

# COUNTERINTUITIVE: INTELLIGENCE OPERATIONS AND INTERNATIONAL LAW

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## I. INTRODUCTION

Although international law has expanded its reach to areas as varied as business transactions, health issues, the environment, the maritime arena and even warfare, it has had little impact on the practice of intelligence gathering. This outcome is not the product of neglect, but rather of the imperatives of intelligence gathering in the twenty-first century, which themselves are shaped by international politics. Careful attention to the causes of war between rational nation-states shows that efforts to regulate intelligence gathering during peacetime will have the highly undesirable result of making war more, rather than less, likely. Proposals for international treaties to govern intelligence collection are not only premature, but will likely prove counterproductive to the goal of promoting international peace and stability.

Intelligence includes two distinct processes—the collection of information and its analysis. Discussion of international rules designed to govern intelligence generally focuses on collection, rather than analysis, which by itself does not appear to raise significant issues of relations between states. Collection can take several different forms, such as human intelligence, or HUMINT, which refers to information gathered by

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contacts and other means involving individuals; signals intelligence, or SIGINT, which includes electronic surveillance and intercepts of communications; and information gathered by satellites and aerial reconnaissance, among other means. Collection can be covert, in that it is not undertaken officially but rather secretly, or it can be in the open, such as the monitoring of sources such as newspapers and government proceedings.

For purposes of this Essay, we will discuss the dimension of intelligence which involves the “collection of information through various surreptitious, intrusive means inside a foreign nation’s territory without that nation’s knowledge or consent.”<sup>1</sup> These types of intelligence operations have long been considered to rest within the power of nation-states, particularly during times of war. The Geneva Conventions already address some of the issues of intelligence gathering during times of war, such as the treatment of spies.<sup>2</sup>

The question before us is whether international law is useful or required to govern the covert intelligence-gathering activities of nation-states during peacetime. The very notion that international law is currently capable of regulating intelligence gathering is dubious. In fact, we suggest that international regulation of intelligence operations could have the perverse effect of making international conflict more, rather than less, likely. Certainly, there is legitimate space for coordination and cooperation between states in sharing intelligence,<sup>3</sup> but such “sharing” does not involve significant needs for universal regulation by international law. Simply stated, it is not in the interests of nation-states or the international system to permit regulation of their intelligence-gathering activities. This Essay will explore both the historical and current views of intelligence gathering, U.S. domestic issues related to regulation of intelligence operations, and the benefits of refraining from regulating such operations through an international entity or via international law.

## II. INTELLIGENCE GATHERING

Nations have gathered intelligence since the beginning of time.<sup>4</sup> Historical accounts of the ancient world commonly discuss the activities of

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1. See Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217, 217 (1999).

2. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

3. SIMON CHESTERMAN, *SHARED SECRETS: INTELLIGENCE AND COLLECTIVE SECURITY* 1–10 (2006).

4. See generally Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT’L L. & POL’Y 321 (1996).

spies and the importance of accurate information in determining the outcomes of battles and wars. The regulation of wartime intelligence activities has been an issue for nation-states for centuries and is best embodied in the Geneva Conventions of 1949<sup>5</sup> and Additional Protocol I to the Geneva Conventions of 1977.<sup>6</sup> These treaties do not attempt to impose a comprehensive regulatory framework on the gathering of intelligence, but rather focus on the treatment of certain classes of individuals, basically spies, who engage in covert intelligence activity. Fundamentally, peacetime regulation of intelligence activities has always and consistently been held to be within the sole province of domestic law. In the seventeenth century, Hugo Grotius summed up the state of the law regarding intelligence operations during his era:

Spies, whose sending is beyond doubt permitted by the laws of nations—such as spies whom Moses sent out, or Joshua himself, if caught are usually treated most severely. “It is customary,” says Appian, “to kill spies.” Sometimes they are treated with justice by those who clearly have a just case for carrying on war; by others, however, they are dealt with in accordance with that impunity which the law of war accords. If any are captured who refuse to make use of the help of spies, when it is offered to them, their refusal must be attributed to their loftiness of mind and confidence in their power to act openly, not to their view of what is just or unjust.<sup>7</sup>

Peacetime intelligence gathering allows nation-states to more accurately judge potential threats and to choose between peaceful or hostile courses of action. Intelligence gathering often provides the basis for the *jus ad bellum*. Indeed, many scholars today still assert that a nation-state that engages in peacetime intelligence activities does not violate the law. Hays Parks, one of the U.S. military’s leading thinkers on the laws of war, has observed:

Nations collect intelligence to deter or minimize the likelihood of surprise attack; to facilitate diplomatic, economic, and military action, in defense of a nation in the event of hostilities; and in times of “neither peace nor war,” to deter or defend against actions by individuals, groups, or a nation that would constitute

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5. See, e.g., Geneva Convention IV, *supra* note 2, art. 5.

6. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. Notably, the United States has not ratified Protocol I. See also CHESTERMAN, *supra* note 3.

7. HUGO GROTIUS, THE LAW OF WAR AND PEACE bk. III, ch. IV, xviii (F. Kelsey trans., Oxford 1925) (1625).

a threat to international peace and security (such as acts of terrorism).<sup>8</sup>

It is well established by international practice that a state has the inherent domestic authority to punish those it has captured who have engaged in spying. Captured spies derive no “rights” to legally defend their actions, other than those they may acquire through the domestic legal system of the state that has captured them. Scholars of international law, such as Oppenheim, assert that peacetime intelligence gathering “is not considered wrong morally, politically or legally . . . .”<sup>9</sup> Nation-states do not prohibit most intelligence activities by their own agents. In fact, the United States has codified, under domestic law, its authority to conduct intelligence operations in the National Security Act.<sup>10</sup> State practice throughout history also supports the legitimacy of spying.<sup>11</sup> Nowhere in international law is peaceful espionage prohibited. Domestic law punishes captured spies not because they violate some universal norm against espionage, but because they have engaged in intelligence operations against national interests.<sup>12</sup>

Intelligence collection has been, and continues to be, necessary for the national security of a nation-state. Notwithstanding the concerns some have raised that intelligence gathering may transgress the territorial integrity and political independence of a country, in violation of the United Nations Charter,<sup>13</sup> most experts today still agree that espionage remains part of the sovereign right of the nation-state.<sup>14</sup> The offended nation-state often condemns the acts themselves, but the acts are not illegal under international law. The burden of proof should rest with critics of intelligence collection to show that the United States and other states that ratified the UN Charter understood its terms to preclude not just the use of force in certain situations, but also the less invasive process of intelligence collection in peacetime. There appears to be little evidence that the representatives of the leading powers at the San Francisco conference believed Article 2 or 51 of the UN Charter would prohibit intelligence collection, or that the United States and the other members

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8. W. Hays Parks, *The International Law of Intelligence Collection*, in NATIONAL SECURITY LAW 433–34 (John Norton Moore & Robert F. Turner eds., 1999).

9. I L. OPPENHEIM, INTERNATIONAL LAW 862 (H. Lauterpacht ed., 8th ed. 1955).

10. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended in scattered sections of 50 U.S.C. ch. 15).

11. See generally Demarest, *supra* note 4.

12. Parks, *supra* note 8.

13. See Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW 3, 12 (Roland J. Stranger ed., 1962).

14. See Loch K. Johnson, *On Drawing a Bright Line for Covert Operations*, 86 AM. J. INT’L L. 284 (1992).

of the Security Council, when they ratified the Charter, did so with that understanding. Indeed, the practice of these states in the years following the adoption of the Charter would suggest the opposite.

Intelligence collection does not rise anywhere near the level of a pressing need for international legal regulation—let alone that of a peremptory norm. International law ordinarily emerges through state practice. In some cases, such as genocide and slavery, such actions can rise to the level of *jus cogens*; restriction or prohibition of espionage has never reached even the level of custom, let alone attained *jus cogens* status within the international community. Simply put, the practice of nation-states reveals a strong preference, for myriad reasons, for engaging in espionage activity fully aware that if caught, the offended state retains the right to punish offenders accordingly (and with almost no resistance afforded to the state engaging in this activity). Few, if any, patterns of state practice by those states capable of significant intelligence activity appear aligned against the collection of intelligence.

