The International Law of Intelligence:
The World of Spycraft and the Law of Nations

A Dissertation
Presented to the Faculty of the Law School
of
Yale University
In Candidacy for the Degree of
Doctor of the Science of Law

By
Asaf Lubin

Doctoral Committee Chairperson: W. Michael Reisman
Doctoral Committee Readers: Lea Brilmayer, James J. Silk

May 2020
Abstract
The International Law of Intelligence:
The World of Spycraft and the Law of Nations

Asaf Lubin
2020

The International Law of Intelligence: The World of Spycraft and the Law of Nations provides a first-of-its kind exploration of the contemporary legal framework that governs peacetime intelligence operations. This doctoral project attempts to write the missing textbook on espionage to be added to the grand bookshelf of international law. It rejects decades of academic scholarship that has considered spying an extralegal construct, existing at the edge of international legitimacy, and beyond the grasp of mortal rules and regulations. This dissertation diametrically opposes this line of argumentation while maintaining a clear-eyed view of the important functions that intelligence plays in our public world order, further framing these functions within a larger global constitutive process.

The object of this examination is to understand the arrangements, organically devised by the international community, for settling the possible conflicts between spy and spied, and to highlight the shortcomings of this system of laws in the face of our modern-day data-driven surveillance tools and technologies. The result, it is hoped, is a reimagining of a professional practice: putting into words a neglected set of unexpressed but generally accepted norms and expectations. The methodical identification of these
normative benchmarks throughout the dissertation centers on a process of extrapolation; discerning the *lex lata* from its layers of *lex simulata* and *lex imperfecta*.

After mapping out some conceptual and thematic frames of reference underpinning this dissertation, in Part I, and summarizing the existing discourse and its pitfalls, in Part II, the remaining three Parts move to present, apply, and defend my proposed normative framework. This framework, a diagnosis of intelligence operations at three distinct temporal stages – before (*Jus Ad*), during (*Jus In*), and after (*Jus Post*) – follows the traditional paradigms of international law and the use of force, which themselves are grounded in the rich history of Just War Theory. I further rely on general principles of international law as “standard clarifiers”, where the continued development of the law of nations is lagging behind technological developments, and where existing conventions and other codification initiatives seem to offer little organizational help.

Part III, introduces the *Jus Ad Explorationem (JAE)*, a sovereign’s prerogative to engage in peacetime espionage. This section asserts the existence of a derivative liberty right to spy by analyzing a plethora of international legal sources that require, either explicitly or implicitly, the gathering of intelligence as a necessary prerequisite for the functioning of the broader legal system. Acknowledging the existence of the *JAE* is important, as it allows us to begin sketching the justifications for spying and thereby draw the very boundaries of the practice – those cases in which the right to spy may be abused. Finally, the last portion of this section moves the discussion to the complicated, often ignored, issue of the delegation of the right to spy, examining the legitimacy of both upward delegation (multilateralization) and downward delegation (privatization).
Part IV, shifts the focus to the *Jus In Exploratione (JIE)*, the law governing the choice of means and choice of targets employed in the conduct of spying. If the initial analysis put a spotlight on the propriety of the operation’s objectives, the consecutive inquiry turns to the propriety of the operation’s tactical core, the adoption of particular measures and methods throughout the mission’s life cycle. To make determinations as to the legality of the *JIE*, prudent international lawyers will be guided by a collection of principles which form the substratum of our international legal order: Rule of Law, Effectiveness, Proportionality, Good Faith, Fairness, and Comity. Together these six principles introduce a set of constraints on a State’s margin of appreciation in selecting specific surveillance techniques and reconnaissance marks. The chapter concludes by applying these standards to an array of controversial and future-oriented intelligence gathering, analysis, and sharing techniques.

Part V, discusses the *Jus Post Explorationem (JPE)*, the law triggered after the intelligence operation has ceased. The section identifies five dimensions of *JPE*: prescription, accountability, redress, collective memory formation, and training and education. After discussing how restrictions on transparency and access to justice directly impact the evolution of the *JPE*, the section moves to illustrate law formation in the ILI. It discusses how incidents of international espionage, when exposed, become fertile ground for a process I call “constitutive elucidation,” in which traditional rule-appliers and rule-agitators might take a more profound role as rule-prescribers. The section concludes by examining the accountability mechanisms of the international law of intelligence (ILI), considering formal and informal mechanisms for quality control and assurance.
# Table of Contents

Introduction...........................................................................................................................................1

Part I – Prolegomena...............................................................................................................................18

A. Conceptual Framing............................................................................................................................20

1. Intelligence as a Product....................................................................................................................23
   i. Peacetime vs. Wartime.....................................................................................................................32
   ii. Domestic vs. Foreign....................................................................................................................40
   iii. Metadata vs. Content...................................................................................................................50
   iv. Public vs. Clandestine..................................................................................................................57
   iv. Passive Collection vs. Covert Action..........................................................................................63

2. Intelligence as a Process....................................................................................................................69
   i. The Intelligence Cycle...................................................................................................................70
      a. The Planning and Direction Stage............................................................................................70
      b. The Collection Stage................................................................................................................80
      c. The Processing Stage...............................................................................................................76
      d. The Analysis Stage...................................................................................................................78
      e. The Dissemination and Consumption Stage.............................................................................82
   ii. Cross-Cycle Regulation..............................................................................................................85

3. Intelligence as an Organization.......................................................................................................89
   i. Law Enforcement vs. Intelligence Agencies...............................................................................97
   ii. States vs. Non-State Actors......................................................................................................102

B. Thematic Framing...............................................................................................................................106
1. The Hypocrisy of Espionage ........................................... 107
   i. The Dual Nature of Spying ....................................... 107
   ii. The Myth System and the Operational Code ............. 112
2. The Realism of Espionage ........................................... 116
   i. The Cloak of Secrecy ........................................... 116
   ii. Surveillance and Power Dynamics .......................... 125
3. The Technology of Espionage ...................................... 138
   i. The Invisible Hand of Technology ........................... 138
   ii. Privacy Activists and Security Specialists .............. 147

Part II – Existing Legal Frameworks and Their Inadequacies .......... 155

A. Absolutist Accounts of the ILI ..................................... 163
   1. The Lotus Principle ............................................ 163
   2. The Prohibitionist Account (Spying is Always Illegal) ......... 165
      i. Spying is Morally Repugnant ............................... 165
      ii. Spying is a Violation of International Law ............. 167
   3. The Permissivist Account (Spying is Always Legal) .......... 172
      i. Spying is Morally Justified ............................... 172
      ii. No Explicit Prohibition of Espionage .................... 174
   4. The Extralegalist Account (Spying is Neither Legal nor Illegal) .... 175

B. Relativist Accounts of the ILI (Spying is Sometimes Legal or Illegal) .... 176
   1. The Piecemeal Account ........................................ 176
      i. Geographical Zoning of the ILI ........................... 176
## ii. The pitfalls of the Piecemeal Account

