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THE DEVELOPING INTERNATIONAL LAW ON GATHERING
AND SHARING SECURITY INTELLIGENCE*

Jonathan E. Colby

I. The Context

The survival of all participants in the international arena rests upon the maintenance, short of actual and viable disarmament, of a system of effective mutual deterrence among the major participants. This system is based on the capability of each major participant to inflict an intolerable degree of destruction upon any other who might strike first with nuclear weapons. Given such a capability at present and for the foreseeable future, effective mutual deterrence in turn depends upon the major participants' adequate knowledge of their respective capabilities and intentions, sufficient to reveal a relative balance and thereby to deter a nuclear first strike by any of them.

Without such knowledge, a participant may come to expect that its options are reduced to choosing between striking first or suffering destruction. Alternatively, a participant might consider that it could gain strategic advantage by launching a surprise, or preemptive, nuclear or other strike and emerge without sustaining intolerable damage. Accordingly, the gathering and sharing of intelligence, or knowledge,

*Particular gratitude is due to Professors Myres S. McDougal and W. Michael Reisman, both of the Yale Law School, for their valuable assistance and criticism in the preparation of this manuscript and the original study from which it was drawn. For a more thorough treatment of the intelligence function, particularly as it relates to basic constitutive policies, see McDougal, Lasswell, and Reisman, "The Intelligence Function and World Public Order", 46 Temp. L. Q. 365 (1973), and McDougal, Lasswell, & Reisman, "The World Constitutive Process of Authoritative Decision," 19 J. Legal Ed. 253, 417-421 (1967); Reprinted in 1 The Future of the International Legal Order 73 (C. Black & R. Falk, eds., 1969).
concerning their respective security is an essential and specialized function for each of the major participants if the system of reciprocal deterrence is to continue to prevent the outbreak of large-scale hostilities. Beyond the crucial need of the major participants for such intelligence, the security of other participants in the world social process also rests on their ability to gather and share such information on one another. The absence of such a capability might well preclude rational decision-making by participants in the face of an actual or imagined crisis.

1Security, or the summation of all values, is an objective shared by all participants in the world social process. It may be defined as "high value expectancy, position, and potential: the realistic expectancy of maintaining influence." H. Lasswell & A. Kaplan, Power and Society 61 (1950). More specifically, it may consist of expertise (skill), the successful prosecution or prevention of violence (power), the possession of substantial resources (wealth), and the like, or any combination of these values. Whatever the value or values concerned, the term "security" reflects a high likelihood of realization by a participant or group of participants of that value or values, both at present and as realistically projected into the future.

Security may be considered in terms of a spectrum consisting of value expectations, position, and potential held with varying degrees of intensity. The extremes may be classified as maximal and minimal security. The former would thus reflect the fullest possible influence, or expectancy, position, and potential, with respect to any value or values, while the latter would represent the minimum, not the absence of security, which would still qualify as realistic expectancy of exerting influence.

Influence is an interpersonal relation. As Lasswell & Kaplan observe: "this is true not merely because some values, such as the deference values, consist in such relations, but because the conduct of persons active in the shaping and distribution of the value is essential to its possession (enjoyment)." Id. at 60. As such, the interpersonal shaping and acquisition of influence with respect to power among participants is of vital concern in the context of the currently destabilized world social process. This is not meant to imply that power is in all circumstances the most significant value. Rather, it is to recognize that the exercise of influence, which consists of "affecting policies of others than the self", id. at 71, in regard to power is essential for the continued existence of participants, especially the major participants, in the international arena.
The common interest of all participants in the international arena in at least minimal security requires that intelligence be gathered and made available to the major participants in sufficient quantity and quality to maintain the credibility of their second-strike capabilities. This may in turn provide for the continued deterrence of hostilities between them and may create, over time, sufficient trust to permit the effective prevention of such warfare by means of genuine disarmament.

Beyond this level of minimal security, the interests of all participants in maximal security with respect to all values, or optimum public order, favor greater inclusive participation in all phases of the

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2 McDougal, Lasswell, & Vlasic observe: "Unfortunately the most urgent and fundamental problem facing mankind today is the securing of minimum public order. . . . It is in the interest of all to develop policies which will decrease, if not completely and immediately remove, the rapidly growing threat of comprehensive violence and—at the same time—create conditions conducive to the fulfillment of the aspirations of men everywhere for security and abundance in freedom." M. McDougal, H. Lasswell, & I. Vlasic, Law and Public Order in Space 157 (1963). A more detailed statement of the basic policies of minimum order is made in M. McDougal & F. Feliciano, Law and Minimum World Public Order (1961).

3 "By optimum order we mean a public order which, beyond authoritative orientation toward the minimum of coercion and the maximum of persuasion in the interactions of participants, is further designed to promote the greatest production and the widest possible sharing of human dignity values among the peoples." Id. at 160. The concept of optimum order is developed in somewhat more detail in M. McDougal & Associates, Studies in World Public Order ch. 12 (1960).

4 "Inclusive public order interests" refer to "collective decisions whose outcomes significantly affect the entire world arena or large segments of it. . . ." Id. at 150, and which "therefore justify procedures that bring more than a single nation-state into the center of the process." Id. at 151.
security intelligence function. This is essential if maximal security, reflecting the fullest possible influence, or expectancy, position, and potential, in regard to all values, is to be achieved for all participants. However, in the absence of an effective world constitutive process and in the context of the presently destabilized international arena, such inclusive interests are challenged by exclusive\(^5\) and special\(^6\) interests of a variety of different groups, especially functional and territorial elites. Among the most typical and persistent demands for security intelligence based on exclusive and special interests are those relating to the preservation of the integrity and efficacy of certain territorial communities and to the effective power, wealth, and other value positions of particular elite groups. Accommodation is required on the basis of contextual analysis between inclusive and exclusive interests, with the rejection of special interests.\(^7\)

II. The Security Intelligence Function

The security intelligence function itself involves the collection, processing, and distribution of information which is or may be relevant

\(^5\)By "exclusive public order interests", McDougal, Lasswell, & Vlasic refer to decisions whose "impacts are of restricted scope that are left to the determination of individual nation-states." Id. at 150. They observe that:

Despite the urgency of obtaining at least minimum order on a universal scale, we do not, however, neglect the many important exclusive interests that can appropriately be recognized within the all-embracing system of public order, and which give reference to the uses and competences exclusive to a nation-state (or a component of a hypothetical unitary state that includes all communities)... hence the problem that arises in the delimitation of exclusive interests is to identify uses whose incidence is relatively localized, and which further the common interest when left to local competence.

Id. at 162-163.

\(^6\)Special interests are defined as "interests incompatible with human dignity." Id. at 148.

\(^7\)As McDougal, Lasswell & Vlasic note:
to the participants who gather it. It includes the collection of a wide variety of information, ranging from the casual observations reported by tourists returning from abroad to the highly sophisticated data gathered by reconnaissance satellites. There are no limits to the types and sources of information which may be useful.

The processing of intelligence refers to the treatment accorded the raw data which has been collected. It generally includes appraisal of the relevance of the information, as well as dating and cataloguing in forms useful to decision-makers. These tasks vary enormously in complexity, depending in large measure on the amount and quality of data requested and actually collected.

Distributing intelligence requires identifying who needs to know what information for what purposes and forwarding such information accordingly. The satisfaction of such demands generally involves a complex on-going process, as the needs of decision-makers for information shift to meet the problems which confront them. Therefore, not only the distribution effort but also the initial gathering and processing tasks, must continuously react to these changes in decision-makers' requirements for intelligence.

The product of the security intelligence function, the intelligence itself, is defined in simplest form as dealing "with all the things which should be known in advance of initiating a course of action." More spe-

Inclusive and exclusive interests require accommodation at every step, both between and within the two broad categories. The basic challenge of accommodation is, while giving primacy to inclusive interests, to insure the protection of exclusive interests without giving inadvertent protection to interests that are special and hence incompatible with common interests.

For the problems that arise in the accommodation process a fundamental guideline is available, namely, the principle of contextuality. By contextuality we refer to the consideration of every particular question in the light of the overriding goals and characteristics of the world community.