Few have questioned whether intelligence collection activities violate international law.<sup>15</sup> Some have expressed concern about the ethics (not legality) of covert intelligence collection, but have later recanted their concerns as the reality of world affairs interceded. For example, former Secretary of State Henry L. Stimson closed the cryptographic division of his office in 1929, stating, “Gentlemen do not read each others’ mail.”<sup>16</sup> However, he later rescinded that order as the realities of emerging threats from Asia and Europe became apparent. In fact, no serious proposals have ever been made to prohibit intelligence collection as a violation of international law.<sup>17</sup> There are numerous examples of states, particularly those with the resources, capabilities, and national will to conduct intelligence collection, engaging in such activities in both the past and the present. Russia, China, the United Kingdom, Israel, France, Germany, Japan, the Koreas, Cuba, and countless others have, and do, engage in intelligence collection and covert action.<sup>18</sup> Nation-states will continue to regulate this activity through domestic legislation and protect themselves through counterintelligence programs. Legislation is often enacted to protect the national security of one state from the

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15. *But cf.* Manuel Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT. L. REV. 65, 79–80 (1964) (“Though international law does not explicitly condemn wartime espionage, peacetime espionage is regarded as an international delinquency and a violation of international law.”).

16. *See* David M. Crane, *Counterintelligence Coordination within the Intelligence Community of the United States: Divided We Stand*, 12 ARMY LAW. 26, 31 (1995).

17. Parks, *supra* note 8.

18. *See* Johnson, *supra* note 14, at 292. Johnson provides a list of Western operations ranging from France spying on U.S. officials in Paris in 1964 to Israel’s covert weapons sales to Iran.

intrusions of another. Although some may assert that the act of espionage violates the longstanding principle of refraining from violations of another nation-state's territorial integrity,<sup>19</sup> there remains the reality of long-accepted practice.

### III. DOMESTIC VIEWS OF INTELLIGENCE IN THE UNITED STATES

Before rising to the level of a defined norm that could support an international convention, intelligence gathering must be sufficiently understood to construct a working, consistent definition. Although a working definition of intelligence remains elusive, there are generally recognized practices relating to intelligence collection that can be agreed to by most, if not all, states. Intelligence originates with three fundamental sources: human, documentary, and technical. The first category is derived from human sources; the second involves any recorded information, regardless of form, and actual items recovered—even material items such as captured enemy weapons. As mentioned earlier, the third category, technical intelligence, includes SIGINT, as well as communications intelligence (COMINT), electronic intelligence (ELINT), and imagery intelligence (IMINT)—including photo intelligence (PHOTOINT) and infrared imagery.<sup>20</sup>

#### A. *Human Collection*

Human collection encompasses both HUMINT and spying. It is performed in peacetime or war, and normally involves information that is not publicly or readily accessible. Such collection can include voluntary interviews with businessmen, tourists, refugees, or others returning from a foreign country. It also includes “clandestine” meetings with citizens of other countries or even information obtained from interrogations during war. Espionage is simply a catch-all term for spying activities. The use of personnel to engage in espionage normally is a means of obtaining myriad information about other countries, whether during peacetime or war.

#### B. *Documentary Materials*

Normally these are written materials (printed, drawn, engraved), voice recordings, photographs, and any copies or reproductions of such

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19. Wright, *supra* note 13.

20. Parks, *supra* note 8.

items. Material “collection” can include weapons, equipment, natural resources, or other such data.

### C. Technical

Signals intelligence emerged as a means of collection with the advent of the telegraph—and the technology to send such messages in encrypted format. The ability to capture this “public property” transmission became a tool of the intelligence community. Essentially, the “transmission” is recognized as public property once a radiated signal enters the public domain and is available for anyone to detect or collect. The various forms of technical intelligence include the following:

- Communications intelligence (COMINT) is the technical information derived from the interception of foreign communications by someone other than the intended recipients. It can be asserted that this practice—the use of COMINT—has become part of customary international law, although no states are willing to admit openly they engage in the activity.
- Electronics Intelligence (ELINT) is technical information derived from foreign noncommunication electromagnetic radiations emanating from sources other than atomic detonation or radioactive materials. This activity is now commonly used in military operations known as electronic warfare.
- Imagery Intelligence consists of overhead photographic intelligence and infrared imagery. PHOTOINT consists of photographs of an area or a specific object; infrared imagery is a likeness of the image produced by sensing the electromagnetic radiations emitted or reflected from a given target. IMINT objects are ordinarily stationary, unlike SIGINT, where the signals retrieved are propelled into the air and viewed as “public property.”<sup>21</sup>

