 2003.

49. United Nations Convention on the Law of the Sea (UNCLOS), done at Montego Bay, Dec. 10, 1982 (in force Nov. 16, 1994), *at* http://www.un.org/Depts/los, art. 58(3). *See, e.g.*, U.S. Seriously Violates International Law (Washington, DC: Embassy of the People's Republic of China in the United States, Apr. 15, 2001), *at* http://www.china-embassy.org/eng/zt/zjsj/t36383.htm.

50. The incident took place on Apr. 1, 2001, approximately 70 nautical miles south-east of China's Hainan Island, in the airspace above a 200 mile exclusive Economic Zone that is claimed by China. The damaged Chinese fighter jet crashed into the sea, killing its pilot Wang Wei, while the American surveillance plane was also damaged and forced to land at a Chinese airstrip. China and the U.S. offered differing accounts as to who was responsible for the collision, each alleging dangerous manoeuvring by the other state's pilot. Chinese authorities justified their actions during and following the incident by claiming that its limited economic jurisdiction over a 200-mile coastal zone gave it authority over the spy plane before and after the collision. The United States argued that between 25–30 Mayday distress calls were made prior to the emergency landing, justifying the alleged intrusion on Chinese territorial sovereignty. The U.S. further claimed that both the EP-3 and its crew were the sovereign property of the U.S.; consequently, the aircraft should not have been boarded or examined in any way and both the crew and the plane should have been returned to the U.S. immediately. The Chinese demanded an apology from the U.S.; the U.S. replied with a letter that it was "very sorry for the incident." The Chinese also made a claim for $1 million in reparations, which was met with a "non-negotiable" offer from the U.S. of $34,567. This issue was never settled. *See* Margaret K. Lewis, *Note: An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident*, 77 N.Y.U. L. REV. 1404 (2002); Eric Donnelly, *The United States-China EP-3 Incident: Legality And Realpolitik*, 9 JOURNAL OF CONFLICT AND SECURITY LAW 25 (2004) and sources there cited.

51. *See, e.g.*, Letter dated Oct. 26, 2005 from the Chargé d'affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc. S/2005/692 (Oct. 31, 2005), *at* http://documents.un.org (protesting the incursion of two U.S. unmanned aerial vehicles—a Shadow-200 (RQ-7) and a Hermes—that crashed in Iran on July 4, 2005 and Aug. 25, 2005 respectively).

52. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty), done at London, Moscow, and Washington, Jan. 27, 1967 (in force Oct. 10, 1967), *at* http://www.oosa.unvienna.org/SpaceLaw/outerspt.html, art. 2.

not prohibit surveillance satellites, and no state has formally protested their use.[53] One problem that has emerged with new generations of high-flying aircraft such as scramjets is that there is no agreed definition of where airspace ends and outer space begins.[54]

Other potential approaches to regulating space-based surveillance activities have had limited success. A separate convention requires registration of satellites and other objects launched into space. Information is to be deposited "as soon as practicable" with the UN Secretary-General concerning the basic orbital parameters of the object and its "general function."[55] This provides considerable leeway for reporting on spy satellites and the information provided tends to be very general indeed: in 2004 the United States registered 13 launches, 12 of which were described as "[s]pacecraft engaged in practical applications and uses of space technology such as weather and communications."[56]

In 1986, the UN General Assembly adopted fifteen "Principles Relating to Remote Sensing of the Earth from Outer Space," though this was limited to remote sensing "for the purpose of improving natural resources management, land use and the protection of the environment." Such activities are to be conducted on the basis of respect for sovereignty and not in a manner detrimental to the legitimate rights

53. McDougal, Lasswell, and Reisman, *supra* note 13, at 434 (citing Eisenhower's policy of distinguishing passive satellite intelligence gathering from aerial incursion); D. Goedhuis, *The Changing Legal Regime of Air and Outer Space*, 27 INT'L & COMP. L.Q. 576, 584 (1978) ("it is now generally recognized that, as reconnaissance satellites operate in a medium which is *not* subject to the sovereignty of any State their use is not illegal"); M.E. Bowman, *Intelligence and International Law*, 8(3) INT'L J. OF INTELLIGENCE AND COUNTERINTELLIGENCE 321, 331 n10 (1995) ("Today, 'spy' satellites are so common the United Nations expects nations merely to register their space objects, giving specified information about the object, including a general description of its function"). *See also* North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (International Court of Justice, Merits, Feb. 20, 1969), 1969 ICJ Rep 3, 230 (1969), *at* http://www.icj-cij.org (obiter dicta in the dissenting opinion of Judge Lachs): "[T]he first instruments that man sent into outer space traversed the airspace of States and circled above them in outer space, yet the launching States sought no permission, nor did the other States protest. This is how the freedom of movement into outer space, and in it, came to be established and recognized as law within a remarkably short period of time." *Cf.* BRUCE A. HURWITZ, THE LEGALITY OF SPACE MILITARIZATION 29–30 (1986) (comparing outer space to the high seas).

54. *See, e.g.*, Goedhuis, *supra* note 53, at 590; Committee on the Peaceful Uses of Outer Space, Historical Summary on the Consideration of the Question on the Definition and Delimitation of Outer Space, UN Doc. A/AC.105/769 (Jan. 18, 2002), *at* http://www.oosa.unvienna.org/Reports/AC105_769E.pdf.

55. Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975 (in force Sept. 15, 1976), *at* http://www.oosa.unvienna.org/SORegister/regist.html, art. 4.

56. *See* UN Docs ST/SG/SER.E/444 (2004), ST/SG/SER.E/449 (2004), ST/SG/SER.E/451 (2004), ST/SG/SER.E/452 (2004), ST/SG/SER.E/453 (2004), *at* http:// www.oosa.unvienna.org. The thirteenth object was designated "Spacecraft engaged in investigation of spaceflight techniques and technology": UN Doc. ST/SG/SER.E/458 (2004), *at* http:// www.oosa.unvienna.org.

and interests of the state whose territory is the subject of investigation. The scope of the principles was clearly intended to exclude, among other things, surveillance and military satellites.[57]

Today, satellite photographs are widely available commercially through services such as Google Earth. Though some states have occasionally expressed concerns about the prudence of making such images available, there has been little suggestion that either the collection or dissemination of the material is itself illegal.[58]

Interception of electronic communications raises more complicated issues.[59] The use of national intelligence in the lead up to the 2003 Iraq war, for example, was not limited to spying on Saddam Hussein's regime. As the United States and Britain sought support for a resolution in the Security Council authorizing an invasion, a translator at the British Government Communications Headquarters (GCHQ) leaked an email that outlined plans by the U.S. National Security Agency (NSA) to mount a "surge" against the other 13 members of the Council. This message, sent between the U.S. and British signals intelligence agencies, revealed a concerted effort to tap into the office and home telephone and email communications of delegations on the Council in order to collect information on their positions on the debate over Iraq, including alliances, dependencies, and "the whole gamut of information that could give U.S. policymakers an edge in obtaining results favorable to U.S. goals or to head off surprises."[60] Though some expressed shock at the revelation, most diplomats in New York assume that U.S. and other intelligence services routinely intercept their communications. One Council diplomat, when asked by a

57. G.A. Res. 41/65 (1986), Annex.

58. *See, e.g., Google Faces Terror Claim*, HOBART MERCURY (AUSTRALIA), Oct. 17, 2005 (Indian President Abdul Kalam expressing concern about the new Google Earth service providing terrorists with maps of potential targets).

59. The International Telecommunications Convention of 1973 provides, on the one hand, that members will take "all possible measures, compatible with the system of telecommunication used, with a view to ensuring the secrecy of international correspondence." Nevertheless, they "reserve the right to communicate such correspondence to the competent authorities in order to ensure the application of their internal laws or the execution of international conventions to which they are parties." International Telecommunication Convention, done at Malaga-Torremolinos, Oct. 25, 1973 (in force Jan. 1, 1975), *at* http://www.austlii.edu.au/au/other/dfat/treaties/1975/24.html, art. 22.

60. Martin Bright, Ed Vulliamy, and Peter Beaumont, *U.S. Dirty Tricks to Win Vote on Iraq War*, OBSERVER, Mar. 2, 2003.

reporter in a telephone interview whether he believed his calls were being monitored, replied dryly, "Let's ask the guy who's listening to us."[61]

The response to such revelations has tended to be pragmatic rather than normative. A 1998 report to the European Parliament, for example, warned bluntly that the NSA routinely intercepted all email, telephone, and fax communications in Europe.[62] Six years later, the EU committed €11 million over four years to developing secure communications based on quantum cryptography (SECOQC), which would theoretically be unbreakable by any surveillance system, specifically including the U.S.-led ECHELON network.[63]

C. *Diplomatic and Consular Relations*

Diplomacy and intelligence gathering have always gone hand in hand. The emergence of modern diplomacy in Renaissance Italy underscored the importance of having agents to serve as negotiators with foreign powers, and a chief function of the resident ambassador soon came to be ensuring that a continuous stream of foreign political news flowed to his home government.[64]

Current treaty law on diplomatic relations implicitly acknowledges this traditional intelligence-gathering component of diplomacy and seeks to define some of the limits of what is acceptable. The Vienna Convention on Diplomatic Relations includes among the functions of a diplomatic mission "ascertaining *by all lawful means* conditions and developments in the receiving State, and reporting thereon to the Government of the sending State."[65] The Convention also provides for receiving state

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61. Colum Lynch, *Spying Report No Shock to UN*, WASHINGTON POST, Mar. 4, 2003.

62. Steve Wright, An Appraisal of the Technologies of Political Control (European Parliament, Brussels, STOA Interim Study, PE 166.499/INT.ST, 1998).

63. *See* Soyoung Ho, *EU's Quantum Leap*, FOREIGN POLICY, September 2004, 92. For further information, visit <http://www.secoqc.net>. *See also* SIMON CHESTERMAN, SHARED SECRETS: INTELLIGENCE AND COLLECTIVE SECURITY (2006), *at* http://www.lowyinstitute.org.

64. GARRETT MATTINGLY, RENAISSANCE DIPLOMACY 67 (1962); VAN DINH TRAN, COMMUNICATION AND DIPLOMACY IN A CHANGING WORLD 89–92 (1987); KEITH HAMILTON AND RICHARD LANGHORNE, THE PRACTICE OF DIPLOMACY: ITS EVOLUTION AND ADMINISTRATION 217–21 (1995); HERMAN, *supra* note 10, at 9–10.

65. Vienna Convention on Diplomatic Relations, done at Vienna, Apr. 18, 1961 (in force Apr. 24, 1964), *at* http://www.un.org/law/ilc/texts/diplomat.htm, art. 3(d) (emphasis added).

approval of military attachés, presumably in order to ascertain their possible intelligence functions.[66] This is consistent with the relatively common practice of having identified intelligence officials in certain diplomatic missions for liaison purposes.

Other provisions are clearly intended to prevent or at least limit intelligence gathering. The receiving state may limit a mission's size and composition,[67] and its consent is required to install a wireless transmitter[68] or establish regional offices.[69] The freedom of movement of diplomats may be restricted for reasons of national security.[70] More generally, diplomats have a duty to respect the laws and regulations of the receiving state and not to interfere in its internal affairs.[71] In addition, the premises of the mission are not to be used "in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State."[72]

Regardless of their activities, the person of the diplomat, the mission's premises, and diplomatic communications are inviolable.[73] Temporary detention of diplomats accused of espionage is fairly common, but there are no recorded cases of prosecution for espionage.[74] Instead, the traditional remedy

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66. *Id.* art. 7: "Subject to the provisions of Articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attaches, the receiving State may require their names to be submitted beforehand, for its approval." *See also* MICHAEL HARDY, MODERN DIPLOMATIC LAW 28 (1968).

67. Vienna Convention on Diplomatic Relations, art. 11. *See* Rosalyn Higgins, *UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report*, 80 AM. J. INT'L L. 135, 138–39 (1986) ("involvement in espionage or terrorism is likely to lead to the imposition of specific ceilings 'since the mission has no need for those "diplomats" whose activities are not properly diplomatic' "); GRANT V. MCCLANAHAN, DIPLOMATIC IMMUNITY: PRINCIPLES, PRACTICES, PROBLEMS 163 (1989) (in practice article 11 is invoked out of a "conviction that spying was the real function of too many of the members of the mission").

68. Vienna Convention on Diplomatic Relations, art. 27(1).

69. *Id.* art. 12.

70. *Id.* art. 26.

71. *Id.* art. 41(1). It has been argued that the requirement that persons enjoying diplomatic immunity have a "duty . . . to respect the laws and regulations of the receiving State" supports a theory that collection of secret intelligence by diplomats violates international law: Delupis, *supra* note 6, at 69 (citing Vienna Convention on Diplomatic Relations, art. 41(1)). This line of reasoning is untenable; it would make virtually any violation of the laws and regulations of the receiving state a violation of international law. For an early view, see Yearbook of the International Law Commission 1958, UN Doc. A/CN.4/SER.A/1958 (1958), para. 68 (Grigory I. Tunkin distinguishing between the existence of an obligation and the possibility of coercion).

72. Vienna Convention on Diplomatic Relations, art. 41(3).

73. *Id.* arts 22, 27, 29, 31.

74. *Cf.* United States v. Kostadinov, 734 F.2d 905 (2d Cir.1984) (determining first that individual was not automatically covered by the Vienna Convention because of his employment in an embassy building and then accepting the State Department's determination as to whether the individual was a diplomatic agent). For examples of detentions, *see* Steven Greenhouse, *Bold Iranian Raid on French Craft Heightens Gulf Tensions*, N.Y. TIMES, July 19, 1987; Paul Lewis, *France*

for overstepping the explicit or implicit boundaries of diplomacy is to declare a diplomat *persona non grata*, normally prompting a swift recall of the person to the sending state.[75] Though the Vienna Convention does not require reasons to be given,[76] the formula typically used by the receiving state is that a diplomat has engaged in "activities incompatible with their diplomatic status."[77]

The norms in place, then, both implicitly accept limited intelligence gathering as an inevitable element of diplomacy and explicitly grant an absolute discretion to terminate that relationship at will. A practice nevertheless has emerged of states justifying their actions with reference to appropriate and inappropriate activities. The possible normative content of this practice is most evident in the cases of retaliatory expulsions (technically the naming of diplomats *persona non grata* prior to recall). Some have claimed that, where an expulsion is seen as unwarranted, the sending state may "retaliate" by expelling an innocent diplomat from a mission in its own territory.[78] This norm sometimes extends to situations where diplomatic immunity may not be applicable: though the days of trading spies across Berlin's Glienicke

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Proposes 2 Sides Evacuate Embassy Staffs, N.Y. TIMES, July 19, 1987 (French police surrounded the Iranian embassy for five days in an attempt to question a bombing suspect; Iran retaliated by circling the French embassy in Tehran); Michael R. Gordon, *Russians Briefly Detain U.S. Diplomat, Calling Her a Spy*, N.Y. TIMES, Dec. 1, 1999 (detention on the way to alleged meeting with agent; detained then released; Vienna Convention explicitly invoked by United States); Ian Fisher, *In Serbia, Politics in Turmoil as U.S. Diplomat Is Detained*, N.Y. TIMES, Mar. 16, 2002 (state disavowed involvement in detention of diplomat allegedly meeting with agent by plainclothes military personnel).