Id. at 165.


cifically, it may be considered as "the product resulting from the collection, evaluation, integration, and interpretation of all available information which concerns one or more aspects of foreign nations or areas of operations, and which is immediately or potentially significant to planning".  

In actual practice, the gathering and sharing of such intelligence may have helped to deter the outbreak of nuclear or other large-scale warfare among the major participants since the end of World War II. It has not, however, encouraged significant progress beyond this minimal objective.

A. Participants

Participation in the process of gathering, processing, and disseminating security intelligence is not representative of and responsible to the widest possible range of interests. It is, instead, concentrated in the various agencies of government of nation-states and is largely responsive to narrow national interests. While certain trends away from this regime may be detected, this pattern remains dominant in the context of the currently destabilized world order.

Participants may be considered in terms of two principal types: governmental and non-governmental. The first, governmental, includes both supranational and national governmental units. Supranational governmental units involved in gathering, processing, and disseminating security intelligence include the Security Council, the General Assembly, the Secretariat, and other bodies within the United Nations. Each of these is frequently involved in the gathering and sharing of information relevant to security conditions throughout the world.  

10 Dictionary of United States Military Terms for Joint Usage, quoted in id. at 26.

11 See Mc Dougall, Lasswell & Reisman, "The Intelligence Function and World Public Order, supra note 8, at 378-389.

12 For instance, the Security Council receives regular reports from United Nations Emergency Forces, as during the Congo, Sinai and Cyprus crises, while the Secretary General receives a variety of intelligence from his special representatives.
Organizations such as the North Atlantic Treaty Organization and the Warsaw Treaty Organization also provide for intelligence gathering and sharing. One of the major responsibilities of the NATO Secretariat is to prepare intelligence reports and digests, often using information supplied by member countries.13

A variety of other international organizations, ranging from the International Court of Justice to the International Labor Organization, involve themselves on a regular or occasional basis in gathering, processing, and disseminating information of possible relevance to security. The International Criminal Police Organization (Interpol) is engaged in the overt and clandestine collection, processing and dissemination of intelligence, often bearing on security matters.

National governmental participants engaged in the performance of the security intelligence function include specialized agencies.14 In

13To assist in the performance of this task, NATO maintains a Situation Centre and has an Assistant Director for Intelligence on its International Military Staff. NATO Information Service, NATO Handbook 15, 27 (1969); NATO Information Service, NATO—Facts and Figures (1962, 1969); and Cleveland, "NATO After the Invasion" 47 For. Aff. 251-265; at 257 (1969).

terms of the volume of security intelligence gathered, however, these specialized intelligence agencies are surpassed by foreign, defense, commerce, and other ministries which, in the normal course of decision, amass vast amounts of information relevant to security purposes. Diplomatic and other governmental personnel stationed abroad play a crucial role in transmitting information about their host countries and, alternately, about their own nation-state to the host countries.

Non-governmental participants include political and other organizations, business associations, interest groups, and individuals. The Cominform, an intelligence gathering and sharing network which from 1947 to 1953 linked all Communist parties with the Soviet Communist Party, and a similar organization linking overseas Chinese communities with the Chinese Communist Party, are typical of such participants. Religious organizations, such as the World Council of Churches, the Roman Catholic Church, with its worldwide system of Papal nuncios accredited both to national bishops and governments, and the Buddhist associations, are representative of non-political organizations which also carry out this function.

Private enterprise is also an important participant in the performance of the security intelligence function. The Rand Corporation and the Hudson Institute exemplify the numerous research organizations devoted to the task of collecting, processing, and distributing information on a wide range of subjects, including security. Industrial concerns continually seek new sources of and outlets for their products. This often involves gathering and sharing information of possible relevance to security.

Other organizations concerned specifically with the collection, interpretation, and transmission of information are universities and colleges. Whether directly associated with government in the performance of the security intelligence function, or independent, academic institutions are crucial participants in the performance of this function.

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15 As disclosed with respect to a number of American universities, including Michigan State University, which provided support, including cover, for Central Intelligence Agency operations in South Vietnam from 1955 through 1959, N. Y. Times, April 14, 1966, at 1; and the International Studies Center of the Massachusetts Institute of Technology, whose director, Mr. Milikan, admitted receiving funds from the Central Intelligence Agency, which he indicated were used for academic research, not overseas operations. Id. April 18, 1966, at 4.

16 Such as the British Institute for Strategic Studies and the Institute for Advanced Study at Princeton University.
Individuals as such are involved at every stage of the performance of the security intelligence function. On the international level, attendance at specialized conferences, conventions, and the like can provide opportunities both for gathering and sharing information relevant to security. This is particularly the case at meetings of scientists, educators, and other specialists, where the international recognition accorded scientific and other expertise often prompts information and sharing and assures a respectful reception for information actually shared. Other forms of individual participation in the security intelligence function include the normal contacts of businessmen, students, and others with their counterparts abroad. Such contacts involve the exchange of a wide range of information, much of it relevant to security. Also, observations by tourists traveling abroad can produce significant intelligence data if reported.

B. Perspectives

Trends in the performance of the security intelligence function reveal a growing inclusivity in some areas and continued exclusivity in others. Examples of the former include the exchange of photographs and other information obtained by the Soviet Union and the United States in their respective space exploration efforts; the cooperation afforded by the United States to Soviet intelligence gathering and fishing trawlers in distress off the American coast; and the exchange of captured and convicted intelligence gathering operatives, as in the Abel-Powers case. On the other hand, the seizure of the American intelligence gathering vessel Pueblo and the downing of a U.S. EC-121 surveillance aircraft by the North Koreans and an American RB-47 aircraft by the Soviet Union demonstrate a persistent exclusivity.

Each participant engaged in gathering security intelligence seeks to maximize its value position in relation to those of other participants. However, no participant possessing nuclear weapons in its arsenal has yet chosen to launch a surprise, or preemptive, strike using such weapons against another participant, no doubt due in large measure to the projections of severe mutual losses which would result.

Thus, while each participant makes demands for more intelligence in order to enhance its own security, there is a growing recognition of the need to collaborate in the performance of the security intelligence function if mutual security is to be achieved. Such international regional organizations as NATO and the Warsaw Treaty Organization at least provide for sharing information among allies, while the Strategic Arms Limitations Talks and the disarmament negotiations at Geneva provide, at the least, a means of sharing some such information among potential opponents.
Such collaborative perspectives, however, appear at present to be more characteristic of the major, or nuclear, participants in their relations with each other and with their allies than of the non-nuclear participants. The non-nuclear participants may not be as likely, without the expectation of severe deprivations which would accompany the use of nuclear weapons, to develop perspectives favoring collaboration in the performance of the security intelligence function. Security for such participants appears to involve certain exclusive perspectives, even though such perspectives may have the effect over time of breeding suspicion and distrust and increasing the likelihood of resort to violence unauthorized by community expectations. In light of the expectations of imminent or actual violence in such areas as the Middle East, the Indian subcontinent and Southeast Asia, past trends among a number of non-nuclear participants have not been favorable to the development of collaborative perspectives in the performance of the security intelligence function.

Furthermore, in crisis situations, the general pattern is a restriction by all participants of shared activities and knowledge transfer, especially intelligence gathering and sharing for security purposes. The expectation arises that a curtailed exchange of values with other participants will produce strategic or tactical advantage. Such restrictive policies, however, can seriously diminish the realism of expectations and contribute to a resort to violence.

C. Situations

The performance of the security intelligence function involves a variety of different situations. While to an increasing extent, particularly in the case of shared international resources (the high seas, the airspace above and outer space), these situations are open to all participants, a preferred policy of open access, subject to essential public order requirements, does not characterize the performance of this function in and immediately about the territory of nation-states at present.