Domestically, so many components and issues comprise “intelligence” that it remains difficult to pin down a specific definition.<sup>22</sup> Mark Lowenthal, an expert in intelligence gathering, has noted that “[v]irtually every book written on the subject of intelligence begins with

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21. *Id.* These are categories that have been recognized as embodying the general means of intelligence collection. *See generally* CHRISTOPHER ANDREW, FOR THE PRESIDENT’S EYES ONLY (1995); INSIDE CIA’S PRIVATE WORLD: DECLASSIFIED ARTICLES FROM THE AGENCY’S INTERNAL JOURNAL (H. Bradford Westerfield ed., 1995).

22. *See* Kristan J. Wheaton & Michael T. Beerbower, *Toward a New Definition of Intelligence*, 17 STAN. L. & POL’Y REV. 319 (2006).

a discussion of what the author believes 'intelligence' to mean, or at least how the he or she intends to use the term. This editorial fact tells us much about the field of intelligence."<sup>23</sup> Even those who have spent years in the field find the term vague.<sup>24</sup> Any international convention on the peacetime conduct of intelligence collection would prove unsuccessful at the very least because of difficulties in defining exactly what it would seek to regulate. Defining intelligence and intelligence gathering often derives from such vague subject terms as counterintelligence, business intelligence, foreign intelligence, espionage, maritime intelligence, space-related intelligence, signals intelligence, and human intelligence. These subject terms themselves then need an established universal definition and further simplification in order to reduce the ambiguity associated with attempts to regulate the practice. Currently, the United States defines intelligence as a body of evidence and the conclusions drawn from it. It is often derived from information that is concealed or not intended to be available for use by the inquirer."<sup>25</sup> This vague and overly broad definitional statement reveals the problems with actually articulating what intelligence is and what it is not. Without a clear definition of the term (from the United States or any other state for that matter), we should not expect regulation of intelligence activities at the international level.

Recent controversies on the lawfulness of engaging in intelligence activities, both within and outside the United States, suggest it is premature to seek regulation of intelligence activities at the international level. Originally raised in public debate during the 1970's, these efforts to restrict or cabin the intelligence-gathering function have again become the subject of enormous political discourse in the early years of the twenty-first century. There is currently a deep divide within the United States as to the government's efforts to obtain information that best preserves national security. For example, the National Security Agency (NSA) created the Terrorist Surveillance Program (TSP)<sup>26</sup> in response to the September 11 attacks. This covert program was revealed publicly only after the *New York Times* obtained classified information and subsequently (against the wishes of the Bush administration) published a story

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23. *Id.* at 320 (quoting MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY 1 (2d ed. 2002)).

24. *Id.*

25. U.S. Intelligence Cmty., The Character of Intelligence (2005), <http://www.intelligence.gov/2-character.shtml>.

26. See JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006) for a discussion of the program.

concerning details of the secret program.<sup>27</sup> A firestorm of controversy ensued. Some Democratic members of Congress suggested that President Bush be impeached for violating federal law and the Constitution, a view several liberal commentators shared.<sup>28</sup> A group of law professors and the Congressional Research Service argued that the President had broken the law by acting outside the federal wiretapping statutes.<sup>29</sup> In March 2006, Senator Russell Feingold introduced a motion in the Senate to censure President Bush for approving “an illegal program to spy on American citizens on American soil.”<sup>30</sup> Feingold claimed the TSP was “right in the strike zone of the concept of high crimes and misdemeanors,” referring to the standard for impeachment.<sup>31</sup>

The election of the 110th Congress will undoubtedly continue to divide the nation on the topic of intelligence gathering as congressional committees continue to review the TSP.<sup>32</sup> Although the administration has recently agreed to have such measures reviewed by a special court under the Foreign Intelligence Surveillance Act (FISA), the program remains a topic of heated debate within the legal academy and American society. With our own internal debates raging as to what appropriate intelligence gathering entails, it seems most imprudent to seek regulation at the international level.

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27. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 19, 2005, at A1. Even after the President requested that the *New York Times* not print the story, the editors felt compelled to do so, as not reporting the story would be viewed as undermining their “role” as a newspaper in upholding the “public’s right to know.”