75. Vienna Convention on Diplomatic Relations, art. 9(1). A person may be declared *non grata* prior to arriving in the receiving state: *id*. If the sending state refuses or fails within a reasonable period to recall the person, the receiving state may refuse to recognize them as a member of the mission: *id.* art. 9(2). This may apply to large numbers of persons: in 1971 Britain expelled 105 Soviet intelligence officers at once: MICHAEL HERMAN, INTELLIGENCE SERVICES IN THE INFORMATION AGE: THEORY AND PRACTICE 41 (2001). *See generally* EILEEN DENZA, DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 64 (2nd ed. [1976] 1998).

76. Vienna Convention on Diplomatic Relations, art. 9(1).

77. *See, e.g.*, Irvin Molotsky, *U.S. Expels Cuban Diplomat Who Is Linked to Spy Case*, N.Y. TIMES, Feb. 20, 2000 (requiring a Cuban diplomat to leave the United States within seven days for due to activities "incompatible with his diplomatic status").

78. DENZA, *supra* note 75, at 66 (noting that expulsion is not subject to control by objective assessment of reasons or evidence and as such "retaliation cannot be said to be a contravention of the Convention"); Delupis, *supra* note 6, at 59. *See, e.g.*, Bill Keller, *Moscow Expels U.S. Attache in Response to "Provocation"*, N.Y. TIMES, Mar. 16, 1989 (while accusing U.S. diplomat of particular acts of spying, USSR gives earlier expulsion of Soviet diplomat for spying as the expulsion's cause); Robert Pear, *U.S. Charges Russian with Spying and Says He Will Be Sent Home*, N.Y. TIMES, Mar. 10, 1989 (Soviet diplomat is named *persona non grata* for accepting sensitive information from an American). In March 2001, following revelations of espionage by Robert P. Hanssen the United States demanded that four Russian diplomats leave the U.S. in ten days and a further 46 alleged intelligence officers depart by July 1, 2001. The Russian government swiftly identified four U.S. diplomats who were required to leave within ten days and 46 others required to exit by July 1, 2001. *See* Patrick E. Tyler, *Russia's Spy Riposte: Film Catches Americans in the Act*, N.Y. TIMES, Mar. 28, 2001. *See also* MCCLANAHAN, *supra* note 67, at 163 (describing mutual expulsions in 1986 with the United States and Soviet Union maintaining "numerical parity" on reciprocal charges of intelligence activities).

Bridge at midnight are over, foreign agents may be expelled by the target state rather than prosecuted in order to ensure that the state's own "diplomats" are treated similarly.[79]

D. *Arms Control*

One of the reasons for the unusual treatment of espionage in diplomatic relations is the principle of reciprocity—the recognition that what one does to another state's spies will affect its treatment of one's own agents. The underlying assumption of this arrangement is that intelligence collection is an important or at least an unavoidable component of diplomatic relations. This is even truer of a fourth body of international law that casts light on the regulation of intelligence gathering: arms control. Arms control poses a classic prisoners' dilemma, where a key mechanism for avoiding the negative costs associated with a lack of trust is to ensure a flow of information about the other party's actions.[80] Intelligence can provide this information; arms control regimes exhibit innovative means of protecting it.

In the late 1960s and early 1970s, intelligence was essential to strategic arms limitation negotiations between the United States and the Soviet Union.[81] The inability to reach agreement on a verification regime, such as on-site inspections, had for some time stalled agreement on a test ban and arms limitation, even as space-based surveillance increased access to information on the conduct of other parties. Eventual agreement depended not on a verification regime but rather on protection of that surveillance capacity. In the end, the same text was used in the two agreements concluded in Moscow in May 1972: the Anti-Ballistic Missile Treaty and the SALT I Agreement. Both embraced the euphemism "national technical means of verification" for the intelligence agencies of the two parties:

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79. John S. Beaumont, *Self-Defence as a Justification for Disregarding Diplomatic Immunity*, 29 CANADIAN YEARBOOK INT'L L. 391, 398–401 (1991) (discussing the importance of careful treatment of diplomats due to the principle of reciprocity); Steven Erlanger, *U.S. Will Ask Former Soviet Republic to Lift Diplomat's Immunity in Fatal Car Crash*, N.Y. TIMES, Jan. 6, 1997 (quoting officials to the effect that, in general "foreign spies are simply expelled, to insure that American spies, when caught, are treated equally").

80. *See, e.g.*, JOSEPH FRANKEL, CONTEMPORARY INTERNATIONAL THEORY AND THE BEHAVIOR OF STATES 93ff (1973) (discussing game theory in international relations); John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1, 27–32 (1997) (discussing the prisoners' dilemma in arms control).

81. HERMAN, *supra* note 10, at 158–59.

1. For the purpose of providing assurance of compliance with the provisions of this Treaty, each Party shall use national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law.
2. Each Party undertakes not to interfere with the national technical means of verification of the other Party operating in accordance with paragraph 1 of this Article.
3. Each Party undertakes not to use deliberate concealment measures which impede verification by national technical means of compliance with the provisions of this Treaty. This obligation shall not require changes in current construction, assembly, conversion, or overhaul practices.[82]

These provisions effectively establish a right to collect intelligence, at least with respect to assessing compliance with the arms control obligations. Although there is no formal elaboration of such a right, the text strongly implies that such activity is or can be consistent with "generally recognized principles of international law." It then prohibits interference with such activities and limits concealment from them. Drawing on Wesley Newcomb Hohfeld's analytical approach to rights, this amounts to a *claim-right* (or a "right" *stricto sensu*) for state A to collect intelligence on state B's compliance, as state B is under a corresponding duty not to interfere with state A's actions. This may be contrasted with the treatment of spies in the laws of war, discussed earlier, where state A may have a *liberty* to use spies—state B is unable to demand that A refrain from using spies but is not prevented from interfering in their activities.[83]

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82. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty), United States-Union of Soviet Socialist Republics, done at Moscow, May 26, 1972 (in force Oct. 3, 1972 (United States announced its withdrawal on Dec. 14, 2001)), *at* http://www.state.gov/t/np/trty/16332.htm, art. XII; Interim Agreement Between The United States of America and The Union of Soviet Socialist Republics on Certain Measures With Respect to the Limitation of Strategic Offensive Arms (SALT I Agreement), United States-Union of Soviet Socialist Republics, done at Moscow, May 26, 1972 (in force Oct. 3, 1972), *at* http://www.state.gov/t/ac/trt/4795.htm, art. V. In the SALT I Agreement, the words "Interim Agreement" are substituted for "Treaty" in paragraph 3. Cf Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms, Together with Agreed Statements and Common Understandings Regarding the Treaty (SALT II Treaty), United States-Union of Soviet Socialist Republics, done at Vienna, June 18, 1979 (in force (unratified)), *at* http://www.state.gov/t/ac/trt/5195.htm, art. XV. Similar provisions were included in a General Assembly resolution providing basic provisions for a treaty prohibiting nuclear weapons testing: G.A. Res. 37/85 (1982), Annex, arts 6–8.

83. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 27–64 (1923). Briefly, Hohfeld distinguishes two separate uses of the word right: (i) a *claim-right*, which

Subsequent U.S.-Soviet arms control treaties tended to follow or extend the approach used in the ABM Treaty. The 1987 Intermediate-Range Nuclear Forces Treaty (INF), for example, affirmed the basic text quoted above and added a right to make six requests a year for the implementation of "cooperative measures" to enable inspection of deployment bases for certain road-mobile missiles. These measures consisted of opening the roofs of all fixed structures and displaying the missiles on launchers in the open, which was to happen within six hours of the request and continue for a period of twelve hours, presumably to enable satellite observation.[84] The 1991 Strategic Arms Reduction Treaty Text (START I) also required the parties to limit the use of encryption or jamming during test flights of certain missiles.[85]

The Open Skies Agreement followed a more regulated approach that established a regime of unarmed aerial observation flights over the entire territory of its participants.[86] Rather than guaranteeing non-interference with unilateral intelligence collection, the agreement provides for a defined quota of flights using specific airplanes and photographic technology that must be commercially available to all states parties.[87] Imagery collected is made available to any other state party.[88]

The use of intelligence in the ways described here serves two functions. In addition to being an important means of monitoring specific factual questions, such as compliance with disarmament obligations, ensuring a regular supply of intelligence itself may serve as a confidence-building measure.

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has an enforceable *duty* as its correlative, and (ii) a *privilege* (commonly renamed "liberty" in the subsequent literature), which corresponds not to a duty but to a *no-right* (ie, the lack of a claim-right that something not be done).

84. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (Intermediate-Range Nuclear Forces (INF) Treaty), United States-USSR, done at Washington, DC, Dec. 8, 1987 (in force June 1, 1988), *at* http://www.state.gov/www/global/arms/treaties/inf2.html, art. XII. *See, e.g.*, George P. Schultz, Letter of Submittal (report on the Intermediate-Range Nuclear Forces Treaty to President Ronald Reagan) (State Department, Washington, DC, Jan. 25, 1988), *at* http://www.defense.gov/acq/acic/treaties/inf/inf_lett.htm ("The Treaty recognizes the utility of national technical means of verification, such as reconnaissance satellites, and each Party agrees not to interfere with such means of verification").

85. Strategic Arms Reduction Treaty Text (START I), United States-USSR, done at Moscow, July 31, 1991 (in force December 1994), *at* http://www.defenselink.mil/acq/acic/treaties/start1/text.htm, art. X. Other measures provided for on the ground inspections.

86. Open Skies Treaty, done at Helsinki, Mar. 24, 1992 (in force Jan. 1, 2002), *at* http://www.state.gov/t/ac/trt/33393.htm, arts I(1), II(4).

87. *Id.* arts III-VI. The official certified U.S. Open Skies aircraft is the OC-135B (a military version of the Boeing 707). As of June 2005 there were 34 states parties: Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sweden, Turkey, United Kingdom, Ukraine, and the United States.

88. *Id.* art. IX.

The United States has demonstrated willingness to use its own intelligence in this way in conflict mediation, as when Secretary of State Henry Kissinger offered Egypt and Israel U-2 overflight imagery as a means of guarding against surprise attack following the 1973 Yom Kippur War.[89] Similarly, intelligence briefings of both India and Pakistan were helpful in averting war over Kashmir in 1990.[90]

E. *Multilateral Intelligence Sharing*

As intelligence has become a more common and accepted part of foreign policy—notably as it moved from being a wartime activity to one conducted in peacetime, or at least in cold as opposed to hot wars—communities of intelligence officials have emerged. This is clearest in the case of intelligence sharing alliances.[91] Intelligence services tend to regard their relationships with counterparts in other countries in terms of concentric rings. The inner ring includes those countries with which an established relationship is built on history, trust, and shared protocols for handling information. The closest such relationships derive from formal intelligence alliances established during the Second World War, notably the relationship between the United States and Britain, later expanded to include Australia, Canada, and New Zealand.[92] A second tier embraces trusted governments with common interests. For the United States

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89. HENRY KISSINGER, YEARS OF UPHEAVAL 828 (1982). *See also* VOLKER KUNZENDORF, VERIFICATION IN CONVENTIONAL ARMS CONTROL 18 (1989); ALAN JAMES, PEACEKEEPING IN INTERNATIONAL POLITICS 114–15 (1990).

90. HERMAN, *supra* note 10, at 157. *See also* OPEN SKIES, ARMS CONTROL, AND COOPERATIVE SECURITY 244 (Michael Krepon and Amy E. Smithson eds., 1992) (discussing aerial inspections used as a confidence-building mechanism by the United Nations along the Iran-Iraq border and in Lebanon).

91. The following text draws upon CHESTERMAN, *supra* note 63, section 1.2.

92. The reach and capacity of this network remains the subject of speculation, but its basic history is now essentially a matter of public record. In 1947 the United States and Britain signed the United Kingdom-USA Intelligence Agreement, known by the shorthand "UKUSA"; Australia, Canada, and New Zealand signed protocols the following year. The agreement forms the basis for a signals intelligence alliance that links the collection capacities of the U.S. National Security Agency (NSA), Britain's Government Communications Headquarters (GCHQ), Australia's Defence Signals Directorate (DSD), the Canadian Communications Security Establishment (CSE), and New Zealand's Government Communications Security Bureau (GCSB). Comparable to the burden sharing by the United States and Britain in the Second World War, the five UKUSA countries assumed responsibility for overseeing surveillance of different parts of the globe. They also agreed to adopt common procedures for identifying targets, collecting intelligence, and maintaining security; on this basis, they would normally share raw signals intelligence as well as end product reports and analyses. *See generally* JEFFREY T. RICHELSON AND DESMOND BALL, THE TIES THAT BIND: INTELLIGENCE COOPERATION BETWEEN THE UKUSA COUNTRIES, THE UNITED KINGDOM, THE UNITED STATES OF AMERICA, CANADA, AUSTRALIA, AND NEW ZEALAND (1985). Other countries later joined as "Third Parties,' but it is the five original members whose relationship is the closest—so close that it is said that "home" and "foreign" contributions can be difficult to distinguish. HERMAN, *supra* note 10, at 203. Though almost certainly an exaggeration, the hyperbole reflects the deep and long-

this might include other NATO allies such as France (intelligence relationships are always more robust than their political counterparts), while for a country like Australia, it might mean Japan or Singapore. Specific interests at times encourage unusual candor: intelligence may be shared between nuclear powers that would not be shared with non-nuclear allies. Beyond this is an outer ring characterized less by relationships than by a series of opportunistic exchanges. Revealingly, states that cannot keep secrets are often lumped in with those from whom secrets must be kept.

The process of intelligence sharing varies but typically involves an exchange of information, analysis, or resources. The "quid" may be access to translation and analytical assistance or the use of strategically important territory; the "quo" might take the form of sharing the fruits of this labor, training, or the supply of related equipment. Intelligence may sometimes be treated as a kind of foreign assistance,[93] and its withdrawal may be used as a kind of punishment.[94] For the majority of countries, the most important partner in any such relationship is the United States. Despite having the largest intelligence budget of any country—approximately $44 billion per year[95]—even the United States relies on some assistance from countries such as Britain in relation to the Near and Middle East, Australia in relation to Southeast Asia, and various other countries that support its global signals intelligence reach. A specific agency may be given the formal role of coordinating external intelligence relations, usually the

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standing ties that emerged from the Second World War and were formalised at the beginning of the Cold War. *Cf.* Martin Rudner, *Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism*, 17 INT'L J. OF INTELLIGENCE AND COUNTERINTELLIGENCE 193, 201 (2004) (describing reciprocity pact between UKUSA signals intelligence agencies).