The developing international law on gathering and sharing security intelligence may be considered in terms of the various situations to which it applies:

1. **Legality of the Security Intelligence Function Conducted in Shared International Resources**

Situations in which the performance of the security intelligence function is clearly lawful, that is, supported by customary constitutive prescriptions, include those occurring within shared international resources (the high seas, the airspace above and outer space), provided they are conducted in such a manner as not to interfere with lawful uses
of such resources by other participants or to engender serious deprivations in or about the territory of other participants. The gathering and sharing of security intelligence within shared international resources is thus not unlawful per se; rather, it is only unlawful when it interferes with other legitimate uses of such resources or with valid claims of coastal states. Furthermore, only in situations in which a partici-

17The major participants in the international arena carry out an extensive intelligence gathering effort on the high seas, and in the airspace above. See "U.S. and Russia: How to Play 'I Spy' on a Global Scale," N.Y. Times, March 14, 1971, IV, at 3:1-2. Goulden details a variety of security intelligence efforts performed by, respectively, the United States, the Soviet Union, and Cuba, among others: "[American] oceanographic research vessels [in circumnavigating the Arctic Ocean, attempted to pass near the Soviet nuclear weapons test installations at Novaya Zemlya and Severnaya Zemlya, to test]... capabilities and frequencies of the radar system guarding the Soviet's new antiballistic missile system, one anchor of which is south of Novaya Zemlya, the other slightly to the west of Severnaya Zemlya; [and to investigate] possible routes for Polaris submarines to follow during their frequent forays along the northern tier of the Soviet Union...;" the monitoring by U.S. vessels of Cuban communications and broadcasts and the observation of vessels using Cuban harbors; the Cuban and Soviet "oceanographic research" efforts in the Gulf of Mexico, observing U.S. submarine warfare exercises and charting contours of the ocean bottom, and off the eastern Florida coast observing operations at Cape Kennedy; and the Soviet surveillance of NATO naval exercises and, during July 1967, Soviet monitoring of activities in Communist China from vessels off the East China coast. J. Goulden, Truth is the First Casualty, 117-121 (1969). See also Klass, "Keeping the Nuclear Peace: Spies in the Sky," N. Y. Times, Sept. 3, 1972, VI, at 7.

18Cases upholding this perspective include, first, the Trail Smelter Arbitration, U.S. Dept. of State Arbitration Series 8 (1941); also quoted in H. Briggs, The Law of Nations 310 (2nd ed., 1952), between Canada and the United States, decided on March 11, 1941, for causing or permitting serious deprivations to occur in the territory of another state. The Tribunal held that "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein when the case is of serious consequence and the injury is established by clear and convincing evidence." Id. at 310.
pant is suffering serious deprivations caused by the actions of another may it take self-defense or self-help measures.\textsuperscript{19}

A recent authoritative pronouncement favoring inclusive use of the high seas, subject to each participant exercising due regard for the similar interests of others, is contained in the Convention on the High Seas.\textsuperscript{20}

The International Court of Justice, in the Corfu Channel Case (Merits), [1949] I.C.J. 22, decided April 9, 1949, and involving Albania and the United Kingdom, stated that:

[T]he obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent dangers to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow its territory to be used for acts contrary to the rights of other States.

\textsuperscript{19} See, e.g., the case of the Caroline, 2 Moore, A Digest of International Law 412 (1906), involving the destruction by British forces of a vessel in American waters used in connection with an armed uprising in Canada, which was justified as a legitimate act of self-defense. Such measures must comply with the standards formulated by Daniel Webster, the American Secretary of State, in his letter of April 24, 1841, to Fox, the British Minister in Washington, protesting the destruction of the Caroline; Webster's criteria for legitimate recourse to a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation. . . [and], even supposing the necessity of the moment authorized them to enter the territories of the [other state] at all, [that they] did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it". Webster to Fox, April 24, 1841; Brit. Parliamentary Papers, Vol. LXI (1843); 29 Brit. & Foreign State Papers 1138; quoted in R. Jennings, The Caroline and McLeod Cases, 32 Am. J. Int'l L. 82, 89 (1938), quoted in Briggs, supra note 18, at 985.

2. **Legality of the Security Intelligence Function Conducted in the Territorial Sea**

Determination of the legality of the performance of the security intelligence function in the territorial seas of nation-states requires contextual analysis to ascertain the validity of the often conflicting claims advanced by participants. The notion of a "territorial sea" itself is a shorthand device signifying the importance accorded to exclusive claims.

The high seas [defined in Article 1 as 'all parts of the sea that are not included in the territorial sea or in the internal waters of a State'] being open to all nations, no state may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by those Articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States: (1) freedom of navigation; 

\[\ldots\] (4) freedom to fly over the high seas. These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

*Id.* at 842-43.

Also of relevance to the performance of the security intelligence function on the high seas are Article 8 of the same Convention, which provides in part that "warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State." *Id.* at 842. And Article 9, which provides that "[s]hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag state," *id.* at 844. However, as Judge Moore recognized in his dissenting opinion in the *Lotus* case, there are limits to this immunity: "In conformity with the principle of the equality of independent States, all nations have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation, and no State is authorized to interfere with the navigation of other States on the high seas in time of peace except in the case of piracy by the law of nations or in extraordinary cases of self-defence (Le Louis, 1817, 2 Dodson 210, 243-44)." *Lotus* (Moore, Jr., dissenting), *P.C.I.J.*., Ser. A., No. 10, 25 (1927); quoted in *Briggs*, supra note 18, at 329.
of participants with respect to the waters lying immediately off their coastlines. These claims generally involve the security interests of coastal states and their interest in exploiting the resources to be found within these waters. Claims by participants to exercise a high degree of exclusive competence over these waters are usually expressed by delimiting a certain width of such waters and labeling it as a "territorial sea".

Important inclusive interests, however, also exist with respect to the territorial seas, most often concerning international security, communications, and shipping.

The performance of the security intelligence function in the territorial seas of other participants usually consists either of "passive" surveillance of coastal states and monitoring of their communications, or "active" penetration of their defense zones (which usually encompass, at a minimum, their territorial seas) for the purpose of activating defense-warning systems. This generally involves identifying the type of radar or other defense-warning system activated and recording the intensity, range, and duration of the signals emitted.

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22 The United States which, together with the United Kingdom, France, and most of the nation-states of Europe and the Commonwealth, had claimed a territorial sea three miles wide, has now proposed, with the support of the Soviet Union, a new international limit of twelve miles for the width of territorial seas. The Soviet Union, the People's Republic of China, the United Arab Republic, North Vietnam, and a number of other nation-states already claim territorial seas twelve miles wide, and this width appears to be gaining acceptance as an international standard. However, a number of states are pressing for wider territorial seas. Prominent among these are Argentina, Brazil, El Salvador, Panama, Peru, Senegal, and Uruguay, all of which claim territorial seas two hundred miles wide. Bureau of Intelligence and Research, U.S. Department of State, Sovereignty of the Sea (Geographic Bulletin No. e) at 5, 28029 (1969).

23 McDougal & Burke, supra note 21, at 174.
Past trends with respect to "passive" observation and monitoring conducted from the territorial seas indicate a preference for inclusive interests. Authoritative prescriptions favoring a variety of uses of the territorial seas for inclusive purposes are found in the Geneva Convention on the Territorial Sea and the Contiguous Zone. The rules applicable to all ships enunciated in the Convention on the right of innocent passage are of particular relevance to the conduct of the security intelligence function within the territorial seas.


25 Article 14 provides in part:

1. Subject to the provisions of these Articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters [emphasis added], or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.

4. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State. Such passage shall take place in conformity with these Articles and with other rules of international law.

6. Submarines are required to navigate on the surface and to show their flag.

Article 15 provides in part that "the coastal State must not hamper innocent passage through the territorial sea." Id. Article 16 states, however, that:

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.
"Passive" observation and monitoring, especially when conducted by

3. Subject to the provisions of subparagraph 4, the coastal State may, without discrimination among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

This right of suspension, however, is not unlimited. Article 16 also provides that:

4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.

The rules in the Convention applicable to government ships other than warships and operated for non-commercial purposes, and thus of relevance to the security intelligence function as performed in the territorial seas, are set forth in Article 22, which provides in part that:

With such exceptions as are contained in Articles 14, 15, 16, and 17, in regard to innocent passage above, and Article 18, stating that "no charge may be levied upon foreign ships by reason only of their passage through the territorial sea" and that "charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship"], nothing in these Articles affects the immunities which such ships enjoy under these Articles or other rules of international law.