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. The Pragmatist Account</td>
<td>193</td>
</tr>
<tr>
<td>C. The Philosophical Accounts</td>
<td>196</td>
</tr>
<tr>
<td>1. Just War Theory and Just Intelligence</td>
<td>197</td>
</tr>
<tr>
<td>2. The Escalation Ladder</td>
<td>206</td>
</tr>
<tr>
<td>D. Proposing a New Account: The <em>Lex Specialis</em> of the ILI</td>
<td>210</td>
</tr>
</tbody>
</table>

### Part III – The *Jus Ad Explorationem*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. The Sources of a Derivative Sovereign Right to Peacetime Espionage</td>
<td>212</td>
</tr>
<tr>
<td>1. The Right of States to Survival and Collective Self-Determination</td>
<td>212</td>
</tr>
<tr>
<td>2. The Inherent Right of Individual or Collective Self-Defense</td>
<td>217</td>
</tr>
<tr>
<td>3. Collective Monitoring Obligations under UN and Treaty Law</td>
<td>223</td>
</tr>
<tr>
<td>4. International Human Rights Law</td>
<td>232</td>
</tr>
<tr>
<td>5. International Humanitarian Law</td>
<td>233</td>
</tr>
<tr>
<td>6. International Accountability Regimes</td>
<td>241</td>
</tr>
<tr>
<td>B. The Nature of the Right to Spy</td>
<td>246</td>
</tr>
<tr>
<td>1. Spying as a Liberty Right</td>
<td>248</td>
</tr>
<tr>
<td>2. The Doctrine of Abuse of Rights</td>
<td>256</td>
</tr>
<tr>
<td>3. Just Causes for Spying</td>
<td>259</td>
</tr>
<tr>
<td>i. National Security</td>
<td>264</td>
</tr>
<tr>
<td>ii. International Security</td>
<td>269</td>
</tr>
<tr>
<td>iii. The Application of the Just Causes</td>
<td>270</td>
</tr>
<tr>
<td>4. Unjust Causes for Spying</td>
<td>272</td>
</tr>
</tbody>
</table>
i. Spying as a Means to Advance Personal Interests…………..274
ii. Spying as a Means to Commit a Wrongful Act……………….277
iii. Spying as a Means to Advance Corporate Interests……….281
iv. Spying as a Means to Facilitate a Dictatorship…………….289
v. Spying as a Means to Exploit Post-Colonial Relations……….291

C. Delegation of the Right to Spy……………………………...293

1. Upward Delegation (Multilateralization)…………………….294
2. Downward Delegation (Privatization)……………………….304

i. Case Studies………………………………………………….304

ii. Privatization Taxonomies and Inherent State Functions……312

Part IV – *The Jus In Exploratione*……………………………………323

A. Administrative Discretion………………………………………..323

1. Choice of Targets……………………………………………….325
2. Choice of Means………………………………………………..326

B. The Limits of International Human Rights Law…………….327

C. Administrative Constraint………………………………………..338

1. General Principles as Substitutes for Administrative Discretion……338

i. The Rule of Law Principle…………………………………….343

ii. The Effectiveness Principle……………………………………345

iii. The Proportionality Principle………………………………….347

iv. The Good Faith Principle……………………………………..349

v. The Fairness Principle………………………………………..351
vi. The Comity Principle .................................................. 352
2. The Application of the General Principles to the ILI .......... 354
   i. Structural Guidelines ................................................. 355
   ii. Decision-making Guidelines .................................... 363
D. The JIE in Practice .................................................. 368
   1. HUMINT Collection ................................................. 368
   2. SIGINT Collection ................................................ 374
   3. VISINT Collection ................................................ 379
   4. OSINT Collection .................................................. 381
   5. Intelligence Sharing and Cooperation ........................ 383

Part V – The Jus Post Exploratio nem .................................. 387
A. When Do Intelligence Operations End? ....................... 387
B. The Dimensions of JPE ............................................... 392
C. On Transparency and Access to Justice Under the ILI ....... 395
   1. Transparency ....................................................... 395
   2. Access to Justice .................................................. 399
D. ILI’s Prescriptive Process ........................................... 402
   1. The Unlikelihood of Formal Codification ..................... 402
   2. Glitches in the Matrix and Constitutive Elucidation ....... 404
D. ILI’s Accountability Mechanisms ................................. 406
   1. Informal Accountability .......................................... 406
   2. Formal Accountability ............................................. 410
E. ILI’s Education, Collective Memory, and History-Telling..................414

Conclusion..................................................................................................................418

Figures

1. Proposed Framework of the ILI.................................................................211
2. Human Rights Principles and Correlating General Principles of Law........359

Illustrations

1. Different Articulations of the Piecemeal Approach and Geographic-Zoning of the International Law of Intelligence..........................................................423
2. Different Articulations of the “Escalation Ladder” in Choosing between Conflicting Intelligence Methods and Strategies.................................425
It is a quarter past nine and most of the base's soldiers have already left for the night. I sit by my desk, which is an organized mess of maps, charts, intelligence reports and empty coffee mugs. Two large screens are blinking in front of my eyes, showing programs I don’t quite know how to operate. Right before I doze off, the phone rings. On the other side are two officers calling from an operations room. They ask me to hurry over. I rush down the elevator to the second floor, and enter the narrow room with heightened suspense. After exchanging a few pleasantries, they direct my attention to a large flat screen showing aerial surveillance of a man on a motorbike driving away from a building, his plate number unrecognizable. They ask me a series of questions, as if seeking assurances. Who is this person? Where is he headed? Two years I've studied this group, priding myself on knowing the likes and dislikes of each of its members, and yet their questions catch me off-guard. In a world filled with variables, intelligence analysts are often tasked with providing a constant, but much of the time we have only our naturally limited deductive reasoning as a compass.¹

I spent roughly five years as an intelligence analyst. My daily routine consisted of a myriad of assignments: identifying new potential intelligence sources, guiding collection efforts, analyzing raw surveillance material, developing and publishing intelligence briefs and larger research memos, consulting on specific ground and aerial

¹ DAVID T. MOORE, CRITICAL THINKING AND INTELLIGENCE ANALYSIS, 1 (2007) ("[a]nalysts and analysts alone create intelligence. Although technological marvels assist analysts by cataloguing and presenting data, information and evidence in new ways, they do not do analysis. To be most effective, analysts need an overarching, reflective framework to add structured reasoning to sound, intuitive thinking."); See also Bess J. Puvathingal & Donald A. Hantula, REVISITING THE PSYCHOLOGY OF INTELLIGENCE ANALYSIS: FROM RATIONAL ACTORS TO ADAPTIVE THINKERS, 67(3) AM. PSYCHOL. 199 (2012).
operations, and (mostly towards the end of my service) training new generations of
intelligence cadets.