28. See Interview by WAOK-AM with Representative John Lewis (Dec. 20, 2005) (declaring that he, Representative Lewis, would sign a Bill of Impeachment if one were introduced in the House of Representatives); H.R. Res. 1106, 109th Cong. (2006). Others who suggested impeachment included Representatives Conyers and Nadler and Senator Boxer. See also DAVE LINDORFF & BARBARA OLSHANSKY, *THE CASE FOR IMPEACHMENT: THE LEGAL ARGUMENT FOR REMOVING GEORGE W. BUSH FROM OFFICE* (2006).

29. See ELIZABETH B. BAZEN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., *PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE* 39–44 (2006); *Wartime Executive Power and the NSA’s Surveillance Authority II, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Harold Hongju Koh, Dean, Yale Law School), available at [http://judiciary.senate.gov/testimony.cfm?id=1770&wit\\_id=3938](http://judiciary.senate.gov/testimony.cfm?id=1770&wit_id=3938).

30. 152 CONG. REC. S2011 (daily ed. Mar. 13, 2006) (statement of Sen. Feingold). See also S. Res. 398, 109th Cong. (2006) (relating to the censure of George W. Bush); *Wartime Executive Power and the NSA’s Surveillance Authority II, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Sen. Feingold), available at <http://www.feingold.senate.gov/~feingold/statements/06/02/2006206JT.html>.

31. Interview by George Stephanopoulos with Sen. Russ Feingold (*This Week*, ABC television broadcast, Mar. 12, 2006).

32. See Foreign Intelligence Surveillance Oversight and Resource Enhancement Act of 2006, S. 4051, 109th Cong. (2006). See also Reid Calls for Probe of Domestic Spying by Bush Administration, WASH. POST, Dec. 18, 2005, at A1.

## IV. PREVENTIVE INTELLIGENCE GATHERING PROMOTES PEACE

Sun Tzu, the widely read Chinese strategist, declared that “[w]hat enables the wise sovereign and the good general to strike and conquer, and achieve things beyond the reach of ordinary men, is foreknowledge.”<sup>33</sup> Intelligence gathering has been, and continues to be, a means of looking to the future for answers. Intelligence gathering provides knowledge concerning the activities of enemies before they constitute an immediate threat. Having access to early information on potential threats allows states to take precautionary measures to prevent war. Armed with a more complete information picture, a state can communicate its concerns to rivals, engage in negotiation and diplomatic overtures, and potentially work out differences in a peaceful manner. If such efforts fail, armed conflict remains an option.

Intercepting enemy communications has long been part of waging war. Indeed, it is critical to the successful use of force. Gathering intelligence through such means is generally understood as a legitimate aspect of conducting war.<sup>34</sup> Our military cannot attack or defend with beneficial effect unless it knows where the threat is located. The United States has a long history of conducting intelligence operations to obtain information on its enemies. General Washington used spies extensively during the Revolutionary War. As president, he established a secret fund to support spying that existed until the creation of the CIA.<sup>35</sup> President Lincoln personally hired spies during the Civil War, a practice the Supreme Court upheld.<sup>36</sup> In both World Wars I and II, presidents ordered the interception of electronic communications leaving the United States.<sup>37</sup> Some of the greatest wartime intelligence successes in U.S. history have involved SIGINT. Most notable is the breaking of Japanese diplomatic and naval codes during World War II, which allowed the U.S. Navy to anticipate the attack on Midway Island.<sup>38</sup> SIGINT is even more important in the

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33. SUN TZU, *THE ART OF WAR* 77 (James Clavell ed. 1983) (n.d.).

34. In the 1907 Hague Regulations, one of the first treaties on the laws of war, the leading military powers agreed that “the employment of measures necessary for obtaining information about the enemy and the country is considered permissible.” Regulations Respecting the Laws and Customs of War on Land, annexed to the Convention (IV) Respecting the Laws and Customs of War on Land art. 24, *adopted* Oct. 8, 1907, 36 Stat. 2277 (entered into force Jan. 26, 1910). According to one recognized authority, nations at war can gather intelligence using air and ground reconnaissance and observation, “interception of enemy messages, wireless and other,” capturing documents, and interrogating prisoners. MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 326 (1959).

35. *Halperin v. Cent. Intelligence Agency*, 629 F.2d 144, 158 (D.C. Cir. 1980).