The only rule specifically applicable to warships, also of use in the performance of the security intelligence function, is contained in Article 23, which provides that:

[1] If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.
26 non-military governmental or private vessels within the territorial sea of another state, would seem to pose little threat to the latter's security. It is difficult to envision circumstances which would authorize, consistent with community expectations, a participant to take severe retaliatory measures against another participant engaged in such passive intelligence gathering.

27 The Soviet Union, joined by the Eastern European states, while participating in and adhering to the Convention, submitted the following reservations to Articles 20 and 23, respectively:

The Government of the Union of Soviet Socialist Republics considers that government ships in foreign territorial waters have immunity and that the measures mentioned in this Article may therefore be applied to them only with the consent of the flag State.

The Government of the U.S.S.R. considers that a coastal State has the right to establish procedures for the authorization of the passage of foreign warships through its territorial waters.

26 Even in the case of passage of warships through straits located in the territorial sea but used for navigation between two parts of the high seas, there exists authoritative support for inclusive interests. See the Corfu Channel Case (Merits), [1949] I.C.J. 4, 28. While the scope of innocent passage permitted a participant's warships through the territorial sea of another state in peacetime is thus limited in the Court's opinion to "strait's used for international navigation between two parts of the high seas", the clear implication of the case indicates a strong preference for inclusive use. Furthermore, the Court employed a criterion of mere, not substantial, use of such straits for international navigation as sufficient to qualify such straits for innocent passage by a participant's warships in time of peace.

27 Rubin indicates by analogy to such activities when conducted from "contiguous land",

... at least under current practice apparently accepted as legitimate, states do eavesdrop from land bases on each other's electronic emissions and no countermeasures against foreign territory are known ever to have been publicly justified on grounds of a security need to stop the eavesdropping. If the word 'security' in the normal formulation of the law
The difficulty of distinguishing between a situation involving such "passive" observation and monitoring and one involving simple innocent passage by governmental or private vessels through the territorial sea of another nation-state would tend to favor inclusive interests here. The normal requirements of navigation, including the taking of bearings by reference to stationary points on land, involve many of the same tasks associated with "passive" observation and monitoring of a coastal state.

The same inclusive regime favoring the right of innocent passage and, by implication, "passive" observation and monitoring of a coastal state by the vessels of another participant in the former's territorial sea, has not applied to aircraft in the airspace above the territorial sea, both for commercial and security reasons. However, major par-

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of innocent passage were interpreted to prevent passive listening by a foreign vessel, it is hard to see what passage would still necessarily be considered 'innocent'—certainly no passage of any state-operated vessel.

28 Air rights for commercial aviation are less flexible than regulations for water transit, and rigidly restrict air routes to jurisdictional rather than geographic patterns. The right of aircraft to overfly territorial waters is the same as for sovereign land areas of the coastal state since no 'right of innocent passage' exists as for surface craft. Precedent for these restrictions goes back to the various conventions and agreements made during the first half of the century, particularly the Chicago Conference of 1944. At that time an effort was made to establish air transit rights other than by bilateral agreement. An International Air Services Transit Agreement was enacted and accepted by most members of the International Civil Aviation Organization. It entailed two privileges, . . . (1) the privilege to fly across the territory of another state without landing; and (2) the privilege to land for nontraffic purposes. Rights granted to aircraft of one state operating in the airspace of another, however, are subject to limitations in accordance with the latter's own civil aviation authority. For example, certain air corridors may be designated, or approval for flight may be subject to specific rules or denied at any time.
ticipants appear to tolerate the entry of each other's aircraft within the airspace above their own territorial seas for the purpose of "passive" observation and monitoring, at least to the extent of not automatically destroying such aircraft.\textsuperscript{30}

Bureau of Intelligence and Research, U.S. Dept. of State, Sovereignty of the Sea (Geographic Bulletin No. 3, 1969).

Planes of any given state may fly over the territorial sea of any other state only with its consent. Such privileges are not always assured in the present-day world. Thus, the complicated route structure of international airways with their technical requirements must, in all cases, conform to the sovereign pattern of land and the marginal seas.

\textit{Id. at 10.}

\textsuperscript{29} The military aircraft of a participant operating in the airspace above the territorial sea of another state are subject to a more stringent regime than are surface vessels, including warships: "Flight of military aircraft must adhere strictly to practices incorporated in Law of the Sea conventions. In fact, the shooting down of military planes which stray over the territorial waters as well as land territory of an unfriendly state is by no means unknown." \textit{Id. at 10.} The United States sought in three instances to adjudicate before the International Court of Justice claims for compensation arising from losses caused by the downing of aircraft, which, although, according to the United States, over international waters at the time, were engaged in surveillance and monitoring off the coast of the Soviet Union. In none of these cases, however, did the Soviet Union accept the Court's jurisdiction, therefore requiring the Court to remove the cases from its List.

\textsuperscript{30} Lissitzyn observes that even during the tense period of confrontation between the Soviet Union and the United States during the early 1950's, "[i]n many instances, even when such intrusions occurred across the Iron Curtain, the intruding aircraft, whether civil or military, and their occupants were released and permitted to leave. In some instances, no action was taken to control the intruder's movements, although diplomatic protests may have been subsequently lodged with their governments. In some other instances, the intruding aircraft were fired upon." Lissitzyn, "The Treatment of Aerial Intruders in Current Practice and International Law," 47 Am. J. Int'l L. 559, 569 (1953). Even in the last-mentioned instances, however, the Soviet Union stressed either that it was not the first to open fire or, if it was, that such fire was intended as a warning only. \textit{Id. at 580.}
An argument may be made, however, by the smaller participants in the international arena in favor of greater exclusivity in regard to the use of the territorial sea. This perspective rests primarily upon the premise that it is inequitable to favor inclusive interests here, since what this in fact means is that only those participants capable of marshalling the resources and expertise required for the performance of the security intelligence function in the territorial seas (i.e., the major participants) will be able to take advantage of this inclusivity.\footnote{Butler observes with respect to the intelligence gathering activities of a participant's vessels in the territorial sea of another state: }

Past trends support in some measure such exclusive claims, advanced especially by smaller participants in the international area. Extreme reactions to gathering security intelligence by means of electronic surveillance and monitoring include the North Korean seizure of the USS Pueblo off the coast of North Korea\footnote{Butler, "The Pueblo Crisis: Some Critical Reflections", in [1969] Proceedings, 8.} in 1968 and the internment of

\begin{quote}
[Such a vessel] ... not only carries away visual impressions of the external appearance of a country along the coast; it pierces the very interstices of the defense establishment by monitoring inland communications, by identifying—perhaps jamming—inland radar installations, and by performing the variety of other tasks for which electronics surveillance is suited. The result is that the flag state of the intelligence vessel obtains vastly more detailed, composite data on the defense establishment of the coastal nation than the latter can obtain on the observing state, unless the coastal state also has the resources and know-how to engage in reciprocal activity. Under such circumstances, it is hardly unexpected for small coastal countries to question the appropriateness of granting absolute immunity to electronics intelligence vessels or to seek other means for redressing their comparative technological disadvantage in electronics.
\end{quote}

\textsuperscript{31} But there is some dispute as to whether or not the USS Pueblo intruded
its crew for several months; the downing of a U.S. EC-121 aircraft engaged in electronic intelligence gathering over forty miles off the North Korean coast; the attack on the USS Liberty, a sister ship of the Pueblo, on the high seas north of the Sinai Peninsula during the 1967 Six-Day War; and the seizure in two instances by Latin American coastal states of Soviet intelligence gathering vessels. Less extreme reactions available to the coastal state include requesting the vessel or aircraft engaged in electronics intelligence gathering to cease such activities and, in the event of noncompliance, seeking to require it to leave the territorial waters.

into the territorial waters claimed by North Korea prior to its seizure in 1968. The U.S. position is that the vessel was seized 15.3 miles from the nearest part of North Korea; the North Koreans claim that it was seized 7.6 miles from the North Korean coast. The U.S. claims a territorial sea 3 miles wide; the North Koreans claim a width of 12 miles. While subsequent investigation confirmed that the seizure occurred beyond the 12-mile territorial sea claimed by North Korea, Aldrich, "Questions of International Law Raised by the Seizure of the U.S.S. Pueblo," in Proceedings, supra note 31 at 3, some question remains as to whether the Pueblo may have accidentally come within the 12-mile territorial sea claimed by North Korea. Butler presents two sources for this: first, although the Pueblo was under specific secret orders not to penetrate the North Korean 12-mile belt of territorial waters, missions prior to the Pueblo were apparently authorized by a general order dated February 28, 1966, to approach up to three miles of the North Korean coast (N.Y. Times, Sept. 13, 1968, at 20)." Butler, supra note 31 at 10. Second, "... testimony at the Court of inquiry revealed the Pueblo's main navigational system developed errors as great as five miles. Even though other aids were frequently employed by Pueblo officers, there is no absolute assurance that at some point the vessel did not violate the North Korean boundary." Id. at 10.