93. *See, e.g.*, Dale F. Eickelman, *Intelligence in an Arab Gulf State*, *in* COMPARING FOREIGN INTELLIGENCE: THE U.S., THE USSR, THE UK, AND THE THIRD WORLD 89 (Roy Godson ed. 1988) (discussing British intelligence assistance to Oman in the 1970s).

94. In early 1985, for example, New Zealand's newly elected Labor government announced that it would no longer allow U.S. nuclear-armed or –powered vessels access to its ports. In response the United States threatened, among other things, to curtail signals intelligence sharing: Duncan H. Cameron, *Don't Give New Zealand the Anzus Heave-Ho*, WALL STREET JOURNAL, July 29, 1986. The relationship was quietly restored soon afterwards. Canada has more recently suffered similar exclusion from limited intelligence following its stance on the Iraq war.

95. Scott Shane, *Official Reveals Budget for U.S. Intelligence*, N.Y. TIMES, Nov. 8, 2005. The U.S. intelligence budget has been classified except for two years in the late 1990s, when Director of Central Intelligence George Tenet announced that the intelligence budget for the financial years 1997 and 1998 was $26.6 billion $26.7 billion respectively: Statement by the Director of Central Intelligence Regarding the Disclosure of the Aggregate Intelligence Budget for Fiscal Year 1998 (Central Intelligence Agency, Mar. 20, 1998), *at* http://www.cia.gov/cia/public_affairs/press_release/1998/ps032098.html.

national human intelligence service—the C.I.A.;[96] Britain's Secret Intelligence Service (SIS), commonly known as MI6;[97] the Australian Secret Intelligence Service (ASIS);[98] Israel's Mossad;[99] and so on.

Burden sharing tends to be tactical, but the Second World War saw a broad division between the use of British and U.S. signals intelligence capacities to monitor Europe and the Far East respectively.[100] This unusual arrangement formed the basis for a longstanding relationship between the United States, Britain, and the three "Old Commonwealth" countries of Australia, Canada, and New Zealand. Standing links exist between the signals intelligence agencies of the "five eyes" community rather than between their respective intelligence communities as a whole; in part this is driven by the functional nature of the relationship, in part by what one former intelligence official terms the rise of a kind of "technical freemasonry in which national loyalties merge into professional, transnational ones."[101]

Multilateral intelligence sharing remains unusual, in part due to concerns about how sensitive information will be handled, but also due to the ways in which bilateral intelligence sharing itself can be used to further the national interest. Nevertheless, the practice of ad hoc intelligence sharing in multilateral forums has grown significantly and will continue to do so. This is important both for the question of what rules govern the use of intelligence, discussed in Part Two, but also for how the emerging international intelligence community establishes norms for what is acceptable and what is not.

Evidence of such emerging norms is, naturally, difficult to investigate and problematic to disclose. Nonetheless the development of shared protocols for handling signals intelligence, commitments to share virtually all of that information, and claims that these networks are not used to intercept communications of one's own or one's partner's nationals suggest the possibility of other norms. A different kind of influence was made public in a Canadian freedom of information case that, among other

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96. 50 U.S.C. 403-4a(f) (under the direction of the Director of National Intelligence).

97. Intelligence Services Act 1994 (UK), s 1.

98. Intelligence Services Act 2001 (Australia), s 6(1)(d).

99. *See* http://www.mossad.gov.il/Mohr/MohrTopNav/MohrEnglish/MohrAboutUs.

100. 2 F.H. HINSLEY ET AL., BRITISH INTELLIGENCE IN THE SECOND WORLD WAR: ITS INFLUENCE ON STRATEGY AND OPERATIONS 49 (1981).

101. HERMAN, *supra* note 10, at 208.

things, examined whether U.S. practice should be a model for Canadian law in this area. Canada's reliance on the United States for much of its intelligence led the court to conclude that Canada should be especially wary of loosening its information security laws:

> [T]he United States' position is very different from our own. The United States is a net exporter of information and this exercise is supported by a massive intelligence gathering network. Canada, in contrast, is a net importer with far fewer resources. In these circumstances, it makes sense that Canada should have a greater concern about its allies' perception of the effectiveness of its ability to maintain the confidentiality of sensitive information.[102]

Shared understandings of the "rules of the game" also derive from the interaction of opposing intelligence agencies—epitomized by the practice of exchanging captured agents during the Cold War[103]— and help to explain the manner in which diplomats with an intelligence function are treated, in individual cases and in how perceived illegitimate treatment of diplomats by one state may lead to reprisals against innocent diplomats from that state.[104] In addition, anecdotal evidence suggests the existence of shared sensibilities on the part of these diverse actors, if not explicitly in the form of a code of conduct then as a kind of professional ethic.[105]

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102. Ruby v. Canada (Solicitor General) (1996), 136 DLR (4th) 74, 96 (1996) (Simpson, J). A further indicator of how such intelligence relationships can influence not merely the domestic legal position but, perhaps, foreign policy, was implicit in the explanation given by Prime Minister John Howard for Australia's decision to join the United States in the March 2003 invasion of Iraq: "There's also another reason [to commit Australian forces] and that is our close security alliance with the United States. The Americans have helped us in the past and the United States is very important to Australia's long-term security. . . . A key element of our close friendship with the United States and indeed with the British is our full and intimate sharing of intelligence material. In the difficult fight against the new menace of international terrorism there is nothing more crucial than timely and accurate intelligence. This is a priceless component of our relationship with our two very close allies. There is nothing comparable to be found in any other relationship—nothing more relevant indeed to the challenges of the contemporary world." The Hon. John Howard, *Address to the Nation* (Canberra, Prime Minister of Australia, Mar. 20, 2003), *at* http://www.pm.gov.au/news/speeches/speech79.html. The Prime Minister was correct about the importance of these intelligence-sharing relationships, even if too much credit was placed in the accuracy of U.S. intelligence on Iraq.

103. *See* CRAIG R. WHITNEY, SPY TRADER: GERMANY'S DEVIL'S ADVOCATE AND THE DARKEST SECRETS OF THE COLD WAR (1993).

104. *See supra* note 78.

105. *Cf.* McDougal, Lasswell, and Reisman, *supra* note 13, at 372 ("In unorganized processes, standards are frequently set by the intelligence producers themselves, both as an expression, in a group code, of personal demands for quality

It is important not to overstate the significance of these norms. The term "intelligence community," for example, is most commonly used to refer to just one state's intelligence agencies as a group—frequently it is invoked in an aspirational sense, with rhetoric being used to mask conflicts over resources and influence that divide the agencies concerned.[106] Nevertheless, norms do appear to shape the way various intelligence agencies behave. Writing in 1995, a U.S. naval officer suggested that there are limits of behavior for intelligence officials that "create definable customary international norms . . . To those who must work with these subjects, the norms are real, the boundaries tangible, and the consequences of exceeding them unacceptable—personally and professionally, nationally and internationally."[107] The suggestion that customary international norms had formed was probably overstated, but the notion that there are both personal and professional consequences for violating norms with national and international dimensions rings true.

It is also necessary to be wary of drawing conclusions based on a period of great power rivalry. The Cold War "game" of espionage was a U.S.-Soviet game played in conditions of relative equilibrium with an expectation of repeat encounters. Each side had a clear interest in cultivating norms that would protect their own agents in the event of capture. The "war on terror" presents a different strategic context of asymmetric conflict and no comparable doctrines of balance of power or containment. This changed context may partially explain U.S. policies such as the invocation of the "unlawful combatant" category[108] and open discussion of whether to allow U.S. agents or their proxies to engage in torture:

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and integrity as well as for strategic purposes: the value of intelligence and the ongoing valuation of intelligence producers are commensurate with their dependability.").

106. Rivalries may arise between domestic and foreign intelligence agencies, or as between civilian and military agencies. For examples of the former, *see* MICHAEL SMITH, THE SPYING GAME: THE SECRET HISTORY OF BRITISH ESPIONAGE 12 (2003) ("The rivalry between the domestic and foreign services over who controls counter-intelligence derives not from the traditional security role but from the potential for gathering exceptionally valuable intelligence. The information provided by well-placed double agents can justify budgets and earn knighthoods. It may even lead eventually to high-profile defections—the ultimate intelligence success. No agency would like to see its main rival gain the credit for an intelligence scoop that could have been its own"); RICHARD POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 177 (2005) ("the CIA and FBI have a history of mutual suspicion and antipathy"). For an example of the latter, *see* RONALD KESSLER, THE CIA AT WAR: INSIDE THE SECRET CAMPAIGN AGAINST TERROR (2003) (describing tensions between the C.I.A. and the Department of Defense).

107. Bowman, *supra* note 53, at 330.

108. Despite much commentary to the contrary, this is in fact an old debate. *See, e.g, Ex parte Quirin* 317 U.S. 1, 31–35 (1942) (holding that German nationals arrested by FBI agents in the United States while operating undercover could be tried by military commissions). The Court stated, *inter alia*, that "By universal agreement and practice the law of war draws a

there is little prospect of prisoner exchanges with al Qaeda, let alone establishing any kind of diplomatic relations. It is noteworthy, however, that these U.S. policies have been protested most strongly by the uniformed military, in significant part due to the expectation that such decisions may endanger U.S. servicemen and women captured in the field, in particular special forces who may themselves one day be termed "unlawful combatants." This may be contrasted with the U.S. spy plane incident of April 2001, where the United States and China negotiated an outcome—presumably due to the costs of attempting to resolve the dispute through force and the expectation that there would be an ongoing relationship between the two countries.[109]

A number of international legal regimes are therefore relevant to intelligence, but typically indirectly and at times with contradictory effects. The laws of war allow intelligence gathering but also severely punish its practitioners. The norm of non-intervention limits the activities of one state in the territory of another but has failed to keep pace with technological advancements that render traditional territorial limits irrelevant. Diplomacy has long tolerated intelligence gathering but includes established guidelines for limiting its intrusiveness. Arms control regimes effectively establish a right to collect specific intelligence necessary to the success of the relevant agreement. In each case, intelligence collection is recognized as a necessary evil, something to be mitigated rather than prohibited. The remedies for violation of these norms also reflect this balance: spies in war may be punished without the

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distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals." *Id.* at 31 (footnotes omitted). The Court later went on to hold that "By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government". *Id.* at 35. For approving commentary on the case, *see* Charles Cheney Hyde, *Aspects of the Saboteur Cases*, 37 AM. J. INT'L L. 88 (1943) (supporting the decision on the basis that it removes the anomalous status of spies in international humanitarian law); for a critique, *see* Richard R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 BRITISH YEARBOOK INT'L L. 323 (1951) (arguing that the anomaly is well supported by authority and results from the legality of both espionage and the punishment of spies).

109. *See supra* note 50.

sending state incurring responsibility; violations of the norm of non-intervention are limited to traditional conceptions of territorial sovereignty; diplomatic impropriety is addressed through removal of diplomatic status; interference in intelligence collection undertaken as part of an arms control regime would undermine the main intended result of that regime—trust.

It is unclear whether the partially intersecting series of legal obligations, rights, and liberties discussed in this Part add up to a coherent legal framework within which intelligence collection takes place. Practice has very much led theory in this area and states have obviously been reluctant to establish a single regime that would impose undesirable limits on their own freedom of action. It is apparent, nonetheless, that the piecemeal and indirect approach to regulation of intelligence collection establishes some normative guidelines that supplement the domestic legal constraints that are the primary source of rules for intelligence agencies.

The significance of these guidelines might be considered in at least two different ways. The first is that they provide a set of basic red lines that, even if unenforced, help to avoid anarchy. An analogy might be drawn with speed limits that are loosely enforced: even without policing, heavy traffic on a highway with a theoretical speed limit of 55 miles per hour may assume an actual average speed of, say, 65 miles per hour. Such "rules of the road" might correspond to the treatment of territorial borders during the Cold War, when Soviet and U.S. surveillance aircraft would push the limits of what was acceptable by making slight incursions into one another's airspace—a practice subsequently legitimized and regulated more formally in the Open Skies Treaty. It may also be a useful analogy for the manner in which diplomats have sometimes tested the boundaries of acceptable conduct without being declared *persona non grata*.

A second possibility would be to interpret the guidelines as providing "rules of the game." The metaphor of a game is appropriate not simply because it is one frequently embraced by the intelligence literature and the actors themselves,[110] but also because it suggests a kind of community that generates,

110. *See, e.g.*, JAMES RUSBRIDGER, THE INTELLIGENCE GAME (1989); SCOTT RITTER, ENDGAME: SOLVING THE IRAQ PROBLEM—ONCE AND FOR ALL (1999); FREDERICK P. HITZ, THE GREAT GAME: THE MYTH AND REALITY OF ESPIONAGE (2004).

adapts, and internalizes rules. The notion of spies and other intelligence actors developing their own norms has lagged far behind the traditional military conceptions of honor, chivalry, and so on in part because espionage in particular was long held to be deficient in precisely these areas.[111]

The change in the normative context within which intelligence is collected has broadly coincided with a shift in the norms concerning how intelligence is used. Far from being an evil to be tolerated and mitigated, intelligence collection and sharing is becoming an integral part of collective security. This may be a natural approach to multilateral counter-terrorism and counter-proliferation activities, but use of intelligence in international forums has exposed it to new forms of legal scrutiny as it expands from serving the traditional function of threat assessment to being treated as a form of evidence.

II. USING INTELLIGENCE

> *Interested policy-makers quickly learn that intelligence can be used the way a drunk uses a lamp post—for support rather than illumination.*
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> —Thomas Lowe Hughes, The Fate of Facts in a World of Men, 1976[112]

Six weeks before the United States and Britain, together with Australia and Poland, commenced military operations against Iraq in March 2003, U.S. Secretary of State Colin Powell addressed the United Nations Security Council to make the case for an invasion. Weapons inspectors had been on the ground in Iraq for almost three months and found no evidence of a "smoking gun" that might have served as a trigger for war. Senior figures from the Bush administration continued to assert, however, that there was no doubt that Saddam Hussein's regime continued to manufacture weapons of mass destruction in violation of UN resolutions. Powell's presentation was intended to explain that certainty, drawing upon an impressive array of satellite images, radio intercepts, and first-hand accounts. "My colleagues," Powell said, "every statement I make today is backed up by sources, solid sources. These are not assertions. What

111. *See supra* note 21.