It has been argued that: “service in the intelligence profession [...] involves doing
things that in other times and places most would agree would be horribly immoral.”² In
all my years of service, not once have I felt like I’ve done anything unethical or illegal –
quite the opposite. Entering the profession at the age of 18, I accepted as inherent the
“cloak and dagger” nature of the trade and rarely challenged my superiors. I saw each of
my assignments as a Rubik’s Cube or a 1000-piece puzzle that I was entrusted with
cracking. Once fully immersed in the work, not once did I trouble myself with questions
of law or morality. Instead, I focused all of my energies on finishing the task at hand. At
times, it felt like occupational therapy.

Nor was there much desire to discuss these things within my immediate
community. Throughout my training, for example, which over the course of the five years
never officially ended, I don’t recall the topic of the “right to privacy” or the “ethics of
spying” coming up in conversation, even once, either by the training officers or the
trainees.

It was only upon entering law school that I began developing the physical stamina
and mental capacity necessary to delve into a retrospective review of my service. That
was also when I learned how little public international law and international relations

² Tony Pfaff, Bungee Jumping off the Moral Highground: Ethics of Espionage in the Modern Age, in 1
Elsewhere Pfaff writes: “not only have [intelligence agents] felt that the deceiving and harming they have
done in service to their country have corrupted their integrity, they feel this corruption is exacerbated by the
“cloudy moral purpose” their agency serves.” (Id.). See also JOHN LE CARRÉ, THE SPY WHO CAME IN FROM
THE COLD 246 (1963) (“What do you think spies are: priests, saints and martyrs? They’re a squalid
procession of vain fools, traitors too, yes; pansies, sadists and drunkards, people who play cowboys and
indiands to brighten their rotten lives. Do you think they sit like monks in London balancing the rights and
wrongs?”).
studies had to say on this subject. I remember taking my first course on public international law at Hebrew University of Jerusalem, then taught by Professor Moshe Hirsch, and eagerly scrutinizing the syllabus in search of a session devoted to intelligence work, only to be disappointed. It is in this context that this doctoral project (and the broader research agenda it represents) has truly been more than ten years in the making and offers a unique opportunity for me to both revisit one chapter of my life while closing another.

This dissertation benefited immeasurably from the guidance of Professor W. Michael Reisman. His clairvoyant and razor-sharp writing and thinking, his sage advice and suggestions, and overall support and enthusiasm expanded beyond what is to be expected from a doctoral supervisor, and I am forever indebted to him. I was further lucky enough to have two of the kindest souls on Yale Law School’s Faculty, Professors Lea Brilmayer and James J. Silk, agree to serve as members of my doctoral committee. I thank them both dearly for their support and insight. I also want to give particular thanks to Edward (Ted) Wittenstein, Deputy Director for Leadership Programs and Lecturer at the Jackson Institute for Global Affairs. Ted taught me a course on intelligence during my LL.M. year, alongside former Director of National Intelligence John Negroponte, and since then through the many summers I spent teaching with the Yale Young Global Scholars program, he quickly became a mentor and a friend.

I am very grateful to Yale Law School for the considerable support it gave me during my many years in New Haven as part of the LL.M. and J.S.D. programs. Special thanks go to the Graduate Programs Office, my home away from home, to Gordon Silverstein, Maria Dino, Alexander Rosas, Allegra di Bonaventura, Caroline Curtis, and
Thais Sobczak. I also want to thank Evelyn Ma, the Foreign and International Law Librarian, who was always so attentive and supportive as I was struggling to locate various sources, as well as James (Jim) Tierney whose English language editorial support elevated the quality of this final work.

In the fall of 2016 I was given the honor of writing the problem for the Phillip C. Jessup International Law Moot Court Competition. The problem I wrote, titled “The Frost Files”, presented a complex set of international legal questions relating to espionage and mass surveillance, leaked documents, administrative detention, state immunity, ecological terrorism, and cyberattacks. It was through this experience, that I was fortunate enough to raise the issues of my doctoral dissertation with the final round bench, which comprised of Judges Owada, Greenwood, and Simma of the International Court of Justice. I personally dedicate this work to the thousands of poor unfortunate souls (students, coaches, advisors, judges, and administrators) who were forced to grapple with these legal issues in 2016, because of my own obsession with the topic.

In the fall of 2017 and 2018 I was given another honor, serving as a lecturer for a self-designed 13-week seminar titled: “Tinker, Tailor, Lawyer, Spy: Espionage and International Law”. The course, which was offered as a stand-alone residential college seminar at Yale College, was loosely based on the research I’ve completed as part of my doctoral work. They say that you never forget the first time you teach your own materials. I told my students, jokingly, that entering the class felt like a weekly doctoral viva voce. My students were the first to hear and react to the arguments raised in this doctoral volume and I wish to dedicate this work individually to each of them: Ehrik Aldana, Jessica Ambrosio, Steven Barbee, Matthew Beattie-Callahan, Eric Benninghoff,

Lastly, but certainly not least, I would like to express my deepest thanks to my parents, Shlomo (zekher tzadik livrakha) and Zippi, to my brothers Alon and Eyal, to my parents-in-law Eva and Osvaldo, and to the love of my life, João. Your unconditional support and encouragement throughout this incredible, and at times painstaking journey, means everything to me. I couldn’t have completed this work without you.
“Spies cannot be usefully employed without a certain intuitive sagacity... In order to use them, one must know fact from falsehood, and be able to discriminate between honesty and double-dealing... They cannot be properly managed without benevolence and straightforwardness... Without subtle ingenuity of mind, one cannot make certain of the truth of their reports... Be subtle! Be subtle! Be subtle! And use your spies for every kind of business.”

-Sun Tzu, The Art of War (5th Century BC)

“Her Majesty, at her coming to the crown, utterly disliking of the tyranny of the church of Rome, which had used by terror and rigour to seek commandment over men’s faiths and consciences... Her Majesty not liking to make windows into men’s hearts and secret thoughts, except the abundance of them did overflow into overt and express acts and affirmations...”

-Sir Francis Walsingham on behalf of Queen Elizabeth I of England (1589)

“What do you think spies are: priests, saints, and martyrs? They’re a squalid profession of vain fools, traitors too, yes; pansies, sadists, and drunkards, people who play cowboys and indians to brighten their rotten lives. Do you think they sit like monks in London balancing the rights and wrongs?”

-John Le Carré, “The Spy Who Came in from the Cold” (1963)

"Transmission 2/1 (TO IMAGE)
...Transmitting the truth is always a problem. Facts we can encipher, and they then become sendable messages: why do not the truths Climb obediently into disguises, Learn their lines well and be off? Instead they hang about and plague us unvoiced reproaches..."


“In the Civil War, Union balloons’ reconnaissance tracked the size of Confederate armies by counting the number of campfires. In World War II, codebreakers gave us insights into Japanese war plans. And when Patton marched across Europe, intercepted communications helped save the lives of his troops. After the war, the rise of Iron Curtain and nuclear weapons only increased the need for sustained intelligence gathering... emerging threats from terrorist groups and the proliferation of weapons of mass destruction place new and, in some ways, more complicated demands on our intelligence agencies. Globalization and the internet made these threats more acute as technology erased borders and empowered individuals to project great violence as well as great good. Moreover, these new threats raised new legal and new policy questions...”