36. *Totten, Adm’r v. United States*, 92 U.S. 105 (1876).

37. Exec. Order No. 2604 (Apr. 28, 1917) (World War I order); Exec. Order No. 8985, 6 Fed. Reg. 6625 (1941) (World War II order).

38. ANDREW, *supra* note 21.

twenty-first century war on international terrorism than in the conflicts of the last century. Al Qaeda has launched a variety of covert actions to attack the United States, and it intends to continue doing so. The primary way to stop such attacks is to find and detain al Qaeda operatives who have infiltrated the United States. One way to pinpoint their location is to intercept their electronic communications entering or leaving the country.

Better information gleaned from intelligence gathering, whether covert or overt, can actually *promote* the potential for peace and reduce international tension. One way to understand this, as one of us has suggested elsewhere, is to view war as the result of a failure of bargaining between states.<sup>39</sup> Suppose two nations have conflicting preferences over an issue, whether it is possession of land, access to trade rights, or development of weapons. Assume also that the range of outcomes each is willing to accept overlap—they have a common “win set.” Nevertheless, the parties must still reach a settlement over the fair allocation of the good at issue within that win set. That allocation should be directly related to the expected value of war to each side, which itself is a product of the probability of prevailing in war and the value of the asset, minus the costs of war. The probability of prevailing in war will be determined by the balance of military strength between the two states. As one state grows stronger in relation to the other, it should be better able to gain a greater proportion of the good or territory. If the countries were to go to war in order to resolve their differences over the disputed allocation, they should expect that, *ex ante*, their probabilities of prevailing would be in direct proportion to their expected value of the asset, which is dictated in part by military strength.<sup>40</sup> A change in the distribution would also occur if the asset’s value changed to one side or the other, which would also affect the expected value of war.

To illustrate this with a hypothetical, suppose the United States and China have different goals with regard to Taiwan. China would like to possess the whole island, while the United States would prefer that the island remain independent. When the United States held an overwhelming military advantage over China, especially in naval and air power, it was able to preserve Taiwan’s independence. As the balance of military power between the two countries begins to shift, Taiwan’s status will become less independent. The value of Taiwan to China may also have

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39. See generally John Yoo, *Force Rules: U.N. Reform and Intervention*, 6 CHI. J. INT’L L. 641 (2006); Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006).

40. For more detailed explanation of this model, see ROBERT POWELL, *BARGAINING IN THE SHADOW OF POWER* (1999). See also James Fearon, *Rationalist Explanations for War*, 49 INT’L ORG. 379 (1995).

increased recently as China's nationalist ambitions have become stronger, while perhaps the importance of an independent Taiwan has become less important to the United States after the end of the Cold War. Perhaps at some point the two states would be willing to accept a partition of the island that reflects changes in their military power and the value they place on Taiwan.

Since war is more costly than negotiation, both states should be willing to accept a negotiated settlement rather than go to war. If the negotiated settlement arrives at the same point as the outcome dictated by their relative military power, then the two states can avoid the joint costs of war and still reach the same outcome. But a significant obstacle to reaching a negotiated settlement is the problem of imperfect information. Any state will frequently face situations in which it does not have perfect information about its adversaries' military strength and willingness to go to war. One side, for example, may have secret weapons systems that would give it a much higher probability of winning a conflict. Or one side may be bluffing about its ability and willingness to go to war in order to trick its opponent into agreeing to a more favorable settlement. Private information can thus lead the other state to either overestimate or underestimate the opponent's willingness and ability to fight. This uncertainty can greatly increase the likelihood of armed conflict where the two states should have been able to reach a negotiated settlement.

Effective intelligence gathering can reduce this uncertainty. Better intelligence allows a state to determine more accurately the military strength of the other side and the value it places on the disputed asset. If the states have a better understanding of the expected value of war to the other side, this understanding should make it more likely that states will be able to reach a negotiated settlement of their differences rather than going to war. Thus, more aggressive intelligence gathering can reduce the chances of conflict. Any international agreement or norm that makes it more costly for states to gather better information, and hence reduce uncertainty, would only increase the possibility of mistaken intentions, and correspondingly increase the possibility of war.