N.Y. Times, June 12, 1968, at 1; referred to in Butler, supra note 31 at 9, N.9. Butler states with respect to such reactions that "a surprise armed attack ... is clearly a disproportionate response to the threat posed by an electronics intelligence vessel, but it nevertheless is illustrative of the magnitude of concern felt by the coastal state." Id. at 9.

It is doubtful, however, whether this argument in favor of exclusivity advanced on behalf of the smaller participants gives rise to a right of self-defense on their part. The attacks against and seizures of electronics intelligence gathering vessels and aircraft seem clearly out of proportion to the dangers posed to the coastal state's security by another participant's "passive" observation and monitoring of communications within the coastal state. "Passive" electronics intelligence gathering and visual observation can hardly be conceived of as an "armed attack" per se nor even as creating a reasonable apprehension of such attack in most instances. While it could be argued that vessels and aircraft engaged in such "passive" monitoring and observation could be employed to obstruct or destroy the operation of a coastal state's defense-warning system and jam its communications network, such "active"

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35 Though the right of self-defense in both customary law and Article 51 of the U.N. Charter allows an endangered state to act against an imminent threat, in order for its acts of intense coercion to be lawful, they must satisfy not only a principle of necessity, but a principle of proportionality. McDougal & Feliciano, supra note 2, at 198-203. Since self-defense is self-help in extremis, its necessity must be grounded in an imminent and unlawful threat to the vital values of a territorial community. See W. Michael Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards 836ff (1971).

36 But, cf. Butler's sympathetic comments on North Korea's action against the Pueblo:

North Korea characterized the seizure as a 'decisive measure of self-defense.' A right of self-defense has always been recognized by international law, although more recently the exercise of the right as a matter of law has been restricted to instances of armed attack or, perhaps, an immediate threat of armed attack. Apprehension of the introduction of Soviet missiles into Cuba led the United States to invoke the principle of collective self-defense and to establish a naval quarantine in 1962. At stake was probably not a threat of armed attack, but a fundamental reordering of the balance of power in the Western Hemisphere and elsewhere. The principles of self-defense and freedom of the seas acquired a new dimension as a result of the Cuban crisis. North Korea's situation is indeed different, yet the threat to its defense establishment perceived by North Korea in the operations of the Pueblo and similar vessels may have been as imminent as the Cuban threat was to us. North Korea was confronted
Past trends with respect to the second type of security intelligence function conducted by participants within the territorial seas of other nation-states—penetration of a coastal state's defense zones for the purpose of activating defense-warning systems—may be considered in terms of the two principal sets of responses which it evokes. The first, characteristic of the major participants, is an increasing degree of mutual tolerance for this practice. With the growing technological sophistication of nuclear weapons, their delivery systems, and of the means to protect them, deterrence requires more than simply knowing the location of significant targets and how to reach them in a second, or retaliatory, strike. It also requires the identification and development of means to overcome a potential opponent's defense-warning systems, such as radar and anti-ballistic missile systems. Without such knowledge, a major participant would not be confident of retaining an effective second-strike capability, sufficient to deter other participants from striking first with nuclear weapons. Alternatively, in the absence of adequate security intelligence with respect to a potential opponent's capabilities and intentions, a participant might consider in a crisis that it has no choice but to strike first or be attacked and destroyed.

by vessels which penetrated the heart of its defense network and which were operated by its primary adversary in the Korean conflict. To conclude the Pueblo posed no threat of armed attack against North Korea begs the question; the threat posed by the Pueblo was the acquisition of data that could render the coastal state defense establishment vulnerable. The problem of secrecy is something with which all states must live, but they live with it to an unequal degree. North Korea possessed no comparable capability to obtain equivalent data on the United States defense system. If there is no precedent or scholarly support for invoking self-defense in this kind of situation, neither is there a large body of experience with this enormous technological gap which presently exists between naval Powers and smaller coastal Powers.

Butler, supra note 31, at 10, 11.

37 For detailed information on such intelligence gathering, see Coul
den, supra note 17 at 110-111.
It is doubtful, however, in view of the incidents involving the Pueblo, the Liberty, and the seizure of two Soviet intelligence gathering vessels off the coast of Latin America, whether the smaller participants would tolerate penetration of their defense zones by other participants for the purpose of activating their defense-warning systems, assuming they had such systems. The perspective of any such participant would most likely be influenced by its level of technological sophistication and that of its potential adversaries, as well as its perception of the likelihood of attack by the participant conducting such "active" electronics intelligence gathering.38

3. Legality of the Security Intelligence Function Conducted in the Contiguous Zone

The performance of the security intelligence function in the waters and airspace contiguous to the territorial seas of coastal states gives rise to many of the same issues as does its performance within and above the territorial sea. While the intensity of exclusive claims with respect to the contiguous zone is likely to be less, such claims typically are asserted in reference to the security, health, customs, and immigration interests of the coastal state. Exclusive claims are also likely to be asserted with respect to the exploitation of resources, especially fisheries and mineral deposits, in the contiguous zone. However, the burden of establishing the validity of such claims rests on those who assert them to a greater extent than in situations involving the territorial seas. While there is no inherent conflict between such exclusive claims, particularly those relating to the health, customs, and immigration interests of the coastal state, and the performance of the security intelligence function by a participant within the zone contiguous to the territorial sea of another, the possibility exists of such a conflict, especially involving exclusive security claims.

Authoritative international prescriptions favor inclusive use of the contiguous zone in a wide variety of situations.39 There are, how-

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38 In the case of non-nuclear participants, such penetration for the purpose of activating defense-warning systems, in the absence of the restraint which the possession of nuclear weapons might otherwise impose, would appear to be more provocative than beneficial for minimum order, and be so regarded by their potential opponents.

39 The 1958 Convention on the Territorial Sea and the Contiguous Zone limits the exclusive interests which coastal states may advance with respect to the use of contiguous zones to narrow classes of situations. Article 24 of the Convention provides:
ever, certain exclusive claims which deserve recognition, particularly those relating to the control of air traffic and the temporary use of

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

   (A) prevent infringement of its customs, fiscal, immigration, or sanitary regulations within its territory or territorial sea;

   (B) punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

U.N. Doc. A/Conf.13/L.52; supra note 34, 52 Am. J. Int'l L. 834, 840 (1958). Beyond these limited exclusive interests, however, the clear implication of the Convention is to favor inclusive uses of the contiguous zones in most contexts. Nonetheless, it is probable that states will not abide by these limits, particularly in reference to security zones beyond a width of twelve miles. See McDougal & Burke, supra note 21 at 596-598.

The major problem in specific strategy posed by claims to exclusive authority in contiguous zones is to permit the necessary extensions of coastal authority for protection of uniquely affected coastal interests and, simultaneously, to promote and to protect the widest possible range of inclusive uses and interests, free of coastal interference. Accommodation of the resulting conflicts between inclusive and exclusive interests has been achieved historically by application of a standard of reasonableness, requiring a disciplined multifactoral analysis to avoid arbitrary decision.

Id. at 579.

The United States has promulgated "rules for operating civil aircraft in a defense area, or into, within, or out of the United States." 14 C.F.R. Sec. 99.1 (A) (1970). This authority derives from the powers accorded the Administrator of the U.S. Federal Aviation Agency to designate certain zones in U.S. airspace in which he may prohibit or restrict flights of aircraft which he cannot otherwise identify and control.
such zones (as well as the high seas beyond) for exercises by military aircraft and vessels and for the testing of ballistic missiles.\textsuperscript{42}

\textbf{U.S.C.A. Sec. 1522 (1958).} He is empowered to create "Air Defense Identification Zones" ("ADIZ's"), which are defined as "areas of airspace over land or water in which the ready identification, location, and control of civil aircraft is required in the interest of national security." 14 C.F.R. Sec. 99.3(A) (1970).