-President Barack Obama, Speech on NSA Reforms (2014)
Introduction

Much of our international relations revolve around intelligence collection and analysis. From the Elizabethan days of Sir Francis Welsingham, the father of modern intelligence agencies and the first spymaster to manage an omnipresent mass surveillance program across the European continent, all the way to the Trump-Russia dossier produced by former MI6 agent Christopher Steele – intelligence seems to guide world politics. Examples of the impact of intelligence on foreign policy abound and cross generations. Compare, for example, the U-2 spy planes that uncovered the Soviet missile sites in Cuba during the Cold War to modern-day Iranian exiled dissidents claiming evidence of hidden nuclear facilities in Tehran. The details of a U.S.-British mass surveillance program leaked by former CIA computer specialist, Edward Snowden, made top headlines in nearly every major world news source in a matter of hours. Classified reports, caches of hacked email exchanges, and leaked documents have truly emerged as the new commodity of our data-obsessed information society.

Much like international relations, our international legal order is also dependent upon the elusive estimations of intelligence bureaus. Intercepted transmissions are used to determine the immanency of a threat under *jus ad bellum*, and strategic reconnaissance serves a vital tool in making military proportionality assessments under *jus in bello*. Double agents 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. In light of its expanding legal nature, domestic, regional, and international courts
and adjudicators have become increasingly engaged in controlling the intelligence function: providing *ex ante* authorization to clandestine operations,\(^3\) determining the admissibility and authenticity of confidential materials disclosed by leakers,\(^4\) ordering the detention, execution, or extradition of captured spies and the conviction of whistleblowers,\(^5\) and conducting *ex post* review of the legality and propriety of certain acts of espionage.\(^6\) Intelligence plays such a cardinal role in our public world order that

---


\(^5\) See e.g., Jadhav Case (India v. Pak.), Judgement, 2019, I.C.J Rep. 168, (July 17) (Mr Kulbhushan Sudhir Jadhav was sentenced to death on 10 April 2017 by a Court Martial for conducting “espionage, sabotage and terrorism.” The International Court of Justice by a vote of 15 to 1 that Pakistan violated Article 36(1) of the Vienna Convention on Consular Relations by failing to inform Jadhav, without delay, of his rights and by failure to notify consular post of the Republic of India, without delay, of his detention. The ICJ concluded that the appropriate reparation in the case is an “effective review and reconsideration of the conviction and the sentence” of Jadhav); CLARK STOECKLEY, THE UNITED STATES VS. PVT. CHELSEA MANNING: A GRAPHIC ACCOUNT FROM INSIDE THE COURTROOM (2014) (Private Bradley E. Manning, known after the trial as Chelsea Manning, was arrested in May 2010 for passing hundreds of thousands of classified diplomatic cables and army reports to WikiLeaks. Manning was ultimately charged with various charges including violations of the Espionage Act. In August 2013, Manning was sentenced to 35 years imprisonment, which were eventually commuted by President Obama in 2017. Manning was released on 17 May 2017).

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 myriad ways by which States compile, analyze, verify, and promulgate intelligence. Instead, as noted by Professor Chesterman, intelligence exits in a "legal penumbra, lying at the margins of diverse legal regimes and at the edge of international legitimacy."7

This comes as no surprise for those who have mastered the art of “the second oldest profession.”8 Espionage is both a vestigial remnant of an anarchic international

---

7 Simon Chesterman, The Spy Who Came In From the Cold War: Intelligence and International Law, 27 Mich. J. Int'l L. 1071, 1130 (2006). Chesterman writes elsewhere: "Despite its relative importance in the conduct of international affairs, there are few treaties that deal with it directly. Academic literature typically omits the subject entirely, or includes a paragraph or two defining espionage and describing the unhappy fate of captured spies. For the most part, only special regimes such as the laws of war address intelligence explicitly. Beyond this, it looms large but almost silently in the legal regimes dealing with diplomatic protection and arms control." (Id. at 1072); See also David Silver, Intelligence and Counterintelligence, in National Security Law 935, 965 (John Norton Moore & Robert F. Turner eds., 2nd ed., 2005) ("There is something almost oxymoronic about addressing the legality of espionage under international law... despite the ambiguous state of espionage under international law, it is not specifically prohibited by treaty or other international legal mechanism.").

8 Michael J. Barnett, Honorable Espionage, 2(3) J. Def. & Pol. 14, 14 (“Espionage is the world’s second oldest profession and just as honorable as the first.”); BRIAN STEWARD AND SAMANTHA NEWBERY, WHY SPY? THE ART OF INTELLIGENCE 1-2 (“It is often suggested that prostitution is the oldest profession in
society ordered around systematic self-help and self-reliance, and the crown jewel of a vibrant transnational legal order that depends on a continuous stream of qualified information, necessitating unilateral and multilateral peacetime surveillance efforts. In the absence of hierarchal global structures and prescriptive processes, States depend on such intelligence collection and analysis to monitor and divert potential threats and imperilments as well as to maximize their own relative power. What more, in the absence of a world “Interspy”, of the kind once ideally imagined by Professors Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman (“a service that draws upon the sources available to all organizations willing and able to work together to expose threats to world public order”), international institutions in the fulfillment of their mandate of maintaining international peace and security, continue to rely almost entirely on intelligence produced by their member states. With these profound national and international institutions in the fulfillment of their mandate of maintaining international peace and security, continue to rely almost entirely on intelligence produced by their member states.  

9 Former director-general of the United Kingdom’s Security Services MI5, Sir Stephen Lander, argued that: “intelligence services and intelligence collection are at heart manifestations of individual state power and of national interest.” (See Sir Stephen Lander, International Intelligence Cooperation: An Inside Perspective, 17(3) CAMBRIDGE REV. INT’L AFF. 481, 481 (2004)); Former U.S. Deputy Assistant Secretary of State for Intelligence Coordination, Jennifer E. Sims had similarly argued that: “intelligence systems collect, analyze, and disseminate information on behalf of decisionmakers engaged in protecting and advancing a state’s interests in the international system. This process is inherently competitive and secretive, even among allies, because the international system is essentially one of self-help and anarchy.” (See Jennifer Sims, Foreign Intelligence Liaison: Devils, Deals, and Details, 19(2) INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 195, 196 (2006)); See also, Don Munton, Intelligence Cooperation Meets International Studies Theory: Explaining Canadian Operations in Castro’s Cuba, 24(1) INTELLIGENCE & NAT’L SEC. 119, 126-128 (2009).  

10 Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, The Intelligence Function and World Public Order, 46 TEMP. L.Q. 365, 447 (1973). See also James L. Tyron, International Organization and Police, 25(7) YALE L.J. 34, 34 (1916) (making the case for an “international army and navy” suggesting that such an idea “is one of the oldest and most persistent ideas associated with the movement for world peace.”).  