112. THOMAS L. HUGHES, THE FATE OF FACTS IN A WORLD OF MEN: FOREIGN POLICY AND INTELLIGENCE-MAKING 24 (1976).

we are giving you are facts and conclusions based on solid intelligence."[113] Though he did not speak during the meeting, George Tenet, the Director of the CIA, sat behind Powell for the entire 80-minute presentation—an apparent effort to dispel perceptions of discord in the U.S. intelligence and defense communities about the threat Iraq posed, but also underlining the unprecedented nature of this public display of the fruits of U.S. espionage.

Legal questions concerning how the United States came to possess such detailed intelligence on Iraq understandably are not the primary focus of analysis of the Iraq war and its aftermath. Similarly in late 2005 the provenance of a "stolen laptop" with information concerning Iran's nuclear program was challenged not on the basis of its admissibility but rather its credibility. Indeed, there were some suggestions that proof of genuine theft would actually *enhance* the laptop's importance by demonstrating that evidence improperly obtained at least had not been fabricated.[114]

Elaborate protections exist in most jurisdictions to distinguish between the collection of intelligence and evidence of criminal acts, the most basic being that distinct agencies pursue such activities and prosecuting authorities are constrained in using intelligence information to inform or support a criminal investigation.[115] As there are no comparable sets of agencies or procedures at the international level, analogies between the use of intelligence in international forums and the use of dubious evidence in domestic criminal proceedings must be drawn with caution. This Part nevertheless explores how intelligence is currently used in international bodies—most prominently the United Nations—as a basis for the exercise of coercive powers. The question of pre-emptive military action, such as U.S. arguments in support of its policy against Iraq, presents the hardest case and may be more

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113. *Powell's Address, Presenting "Deeply Troubling" Evidence on Iraq*, N.Y. TIMES, Feb. 6, 2003.

114. Daniel Dombey and Gareth Smyth, *Iran Faces More Heat to Agree Atomic Deal*, FINANCIAL TIMES, Nov. 14, 2005.

115. Within the United States, this has sometimes been referred to as the "wall" between intelligence and criminal investigations. The U.S.A. Patriot Act and a series of court decisions have substantially breached this divide, leading some to express concerns about potential violations of civil liberties. *See especially* In re Sealed Case, 310 F.3d 717 (For. Intel. Surv. Rev., Nov. 18, 2002), at 724–26. For commentary *see* J. Christopher Champion, The Revamped FISA: Striking a Better Balance Between the Government's Need to Protect Itself and the 4th Amendment, 58 VAND. L. REV. 1671 (2005) (calling for a new FISA standard); Richard Henry Seamon and William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL'Y 319 (2005) (challenging perceived myths about the "wall"); James B. Comey, *Fighting Terrorism and Preserving Civil Liberties*, 40 U. RICH. L. REV. 403 (2006) (defending the ability to share information between intelligence and law enforcement actors).

susceptible to political than legal remedies.[116] But the exercise of two other forms of coercive power by the Council suggests the beginning of a legal framework for considering intelligence in international forums: freezing the assets of individual terrorist financiers and issuing indictments before international tribunals.[117] This Part will consider each of these three areas in turn.

A. *Pre-Emptive Military Action*

Over two years after the 2003 invasion of Iraq, London's *Sunday Times* published a secret memorandum that recorded the minutes of a meeting of British Prime Minister Tony Blair's senior foreign policy and security officials. Convening eight months prior to the invasion, their discussion of Iraq policy focused more on Britain's relationship with the United States than on Iraq itself. John Scarlett, head of the Joint Intelligence Committee, began the meeting with a briefing on the state of Saddam's regime. This was followed by an account of meetings with senior officials of the Bush Administration from Sir Richard Dearlove, head of Britain's Secret Intelligence Service (MI6), known as "C." His report was summarized in the memorandum as follows:

> C reported on his recent talks in Washington. There was a perceptible shift in attitude. Military action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and [weapons of mass destruction]. But the intelligence and facts were being fixed around the policy. The [U.S. National Security Council] had no patience with the UN route, and no enthusiasm for publishing material on the Iraqi regime's record. There was little discussion in Washington of the aftermath after military action.[118]

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116. *See further* CHESTERMAN, *supra* note 63.

117. For a discussion of intelligence sharing in other international organizations, *see id*.

118. Iraq: Prime Minister's Meeting (Memorandum by David Manning; Secret and Strictly Personal—UK Eyes Only) (London, S 195 /02, July 23, 2003), available in *The Secret Downing Street Memo*, THE SUNDAY TIMES, May 1, 2005.

Selectivity and apparent manipulation of intelligence in the lead up to the Iraq war has been the subject of considerable discussion, as has the failure to plan for post-conflict operations.[119] This section examines a somewhat different issue to which less attention has been paid: how comparable intelligence might be used in bodies such as the Security Council in the future in order to authorize, sanction, or condemn the use of force.

Prior to Colin Powell's February 2003 presentation there had been much talk of an "Adlai Stevenson moment," referring to the tense scene in the Security Council in October 1962 when Stevenson, the U.S. Ambassador to the United Nations, confronted his Soviet counterpart on its deployment of missiles in Cuba. "Do you, Ambassador Zorin, deny that the USSR has placed and is placing medium- and intermediate-range missiles and sites in Cuba?" Stevenson had asked in one of the more dramatic moments played out in the United Nations. "Don't wait for the translation! Yes or no?" "I am not in an American courtroom, sir," Zorin replied, "and I do not wish to answer a question put to me in the manner in which a prosecutor does—" "You are in the courtroom of world opinion right now," Stevenson interrupted, "and you can answer yes or no. You have denied that they exist, and I want to know whether I have understood you correctly. I am prepared to wait for my answer until hell freezes over, if that's your decision. And I am also prepared to present the evidence in this room." Zorin did not respond. In a *coup de théâtre* Stevenson then produced poster-sized photographs of the missile sites taken by U.S. spy planes.[120]

This exchange highlights the problem Powell confronted four decades later and a key dilemma in the use of intelligence in bodies such as the United Nations. Powell was presenting intelligence intended to demonstrate Saddam Hussein's noncompliance with previous Security Council resolutions. His audience heard, however—and was intended to hear—evidence. This was perhaps necessary given the

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119. In addition to the reports cited earlier, *see also*Intelligence and Analysis on Iraq: Issues for the Intelligence Community (Central Intelligence Agency, Langley, VA, July 29, 2004), *at* http://www.gwu.edu/~nsarchiv/news/20051013/kerr_report.pdf, 2–3 ("In an ironic twist, the policy community was receptive to technical intelligence (the weapons program), where the analysis was wrong, but apparently paid little attention to intelligence on cultural and political issues (post-Saddam Iraq), where the analysis was right."

120. *See generally* ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS (1969); THE CUBAN MISSILE CRISIS (Robert A. Divine ed., 1971).

various audiences to whom Powell was speaking: the members of the Council, the U.S. public, world opinion more generally. But it meant the onus subtly shifted from Iraq being required to account for the dismantling of its weapons to the United States asserting that such weapons were in fact in Iraq's possession. Lacking evidence as compelling as Stevenson's, Powell persuaded only those who were already convinced.[121]

The fact that U.S. and British intelligence was essentially wrong on the central question of Iraq's weapons programs naturally dominates consideration of this issue, though it bears repeating that Hans Blix, the Executive Chairman of the UN Monitoring, Verification, and Inspection Commission (UNMOVIC), also suspected that Iraq retained prohibited weapons.[122] Ambassador Zorin was correct, of course, that the Council is not a courtroom; it lacks the legitimacy and procedural guarantees necessary to establish guilt or innocence. Nonetheless, as Stevenson replied, it may function as a chamber in the court of world opinion. In such circumstances, the limitations of intelligence as a form of risk assessment intended to guide action may conflict with the desire of policymakers to use intelligence—like the proverbial drunk at the lamppost[123]—to support their decisions.

It is important to distinguish between two legal contexts in which intelligence might be introduced to the Council to justify the use of force: as the basis of an *ex ante* determination that a threat to international peace and security requires enforcement action under Chapter VII, or as an *ex post facto* explanation of the exercise of the right of self-defense under Article 51 of the Charter.[124] The Charter does not offer a complete definition of self-defense, providing only that Article 51 does not impair the "inherent right of individual or collective self-defense if an armed attack occurs."[125] With respect to

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121. *See, e.g.*, Adlai E. Stevenson III, *Different Man, Different Moment*, N.Y. TIMES, Feb. 7, 2003. Cf Hans Blix, Briefing of the Security Council: Inspections in Iraq and a Further Assessment of Iraq's Weapons Declaration (UNMOVIC, New York, Jan. 9, 2003), *at* http://www.unmovic.org: ("in order to create confidence that it has no more weapons of mass destruction or proscribed activities relating to such weapons, Iraq must present credible evidence. It cannot just maintain that it must be deemed to be without proscribed items so long as there is no evidence to the contrary").

122. HANS BLIX, DISARMING IRAQ 264 (2004) ("Like most others we at UNMOVIC certainly suspected that Iraq might still have hidden stocks of chemical and biological weapons").

123. *See supra* note 112.

124. UN Charter, art. 51 (providing, *inter alia*, that such action be "immediately reported" to the Council).

125. UN Charter, art. 51.

Security Council action, the only formal requirement to invoke the enforcement powers of Chapter VII of the Charter is a determination that a "threat to the peace" exists and that non-forcible measures would be inadequate.[126] In neither case is there an indication of what evidence, if any, must be adduced in order to justify a claim of self-defense or recourse to Chapter VII. Thus, when the United States in 2003 presented evidence of Iraq's alleged violations of past Council resolutions, no procedures were available for evaluating the veracity and accuracy of that evidence or, indeed, for making any independent findings of fact.

These problems are not new to the United Nations. In the area of self-defense, the emergence of nuclear weapons led to sustained debate as to whether the requirement for an armed attack to occur should be taken literally. "Anticipatory self-defense" became a controversial sub-theme in academic treatment of the subject, which typically cites Israel's actions in the Six-Day War of 1967 and its destruction of Iraq's Osirak nuclear reactor in 1981. The normative impact of these cases is debatable, however. The 1967 war provoked mixed views in the General Assembly.[127] The Osirak incident, which successfully derailed Iraq's nuclear program for some years, is viewed positively today but was unanimously condemned at the time by the Security Council as a clear violation of the Charter.[128] Commentators occasionally cite other incidents, but states themselves have generally been careful to avoid articulating a right of self-defense that might encompass the first use of force, even if they have been unable or unwilling to rule it out completely.[129]

126. UN Charter, arts 39, 42.

127. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma ed., 2nd ed. 2002), Vol I, 803–804.

128. S.C. Res. 487 (1981), para. 1. *Cf.* Anthony D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584 (1983) (defending legality of the strike).

129. *See generally* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 97–108 (2002). During the 1962 Cuban missile crisis, for example, U.S. President John F. Kennedy acknowledged that nuclear weapons meant that "[w]e no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril." Nevertheless, the United States sought to justify the subsequent blockade of Cuba not on the basis of self-defence, but rather on the regional call for action from the Organisation of American States: ABRAHAM CHAYES, THE CUBAN MISSILE CRISIS 62–66 (1974).

One year after the September 11 attacks, the United States released a National Security Strategy that justified and elaborated a doctrine of preemptive intervention.[130] The document emphasized a new strategic reality in which non-state actors that are not susceptible to deterrence pose an increasing threat to countries like the United States. Raising the specter of a terrorist or rogue state attack using weapons of mass destruction, it stated that the United States would act preemptively to "forestall or prevent such hostile acts by our adversaries."[131] This sparked vigorous debate about the limits of such a policy, particularly when combined with the stated aim of dissuading potential adversaries from hoping to equal the power of the United States and when followed so swiftly by the U.S.-led invasion of Iraq (though the formal basis for that war was enforcement of Security Council resolutions).[132] In part due to the difficulties experienced on the ground in Iraq, the rhetoric from the White House toned down significantly over the following years, though there remains a significant need for greater consideration of the circumstances in which self-defense might legitimately be invoked against a non-state actor or a state manifestly insusceptible to deterrence.[133]

In 2004 the UN High-Level Panel on Threats, Challenges, and Change attempted to address this problem by drawing a line between the issue of preemptive action and the even more radical notion of preventive war. Where the former is broadly consonant with earlier arguments for a right of anticipatory self-defense, the latter is a direct challenge to the prohibition of the use of force itself. The Panel concluded that a state may take military action "as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate."[134] This glossed over the many legal questions concerning anticipatory self-defense discussed earlier but was intended to discredit the larger evil of a right of preventive war. If good arguments can be made for preventive military action, with good evidence

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130. The National Security Strategy of the United States of America (President of the United States, Washington, DC, September 2002), *at* http://www.whitehouse.gov/nsc/nss.html.

131. *Id.* at 15.

132. *Id.* at 30. *See* Simon Chesterman, *Just War or Just Peace After September 11: Axes of Evil and Wars Against Terror in Iraq and Beyond*, 37 N.Y.U. J. INT'L L. & POL. 281 (2005).

133. The Security Council resolution adopted soon after the Sept. 11, 2001 attacks significantly expanded the right of self-defence to encompass actions against those who aid, support, or harbour terrorists: S.C. Res. 1368 (2001), para. 3.

134. A More Secure World: Our Shared Responsibility (Report of the High-Level Panel on Threats, Challenges, and Change), UN Doc. A/59/565 (Dec. 1, 2004), *at* http://www.un.org/secureworld, para. 188.

to support them, the Panel concluded, these should be put to the Security Council, which has the power to authorize such action.[135]

But is the Council in a position to assess such evidence and make such decisions? The history of Council decision-making when authorizing military action does not inspire confidence: it has been characterized by considerable flexibility of interpretation, tempered mainly by the need for a preexisting offer from a state or group of states to lead any such action.[136] There have been attempts to make Council decisionmaking more rigorous, including efforts to limit the veto power of the five permanent members, but these remain the most politicized of all questions raised in the United Nations.[137]

An alternative approach would be to improve the analytical capacity of the UN Secretariat, enabling it to advise the Council, or to develop some kind of fact-finding capacity that could report independently on developing situations. Member states historically have been wary of giving the United Nations an independent voice, maintaining a general divide between governance and management responsibilities: governance remains the province of the member states, while management falls to the Secretariat. This theory has never been quite so neat in practice. The best example of the ambiguity that frequently obtains is the role of the UN Secretary-General. In theory the chief administrative officer of the United Nations,[138] the Secretary-General also functions as the chief diplomat of the United Nations. The sole power given to the Secretary-General in the Charter is that of bringing to the attention of the Security Council any matter that, in his or her opinion, threatens international peace and security.[139] Common

135. *Id.* para. 190. The Panel continued: "If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option."

136. *See generally* CHESTERMAN, *supra* note 40.

