

International Law and Intelligence-Gathering Reading Group

Yale Law School

Spring Term 2015

Group Leaders: Colin Agur, Asaf Lubin

Much of our international relations revolve around intelligence collection and analysis. From the U-2 spy planes that uncovered the Soviet missile sites in Cuba to modern-day Iranian exiled dissidents claiming evidence of hidden nuclear facilities in Tehran, intelligence seems to guide world politics. The details of a U.S.-British mass surveillance program leaked by an American CIA computer specialist made top headlines in nearly every major world news source in a matter of hours. Truly, the commodity of our generation is no longer gold, gunpowder, or barrels of oil - it is classified reports. Much like international relations, our international legal order is as well dependent upon the elusive estimations of intelligence bureaus. Intercepted transmissions are used to determine the immanency of a threat in peacetime, and strategic reconnaissance serves a vital tool in making military proportionality assessments in wartime. Secret spies and geospatial imagery become key evidence in managing well-functioning international financial sanctions regimes, or in attributing state responsibility for wrongful acts, or even in assigning individual criminal liability for international crimes.

Intelligence plays such a cardinal role in our public world order that one would have presumed there to be well-established rules of international law, undergirded by a vibrant academic and jurisprudential discourse, that would govern the ways States compile, analyze, verify and promulgate intelligence. Instead, as noted by Professor Chesterman, intelligence exists in a "legal penumbra, lying at the margins of diverse legal regimes and at the edge of international legitimacy".¹ This ominous contention is one shared by many, if not most, international legal scholars. For them, any attempt to extrapolate the customary corpus of the "international law of intelligence", let alone its black-letter-law, would inevitably prove to be a failed attempt, as there is simply nothing to extrapolate. In fact, the notion that international law is moot as to the question of if, when, and how intelligence is to be collected or dispersed, has been repeated so many times that it has reached mythical proportions. This fiction forms the basis for a *lotus* world

¹ Simon Chesterman, *The Spy Who Came In From the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L. L. 1071, 1129-1130 (2006).

of action, one in which "states may spy on each other – and on each other's nationals – without restriction",² justifying their behavior through the *argumentum ad hominem* of "tu quoque".

The Spring 2015 ISP Reading Group on “The International Law of Intelligence” Will aim to challenge this contention. Each week we will be reviewing different international legal fields examining both the law-in-the-books and the law-in-action.³ Relying on both classical and more recent scholarly works we will attempt to apply the rules identified to particular case studies in order to flash out the discrepancies between the "myth system" and the "operational code" of the international law of intelligence further refining its “customary normative limits”.⁴

All students in the reading group must attend at least 14 hours to receive credit. We have scheduled eight sessions, in order to provide an extra session in the event of students missing one of the sessions. We will meet on Wednesdays from 2:00pm to 4:30pm. All sessions will take place at the Information Society Project (40 Ashmun St, 4th floor), 5 minutes’ walk from YLS.

We welcome Yale Law School students as well as fellows, affiliates and students from the broader Yale community. No prior knowledge of international law or national security law is required.

Syllabus

Jan 28 The Intelligence Function and World Public Order

In this first session, we will familiarize ourselves with the New Haven School concept of “public world order” and how it interacts with intelligence. We will discuss the role intelligence-gathering plays in our current world diplomacy and in national security, examining both unilateral and multilateral models, as well as discussing a series of historical cases raised in the readings.

Readings

Simon Chesterman, *The Spy Who Came in From the Cold War: Intelligence and International Law*, 27 MICH. J. INT’L L. 1071 (2006), available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=969551.

² Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT’L L. 1, 10 (forthcoming, 2015), available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=2490700.

³ Rescoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

⁴ Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365, 394 (1973) (the tacit acceptance by States of the common practice of territorially-intrusive intelligence collection measures reflected, as noted by the authors: "...a deep but reluctant admission of the lawfulness of such intelligence gathering, when conducted *within customary normative limits*").

Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman, *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 36 (1973), available at: digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1672&context=fss_papers.

Feb 4 Mass Surveillance and the International Human Right to Privacy

This week's discussion will focus on notion of privacy as a human right in an age of mass digital surveillance and Signal intelligence-gathering (SIGINT). Our readings will explore the ways that human rights treaties address (and neglect) the issues of surveillance and privacy. Specific emphasis will be given to the issue of the extraterritorial reach of international human rights covenants and their application in the context.

Readings

Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, HARV. INT'L L. J. (Forthcoming, 2015) available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=2418485.

Report of the U.N. Office of the High Commissioner for Human Rights, Right to Privacy in the Digital Age, A/HRC/27/37 (2014) available at: ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf.

Feb 11 Espionage and Human Intelligence in Peacetime and Wartime

In this week's discussion, we will examine espionage and the laws governing human intelligence-gathering (HUMINT) across borders. We will examine, through historical and contemporary cases of espionage, the way the international community has sought to regulate both peacetime and wartime transboundary spying.