11 See e.g., Bassey Ekpe, The Intelligence Assets of the United Nations: Sources, Methods, and Implications, 20(3) INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 377, 378-379 (2007) (“[t]he assumption is that members of both the Security Council and the General Assembly, in their daily proceedings, come equipped with wealth of knowledge on specific or emerging issues, provided to them by their national intelligence services or other forms of specialized information and analysis departments.”); Admiral Guido Venturoni, The Washington Summit initiatives: Giving NATO the "tools" to do its job in the next century, 47(3) NATO REV. 8, 11 (“[i]n the area of intelligence gathering, NATO – which has few
international security interests in mind, governments instinctively reject any attempt to regulate their intelligence and reconnaissance capabilities. States would much rather operate under a guise of presumed lawlessness, accepting as a necessary evil the reciprocal corollaries of such a decision. In the process new intelligence agencies have emerged, “wellsprings of power in our society, secret clubs for the elites and privileged.”\footnote{P\textsc{hillip} \textsc{knightly}, \textsc{t}he \textsc{second} \textsc{o}ldest \textsc{p}rofession: \textsc{s}pies \textsc{a}nd \textsc{s}pying \textsc{in} \textsc{t}he \textsc{t}wentieth \textsc{c}entury 8 (1987).} These agencies find, in the conduct of their operations, few \textit{de jure} and \textit{de facto} restrictions on either their bases for action or choice of means.

This portrayal of the intelligence practice seems, however, to run counter to two of the most significant tidal waves of the post-cold war era in international politics: the advancement of global regulatory networks, representing a triumph for the rule of law, transparency and multilateral cooperation;\footnote{See, e.g., David Fidler, \textit{Introduction: The Rule of Law in the Era of Globalization Symposium}, 6 \textsc{Ind. J. Global Stud.} 421, 422 (1999) (suggesting that the end of the cold war brought with it “a movement of renewal for international law... [which] seemed to promise a new era where the rule of law would be a more meaningful concept in international relations.”).} and the reorientation of the purposes of the international security system in light of the rise to preeminence of human rights.\footnote{See, e.g., \textit{Prosecutor v. Dusko Tadić}, ICTY Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 97 (Oct. 2, 1995) (recognizing that the world has witnessed: “significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law \textit{hominum causa omne jus constitutum est} (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.”).} This clash, which has become a matter of public discourse in recent years, following the Snowden revelations, is at the heart of this dissertation, and brings to light the crucial

\begin{footnotesize}
\begin{itemize}
\item \footnote{Office of Technology Assessment (OTA), \textit{Nuclear Safeguards and the International Atomic Energy Agency}, \textsc{United States Congress}, 5 (1995), available at https://bit.ly/3bk0QRb (hereinafter: OTA Report) (“The IAEA is exploring a number of means to improve its ability to determine whether states are pursuing undeclared nuclear weapon programs. However, it is not an intelligence organization, and its ability to discover undeclared activities that states wish to keep hidden from it will depend significantly on the willingness of other member states to share their own intelligence with the IAEA, as well as on the ability of the IAEA to evaluate and analyze all such information.”).}
\item \footnote{P\textsc{hillip} \textsc{knightly}, \textsc{t}he \textsc{second} \textsc{o}ldest \textsc{p}rofession: \textsc{s}pies \textsc{a}nd \textsc{s}pying \textsc{in} \textsc{t}he \textsc{t}wentieth \textsc{c}entury 8 (1987).}
\item \footnote{See, e.g., David Fidler, \textit{Introduction: The Rule of Law in the Era of Globalization Symposium}, 6 \textsc{Ind. J. Global Stud.} 421, 422 (1999) (suggesting that the end of the cold war brought with it “a movement of renewal for international law... [which] seemed to promise a new era where the rule of law would be a more meaningful concept in international relations.”).}
\item \footnote{See, e.g., \textit{Prosecutor v. Dusko Tadić}, ICTY Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 97 (Oct. 2, 1995) (recognizing that the world has witnessed: “significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law \textit{hominum causa omne jus constitutum est} (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.”).}
\end{itemize}
\end{footnotesize}
juncture in which intelligence professionals and policy makers currently find themselves. This is further intensified in the wake of new forms of surveillance technologies, which make obsolete the capacity limitations of old, and introduce additional challenges to the regulatory status quo.

Many, if not most, international legal scholars share the ominous contention that espionage, as a legal field, is devoid of meaning. For them, any attempt to extrapolate the \textit{lex lata} corpus of the International Law of Intelligence (ILI), let alone its \textit{lex scripta}, would inevitably prove to be a failed attempt, as there is nothing to extrapolate—espionage is simply an extralegal construct, its study as a \textit{lex specialis} field is unfathomable.

\begin{flushright}

\textit{16} In the context of Fourth Amendment expectations of privacy Justice Alito noted that: “dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable. On the other hand, concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions.” (U.S. v. Jones, 132 S. Ct. 945, 958 (2012) (Alito J., concurring)); Report of the Office of the United Nations High Commissioner for Human Rights, \textit{The Right to Privacy in the Digital Age}, UN Doc. A/HRC/27/37, para. 2 (Jun. 30, 2014) [hereinafter: OHCHR Report] (“Declining costs of technology and data storage have eradicated financial or practical disincentives to conducting surveillance. The State now has a greater capability to conduct simultaneous, invasive, targeted and broad-scale surveillance than ever before. In other words, the technological platforms upon which global political, economic and social life are increasingly reliant are not only vulnerable to mass surveillance, they may actually facilitate it.”).

\textit{17} See e.g., Hays Parks, \textit{The International Law of Intelligence Collection, in National Security Law} 433, 433-434 (John Norton Moore, Guy B. Roberts, Robert F. Turner eds., 1st ed., 1990) (highlighting the importance of intelligence in preventing surprise attacks and concluding that “no serious proposal ever has been made within the international community to prohibit intelligence collection as a violation of international law because of the tacit acknowledgement by nations that it is important to all, and practiced by each.”); Jeffrey H. Smith, \textit{Keynote Address: State Intelligence Gathering and International Law}, 28 Mich. J. Int’l L. 543, 544 (2007) (“most lawyers would likely scoff at the notion that espionage activities are constrained in any meaningful way by international law. Indeed, most probably believe that international law’s only influence on espionage is that in wartime, spies caught behind the lines out of uniform can be shot. Hardly a sophisticated or, to intelligence services, comforting notion.”); Christopher D. Baker, \textit{Tolerance of International Espionage: A Functional Approach}, 19 Am. U. Int’l L. Rev. 1091, 1091 (2004) (“[e]spionage is curiously ill-defined under international law.”); Report of the Special...
In fact, the notion that international law is moot as to the question of if, when, and how intelligence is to be collected, analyzed, or dispensed, has been repeated so many times that it attained the status of a dogma.\textsuperscript{19} This fiction forms the basis for a \textit{lotus} world of action,\textsuperscript{20} one in which "states may spy on each other – and on each other's nationals – without restriction,"\textsuperscript{21} justifying their behavior through the \textit{argumentum ad hominem} of "\textit{tu quoque}".\textsuperscript{22} Perhaps the most forceful proponent of this extralegal agenda in recent

\textsuperscript{19} Craig Forcese, \textit{Pragmatism and Principle: Intelligence Agencies and International Law}, 102 VA. L. REV. 67, 81 (2016) ("[t]he take-home point is this: to the extent that commentators are inclined to treat intelligence activities as a unique area immunized from international law or subject to some special, more relaxed \textit{lex specialis}, they exaggerate considerably."); See also Ifnaki Navarrete & Russel Buchan, \textit{Out of the Legal Wilderness: Peacetime Espionage}, International Law and the Existence of Customary Exceptions, 51 CORNELL INT’L L. J. 897, 952 (2019) (debunking any claim of customary exceptions that would allow the functioning of intelligence law as a \textit{lex specialis} field of international law).