137. Cf International Commission on Intervention and State Sovereignty, The Responsibility to Protect (International Development Research Centre, Ottawa, December 2001), *at* http://www.iciss.ca; High-Level Panel Report, *supra* note 134, para. 207; In Larger Freedom: Towards Development, Security, and Human Rights for All, UN Doc. A/59/2005 (Mar. 21, 2005), *at* http://www.un.org/largerfreedom, para. 126.

138. UN Charter, art. 97.

139. UN Charter, art. 99.

sense suggests that the Secretary-General's opinion should ideally be informed, but common sense rarely determines the structure of international organizations.[140]

Proposals to develop general analytical capacities at the United Nations have tended to be abortive or short-lived—a concerted reform effort in 2000 proposed an Information and Strategic Analysis Secretariat (EISAS).[141] The new body was to be formed by consolidating the Department of Peacekeeping Operations' Situation Centre and the handful of policy planning units scattered across the organization, with the addition of a small team of military analysts.[142] From the moment EISAS was referred to as a "C.I.A. for the UN" it was dead as a policy proposal. Some states expressed concern about the United Nations appearing to involve itself in espionage,[143] but the real concern appeared to be the potential for early warning to conflict with sovereignty. Following so soon after unusually blunt statements by the Secretary-General on the topic of humanitarian intervention in September 1999,[144] the defenders of a strict principle of non-interference found a receptive audience. The Secretary-General stressed that EISAS "should not, in any way, be confused with the creation of an 'intelligence-gathering capacity' in the Secretariat," but would merely serve as a vehicle to ensure more effective use of information that already exists.[145] In an effort to save at least the idea of system-wide policy analysis, he later proposed a unit half

140. The very first UN Secretary-General, Trygve Lie, suggested that this must encompass the power "to make such inquiries or investigations as he may think necessary in order to determine whether or not he should consider bringing any aspect of [a] matter to the attention of the Security Council under the provisions of the Charter": 1 UN SCOR, 2nd Series, 70th mtg at 404 (1946), reproduced in 5 REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS (1945–1954) 177 (1955).

141. The initial "E" denotes yet another acronym: the Executive Committee on Peace and Security, which was established in 1997 as "the highest policy development and management instrument within the UN Secretariat on critical, cross-cutting issues of peace and security": Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, UN Doc. A/C.5/55/46/Add.1 (Aug. 8, 2001), *at* http://www.stimson.org/fopo/pdf/pbimprepAC55546Add1.pdf, para. 3.2.

142. Report of the Panel on United Nations Peace Operations (Brahimi Report), UN Doc. A/55/305-S/2000/809 (Aug. 21, 2000), *at* http://www.un.org/peace/reports/peace_operations/, paras. 65–75. The existing units included DPKO's Policy Analysis Unit (DPKO); DPA's Policy Planning Unit; OCHA's Policy Development Unit; and the Department of Public Information's Media Monitoring and Analysis Section.

143. Brazil, for example, noted that the Secretariat should not be transformed into an intelligence-gathering institution: Fourth Committee: Agenda Item 86—Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects (continued), UN Doc. A/C.4/55/SR.21 (Mar. 16, 2001), para. 75.

144. *See generally* KOFI A. ANNAN, THE QUESTION OF INTERVENTION: STATEMENTS BY THE SECRETARY-GENERAL (1999).

145. Report of the Secretary-General on the Implementation of the Report of the Panel on United Nations Peace Operations, UN Doc. A/55/502 (Oct. 20, 2000), *at* http://www.un.org/apps/docs/ws.asp?m=A/55/502, para. 45.

the size and without media monitoring responsibilities,[146] but even this has failed to generate any traction.[147]

It is possible, then, that the Council's consideration of the threat Iraq posed in late 2002 and early 2003 was as effective as could be expected. The intelligence the United States provided, though it produced no Adlai Stevenson moment, was an attempt to use the Council as a forum for decisionmaking as well as a vehicle for advancing a foreign policy agenda. Indeed, one reason the United States was prepared to share so much intelligence was that—whatever the outcome of discussion in the Council—the human and technical sources of that intelligence were not going to remain in place much longer.

Yet it remains striking that the three countries most active in the initial hostilities had significantly different assessments of Iraq's actual weapons of mass destruction capacity. Drawing upon similar but more limited material than that available to the United States and Britain, for example, Australian assessments of Iraq's weapons of mass destruction were more cautious and, as it happened, closer to the facts. This was true on the issues of sourcing uranium from Niger, mobile biological weapon production capabilities, the threat posed by smallpox, Iraq's ability to deliver chemical and biological weapons via unmanned aerial vehicles, and links between al Qaeda, Iraq, and the September 11 terrorist strikes in the United States.[148] While there is clear resistance to the creation and maintenance of an authoritative international intelligence unit that exists to gather and analyze evidence, states continue to use such evidence to justify preemptive strikes. A multilateral approach to intelligence sharing might not get beyond using a body such as the United Nations as a forum, but even that—if done effectively—would mark a significant advance on current practice.

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146. Implementation of the Recommendations of the Special Committee on Peacekeeping Operations and the Panel on United Nations Peace Operations, UN Doc. A/55/977 (June 1, 2001), *at* http://www.un.org/apps/docs/ws.asp?m=A/55/977, paras. 301–307.

147. *See generally* Owen Philip Lefkon, *Culture Shock: Obstacles to Bringing Conflict Prevention Under the Wing of UN Development . . . and Vice Versa*, 35 N.Y.U. J. INT'L L. & POL. 671, 711–15 (2003), *at* http://www.nyu.edu/pubs/jilp/main/issues/35/35_3_Lefkon.pdf.

148. Report of the Inquiry into Australian Intelligence Agencies (Flood Report) (Australian Government, Canberra, July 22, 2004), *at* http://www.pmc.gov.au/publications/intelligence_inquiry, 27–28.

B. *Targeted Financial Sanctions*

State authorities have directed greater energy toward improving checks on the use of information in imposing targeted financial sanctions. In part this is due to the more diffuse set of interests at stake in the process of listing and de-listing individuals for sanctions as opposed to justifying military action. More importantly, it is because implementation of sanctions requires the cooperation of many states acting in ways that may be susceptible to judicial review in national courts.

Concerns about the humanitarian consequences of comprehensive economic sanctions, in particular those imposed on Iraq from 1990,[149] led to efforts to make them "smarter" by targeting sectors of the economy or specific individuals more likely to influence policies—or at least confining sanctions to ensure that those who bore the brunt of their consequences were also those perceived as most responsible for the situation that led to their imposition.[150] This utilitarian approach to minimizing suffering gave rise to different concerns, however, as the identification of individuals (and, in some cases, their immediate families)[151] for freezing assets suggested a shift in the way that sanctions were being used.

Though other taxonomies are possible, sanctions tend to be imposed for one of three reasons. First, sanctions may be intended to compel compliance with international law, including acceding to demands by a body such as the UN Security Council. Second, sanctions may be designed to contain a conflict, through arms embargoes or efforts to restrict an economic sector that is encouraging conflict. Third, sanctions may be designed primarily to express outrage but may not support a clear policy goal; they are sometimes invoked as a kind of default policy option, where something more than a diplomatic

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149. *See, e.g.,* Roger Normand, *Human Rights Assessment of Sanctions: The Case of Iraq (1990–1997), in* UNITED NATIONS SANCTIONS—EFFECTIVENESS AND EFFECTS, ESPECIALLY IN THE FIELD OF HUMAN RIGHTS: A MULTI-DISCIPLINARY APPROACH 19 (Willem J.M. van Genugten and Gerard A. de Groot eds., 1999); ABBAS ALNASRAWI, IRAQ'S BURDENS: OIL SANCTIONS AND UNDERDEVELOPMENT 74–95 (2002).

150. *See generally* DAVID CORTRIGHT AND GEORGE A. LOPEZ, THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S (2000); DAVID CORTRIGHT AND GEORGE A. LOPEZ, SANCTIONS AND THE SEARCH FOR SECURITY: CHALLENGES TO UN ACTION (2002); Simon Chesterman and Béatrice Pouligny, *Are Sanctions Meant to Work? The Politics of Creating and Implementing Sanctions Through the United Nations*, 9 GLOBAL GOVERNANCE 503 (2003).

151. *See, e.g.,* S.C. Res. 1173 (1998), para. 11 (requiring the freezing of assets belonging to "senior officials of UNITA or adult members of their immediate families"). S.C. Res. 917 (1994), para. 3 had prohibited the cross-border movement of the Haitian military and those involved in the 1991 coup or their immediate families without approval by a committee of the whole.

plea is required but a military response is either inappropriate or impossible.[152] Targeted sanctions were initially a subspecies of the first type, employed in an effort to coerce key figures in a regime to comply with some course of action by restricting their ability to travel or access their assets.[153] As sanctions came to be applied in the context of counter-terrorism, however, they began to approximate the second type: assets were frozen not to force individuals to do or refrain from doing anything, but rather as a prophylactic measure against future support for terrorism.[154]

There is no burden of proof as such for imposing sanctions through a mechanism such as the UN Security Council. The Council, having determined the existence of a threat to the peace, is empowered to decide what measures should be taken "to maintain or restore international peace and security."[155] These non-forcible measures are broadly defined:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[156]

There is a qualitative difference, however, between using economic sanctions as a measure intended to maintain or restore international peace and security in the sense of containing or ending a conflict, and freezing an individual's assets indefinitely on the basis that he or she might at some

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152. As UN Secretary-General Kofi Annan has stated, "getting sanctions right has [often] been a less compelling goal than getting sanctions adopted": UN Press Release SG/SM/7360, echoing Lloyd Axworthy, *Forward* in CORTRIGHT AND LOPEZ, SANCTIONS DECADE, *supra* note 150, at ix.

153. *See generally id*.

154. Targeted financial sanctions are only one element of the Security Council's response to the threat of terrorism. Others include condemnation of specific terrorist acts, imposition of obligations on states to take action with respect to preventing terrorist attacks, and capacity-building. *See* Eric Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 AM. J. INT'L L. 745 (2004).

155. UN Charter, art. 39.

156. UN Charter, art. 41. Article 42 provides that "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

unspecified point in the future provide funds to an unidentified terrorist network. The recent practice of freezing individuals' assets has also gone well beyond leading members of governments or armed groups (such as the Angolan rebel group UNITA and Afghanistan's Taliban) that are the target of Security Council demands, to embrace a far wider category of "individuals and entities associated with" al Qaeda as designated by a committee of the Security Council.[157] By the end of 2005 this committee had frozen the assets of 347 individuals and 119 entities.[158]

Most criticism of the targeted sanctions regimes focuses on alleged violations of the rights of persons whose assets have been frozen, or the inappropriateness of the Security Council "legislating" by issuing binding orders of general application without adequate checks on its powers.[159] Underlying such human rights and administrative law concerns is the question of how the Council uses information in such circumstances. As that information is frequently sourced from national intelligence services, addressing those concerns must take account of the classified nature of the material. This is relevant at two discrete stages: listing or designation of individuals and entities and the de-listing process. Discussion here will focus on the most active committee—concerned with al Qaeda—but many concerns apply to the other Security Council committees managing lists for Sierra Leone,[160] Iraq,[161] Liberia,[162] the Democratic Republic of the Congo,[163] and Côte d'Ivoire.[164]

The sanctions regime that is now used to freeze al Qaeda-connected assets worldwide was initially established in October 1999 to pressure the Taliban regime to surrender Osama bin Laden for prosecution following his indictment in the United States for the August 1998 bombings of U.S.

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157. S.C. Res. 1333 (2000), para. 8(c).

158. The New Consolidated List of Individuals and Entities Belonging to or Associated with the Taliban and Al-Qaida Organisation as Established and Maintained by the 1267 Committee (UN Security Council Committee established pursuant to paragraph 6 of resolution 1267 (1999), New York, Dec. 20, 2005), *at* http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm (listing 142 individuals and 1 entity belonging to or associated with the Taliban, and 205 individuals and 118 entities belonging to or associated with al Qaeda).

159. *See, e.g.,* José Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003).

160. S.C. Res. 1132 (Oct. 8, 1997).

161. S.C. Res. 1518 (Nov. 24, 2003).

162. S.C. Res. 1521 (Dec. 22, 2003).

163. S.C. Res. 1533 (Mar. 12, 2004).

164. S.C. Res. 1572 (Nov. 15, 2004).

embassies in Kenya and Tanzania.[165] Resolution 1267 established a committee (the "1267 Committee") to oversee implementation of the sanctions, including the power to "designate" the relevant funds to be frozen.[166] In December 2000, the regime was expanded to apply to bin Laden himself and "individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization."[167] In January 2002, following the September 11 attacks and the successful military operation in Afghanistan, the sanctions regime was further expanded through the removal of the geographic connection to Afghanistan and any time-limit on its application.[168]

The criteria for inclusion on the list have been left intentionally vague. The threshold established by the Council (being "associated with" Osama bin Laden or al Qaeda) was low and ambiguous. Only in January 2004, with the passage of Resolution 1526, were member states proposing individuals to be listed called upon to provide information demonstrating such an association.[169] The same resolution "*encourage[d]*" member states to inform such individuals that their assets were being frozen.[170] In July 2005—almost six years after the listing regime was first established—Resolution 1617 required that when states proposed additional names for the consolidated list they should henceforth provide to the Committee a "statement of case describing the basis of the proposal."[171] This did not affect the more than four hundred individuals and entities that had been listed without such a formal statement of case.[172] The same resolution "*request[ed]* relevant States to inform, to the extent possible, and in writing where

165. S.C. Res. 1267 (Oct. 15, 1999).

166. S.C. Res. 1267 (Oct. 15, 1999), para. 6(e).

167. S.C. Res. 1333 (Dec. 19, 2000), para. 8(c).

168. S.C. Res. 1390 (Jan. 16, 2002), para. 3: "*Decides* that the measures referred to in paragraphs 1 and 2 above will be reviewed in 12 months and that at the end of this period the Council will either allow these measures to continue or decide to improve them, in keeping with the principles and purposes of this resolution."

169. S.C. Res. 1526 (Jan. 30, 2004), para. 17 ("Calls upon all States, when submitting new names to the Committee's list, to include identifying information and background information, to the greatest extent possible, that demonstrates the individual(s)' and/or entity(ies)' association with Usama bin Laden or with members of the Al-Qaida organization and/or the Taliban, in line with the Committee's guidelines").