These rules require the filing of a flight plan with an appropriate aeronautical facility and position reports for aircraft operating in or penetrating a domestic ADIZ or entering the United States through a coastal ADIZ or through "Distant Early Warning Identification Zones". Specifically, foreign aircraft entering the United States must comply with the following provision:

\begin{quote}
In addition to such other reports as ATC [Air Traffic Control] may require, no pilot in command of a foreign civil aircraft may enter the United States through a coastal ADIZ unless he makes the reports required in section 99.17 or section 99.19 (position reports for aircraft operating in or penetrating a domestic ADIZ) or reports the position of the aircraft when it is not less than one hour and not more than two hours average cruising distance from the United States.
\end{quote}


The United States is not alone in designating such aerial zones. Canada has created similar zones and requires aircraft to give position reports even when such aircraft are not flying to or from Canada. Security Control of Air Traffic Order, Air Navigation Order Series V., No. 14, in Air Laws and Treaties of the World, 323, 324, 87th Cong., 1st Sess. (1961); referred to in McDougal & Burke, supra note 21 at 593, n. 85. "[Claims for security purposes] sometimes extend into areas having no unique geographic nexus to the claimant state, yet it is generally agreed that these exclusive areas are reasonable and ought, in mutual tolerance, to be recognized." McDougal & Burke at 593.

\textsuperscript{42}See McDougal & Schlei, "The Hydrogen Bomb Test in Perspective and Lawful Measures for Security", 64 Yale L. J. 648, 678-681 (1955). Other types of exclusive claims over contiguous zones are exemplified by the security zone created by twenty-one states of the Western Hemisphere by the Declaration of Panama in 1940. This Declaration provided in part:
In view of the variety of significant inclusive interests affecting

As a measure of continental self-protection, the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard as of primary concern and direct utility in their relations, free from the commission of any hostile act by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea, or air.

"International Conferences of American States, 1933-40", 334 (1st Supp. 1940), reprinted in 34 A.J.I.L. Supp. 17 (1940); quoted in McDougal and Burke, supra note 21 at 590. As McDougal and Burke indicate, this security zone extended from a minimum of 300 miles in width to a maximum of 1,200 miles from the coast in some places. Masterson, "The Hemisphere Zone of Security and the Law", 26 A.B.A.J. 860, 861 (1940). In addition, although the belligerents protested the legality of such a zone and on several occasions engaged in hostilities within it, "[i]nfluential publicists have affirmed the soundness of the principle embodied in the Declaration, conceding the validity of objections to enforcement only in the particular instances in which enforcement could be shown to be unreasonable." Brown, "Protective Jurisdiction", 34 A.J.I.L. 112 (1940); Fenwick, "The Declaration of Panama", 34 A.J.I.L. 116 (1940); "The Exercise of Jurisdiction for Special Purposes in High Seas Areas Beyond the Outer Limit of Territorial Waters", address by W. W. Bishop, Jr., before the Inter-American Bar Association, May 1949, 4-5, Masterson, supra, at 862-863. Cf. Gidel, Memorandum, 34-36; quoted in McDougal & Burke, supra note 21 at 591, n.73.

A further example of the creation of such security zones in the waters contiguous to the territorial seas of coastal states is presented by Article II, sections 15 and 16, of the 1953 Armistice Agreement in Korea, which provide:

15. This Armistice Agreement shall apply to all opposing naval forces, which naval forces shall respect the waters contiguous to the Demilitarized Zone and to the land area of Korea under the military control of the opposing side, and shall not engage in blockade of any kind of Korea.

16. This Armistice Agreement shall apply to all opposing air forces, which air force shall respect
the use of those areas contiguous to the territorial seas of coastal
states, contextual analysis is required to determine whether exclusive
claims deserve authoritative weight, with the burden cast against such
a presumption absent a strong showing of need.

4. Legality of the Security Intelligence Function Conducted
   in the Airspace of Nation-States

Situations involving the performance of the security intelligence
function in the airspace above the territory of nation-states present
more complex questions of legality. Claims by participants to terri-
torial sovereignty, that is, to preeminence of a range of exclusive claims,
in the airspace above national territory are usually recognized only with-
in the substratosphere superjacent to the nation-states. However, authori-
tative international prescriptions do support a variety of exclusive in-
terests in the airspace beneath the stratosphere above a state's terri-
tory.43

the air space above the Demilitarized Zone and over
the area of Korea under the military control of the
opposing side, and over the waters contiguous to both.

ted Statements and Documents," U.S. Dept. of State Publication 5150 (Far

Aldrich states that, assuming the Pueblo was at the position claimed
by the North Koreans--7.6 miles off its coast--then "[i]n this latter
circumstance North Korea might . . . be able to claim a violation of the
1953 Armistice Agreement (Article II[15]) which requires naval vessels
to both sides to respect the waters contiguous to Korea, which were un-
derstood to extend twelve nautical miles to sea. However, such viola-
tion would not, by itself, give rise to any right to seize the ship."
Aldrich, supra note 32 at 1, 3, n.

43 Article I of the 1919 Paris Convention on Aerial Navigation pro-
vided for the "[c]omplete and exclusive sovereignty over the airspace
above [national] territory and the territorial waters adjacent thereto."
13, 1919, 11 L.H.T.S. 173; the 1944 Chicago Convention on International
Civil Aviation, which superseded the Paris Convention, provides in Arti-
cle I that "[t]he Contracting States recognize that every State has com-
plete and exclusive sovereignty over the airspace above its territory."
Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591 (effective April 4, 1947);
These prescriptions, however, do not give rise to an unlimited pre-dominance by a nation-state's exclusive interests in the airspace within the substratosphere above its territory. Aircraft in distress entering the airspace of another nation-state are, according to authoritative international agreement and customary international law, to be rendered assistance by the latter state.\(^4\) For aircraft not in distress which enter the airspace of another state, customary practice is to require that some kind of warning be given indicating to the intruding aircraft that it should leave the airspace of the state entered, follow a certain course, or land where directed, before hostile measures may be taken against it.\(^4\)

If the state entered perceives imminent danger to its security from the entering aircraft, more difficult considerations arise. A balance is required in each instance between, on the one hand, the safety of those aboard the aircraft and, on the other, the interest of the state entered in protecting itself.\(^4\) The determination of an appropriate response to such aerial intrusion requires analysis of a variety of factors.\(^4\)

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both quoted in "Legal Aspects of Reconnaissance in Airspace and Outer Space", 61 Colum. L. Rev. 1074, 1076-7 (1960).

\(^{44}\) Article 25 of the Chicago Convention, quoted in id. at 1078, n. 28.

\(^{45}\) Id. at 1078.

\(^{46}\) As Lissitzyn observes, "in cases where there is reason to believe that the intruder's intention may be hostile or illicit, a warning or order to land should normally be first given and the intruder may be attacked if it disobeys. Lissitzyn, supra note 30, at 587.

\(^{47}\) Lissitzyn notes the following:

Among the many relevant factors may be the character of the intruding aircraft and the probable motives for the intrusion, the proximity of the intrusion to important installations, or to areas in which armed hostilities (whether or not legally amounting to war) are being carried on, the frequency and regularity of intrusions by aircraft of a particular state, and the availability of means for controlling the intruder's movements.

\(^{47}\) Id. at 586-587. Beyond a consideration of these factors would be an assessment of possible responses in terms of whether they would give rise to reciprocity and, possibly, retaliation.
The stratosphere and space beyond are considered shared international resources, subject to a regime similar to that which governs the use of the high seas, the airspace above, and outer space. The reasons for making a distinction at this point are "[i]n part because of an inability to control surveillance aircraft above a certain level, in part because of a shared perception of common security needs. . . ." This distinction rests not on the simple application of traditional legal norms to a novel situation, but at least in part on a shared recognition by participants of common interests, both in terms of mutual security and the open and safe exploration of space.