\textsuperscript{20} Glenn Sulmasy & John Yoo, \textit{Counterintuitive: Intelligence Operations and International Law}, 28 MICH. J. INT’L L. 625, 637-638 (2006) ("International law has never prohibited intelligence collection, in peacetime or wartime... The history of state practice reveals that the regulation of intelligence gathering has always been left to domestic enforcement... Calls to pursue the establishment of international entities or international law to regulate the intelligence collection activities of nations-states are counterproductive"); Deeks, supra note 3, at 293 ("why has international law had so little to say about how, when, and where governments may spy on other states and foreign citizens, including by electronic means? ... states sensibly concluded that the benefits to unregulated spying were high and the corresponding costs were few.").

\textsuperscript{21} S.S. Lotus (France v. Turkey), 1927 P.C.I.J (ser. A) No. 10, para. 46 ("[i]nternational law leaves States in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."); The \textit{Lotus Principle}, commonly cited as a foundational principle of international law, assumes that lawfulness on the international level is derived from the absence of a prohibition. It runs in opposition to democratic and administrative rule of law systems that require, through some principle of legality, that state agencies possess statutory authorization prior to taking any action. For further discussion of the principle see infra Section II.A.1.

\textsuperscript{22} Department of Defense, Office of General Counsel, \textit{An Assessment of International Legal Issues in Information Operations}, 46 (1999), available at https://bit.ly/2WFqTye ("The lack of strong international legal sanctions for peacetime espionage may also constitute an implicit application of the international law doctrine of "\textit{tu quoque}" (roughly, a nation has no standing to complain about a practice in which it itself engages)."; See also KIRSTIN SCHMALENBACH, \textsc{Casebook Internationales Recht} 35 (2014) ("according to the ancient Roman defense maxim ‘\textit{tu quoque}’, the defendant may object that the opponent has done the same as he has; therefore he cannot be prosecuted for the crime... The principle ‘\textit{tu quoque}’ is supposed to
years has been former Assistant General Counsel to the CIA, Professor Afsheen Radsan. As a participant in a 2007 symposium organized by the Michigan Journal of International Law, Radsan produced an article titled “The Unresolved Equation of Espionage and International Law”. The Article begins in the following way:

“Mortals should not attempt to perform miracles. We cannot convert water into wine at weddings, turn lead into gold in a chemistry lab, or form a human being from a lump of clay. To accept reality is to abide by the laws of physics .... Espionage and international law start from different points. Espionage dates from the beginning of history, while international law, as embodied in customs, conventions, or treaties, is a more recent phenomenon. They are also based on contradictory principles. The core of espionage is treachery and deceit. The core of international law is decency and common humanity. This alone suggests espionage and international law cannot be reconciled in a complete synthesis. Perhaps we should leave it at that.”

The Article’s conclusion carries a similar tone:

“Around and around we go with the second oldest profession. What we do to them is "gathering intelligence" – something positive, worthy of praise. What they do to us is "performing espionage" – something negative, worthy of punishment. But without the negative sign that depends on the circumstances, X equals X. Gathering intelligence is just the flip side of performing espionage, and performing espionage is just one part of a country's broader effort for survival. Beyond any international consensus, countries will continue to perform espionage to serve their national interests. Negative or positive, it all depends on who does what to whom. International law does not change the reality of espionage.”

Radsan sends a very clear message to future young scholars interested in engaging in research and writing on the international law of intelligence (let alone those seeking to produce a doctoral dissertation on the topic). In his words we should all “move on to

---

24 Id, at 623.
other projects – with grace.” 25 This dissertation is my graceful rejection of Radsan’s invitation. His analogy, comparing espionage scholars to alchemists and deities, is misguided – rather, we should be seen as explorers. The rules that govern the ILI have so far remained chained to the most secluded and uncharted “off-shore zones” of the international law’s archipelago, adamantly resisting codification. 26 The laborious challenge of charting these diverse, distant, and seemingly inaccessible international legal enclaves is an exercise in trailblazing, not wizardry.

The International Law of Espionage: The World of Spycraft and the Law of Nations provides a first-of-its kind exploration of the contemporary legal framework that governs peacetime intelligence operations. This research project attempts to write the missing textbook on espionage to be added to the grand bookshelf of international law. It rejects decades of academic scholarship that has considered the practice of spying as an extralegal construct, existing at the edge of international legitimacy, and beyond the grasp of mortal rules and regulations. This dissertation diametrically opposes this line of argumentation while maintaining a clear-eyed view of the important functions that intelligence plays in our public world order, further framing these functions within a larger global constitutive process. In this regard, the dissertation provides for a timely

25 Id (“[c]oming full circle, my conclusion, as presaged by my introduction, is that rather than force synthesis, we should tolerate the ambiguities and paradoxes inherent in the world's second oldest profession. Accepting that espionage is beyond the law, we should move on to other projects – with grace.”).

26 For further reading on the archipelagic nature of international law, see W. Michael Reisman, The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment 19-21 (Hague Academy of International Law, 2012). Reisman particularly notes that “much of the literature on and about international law concerns itself with the islands”, those “highly developed ecologies with effective sanctions components approximating those of an idealized domestic law model.” But in so doing the literature ignores the “off-shore zones”. These zones are simultaneously “part of the reality within which international lawyers have to operate,” and “a pathological condition which international lawyers must seek to remedy.” Reisman concludes that lawyers will be unable to change these “off-shore zones” unless they “acknowledge their existence and nature”. Id, at 20-21.
revisit to the 1973 seminal piece by McDougal, Lasswell, and Reisman: “The Intelligence Function and World Public Order”.  

While investigating the phenomenon of peacetime espionage, this dissertation does not seek to offer a naïve articulation of some unattainable lex feranda. Instead, it aims to learn from the mistakes made in previous scholarly endeavors, which either erred by over-emphasizing the “myth system” or over-simplifying the “operational code”. In explaining, throughout this volume, the practice of intelligence work and the normative benchmarks that reinforce it, the approach taken by the author is one that maneuvers through the ILI’s great “wilderness of mirrors” by describing in generally plain and neutral terms both the world as it spins and the physics behind its continuous motion.