170. S.C. Res. 1526 (Jan. 30, 2004), para. 18.

171. S.C. Res. 1617 (July 29, 2005), para. 4.

172. Prior to S.C. Res. 1617 the committee had listed 142 individuals and one entity associated with the Taliban, and 180 individuals and 118 entities associated with al Qaeda.

possible, individuals and entities included in the Consolidated List of the measures imposed on them, the Committee's guidelines, and, in particular, the listing and delisting procedures."[173]

This incremental approach to constraining the discretion of the Committee is suggestive of the manner in which its activities came to be seen as more than a simple sanctions regime. When Resolution 1267 was first passed, sanctions targeted specifically at the Taliban regime were intended to minimize collateral harm to the population of Afghanistan; in the wake of September 11, sanctions became a means of restricting the flow of terrorist finances. Over time, it became clear that freezing the assets of individuals or banks indefinitely raised concerns both in terms of the rights of the affected individuals and the accountability structures for the exercise of this power.[174] By September 2005, a United Nations summit of world leaders called upon the Security Council to "ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions."[175]

Such limited protections may be contrasted with the elaborate safeguards incorporated within the ad hoc tribunals established for the former Yugoslavia[176] and Rwanda,[177] also creatures of the UN Security Council. The resolutions establishing each tribunal contained in their respective statutes elaborate protections for the accused, including a presumption of innocence, a right to be informed of the nature and cause of the charge against him or her, and the opportunity for a fair trial including legal

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173. S.C. Res. 1617 (July 29, 2005), para. 5. Notification procedures vary between the committees. The al Qaeda/Taliban and Iraq committees advise member states of new listings and add information to their websites. The Liberia and Côte d'Ivoire committees, by contrast, rely on press releases, *notes verbales*, and less frequent changes to their websites. None of the committees directly notifies the targets of sanctions. Strengthening UN Targeted Sanctions Through Fair and Clear Procedures (Watson Institute for International Studies, Providence, RI, Mar. 30, 2006), *at* http://www.watsoninstitute.org/TFS, 30.

174. As the High-Level Panel noted in December 2004, "The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions." High-Level Panel Report, *supra* note 134, para. 152.

175. 2005 World Summit Outcome Document, UN Doc. A/RES/60/1 (Sept. 16, 2005), *at* http://www.un.org/summit2005, para. 109. Humanitarian exemptions presently allow individuals whose assets have been frozen to purchase "basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources." S.C. Res. 1452 (2002), para. 1(a).

176. S.C. Res. 827 (May 25, 1993).

177. S.C. Res. 955 (Nov. 8, 1994).

assistance and the opportunity to question witnesses.[178] Convicted persons also enjoyed a right of appeal over errors of law and fact.[179]

Sanctions are not a form of criminal punishment as such—a point that is frequently emphasized by defenders of the regime and those tasked with implementing it.[180] In a pair of judgments issued in 2005 by the European Court of First Instance known as *Yusuf* and *Kadi*, this characterization as preventive rather than punitive was important in determining that the practice, described as "a temporary precautionary measure restricting the availability of the applicants' property,"[181] did not violate fundamental rights of the individuals concerned. The Court noted that "freezing of funds is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof."[182]

Nevertheless, once an individual is included on the list it is difficult to be removed. Prior to January 2002 there was no official procedure for managing the sanctions regime. Resolution 1390 (2002) requested the Committee to "promulgate expeditiously such guidelines and criteria as may be necessary to facilitate the implementation" of the sanctions regime.[183] In August 2002 a policy for de-listing was announced by the Chairman of the 1267 Committee, requiring a listed person to petition his or her government of residence or citizenship to request review of the case, putting the onus on the petitioner to "provide justification for the de-listing request, offer relevant information and request support for de-

178. ICTY Statute, art. 21.

179. ICTY Statute, art. 25.

180. *See, e.g.*, Third Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, UN Doc. S/2005/572, Annex (Sept. 9, 2005), *at* http://documents.un.org, para. 41 ("United Nations sanctions programmes have not required their targets to have been convicted by a court of law. The consent of the Security Council (whose members also make up the Committee established pursuant to resolution 1267 (1999), as well as other sanctions committees) is all that is required under Chapter VII of the Charter of the United Nations. After all, the sanctions do not impose a criminal punishment or procedure, such as detention, arrest or extradition, but instead apply administrative measures such as freezing assets, prohibiting international travel and precluding arms sales.").

181. Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Court of First Instance of the European Communities, Case T-306/01, Sept. 21, 2005) (2005), *at* http://curia.eu.int, para. 320; Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities (Court of First Instance of the European Communities, Case T-315/01, Sept. 21, 2005) (2005), *at* http://curia.eu.int, para 274.

182. Yusuf, *supra* note 181, para. 299; Kadi, *supra* note 181, para. 248.

183. S.C. Res. 1390 (2002), para. 5(d).

listing." That government was then expected to review the information and approach the government(s) that first listed the person on a bilateral basis "to seek additional information and to hold consultations on the de-listing request."[184] The Committee adopted guidelines implementing this approach in November 2002.[185] In the event that the relevant government of residence or citizenship chooses not to request review of the case, there is no provision for an alternative means of petition.[186] The Liberian sanctions regime, by contrast, allows for an individual to petition the relevant committees in "exceptional circumstances"; two individuals duly submitted petitions that were received by the committee but rejected on the merits.[187]

In practice the Committee itself has little direct input into listing or de-listing, instead ratifying decisions made in capitals on the basis of a confidential "no-objection" procedure. Under this procedure a proposed name is added to the list if no member of the Committee objects within a designated period. Until 2005 this period was 48 hours; it was recently extended to five days.[188] In practice, the amount of information provided to justify listing and identify an individual or entity varies. There has been some progress from the days when the Angola Sanctions Committee regarded the *nom de guerre* "Big Freddy"

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184. UN Press Release SC/7487 (Aug. 16, 2002), at http://www.un.org/News/Press/docs/2002/sc7487.doc.htm.

185. Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, Guidelines of the Committee for the Conduct of Its Work (amended on Apr. 10, 2003 and Revised on Dec. 21, 2005) (New York, Nov. 7, 2002), *at* http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf, para. 8.

186. *But see* Faraj Hassan v. Council of the European Union and Commission of the European Communities (Court of First Instance of the European Communities, Case T-49/04, July 12, 2006) (2006), *at* http://curia.eu.int, paras. 113-123 and Chafiq Ayadi v. Council of the European Union (Court of First Instance of the European Communities, Case T-253/02, July 12, 2006) (2006), *at* http://curia.eu.int, paras. 143-153.

(concluding that member states of the European Union are bound to respect the fundamental rights of persons within their jurisdiction insofar as this does not impede their proper performance of obligations under the UN Charter). Member states are "required to act promptly to ensure that such persons' cases are presented without delay and fairly and impartially to the Committee, with a view to their re-examination" *Hassan*, para. 119; *Ayadi*, para. 149. Wrongful refusal by the competent national authority to act in this way would properly be the subject of judicial review. *Hassan*, para. 120; *Ayadi*, para. 150. In the present cases, the applicant had made no such allegations. *Hassan*, para. 123; *Ayadi*, para 153. *Cf.* Yusuf, *supra* note 181, para. 317; Kadi, *supra* note 181, para. 270.

187. Procedures for Updating and Maintaining the List of Persons Subject to Travel Restrictions Pursuant to Resolution 1521 (2003) (Security Council Committee Established Pursuant to Resolution 1521 (2003) Concerning Liberia, New York, Mar. 16, 2004), *at* http://www.un.org/Docs/sc/committees/Liberia3/1521tbl_proc.pdf, para. 3.

188. Other sanction committees have different waiting periods: three days for the 1518 Committee (Iraq); 2 days for the 1521 Committee (Liberia); 2 days for the 1572 Committee (Côte d'Ivoire): Strengthening UN Sanctions, *supra* note 173, at 28.

as sufficient identifying information,[189] but statements of case vary considerably. The average statement of case on the 1267 Committee runs to about a page and a half of information, with some considerably longer. At the other extreme, one statement of case requesting the listing of 74 individuals included a single paragraph of justification for the entire group.[190] The capacity of members of the Committee to make an informed decision on whether to agree to a listing depends significantly on their access to intelligence information, either through their own services or their relationship with the designating state. In the absence of some national interest in a situation, however, there is little incentive to challenge a specific listing.

Various reform proposals to improve the listing and de-listing process have been developed, including the ongoing work of the 1267 Committee's Monitoring Group,[191] proposals by member states, and policy options being developed by independent bodies.[192] To date no court has held the regime invalid, though ongoing litigation in European courts may threaten such an outcome.[193] In addition, unlike other sanctions regimes, it appears unlikely that political developments will lead to the termination of the al Qaeda/Taliban list, as was the case in 2002 when sanctions against UNITA officials were terminated following the death of Jonas Savimbi and the end of Angola's civil war.[194] As the years pass, the fact that assets may never be unfrozen will lead some to conclude that the regime is in effect, if not in name, a form of confiscation. At present, for example, there is still no agreement on what to do with the frozen assets of an individual who dies.[195]

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189. *Id.* at 29.

190. *Id.* at 26 (a hold was placed on this group of 74).

191. Proposals from the Monitoring Group (previously the Monitoring Team) generally stress making existing mechanisms more effective, such as allowing individuals to notify the Committee if their state of residence or citizenship fails to forward their application for de-listing (Second Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, UN Doc. S/2005/83, Annex (Feb. 15, 2005), *at* http://documents.un.org, para. 56); requiring states to forward application for de-listing to the Committee (S/2005/572, *supra* note 180, para. 55); or allowing any state to petition Committee for de-listing (S/2005/572, *supra* note 180, para. 56).

192. *See, e.g.*, Strengthening UN Sanctions, *supra* note 173.

193. *See, e.g.*, Yusuf, *supra* note 181; Kadi, *supra* note 181. Both cases are being appealed. Other cases have been settled, sometimes through the de-listing of individuals.

194. S.C. Res. 1439 (Oct. 18, 2002); S.C. Res. 1448 (Dec. 9, 2002).

195. S/2005/83, *supra* note 191, at 19.

A basic point of argument is whether any improved procedure should incorporate an independent assessment of the evidence used to justify inclusion on the list. The Danish government (which held an elected seat on the Security Council for 2005-2006) proposed an ombudsman-type institution, while the Swiss government has supported a review panel with representatives of the listing and challenging states.[196] Other proposals include an administrative review panel comparable to the UN Compensation Commission[197] or Kosovo's Detention Review Commission,[198] or more formal judicial proceedings comparable to the appeals process in the ad hoc international criminal tribunals.[199]

Little progress has been made on such discussions, in part because the human rights and administrative law arguments encouraging independent review have been dismissed as essentially irrelevant to the counter-terrorist agenda of the Committee. When the ad hoc tribunals were established,

196. Following criticism by the OSCE Ombudsperson, as well as international human rights organizations such as Human Rights Watch and Amnesty International, a Detention Review Commission of international experts was established by UNMIK in August 2001 to make final decisions on the legality of administrative detentions on the orders of the Special Representative of the Secretary-General. Ombudsperson Institution in Kosovo, Special Report No 3: On the Conformity of Deprivations of Liberty Under "Executive Orders" with Recognized International Standards (June 29, 2001), *at* http://www.ombudspersonkosovo.org; HUMAN RIGHTS WATCH, WORLD REPORT 2002 386 (2002); Amnesty International, Press Release (Feb. 21, 2001). UNMIK Regulation 2001/18 (Aug. 25, 2001), On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders. The Commission approved extension of the detentions of the alleged Nis bombers until December 19, 2001—a few weeks after Kosovo's first provincial elections—ruling that "there are reasonable grounds to suspect that each of the detained persons has committed a criminal act." At the end of that period, the three month mandate of the Commission had not been renewed; in its absence, the Kosovo Supreme Court ordered the release of the three detainees. Arben Qirezi, *Kosovo: Court Overturns Haekkerup Detention Orders*, IWPR BALKAN CRISIS REPORT NO 308, Jan. 11, 2002. The last person held under an Executive Order, Afrim Zeqiri, was released by a judge on bail in early February 2002 after approximately 20 months in detention.

197. The UNCC was established in 1991 to process compensation claims for damage suffered as a direct result of Iraq's invasion and occupation of Kuwait. *See* http://www.unog.ch/uncc.

198. Following criticism by the OSCE Ombudsperson, as well as international human rights organizations such as Human Rights Watch and Amnesty International, a Detention Review Commission of international experts was established by UNMIK in August 2001 to make final decisions on the legality of administrative detentions on the orders of the Special Representative of the Secretary-General. Ombudsperson Institution in Kosovo, Special Report No 3: On the Conformity of Deprivations of Liberty Under "Executive Orders" with Recognized International Standards (June 29, 2001), *at* http://www.ombudspersonkosovo.org; HUMAN RIGHTS WATCH, WORLD REPORT 2002 386 (2002); Amnesty International, Press Release (Feb. 21, 2001). UNMIK Regulation 2001/18 (Aug. 25, 2001), On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders. The Commission approved extension of the detentions of the alleged Nis bombers until December 19, 2001—a few weeks after Kosovo's first provincial elections—ruling that "there are reasonable grounds to suspect that each of the detained persons has committed a criminal act." At the end of that period, the three month mandate of the Commission had not been renewed; in its absence, the Kosovo Supreme Court ordered the release of the three detainees. Arben Qirezi, *Kosovo: Court Overturns Haekkerup Detention Orders*, IWPR BALKAN CRISIS REPORT NO 308, Jan. 11, 2002. The last person held under an Executive Order, Afrim Zeqiri, was released by a judge on bail in early February 2002 after approximately 20 months in detention.

199. *See supra* note 179.

for example, the UN Office of Legal Affairs was deeply involved.[200] By contrast, the 1267 regime was established without reference to the Legal Counsel at all; when a member state suggested that the Counsel should be consulted it was told that there were no legal issues involved in listing or de-listing.[201]

As indicated earlier, the pressure to change is likely to increase, if not through courts striking down asset freezes then through member states refusing to implement them. The main barrier to such reforms, however, is not simply resistance to the human rights arguments or a general reluctance to constrain the discretion of the Security Council by reviewing its decisions.[202] Rather, it is the fact that in many ways the Council and its Committee are not actually making the relevant decisions. As the European Court of First Instance observed in the *Yusuf* and *Kadi* cases, any opportunity for an individual whose assets are frozen to respond to the veracity and relevance of facts used to justify that action is definitively excluded: "Those facts and that evidence, once classified as confidential or secret by the State which made the Sanctions Committee aware of them, are not, obviously, communicated to him, any more than they are to the Member States of the United Nations to which the Security Council's resolutions are addressed."[203] Though the obligation to respect procedural constraints is normally clear when a state is seeking to exercise coercive powers over one of its own nationals, it is less clear that such obligations translate to international bodies as a matter of law, and it is certain there is unwillingness to do so in fact.[204]

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200. *See, e.g.,* Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (First Annual Report), UN Doc. A/49/342-S/1994/1007 (Aug. 17, 1994), *at* http://documents.un.org, paras. 31 (Office of Legal Affairs provided legal officers to the International Criminal Tribunal for the former Yugoslavia), 55 (OLA was heavily involved in assisting judges to draft rules of evidence and procedure).