5. Legality of the Security Intelligence Function Conducted In the Territory of Another Nation-State

Situations involving the performance of the security intelligence function by a participant in the territory of another state present a basic complementarity: all nation-states in the international arena engage in such intelligence gathering, yet all continue to apply their national statutes and policies against espionage.

At the outset, it is necessary to recognize the traditional distinction made between such intelligence gathering conducted in wartime on the one hand and in peacetime on the other. Insofar as the former is concerned, even the traditional perspective admits that intelligence gathering by a participant in the territory of a belligerent does not contravene authoritative international prescriptions.

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48 McDougal, Lasswell & Reisman, supra note 8, at 394.

49 Espionage, strictly speaking, refers to the activity, considered a criminal offense under the laws of most nation-states, involving the clandestine collection of security intelligence by the operatives of one nation-state in the territory of another.

50 The international legal regime applicable to "spies" in wartime was narrowly delineated both by the First Hague Convention in 1899 and the Hague Convention IV of 1907 as follows:

A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.
As such, while spying in wartime presents particular hazards to an individual who engages in it in terms of the severe punishment, usually

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: soldiers and civilians, carrying out their mission openly, intrusted with the delivery of dispatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory.


A spy taken in the act shall not be punished without previous trial.

Article XXX, id. at 179.

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

Article XXI, ibid. In observing that the employment of spies does not contravene the laws of war, the United States Army Field Manual (1956) elucidates the principle motive for nonetheless permitting the punishment of spies captured in wartime:

The foregoing Article 29 [of the Hague Regulations (Par. 75)] and Article 24 [of the Hague Regulations (Par. 48) (dealing with legitimate uses of war)], tacitly recognize the well-established right of belligerents to employ spies and other secret agents for obtaining information on the enemy. Resort to that practice involves no offense against international law. Spies are punished, not as violators of the laws of war, but to render that method of obtaining information as dangerous, diffi-
execution or lengthy imprisonment, which can be levied on him if he is captured before returning to his own forces, it does not qualify as a violation of the laws of war by the sending state. On the contrary, in the context of wartime, belligerents are entitled to obtain information on one another's capabilities and intentions by means of spies and other legitimate ruses of war.\footnote{52}

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U.S. Department of the Army, Field Manual (FM 27-10) on the Law of Land Warfare (1956), at 32-33, quoted in H. Whiteman, \textit{id.} at 179. As Wright observes:

\begin{quote}
The legitimacy of espionage in time of war arises from the absence of any general obligation of belligerents to respect the territory or government of the enemy state, and from the lack of any specific convention against it. The deception involved resembles that in stratagems or ruses de guerre and differs from violations of specific conventions like those of the flag of truce, Red Cross emblems, and armistices, all of which constitute 'perfidy' and are forbidden by the law of war.
\end{quote}


\footnote{51}{See \textit{Ex parte Quirin}, 317 U.S. 1 (1942), in which the U.S. Supreme Court upheld the authority of a military commission to try eight persons for espionage who were accused of being Nazi agents intending to commit sabotage against American industrial plants. The military commission sentenced six of the eight to death and the others to confinement at hard labor for extended periods.}

\footnote{52}{Article 24, Hague Regulations annexed to the Hague Convention No. IV of 1907, 36 Stat. 2277, Treaty Series No. 539; reprinted in 2 Am. J. Int'l L. Supp. 97 (1908). Some examples include the following: "Among legitimate ruses may be counted surprises, ambushes, feigning attacks, retreats, or flights, simulating quiet and inactivity, use of small forces to simulate large units, transmitting false or misleading radio or telephone messages, deception of the enemy by bogus orders purporting to have been issued by the enemy commander, making use of the enemy's
The inadequacy of the traditional perspective in differentiating between lawful and unlawful intelligence gathering is evident from this attempt to base such a distinction on the purported absence of obligations of belligerents to respect each other's territory or government. Nation-states do have certain obligations toward one another even when engaged in hostilities against each other, based on expectations of reciprocity and retaliation, if not also on considerations of human dignity. The use of certain types of weapons, such as chemical and biological agents, and the refusal to take and care for prisoners, are examples of a variety of policies which most participants refuse to adopt even when engaged in hostilities. The refusal to employ such measures reflects a realization at least of the possibility that an opponent might, if confronted with the use of such measures, utilize them himself.

Using a more comprehensive perspective than the notion of a lack of respect for a belligerent's territory or government or the absence of a specific international convention, the legality or illegality of wartime, as well as peacetime, intelligence gathering may be ascertained by analysis of the context in which it occurs and the manner in which it is undertaken, particularly in light of the goals and the expectations of the participants who engage in it. In a wartime context, a belligerent seeks to achieve its objectives, especially the defeat of its opponent's military forces, by a variety of strategies and tactics. The use of the military instrument is, of course, central to the accomplishment of these objectives. In order to provide for the effective utilization of this instrument, sound intelligence is required concerning an opponent's capabilities and intentions. Spying, as a means of obtaining such information, is therefore an important element of any belligerent's total effort.53

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53 As Falk indicates, "... belligerent espionage is just one of several constituent forms of belligerency. It expresses a logistic means-end relationship to characteristic belligerent objectives." Falk,
This is not to imply that all methods which serve a belligerent's objectives are therefore legitimate. The shooting or mistreatment of prisoners of war, the use of force significantly greater than necessary to achieve the objectives sought, the misuse of commonly accepted symbols of neutrals and non-belligerents—these and a variety of other measures, whether specifically prohibited by international convention or not—are generally regarded as unlawful, both as contrary to human dignity and as likely to result in reciprocal use and possible retaliation. Rather, it is to recognize the indispensable interest of belligerents in obtaining information on one another, an interest which, if satisfied may prevent senseless hostilities or, alternatively, hasten their termination.

The performance of the security intelligence function in a peacetime context presents more complex, although not entirely dissimilar, questions of legality. The term "peacetime", however, must be used in such manner to reflect the realities of the interactions of the participants to which it is applied. Thus, use of the term "peacetime" to describe the current world arena must be understood to refer to a destabilized context in which predominantly exclusive perspectives continue to characterize a variety of activities, including resort to violence. Nonetheless, there does exist a measure of stability, exemplified by the mutual, if wary, tolerance of the major participants for one another.

In view of the mutual interest of the major participants, their allies, and the world community as a whole in avoiding a nuclear holocaust, performance of the security intelligence function is an essential element in the maintenance by the major participants of an effective second-strike capability sufficient to deter a first strike with nuclear weapons by another.

"Peacetime" intelligence gathering by the operatives of a nation-state in the territory of another occupies a hybrid position in the traditional perspective on international law. Some commentators characterize such intelligence gathering as in itself a violation of international law, based on the notion that it constitutes intervention within the territory of another state contrary to the latter's domestic legislation.54


The predominant traditional perspective, however, regards it as an activity which does not constitute per se a violation of international law by the sending state. Instead, it is regarded as a practice which is engaged in by all nation-states and yet which gives rise to a right on the part of the state against whom it is directed to punish the spy for violating authoritative domestic prescriptions against espionage.

Governments whose spies are captured normally refuse to acknowledge any responsibility for sending them to avoid creating pressure on the state against whom the spy was directed to seek redress against the sending state. As all participants engage in intelligence gathering with respect to one another, attempts at redress usually serve only to exacerbate already existing tensions and further attenuate intelligence gathering opportunities. In the absence of an effective institutionalized system of sharing security intelligence among participants, "reciprocally..."


56 1 Oppenheim, supra note 55, at 862.

57 Stone observes in this regard:

The disowner of the spy is (as it were) a way of fore-stalling the discomfort of negotiations which could in any case only be fruitless; the practice of dis-owner, therefore, may have no particular significance in determining what the law is.
tolerated espionage" is essential if at least the major participants are to maintain retaliatory capabilities sufficient to deter the outbreak of nuclear or other major warfare.\textsuperscript{58}

A variant on the traditional perspective shifts the focus from the legality of the performance in "peacetime" of the security intelligence function in the territory of another state to the legality of any collateral activities which may accompany it.\textsuperscript{59} While this might be useful where performance of the security intelligence function is "increasingly part of the pattern of coercion roughly identified as 'indirect aggression,'"\textsuperscript{60} as exemplified by the Nazi use of fifth columns prior to and during World War II and the Soviet employment of subversive techniques in Czechoslovakia in 1948,\textsuperscript{61} it does not offer much assistance in the

Contrarily, ... if peacetime espionage as such really did involve state delinquency, it would be a most surprising thing that aggrieved states, when there was such a delinquency, should apparently have allowed the sending state to acquire immunity from its consequences merely by making a disowning.