This purported goal should not be confused with a form of “intelligence legalism”. I do not argue that by merely empowering lawyers with some articulated law (giving them “more steel to put under [their] velvet glove[s]”) a miraculous equilibrium adjustment will be achieved for the profession as a whole. Sometimes, as Schlanger

---

27 McDougal, Lasswell & Reisman, supra note 10, at 370-371 (the article, which was republished in International Law Essays in 1981, is one of the oldest and most comprehensive studies of the subject of intelligence collection and processing under the post-UN world order. The authors provide an original New Haven School account of the international law that governs intelligence activities. They predominantly focus on what they envision as the way forward for the evolution of the practice, or in their words: “If the policies affecting the constitutive structure and functions of the world community are to move toward the realization of at least minimum public order, the intelligence component of the decision process must harmonize as far as possible with criteria designed to provide the pertinent flow of communicated messages to all who participate in authoritative control.” Id.).

28 For a further analysis and application of the “myth system” and “operational code” distinction to the international law of intelligence see infra I.B.2.

29 For further reading, see DAVID C. MARTIN, WILDERNESS OF MIRRORS 10 (1980).

30 Margo Schlanger, Intelligence Legalism and the National Security Agency’s Civil Liberties Gap, 6. HARVARD NAT’L SEC. J. 112, 113 (2015) (Schlanger identifies “intelligence legalism” as a phenomenon comprising of “three crucial and simultaneous features,” including the “imposition of substantive rules given the status of law rather than policy; some limited court enforcement of those rules; and empowerment of lawyers.”).

31 See J.E. Drexel Godfrey, Ethics and Intelligence, in ETHICS OF SPYING, supra note 2, at 15.
correctly points out, empowering lawyers simply means increasing the “prevalence of rights and law talk” and that could create suboptimal effects. As she explains:

“[intelligence legalism] actually dampens the prospects of civil liberties policy making, both by crowding it out and by rendering surveillance more politically acceptable and therefore making political or policy-based claims for reform less likely to succeed, whether inside the Intelligence Community or in the polity as a whole”.

Instead, the object of this examination is to understand the arrangements, organically devised by the international community, for settling the possible conflicts between spy and spied, and to highlight the limits of this system of laws in the face of modern-day data-driven surveillance tools and technologies. The result, it is hoped, is a reimagination of a professional practice: putting into words a neglected set of “unexpressed unexpressed but generally accepted norms and expectations,” in a process that will discern the *lex lata* from its layers of *lex simulata* and *lex imperfecta*.

To achieve this ambitious goal I put particular emphasis throughout my research on general principles of international law. It is important to clarify that I don’t consider these principles as “gap fillers” – transforming the adjudicative process into a legislative one by offering supplemental rules where treaty law and customary law are *non linquet*.

---


33 Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. Rev. 217, 226 (1999) (“As long as unexpressed but generally accepted norms and expectations associated with espionage are observed, international law tolerates the collection of intelligence in the territory of other nations”).

34 Professor W. Michael Reisman identifies the concept of *lex imperfecta* as “laws without teeth,” laws devised so that no remedy or sanction may be invoked following their violation. W. MICHAEL REISMAN, *FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS* 29 (1979). Reisman explains that a common purpose of the *lex imperfecta* as a legal construct is an “elite design for dealing with aggravated myth system and operational code discrepancies.” *Id.* The *lex simulata* serves a similar function but in a more nuanced way. It is a “statutory instrument apparently operable, but one that neither prescribers, those charged with its administration, nor the putative target audience ever intend to be applied.” *Id.*, at 31. By doing so, the *lex simulata* helps to “reaffirm on the ideological level that component of the myth to reassure peripheral constituent groups of the continuing vigor of the myth …” *Id.*, at 31-32.

35 For a criticism of the aggressive usage of general principles as adjudicative “gap fillers” see Johan G. Lammers, *General Principles of Law Recognized by Civilized Nations, in Essays on the*
Rather I see them as “standard clarifiers”, serving the purpose of defining “the depth and contours of broad or amorphous legal provisions” where international conventions and emerging customs offer little organizational assistance. Indeed one of the most fundamental functions of general principles is to allow for the “organic growth” of international law, especially where the law of nations is lagging behind new pressing problems or technological developments. Put differently by Cherif Bassiouni:

“[General principles prevent] the static application of anachronic norms and procedures to what is admittedly an evolving legal process designed to frame or regulate the dynamic exigencies and needs of a community of nations with changing interests and mutable goals and objectives. To state that international law has faced and is likely to face increasing new challenges, if for no other reason than to meet the

---

36 Charles T. Kotub Jr. and Luke A. Sobota, General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes 31-32 (2017) (the authors cite the example of the ICSID tribunal using general principles to determine the precise content of the “fair and equitable treatment” standard, adopting this interpretive approach as a result of the fact that “treaties and international conventions… are not of great help to this end.”).

37 Maarten Bos, The Recognized Manifestation of International Law, 20 GYIL 9, 42 (1977) (noting that general principles “should be able to provide international law with a most welcome possibility for growth”)

38 See e.g., C. Wilfred Jenks, The Proper Law of International Organizations 259-260 (1962) (“Neither agreement nor practice, even in the widest sense, can, however, provide sufficiently vigorous seeds of growth to enable the law to cope with new problems pressing for solution as the result of the activities of the international organisations. Legal principles therefore have an indispensable part to play in the development of the proper law of the international organisations and its assimilation into the general body of international law. The process whereby international law recruits itself from general principles of law must be expected to be intensified…”); Vladimir Djiuro Degan, Sources of International Law 109 (1997) (“importance may be ascribed to general principles of law of a very broad character in legal regulations of some new objective situations, emerging as a consequence of the rapid development of technology”).
fast-growing and changing technological advances, is a truism. Thus the demands on international law must be accommodated through an expanded usage of ‘General Principles’.”

The framework proposed in this book, a diagnosis of the law of peacetime intelligence operations at three distinct temporal stages—before (Jus Ad), during (Jus In), and after (Jus Post)—follows the traditional paradigms of international law and the use of force, which themselves are grounded in the rich history of Just War Theory. Adopting the Jus Ad, Jus In, Jus Post model makes for an appropriate choice, given the unique symbiosis that exists between espionage, fundamental U.N. Charter principles, and the control over international violence. It further follows the ruling of the European Court of Human Rights in its landmark Roman Zakharov v. Russia (2015) decision, where the Court noted that the regulation of secret surveillance measures may come into play “at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated.”