Readings

Craig Forcese, *Spies without Borders: International Law and Intelligence Collection*, 5 J. NAT'L SEC'Y L. & POL'Y 179 (2011), available at: jnslp.com/wp-content/uploads/2011/06/05_Forcèses.pdf.

John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 595 (2007), available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=1003225.

Feb 25 The U.S. Intelligence Apparatus: Discussion with former Director of National Intelligence, Ambassador John Negroponte

We will be joined by John Negroponte, former Director of National Intelligence and 23rd United States Ambassador to the United Nations as well as Ambassador to Honduras, the Philippines, Mexico, and Iraq. Ambassador Negroponte will speak about U.S. intelligence-gathering, past and present.

Readings

TBD (we will consult with Ambassador Negroponte).

Mar 4 The role of the ICT Sector in Intelligence Gathering

This week's session will examine the role of corporate actors from the Information, Communication and Technology (ICT) sector in surveillance and privacy. We will discuss recent cases in the U.S. and Europe, as well as efforts by major tech companies to establish new guiding principles on the storage and use of data.

Readings

European Commission, *ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights* (June 2013), available at: http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-ict-hr-business_en.pdf

Maximilian Schrems v. Data Protection Commissioner, Irish High Court, [2014] IEHC 310, 765 JR (18.6.2014), available at: www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/481f4670d038f43380257cfb004bb125?OpenDocument.

Self-Regulation within the ICT Sector: GNI and TID as case studies

- a. Global Network Initiative (Facebook, Google, LinkedIn, Microsoft, Yahoo! and ProCera Networks), 2008. Please review GNI Principles; GNI Implementation Guidelines; and GNI Governance, Accountability & Learning Framework, available at: www.globalnetworkinitiative.org/corecommitments/index.php

- b. Telecommunications Industry Dialogue (Alcatel-Lucent, At&t, Nokia, Orange, Vodafone, TeliaSonera, Telenor Group, Telefonica), 2013. Please review the TID Guiding Principles, *available at:* www.teliaasonera.com/Documents/Public%20policy%20documents/Telecoms_Industry_Dialogue_Principles_Version_1_-_ENGLISH.pdf.

Mar 11 Intelligence Gathering from a Comparative Perspective

In this session, we will look at the intelligence gathering practices of other (non-U.S.) major powers. Focusing on China, India, Brazil, and Russia, we will consider the differing goals, capacities, constraints, and methods used in each country.

Readings

Asaf Lubin, *Between Beijing and Washington: Setting Maritime Surveillance Rules of the Road - Applying a Jus Ad Bellum Model for Intelligence Gathering within the EEZ* (working paper). *Draft copy will be provided separately.*

Pranesh Prakash, *How Surveillance Works in India*, The New York Times, India Ink blog (2013), *available at:* india.blogs.nytimes.com/2013/07/10/how-surveillance-works-in-india/.

Other readings TBD.

Mar 25 On Intelligence Sharing and International Law

This penultimate session explores the sharing of intelligence among agencies, corporations and allied governments. We will explore how, in a world of networked communications, intelligence can be kept secure. Our readings will discuss these new transnational legal challenges to individual rights to privacy.

Readings

Francesca Bignami, *Towards the Right to Privacy in Transnational Intelligence Networks*, 28 MICH. J. INT'L. L. 3 (2007) *available at:* papers.ssrn.com/sol3/papers.cfm?abstract_id=1819804.

Craig Forcese, *The Collateral Casualties of Collaboration: The Consequences for Civil and Human Rights of Transnational Intelligence Sharing*, in INTERNATIONAL INTELLIGENCE COOPERATION: CHALLENGES, OVERSIGHT AND THE ROLE OF LAW (Born, Leigh & Wills eds., 2010), *available at:* papers.ssrn.com/sol3/papers.cfm?abstract_id=1354022.

Apr 8 Moving ahead - Towards Identifying the Customary Normative Limits of Intelligence Gathering and the Potential of Multilateralist Mechanisms.

We will review the cases, concepts and lessons from past sessions, and discuss what role international law should play in the gathering of intelligence by different actors. In addition, we will also analyze the potential benefits and deficits of a move from unilateral approaches to intelligence collection to multilateral mechanisms: Should the Security Council establish an Interspy? Should we codify the international law of intelligence through a treaty? What role should we assign domestic, regional and international Courts and international organizations?

Guest Speaker TBD.

Readings

Geoffrey Dermarest, *Espionage in International Law*, 24 DENV. J. INT'L. L. & POL'Y 321 (1996).
Copy will be provided separately.

Christopher D. Baker, *Tolerance of International Espionage: A Functional Approach*, 19 AM. U. INT'L. L. REV. 1091 (2004), *available at:* digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1176&context=auilr

Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT'L L. 1, 10 (forthcoming, 2015), *available at:* papers.ssrn.com/sol3/papers.cfm?abstract_id=2490700.