201. Confidential communication, Jan. 24, 2006.

202. An irony of the ongoing debates concerning targeted financial sanctions is that greater procedural guarantees are likely to be available under regimes designed to have more limited humanitarian consequences than comprehensive sanctions such as those imposed on Iraq in 1990. Indeed, the threshold for such sanctions already appears to be higher than that required for the Council to authorize the use of force. *See* Conclusion.

203. *Yusuf*, supra note 181, para 319; Kadi, *supra* note 181, para. 273.

204. *See, e.g.,* the comments from the Australian Minister of Foreign Affairs indicating that a lack of intelligence sharing has prevented 1267 listings. Question Without Notice: National Security: Terrorism, House Hansard, Page 22145 (5 Nov. 2003) (Mr. Downer) "In some cases the 1267 committee will not provide a consensus, because one or two members of the Security Council may have a particular view about a particular organisation which is not shared by other members of the Security Council. It might equally be that a member of the Security Council—and there are cases in point here—has very specific intelligence but is not prepared to share that intelligence."

The general reluctance to share intelligence within an international organization such as the United Nations suggests that a more productive means of challenging specific listings may draw upon the bilateral intelligence relationships described in Part One.[205] Because the United States proposes the majority of listings, a country's relationship with the United States will therefore be crucial. From the adoption of formal de-listing procedures in November 2002 until December 2005 only two individuals were de-listed. One was a British citizen and the other was a resident of Germany. Both were removed from the list only after intense lobbying by the respective governments and in one case de-listing was linked to cooperation with the authorities in investigations of terrorist activities.[206]

Such a practice, which favors the citizens and residents of allies of the United States, is unsustainable. Indeed, there are already indications that in countries not in a position—like Britain, Germany, Canada, Sweden,[207] or Switzerland[208]—to lobby the United States effectively, sanctions are already being implemented selectively.[209] It now seems probable that the greatest hindrance to the regime's effectiveness will not be challenges from courts but the reluctance of states to add to the list. This first emerged as a problem in late 2002,[210] with some states citing practical and legal constraints

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205. *See supra* Part I.E.

206. The two individuals were Rahmatullah Safi and Shadi Abdalla. *See, e.g., Bin Laden's Ex-Bodyguard Is Taken Off Lists of Terrorists*, L.A. TIMES, Jan. 5, 2005 (Shadi Abdalla removed from list). Similarly two Swedish nationals of Somali descent, Abderisak Aden and Abdi Abdulaziz Ali, were removed from the list in August 2002 not because of an error in the listing but because "they submitted information, evidence, sworn statements first that they had no knowledge that the [al Barakaat] businesses that they were associated with were being used, either directly or indirectly, to finance terror. And second, they submitted evidence, documents and sworn certification that they had severed all ties with [al Barakaat, that they had disassociated themselves fully and completely with [al Barakaat]." *Update on Tracking Financial Assets of Terrorists Briefer: Jimmy Gurule, Undersecretary Of Treasury For Enforcement*, FEDERAL NEWS SERVICE (LEXIS), Sept. 9, 2002.

207. *See* the discussion of the Aden and Ali cases, *supra* note 206.

208. In January 2006 two Swiss nationals were removed from the Consolidated List.

209. Particular concerns have been expressed that some countries are not seeking formal humanitarian exemptions, leading to the inference that asset freezes are not being applied rigorously.

210. *See, e.g.*, Second Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by Resolution 1390 (2002), UN Doc. S/2002/1050/Rev.1, Annex (Sept. 19, 2002), *at* http://documents.un.org, para. 25 ("The Group has noted some reticence on the part of several States to submit to the Committee names of additional individuals or entities to be incorporated in the list. In fact, the list has fallen well behind the actions of States in identifying, monitoring, detaining, and arresting individuals believed to be associated with al-Qa'idah or the Taliban."); Third Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by Resolution 1390 (2002), UN Doc. S/2002/1338, Annex (Dec. 4, 2002), *at* http://documents.un.org, para. 13 ("This failing [to submit names] has seriously degraded the value of the United Nations consolidated list, one of the key instruments supporting international cooperation."); Second Report of the Monitoring Group Established Pursuant to Resolution 1363 (2001) and Extended by Resolutions 1390 (2002) and 1455 (2003), on Sanctions Against Al-Qaida, the Taliban and Individuals and Entities Associated with Them, UN Doc. S/2003/1070, Annex (Nov. 3, 2003), paras. 16–17; First Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated

preventing them submitting the names of individuals and entities under ongoing investigation,[211] or expressing concerns about the legality of listing individuals prior to a judicial finding of culpability.[212]

This debate would profit from closer examination of the history of intelligence sharing with international organizations, especially in the context of implementing regimes such as weapons inspections in Iraq. Effective use of intelligence by such organizations depends on both a demonstrated ability to receive confidential information appropriately and a capacity to assess its accuracy, relevance, and implications.[213]

C. *International Criminal Prosecution*

The use of intelligence in international criminal prosecution highlights the tension between the competing objectives of national security and international legitimacy even more starkly than with the use of force and targeted sanctions. The ad hoc international criminal tribunals—which have had to balance the need to protect sources and methods, the rights of the accused, and the integrity of the tribunal itself—constitute an area in which there is now some measure of experience in drawing upon sensitive information to implement Council decisions. The tension is deeper because the national interest that leads a state to share intelligence is likely to be less compelling than in the previous situations. At the same time, the evidentiary threshold for securing a conviction in an international tribunal is considerably more rigorous than that needed to justify asset freezes or military strikes.

Access to intelligence, in the sense used here of information obtained covertly, need not be central to the prosecution of an individual before an international tribunal, but it will frequently be very

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Individuals and Entities, UN Doc. S/2004/679, Annex (July 31, 2004), *at* http://documents.un.org, para. 34 ("So far 21 States have submitted names for inclusion on the List. . . . The number of contributors suggest that many States are reluctant to provide names.").

211. S/2002/1050/Rev.1, *supra* note 210, para. 26–27; S/2002/1338, *supra* note 210, para. 17; S/2003/1070, *supra* note 210, para. 22 ("Those countries that were aware of the [listing] requirements relied heavily on the exemption clause in the resolution, referring to the possibility of compromising investigations or enforcement actions. This appeared to the Group to be more in the nature of an excuse than an actual impediment to providing such names."). The exemption clause refers to the humanitarian exemptions described *supra* note 175.

212. S/2003/1070, *supra* note 210, paras. 19–20 (Kuwait, Yemen, and Morocco all cited the absence of a judicial finding as the reason for not submitting the names of suspected al-Qaeda members who had already been arrested). *See also* S S/2002/1050/Rev.1, *supra* note 210, para. 27; S/2002/1338, *supra* note 210, para. 17; S/2004/679, *supra* note 210, para. 34.

213. *See* CHESTERMAN, *supra* note 63.

useful. The nature of situations that fall within the jurisdiction of such tribunals and their limited investigative capacity makes traditional collection of evidence difficult. Intelligence may be a source of leads for interviews with potential witnesses; it may also provide important contextual information that deepens an investigator's understanding of a case. This demand for intelligence may also correspond to a potential supply: if the situation is a conflict zone, there will often be a number of governments collecting intelligence for their own purposes. In some circumstances these governments may be willing to share at least part of that intelligence with investigators, if not to produce it in open court.[214] At times this discretion may be exercised capriciously. During the Rwandan genocide, for example, the commander of the remaining UN forces in Kigali was informed that the United States had learned of plans for his assassination: "I guess I should have been grateful for the tip," Roméo Dallaire later wrote, "but my larger reaction was that if delicate intelligence like this could be gathered by surveillance, how could the United States not be recording evidence of the genocide occurring in Rwanda?"[215]

The question of whether and how intelligence can and should be used in international criminal prosecution arose shortly after the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY). South African judge Richard Goldstone, the first Chief Prosecutor of the Tribunal, realized the importance of having access to intelligence, especially from the United States. The problem was how to reconcile necessary procedural protection of defendants' rights with the desire of states

214. Peter Nicholson, The Function of Analysis and the Role of the Analyst within the Prosecutor's Office of an International Criminal Court (International Criminal Court, Office of the Prosecutor, The Hague, Feb. 13, 2003), *at* http://www.icc-cpi.int/library/organs/otp/Nicholson.pdf, 6. *See, e.g.,* Sebastian Rotella, *U.S. Lawman's Trip to "Heart of Darkness"*, L.A. TIMES, Aug. 12, 2001 (describing the importance of U.S. intelligence—specifically aerial surveillance photographs—in the *Krstic* case before the ICTY).

215. ROMÉO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA (2003). Dallaire had previously testified before the Organisation of African Unity (OAU) panel that produced its own damning report on the genocide: "Really, there is a UN Secretariat, there is a Secretary-General, and there is the Security Council, but my belief is that there is something above all these. There is something above the Security Council. There is a meeting of like-minded powers, who do decide before anything gets to the Security Council. Those same countries had more intelligence information than I ever had on the ground; and they knew exactly what was going on." Rwanda: The Preventable Genocide (Organization of African Unity, International Panel of Eminent Personalities, Addis Ababa, 2000), para. 15.33.

providing intelligence to avoid compromising their sources and methods.[216] Rule 70(B) of the ICTY's Rules of Procedure and Evidence addressed this issue providing as follows:

> If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.[217]

A further provision was later added to include a national security exemption from the general obligation to produce documents and information.[218]

Louise Arbour, who succeeded Goldstone as Chief Prosecutor, later observed that Rule 70 had been extremely useful: "It is, frankly, and we have to live in a realistic world, the only mechanism by which we can have access to military intelligence from any source."[219] That utility had been especially important in the early days of the Tribunal. As its work moved from investigations to trials, the dangers of accepting classified information became apparent, as doing so prevented the Prosecutor from using the information and could curtail the rights of the defense.[220] Such candor about the use of intelligence

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216. *See* Richard J. Goldstone, *Remarks: Intelligence and the Use of Force in the War on Terrorism*, 98 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 148 (2004). U.S. law, for example, requires the President to certify that procedures are in place to prevent the unauthorized disclosure of sources and methods connected to any information that might be shared with the United Nations. 50 USC 404g(a)(l). This may be waived if the President certifies that it is in the national interest to do so: 50 USC 404g(a)(2).

217. ICTY Rules of Procedure and Evidence, 33 I.L.M. 484, UN Doc. IT/32 (1994) (Mar. 14, 1994), *at* http://www.un.org/icty/legaldoc-e, rule 70 (B). A frequently overlooked aspect of this provision is the requirement for the prosecution to disclose information to the accused *prior* to submitting it as evidence.

218. *Id.* rule 54 *bis* (a state raising such an objection a state must "identify, as far as possible, the basis upon which it claims that its national security interests will be prejudiced;" protective measures may be agreed for the hearing of this objection).

219. Louise Arbour, *War Crimes Tribunals: The Record and the Prospects: History and Future of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 13 AM. U. INT'L L. REV. 1495, 1508 (1998).

220. *Id*. *See, e.g.*, Prosecutor v. Élie Ndayambaje and Sylvain Nsabimana (ICTR, Decision on the Defense Motions Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses, Nov. 15, 2001) Case Nos. ICTR-96-8-T and ICTR-97-29A-T (2001), *at* http://www.ictr.org (applying comparable provision in the ICTR Rules of Procedure.

indicates how much has changed from the days when intelligence itself was a dirty word in the United Nations.[221] Indeed, the ICTY now recruits junior professional staff (P-2 and P-3) for the position of "intelligence analyst."

In the negotiations leading to the creation of the International Criminal Court (ICC), a number of delegations also stressed the importance of including provisions for protecting national security information.[222] As in the ICTY, the Rome Statute allows the Prosecutor to conclude agreements not to disclose documents or information obtained "on the condition of confidentiality and solely for the purpose of generating new evidence."[223] The openness with which the issue was discussed demonstrated the increasing acceptance of intelligence issues as an important part of the work of the Court, reflected in open briefings on the topic[224] and the creation of posts within the Office of the Prosecutor requiring experience in handling and analyzing military intelligence.[225]

The ICC also provides for a national security exception to requests by the Prosecutor or the Court for information or assistance, though it takes the form of a complex mechanism, based in part on an ICTY Appeals Chamber decision in the *Blaskic* case,[226] intended to encourage a state invoking the exception to disclose as much as possible.[227] "Cooperative means" are first encouraged to reach a resolution through modifying the request or agreeing on conditions to protect the threatened interest.[228] If such means fail and the state refuses to disclose the information or documents, the state must notify the Prosecutor or the

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221. *See* text *supra* note 17.

222. Michael A. Newton, *The International Criminal Court Preparatory Commission: The Way It Is & the Way Ahead*, 41 VA. J. INT'L L. 204, 212 (2000).

223. Statute of the International Criminal Court (ICC Statute), UN Doc. A/Conf.183/9 (July 17, 1998), *at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf, art. 54(3)(e).

224. *See, e.g.*, Peter Nicholson, Testimony at Public Hearing of the Office of the Prosecutor (International Criminal Court, Office of the Prosecutor, The Hague, 17-June 18, 2003), *at* http://www.icc-cpi.int/library/organs/otp/ph/030714_otp_ph1s5_Peter_Nicholson.pdf.

225. *See, e.g.*, Military Analyst (P-4) job posting, *at* http://www.icc-cpi.int/jobs/vacancies/306.html. *See also* Proposed Programme Budget for 2006 prepared by the Registrar (International Criminal Court, The Hague, 2005), *at* http://www.icc-cpi.int/library/asp/Part_II_-_Proposed_Programme_Budget_for_2006.pdf, 57 (describing functions of the OTP's Investigative Strategies and Analysis Unit as including the collection of crime information through the establishment of a network with national agencies (police, military, intelligence, prosecutors) and NGOs).

226. Prosecutor v. Tihomir Blaskic (ICTY Appeals Chamber, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of July 18, 1997, Oct. 29, 1997) Case No. IT-95-14 (1997), *at* http://www.un.org/icty, para. 68.

227. ICC Statute, *supra* note 223, art. 72.

228. *Id.* art. 72(5).

Court "of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests."[229] If the Court nevertheless determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of an accused, it may refer the matter to the Assembly of States Parties or, if the Security Council referred the matter to the Court, to the Council.[230] An important departure from the *Blaskic* formula is the apparent reversal of the presumption that states are obliged to disclose information; in the ICC Statute the emphasis is on the right of states to deny the Court's request for assistance.[231] In *Blaskic* this obligation was linked to the use of Chapter VII by the Security Council in establishing the Tribunal.[232] As the ICC lacks such coercive powers, specific obligations to disclose information may require action by the Council on a case-by-case basis. The *Blaskic* case also demonstrates the importance of intelligence in providing exculpatory evidence, the release of which led on appeal to a drastically reduced sentence for the defendant and a grant of early release.[233]

Though most attention to intelligence and international criminal prosecution tends to focus on the difficulty of obtaining evidence in a form that may be presented in court, in some circumstances the problem may be that there is too much support for using such information. This may call into question the independence of the proceedings, as was alleged in the Special Court for Sierra Leone in 2004. A defense motion argued that the Prosecutor's independence had been compromised by the close relationship between its Chief of Investigations and the U.S. Federal Bureau of Investigation (FBI).[234] In its response,

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229. *Id.* art. 72(6).