This dissertation’s framework departs from conventional wisdom by recognizing the existence of a customary liberty-right to spy shared by all sovereign nations. This important finding does not, however, entail that states enjoy a carte blanche to launch any intelligence operation they deem fit, regardless of the objectives and targets sought or means employed. Rather, we should recall the Peter Parker principle, popularized by the Spider-Man comic books series: “with great power comes great responsibility.” The dissertation, therefore, proceeds to highlight a set of general principles of international law which not only help bring value considerations into the existing structures of the ILI,

but further facilitate the interpretation of rules of conventional and customary international law. These general principles restrict and constrain the scope of the States liberty to spy.

The dissertation has five substantive Sections. Section I offers a prolegomena, wherein conceptual and thematic framings and definitional underpinnings are examined to help introduce the reader to the historical and contemporary features of intelligence work. Relying on intelligence studies literature the Section canvasses the language, institutional structures, and unique characteristics of spycraft. The goal of this section is to make spy-talk accessible even to an international lawyer, for whom espionage may seem like a taboo-like “dirty word”.

Section II follows with a detailed review of the existing discourse around espionage and international law and its core inadequacies. This Section discusses both anachronistic absolutist accounts of the law of peacetime intelligence and more recent accounts which have failed to capture the full scope of the practice. Examining the limits of the existing literature thus opens the door for a new relativist account of the

---

41 See Simon Chesterman, Intelligence Cooperation in International Operations, in International Intelligence Cooperation and Accountability 124, 124 (Hans Born et. al. eds., 2011) (“ever since the United Nations deployed peacekeepers into conflict zones it has been necessary to have a deep understanding of the theatre of operations and parties to a conflict, yet intelligence was long regarded as a “dirty word” as the 1984 Peacekeeper’s Handbook put it; “military information” was the preferred euphemism... The prospect of the United Nations or any other international organisation developing an independent intelligence collection capacity is remote. This is due to the understandable wariness of the part of states about authorising a body to spy on them, though the United Nations itself has been reluctant to assume functions that might undermine its actual or perceived impartiality. At the same time, however, this position reflects a larger anomaly in the status of intelligence under international law as an activity commonly denounced but almost universally practised: empowering an international organisation to engage in espionage might give the lie to this example of diplomatic doublethink”). See also Navarrete & Buchan, supra note 18, at 932 (Navarrete & Buchan cite to a statement made by the Pakistani Agent speaking before the ICJ in the Jadhav case, that as far as the travaux préparatoires are concerned the drafters of the Vienna Convention on Consular Relations made no reference to espionage and thereby “accepted the fiction that there were no spies”. Navarrete & Buchan rely on this “bold remark” to reinforce the idea that “States have long regarded espionage as a ‘dirty word’.”).
International Law of Intelligence (ILI) as a lex specialis standalone sub-field of international law. Making this point is one of this dissertation’s key objectives. Today, few syllabi and textbooks of public international law taught at law schools around the world, devote any attention to the intelligence function. While every other aspect of state practice is thoroughly examined—from the law of the sea, to the law of outer space, to the laws of war—the world’s second oldest profession is essentially ignored. Recognizing the ILI as a standalone field of study and exploration will thus create the space for necessary academic and practical conversations and initiatives to ensue.

The final three Sections of the dissertation introduce and defend this new account of the ILI. Part III, examines the Jus Ad Exploracionem (JAE), a sovereign’s prerogative to engage in peacetime espionage. This Section asserts the existence of a derivative customary liberty-right to spy by analyzing an array of international legal sources that require, either explicitly or implicitly, the gathering of intelligence as a necessary prerequisite for the functioning of the broader legal system. Acknowledging the existence of the JAE is important, as it allows us to begin sketching the justifications for spying thereby drawing the very limits of the practice—those cases in which the right to spy may be abused. Relying on the general principle of abuse of rights, this Section identifies five categories of unlawful spying operations—those operations launched for unjust causes: (1) spying as a means to advance personal interests; (2) spying as a means to commit an internationally wrongful act; (3) spying as a means to facilitate a dictatorship; (4) spying as a means to exploit post-colonial relations; and (5) spying as a means to advance corporate interests. Finally, the last portion of this Section moves the discussion to the complicated, often ignored, issue of the delegation of the right to spy, examining the
legitimacy of both upward delegations (outsourcing the intelligence function to multilateral organizations) and downward delegations (outsourcing the intelligence function to private entities and individuals).

Part IV, shifts the focus to the *Jus In Exploratione (JIE)*, the law governing the choice of means and choice of targets employed in the conduct of spying. If the initial analysis put a spotlight on the propriety of the operation’s objectives, the consecutive inquiry turns to the propriety of the operation’s tactical core, the adoption of particular measures and methods throughout the mission’s life cycle. To make determinations as to the legality of the *JIE*, prudent international lawyers will be guided by a collection of principles which form the substratum of our international legal order: Rule of Law, Effectiveness, Proportionality, Good Faith, Fairness, and Comity. Together these six principles introduce a set of constraints on a State’s margin of appreciation in selecting specific surveillance techniques and reconnaissance marks. These constraints have now become commonplace in the constitutional and administrative design of the “reasonable intelligence agency”, and in the international human rights frameworks that undergird the workings of its “reasonable intelligence officers”. The section proceeds to apply these standards to an assortment of controversial contemporary and future-oriented intelligence gathering, analysis, and sharing techniques, in Human Intelligence (HUMINT), Signal Intelligence (SIGINT), Visual Intelligence (VISINT), and Open-Source Intelligence (OSINT) collection and analysis. Among others, this Section examines the law governing extraordinary renditions and non-official covers, mass surveillance and cyber espionage techniques, the use of facial recognition and deep reconnaissance tools, and open-source data mining and algorithmic analysis. The Section uses both historical and contemporary
case studies to highlight precisely how the six general principles are already embedded in the administrative inner workings of intelligence agencies around the world.

Part V, will conclude by discussing the *Jus Post Explorationem (JPE)*, the law triggered after the intelligence operation has come to an end. This section begins by discussing what “an end” actually means for intelligence operations. Given that spying is a circular loop of supply and demand between information gatherers and policymakers, where might one find potential exit points for review and assessment? When can we say that an espionage operation has ceased? After addressing this thorny matter, the Section proceeds to discuss the varied dimensions of the JPE. The Section identifies five such dimensions: (1) The Prescriptive Dimension; (2) The Accountability Dimension; (3) The Redress and Rehabilitation Dimension; (4) The History-Telling, Collective Memory Dimension; and (5) The Educational Dimension. Within the limits of this dissertation, the Section focuses on only the first two dimensions, who are also the most rooted in law. The Section proceeds to discuss two constraints on the ability to prescribe the law and assign liability for espionage operations. These constraints are a lack of transparency and an inability to access justice. Together, these rudimentary restrictions directly impact the evolution of the *JPE*. For the prescriptive process, the Section illustrates how incidents of international espionage, when exposed, become fertile ground for what I call “constitutive elucidation” as an alternative to formal means of codification. This unique regulatory reality forces traditional rule-appliers and rule-agitators to take a more profound role as rule-prescribers. Beyond the prescriptive process, the Section further examines informal and formal mechanisms for quality control and assurance in espionage cases.