Furthermore, any international regulation of such activity could ironically make it more difficult for a nation-state to protect itself. In a more formal sense, intelligence collection can be viewed as a component of the right of self-defense recognized in the UN Charter. Article 51 provides that "nothing in the present Charter shall impair the inherent right of self-defense."<sup>41</sup> Thus, in concert with the Charter's requirement to re-

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41. U.N. Charter art. 51.

frain from engaging in armed aggression under Article 2(4),<sup>42</sup> intelligence gathering can be “lawful” as a necessary means for nation-states to defend themselves.

This need for enhanced intelligence gathering as necessary for effective self-defense is all the more relevant in this current age of international terrorism. Terrorist groups engage in asymmetric warfare and have little or no regard for any established international conventions. Al Qaeda, the primary international terrorist organization in operation today, spans over fifty countries. It would appear that now, more than ever, intelligence gathering promotes self-defense for many nation-states in the West, particularly the United States.<sup>43</sup> States have a very real need to share information and work in concert with other states to prevent these asymmetric attacks. If international law prevents a nation-state from engaging in legitimate intelligence gathering, some of the immediate beneficiaries would be international terrorists and rogue states.

Nation-states and their intelligence-gathering policies must remain flexible to meet evolving security challenges. Any international regulatory scheme could hamper efforts to frustrate al Qaeda. As demonstrated by the September 11 attacks, the enemy in this war refuses to obey the core principles of the laws of war, including any norms in the Geneva Conventions.<sup>44</sup> Al Qaeda has openly demonstrated (and declared) that it would not abide by any new principles formulated by supranational entities or international legal instruments. International agreements on the laws of war depend on fair treatment and reciprocity to be effective.<sup>45</sup> Any hope for reciprocity is unrealistic with regard to al Qaeda.<sup>46</sup>

Threats posed by weapons of mass destruction in the possession of al Qaeda, or nation-states that support or harbor such international terrorists, place even greater demands on intelligence operations. In response to this prevailing threat scenario, the current U.S. National Security Strategy<sup>47</sup> envisions the use of preemption as a means of preventing attacks by international terror organizations. Preemption makes intelligence gathering even more important.<sup>48</sup> One cannot adequately prepare for or thwart attacks upon the United States or its allies without a significant degree of reliable information on the extent of the

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42. U.N. Charter art. 4, para. 2.

43. Yoo, *supra* note 26.

44. See Glenn Sulmasy, *The Law of Armed Conflict in the Global War on Terror*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309 (2005).

45. See James D. Morrow, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 J. LEGAL STUD. 41 (2002).

46. See *id.*

47. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

48. See generally RICHARD POSNER, PREVENTING SURPRISE ATTACKS (2005).

threat. As the attacks on the World Trade Center and the Pentagon (and in a different sense, Operation Iraqi Freedom)<sup>49</sup> have shown, an enhanced commitment by nation-states to intelligence gathering is critical to adequately assessing threats to national security.<sup>50</sup> Technological advances, and weapons of mass destruction in particular, are now available to many rogue states<sup>51</sup> and assorted nonstate actors who have emerged in the post-Cold War era. Such dire and immediate threats require the use of intelligence collection to exercise appropriate preemptive action. Any restriction by international law on peacetime intelligence gathering would only increase the likelihood of surprise attacks. International regulation would limit the ability of nation-states to detect and counter serious existing threats to their national security.

## V. CONCLUSION

International law has never prohibited intelligence collection, in peacetime or wartime. State practice has always supported the principle that such activity, although it can affect the territorial sovereignty of the target, is nevertheless critical to maintaining peace and international security. The history of state practice reveals that the regulation of intelligence gathering has always been left to domestic enforcement.<sup>52</sup> In addition, no internationally recognized and workable definition of “intelligence collection” exists. This conceptual ambiguity, coupled with the current threat of international terrorists and the worldwide proliferation of weapons of mass destruction, requires intelligence gathering that protects nation-states and promotes peaceful resolutions of potential conflicts. Calls to pursue the establishment of international entities or international law to monitor or regulate the intelligence collection activities of nations-states are counterproductive.

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49. Many critics of the existing regime will assert the failures of intelligence collection and analysis in justifying the use of force in Iraq in 2003 as indicia of the need for greater cooperation and intelligence sharing. Again, sharing must be distinguished from regulation by international bodies or entities.

50. See CHESTERMAN, *supra* note 3.

51. Specifically, Iran and North Korea.

52. See Demarest, *supra* note 4.