230. *Id.* arts. 72(7)(a)(ii), 87(7). The Court is also authorized to "make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances." *Id.* art. 72(7)(a)(iii). In limited circumstances the Court may order disclosure. *Id.* art. 72(7)(b)(i).

231. Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUROPEAN J. INT'L L. 144, 166–67 (1999). *See also* Donald P. Piragoff, *Protection of National Security Information*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 270 (Roy S.K. Lee ed. 1999).

232. Blaskic, *supra* note 226, para. 68. *See* Ruth Wedgwood, *International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaskic*, 11 LEIDEN J. INT'L L. 635 (1998).

233. Prosecutor v. Tihomir Blaskic (ICTY Appeals Chamber, Judgement, July 29, 2004) Case No. IT-95-14 (2004), *at* http://www.un.org/icty.

234. Motion Seeking Disclosure of the Relationship Between the United States of America's Government and/or Administration and/or Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor (Special Court for Sierra Leone, Freetown, The Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao, Case No. SCSL-04-15-T, Nov. 1, 2004). The motion asserted that the Prosecutor had "worked with and/or at the behest of and/or in

the Office of the Prosecutor drew a distinction between its dual obligations to investigate and prosecute, emphasizing the important role of external assistance during investigations while distinguishing such assistance from taking instructions from any entity.[235] Rule 39 of the Court's Rules of Procedure and Evidence, for example, provides that in the course of an investigation the Prosecutor may seek "the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL)."[236] The Court, setting what appeared to be an unusually high burden of proof, rejected the defense motion on the basis that it had not demonstrated a "master-servant" relationship between the FBI and the Office of the Prosecutor.[237]

Protecting the integrity of intelligence sources is likely to be important to the medium-term success of international tribunals generally and the International Criminal Court in particular. Soon after the Security Council referred the situation in Darfur to the ICC in March 2005,[238] the Secretary-General transmitted a sealed list of 51 individuals named by the UN International Commission of Inquiry as suspects of grave international crimes.[239] It appears that neither the Secretary-General nor the members of the Council knew the contents of this list and transmitted it to the Prosecutor of the ICC unopened. Developing procedures for maintaining confidentiality will help to build trust on the part of those who might provide intelligence to the ICC. At the same time, the independence of the ICC and its ad hoc cousins depends on more than avoiding a "master-servant" relationship with the intelligence agencies of the United States. Avoiding even the impression of inappropriate relationships will depend on diversifying

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conjunction with" the FBI. This was said to be contrary to Article 15(1) of the Statute, which prohibits the Prosecutor "receiv[ing] instructions from any Government or from any other source." Statute of the Special Court for Sierra Leone (Jan. 16, 2002), *at* http://www.sc-sl.org/scsl-statute.html, art. 15(1).

235. Prosecution Response to Sesay's "Motion Seeking Disclosure of the Relationship Between the United States of America's Government and/or Administration and/or Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor" (Special Court for Sierra Leone, Freetown, The Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao, Case No. SCSL-04-15-T, Nov. 16, 2004). The Prosecution relied on Rules 8 (C) (D) and (E), 39, and 40 of the Rules of Procedure and Evidence, which make reference to assistance from other states, as well as the *Blaskic* decision, which noted that international tribunals "must rely on the cooperation of States." Blaskic, *supra* note 226, para. 29.

236. Rules of Procedure and Evidence (Special Court for Sierra Leone, Freetown, Apr. 12, 2002), *at* http://www.sc-sl.org/scsl-procedure.html, Rule 39(iii).

237. Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao (Special Court for Sierra Leone, Decision on Sesay Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor, May 2, 2005) Case No. SCSL-04-15-T, 14 (2005).

238. S.C. Res. 1593 (Mar. 31, 2005).

239. Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 (2004) of Sept. 18, 2004, UN Doc. S/2005/60, Annex, 5 (Feb. 1, 2005), *at* http://documents.un.org.

the sources of intelligence and strengthening the capacity to receive and analyze them with a critical and impartial eye.

This points to two larger caveats on increasing access to intelligence, whether in an international tribunal or in the Security Council and its committees. The first is that intelligence may be overvalued. Officials with limited past access to intelligence sometimes attach disproportionate weight to information bearing the stamp "secret," or which is delivered by the intelligence service of a member state. Since any such material will normally be provided without reference to the sources and methods that produced it, credulity must be tempered by prudence. A second caveat is the corresponding danger of undervaluing unclassified or open source material. Intelligence is sometimes likened to quality journalism; a reasonable corollary is that good journalists frequently produce material that is comparable to the intelligence product of some services. The United Nations itself collects large amounts of information and analysis, though it is not organized systematically. In addition, non-governmental organizations are increasingly providing better and timelier policy analysis than the United Nations and, on occasion, its member states.[240]

The use of intelligence, then, creates both opportunities and dangers. Though it is improbable that states will come to regard it as a kind of international "public good" to be provided to international organizations for collective security purposes,[241] effective multilateral responses to the threats of proliferation and terrorism will depend on intelligence sharing, while international criminal prosecution will continue to rely on such support at least for the purpose of investigations. The danger is that passivity on the part of the receiving body will undermine the legitimacy of multilateral institutions and processes

240. One of the more prominent is the International Crisis Group: despite its centrality as a threat for Australia and its obvious interest to the United States, the best work on the nature and structure of Jemaah Islamiyah (JI) was undertaken by Crisis Group's Sidney Jones. *See, e.g.*, International Crisis Group, Indonesia Backgrounder: How The Jemaah Islamiyah Terrorist Network Operates (Jakarta/Brussels, ICG Asia Report No. 43, Dec. 11, 2002), *at* http://www.crisisgroup.org; International Crisis Group, Jemaah Islamiyah in South East Asia: Damaged but Still Dangerous (Jakarta/Brussels, ICG Asia Report No. 63, Aug. 26, 2003), *at* http://www.crisisgroup.org. Disclosure: The author was seconded to Crisis Group as its Director of UN Relations in the New York office from late 2003 to early 2004.

241. *Cf.* ADMIRAL STANSFIELD TURNER, SECRECY AND DEMOCRACY: THE CIA IN TRANSITION 280–85 (1985); William E. Colby, *Reorganizing Western Intelligence*, *in* INTELLIGENCE AND THE NEW WORLD ORDER: FORMER COLD WAR ADVERSARIES LOOK TOWARD THE 21ST CENTURY 126, 126–27 (Carl Peter Runde and Greg Voss eds., 1992).

through either the reality or the perception of unilateral influence. This in turn may implicitly shift the question from how intelligence is used to how it was collected in the first place.

CONCLUSION

> "The ethic of our work, as I understand it, is based on a single assumption. That is, we are never going to be aggressors. . . . Thus we do disagreeable things, but we are *defensive*. That, I think, is still fair. We do disagreeable things so that ordinary people here and elsewhere can sleep safely in their beds at night. Is that too romantic? Of course, we occasionally do very wicked things." He grinned like a schoolboy. "And in weighing up the moralities, we go in for dishonest comparisons; after all, you can't compare the ideals of one side with the methods of the other, can you now? . . .
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> "I mean, you've got to compare method with method, and ideal with ideal. I would say that since the war, our methods—ours and those of the opposition—have become much the same. I mean, you can't be less ruthless than the opposition simply because your government's *policy* is benevolent, can you now?" He laughed quietly to himself. "That would *never* do," he said.
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> —John le Carré, *The Spy Who Came In from the Cold*[242]

The Spy Who Came In from the Cold, John le Carré's novel of Cold War espionage and betrayal, paints a bleak picture of intelligence as a question of ends rather than means. Control, the head of Britain's SIS, explains the "ethic of our work" to Alec Leamas in the course of recruiting him to protect an important East German spy. In the screen version, when Leamas realizes that he has been manipulated into condemning a good man and saving a bad one, he resigns himself to the changed moral context in

242. JOHN LE CARRÉ, THE SPY WHO CAME IN FROM THE COLD (1963), ch. 2.

more terse language: “Before, he was evil and my enemy; now, he is evil and my friend.”[243] After a final double-cross, however, in which his lover is killed, Leamas turns his back on a waiting colleague and allows himself to be gunned down on the eastern side of the Berlin Wall.[244]

This Article began with the question of whether any defined parameters exist in international law that regulate the collection and use of secret intelligence. Given widespread state practice in the area, the question is sometimes said to be moot.

Still, it has become clear that a normative context does indeed exist within which intelligence collection takes place. That context draws on the various legal regimes that touch on aspects of intelligence work, but also on the emerging customs and practice of the intelligence community itself. This was true even during the Cold War, but in the post-Cold War era the purposes for which intelligence is used have begun to change. As the discussion of bilateral intelligence relationships showed, intelligence sometimes functions as a form of currency—a fungible item that may be exchanged for other intelligence, foreign aid, or the avoidance of penalties. The value of any currency, however, depends on its scarcity. This is especially true of intelligence, where its value may be inversely proportional to its use: knowing something secret may be more important than acting on it, if to act would reveal the fact of one’s knowledge. Since September 11, 2001, however, many states have significantly increased their intelligence exchanges with respect to counter-terrorism information in particular.

It would be premature to say that a regime regulating the use of intelligence has already emerged, though its contours may be coalescing. Ironically, perhaps, legal controls on the use of intelligence in international forums become stronger as the potential consequences of using it are more limited. There is no formal check on the Security Council’s authority to use force against a perceived threat to international peace and security, and the criteria for evaluating a state’s claim to be acting in self-defense are ambiguous at best. In the case of targeted financial sanctions, stricter limits have been imposed on a sanctions regime that freezes the assets of a few hundred people, with elaborate humanitarian exemptions,

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243. *Cf. id.* ch. 25: “ ‘There’s only one law in this game. . . . Mundt is their man; he gives them what they need. . . . I’d have killed Mundt if I could, I hate his guts; but not now. It so happens that they need him.’ ”).

244. *Id.* ch. 26.

than were applied to the comprehensive sanctions accused of killing half a million Iraqis. As for international prosecution, the single alleged war criminal receives by far the greatest protection from dubious recourse to intelligence sources.

This is not to suggest that legal accountability is the only manner in which the exercise of coercive power may be constrained. Other means include negotiation constraints, checks and balances, the threat of unilateral action, and so on, pointing to an important distinction between legal and political accountability. *Legal* accountability typically requires that a decision-maker has a convincing reason for a decision or act. *Political* accountability, by contrast, can be entirely arbitrary.[245] The UN Security Council was created as an archetypically political body, but as its activities have come to impact on individuals the demands for legal forms of accountability will increase.

Shortly after the Madrid bombings of March 11, 2004, the Council passed a resolution condemning the attacks, which it stated were "perpetrated by the [Basque] terrorist group ETA."[246] The resolution was adopted despite German and Russian efforts to include in the text the modifier "reportedly" to reflect uncertainty about this attribution, which appeared to be intended to bolster the Aznar government's chances in a national election to be held three days later.[247] It was soon established that the uncertainty was well-founded, though even the subsequent arrest of Islamist extremists did not prompt a correction, an apology, or even a statement from the Council.[248]

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245. In an election, for example, voters are not required to have reasons for their decision—indeed, the secrecy of the ballot implies the exact opposite: it is generally unlawful even to ask a voter why he or she voted one way or another. John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131 (Adam Przeworski, S.C. Stokes, and B. Manin eds., 1999). These forms of accountability may be seen as lying on a spectrum, with other variations possible. In a legislature, for example, individual legislators may have specific reasons for voting in favor of or against a piece of legislation, sometimes demonstrated through speeches made before or after it was adopted. But if such reasons are inconsistent, it may be unclear what significance is to be attributed to them. Benedict Kingsbury, "The Rules and Institutions of Accountability" (paper presented at the A Rules-Based International Order, seminar convened by the Institute for International Law and Justice and the Permanent Mission of Austria to the United Nations, UN Headquarters, New York, May 5, 2005).

246. S.C. Res. 1530 (2004), para. 1.

247. *See, e.g.*, Dale Fuchs, *Investigation of Madrid Bombings Shows No Link to Basque Group, Spanish Minister Says*, N.Y. TIMES, Mar. 30, 2004.

248. For a rare exception, *see* Letter dated Mar. 15, 2004 from the Permanent Representative of Spain to the United Nations addressed to the President of the Security Council, UN Doc. S/2004/204 (Mar. 15, 2004), *at* http://documents.un.org.

As the Council has begun to act in the sphere of counter-terrorism and counter-proliferation, its dependence on intelligence findings has introduced slightly different legitimacy problems. There are few consequences for the Council itself when it is wrong. Entrusted to deal with "threats" to international peace and security, it cannot be expected to function as a court of law—though it is no longer tenable to pretend that it does not at least function as a kind of jury. The latter role has been expanded with the Council's move into areas where the determination of a threat to the peace is far more complex than tracking troop movements across international borders. This is only part of a larger transformation in the activities of the Council: instead of merely responding to such threats, it increasingly acts to contain or preempt them. Its expanding responsibilities have ranged from listing alleged terrorist financiers for the purposes of freezing their assets to administering territories such as Timor-Leste and Kosovo. These activities have prompted calls for greater accountability of the Council, or at least wider participation in its decision-making processes.

A useful thought experiment is to consider what would have happened if the Council had accepted Colin Powell's February 2003 presentation at face value, voting to authorize a war to rid Iraq of its concealed weapons of mass destruction. For President Bush and Prime Minister Blair, the absence of weapons was a political embarrassment that could be survived. For the Council, it would have undermined the one thing that the United Nations could bring to the issue: some small amount of legitimacy.

Intelligence today is more than a necessary evil. In the absence of any multilateral capacity to evaluate threats from and calibrate responses to the dangers of weapons of mass destruction and terrorism, international organizations will be forced to rely on intelligence their member states provide.[249] This reliance adds weight to the view that collection of intelligence is more than tolerated, and may actually be encouraged. The use of intelligence, however, remains inconsistent, as do the opportunities to limit the "wicked things" sometimes done in the name of benevolent policy. As practice continues and increases,

249. *See, e.g.*, Elaine Sciolino and William J. Broad, *Atomic Agency Sees Possible Link of Military to Iran Nuclear Work*, N.Y. TIMES, Feb. 1, 2006 (quoting IAEA report on Iran's alleged nuclear activities, "which officials say was based at least in part on intelligence provided by the United States").

so will demands for more effective political and legal mechanisms to avoid abuse and protect valid interests. In the meantime, intelligence will continue to exist in a legal penumbra, lying at the margins of diverse legal regimes and at the edge of international legitimacy.