\textsuperscript{58}As Stone notes, in the absence of an effective system of international inspection and the unlikelihood of developing such a system, "You may not be able to fulfill it [the need which such a system would serve] to the optimum extent by reciprocally tolerated espionage, but you may be able to reduce the dangers. It is not certain that you can, but the possibility surely is worth exploring." \textit{Id.} at 41.

\textsuperscript{59}"[The question] is whether, apart from collateral illegality—there being for example no territorial intrusion when you [are] in outer space—espionage is a delinquency of the state which engages in it. ... [A]s the law now stands, there is no sufficient warrant for saying that international law does not permit state-authorized espionage in peacetime." \textit{Id.} at 34.


\textsuperscript{61}Falk, "Foreword," in R. Stanger, \textit{supra} note 50, at vii. Such covert operations have not been limited to such nation-states as Nazi Germany and the Soviet Union. A number of participants in the world social
A more useful approach in determining the lawfulness of any particular instance involving the performance of the security intelligence function in the territory of another state is one which adopts a more comprehensive framework of analysis, balancing both inclusive and exclusive interests in minimum public order with optimum public order interests in individual dignity and privacy.

Past and current trends indicate the development of new international prescriptions governing the "peacetime" exercise of the security intelligence process have engaged in such activities, including the United States, as evidenced by the successful coup d'état staged by the Central Intelligence Agency in Guatemala in 1954 and by the unsuccessful refugee invasion of Cuba sponsored by the C.I.A. in 1961. D. Wise and T. Ross, The Invisible Government 136-146, 165-183 (1964); A. Tully, C.I.A.—The Inside Story 73-87, 243-256 (1962). Indonesia carried out covert operations, mainly involving sabotage, against Malaysian governmental and industrial facilities during their period of confrontation. Brown, "The Story of a Master Spy," The Canberra Times, July 3, 4, 1964; reprinted by the Federal Department of Information, Malaysia (1964).

The information-collection type of intelligence gathering rarely qualifies as "intervention," strictly defined, since "ground spies ordinarily have entered the victim state legally, and it is hard to construe their acts, however criminal, as violations of the sovereignty of the territorial integrity of states." Note, supra note 54, at 1101, n. 144. A broader conception of intervention, as suggested by Wright ("dictatorial interference"), would thus be required under a traditional perspective if it were to encompass this type of intelligence gathering. See Wright, "Espionage and the Doctrine of Non-Intervention in Internal Affairs," in R. Stanger, supra note 50, at 4.

As McDougal, Lasswell, & Reisman indicate:

... [T]he gathering of intelligence within the territorial confines of another state is not, in and of itself, contrary to international law unless it contravenes policies of the world constitutive process affording support to protected features of in-
gence function by a participant in the territory of another. Support for such a finding is demonstrated, first, by the very few formal protests by states over the performance of the security intelligence function in their territory by the operatives of other states, in contrast with the large number of such incidents which have become a matter of public record. Furthermore, states have become increasingly more candid in acknowledging their sponsorship of specific intelligence gathering activities undertaken by their operatives with respect to other participants in the international arena. These acknowledgements often include the sponsoring state recovering its intelligence agents captured by another participant which it holds. Such exchanges con-

ternal public order. Activities which seriously compromise the dignity of individual citizens, their privacy or personal security, or involve the destruction of property are, of course, unlawful no matter which decision function they attend.

McDougall, Lasswell & Reisman, "The Intelligence Function and World Public Order," supra note 8, at 395.


The most famous recent example was the exchange on February 10, 1962, of the Soviet agent Col. Rudolph Abel by the United States for the American U-2 pilot Francis Gary Powers, held by the Soviet Union. It also involved the release of Frederic Pryor, an American student held by the East Germans since August 25, 1961, for "economic espionage". Bernikow, supra note 64, at 283. Sanche de Gramont adds that one instrumental in bringing about this exchange was an American lawyer, James B. Donovan. S. de Gramont, The Secret War—The Story of International Espionage Since World War II 503-504 (1962). Donovan was also involved in another exchange: the release by the Cuban Government during December 1962, of captured members of the unsuccessful Cuban refugee invasion
stitute at least tacit admission by participants that they do in fact sponsor and engage in the performance of the security intelligence func-

force, Brigade 2056, in exchange for medicinal supplies and baby foods. In addition, as Wise and Ross observe:

[I]n March and April of 1963, Donovan won the release of more than thirty Americans held in Cuban jails, including three C.I.A. men. On July 3, when the last of the medical supplies reached Cuba, the American Red Cross announced that a total of 9,703 persons (including the Bay of Pigs prisoners and the Americans) had been brought out of Cuba under the agreements negotiated by Donovan. ... In all of these missions, Donovan had the assistance of, and worked hand in hand with the United States Government. But he was not formally a part of it. In each case [in the Cuban refugee case and the Abel-Powers exchange], as a private citizen, he was breaking new ground in a form of intelligence diplomacy that is a unique outgrowth of the Cold War.

Wise and Ross, supra note 61 at 288.

The Soviet Union and the United Kingdom have carried out several exchanges of their respective intelligence gathering operatives. Gordon Lonsdale, convicted by the British for espionage involving the Underwater Weapons Establishment, was exchanged for Grenville Wynne, an English businessman sentenced to eight years' imprisonment by the Soviet Union in 1963. The Soviet Union charged Wynne with acting as a courier for Col. Oleg Penkovskiy, who was himself convicted of espionage by the Soviet Union. R. West, The New Meaning of Treason 290 (1964). Another British-Russian exchange involved the Soviet agents Peter and Helen Kroger (alias Morris and Lona Cohen), convicted of espionage by the United Kingdom, for the British citizen Gerald Brooke, held by the Soviet Union. A. Terry, "Spy Refuses to go Home", Wash Post, Nov. 10, 1969, at A-25:1.

Another recent exchange involved two accused Soviet agents, Ivan D. Egorov, a personnel officer at the United Nations, and Aleksandra, his wife, for Marvin Makinen, accused by the Soviet Union of taking photographs of military installations in Kiev and who the Russians alleged confessed to engaging in espionage, and Rev. Walter Ciszek, a Jesuit priest confined for twenty-three years by the Soviet Union. Wise and Ross, supra note 6 at 241n.
tion in the territory of other states, and perhaps evidence a greater
tolerance on their part for such activities.66

There is also growing recognition67 and tolerance for the perfor-
mance of the security intelligence function by diplomatic representatives
stationed in foreign states. While such tolerance is not uniform among
all participants in the international arena,68 and remains low, if at
all in situations of intense crisis, it is nonetheless perceptible.69

The Soviet Union also attempted, unsuccessfully, to exchange a group
of West Germans accused of espionage and held in Moscow, for Heinz Suet-
terlin, arrested on similar charges by the West Germans. Terry reports
that the Russians sent Wolfgang Vogel, an East German private lawyer, to
Bonn to negotiate the exchange. Vogel also was instrumental in negotia-
ting the exchange of the Krogers, convicted by the British of espionage,
for the British lecturer, Brooke. Terry, supra at A-25:1.

66As de Gramont observes with respect to the Abels-Powers exchange,
"the principle implicitly recognized by Premier Krushchev and Presidents
Eisenhower and Kennedy was that espionage is an organic branch of foreign
relations and foreign policy, similar to diplomatic exchanges and summit
conferences". De Gramont, supra note 65 at 504.

67"The theory that service attaches or other members of embassies,
legations, or trade commissions do not spy, a theory strengthened by
actual practice at certain periods, for example immediately before 1914,
was one of those polite fictions by which diplomacy had been carried on
in the past. It was finally torn to shreds by the spy trials which vari-
ous Soviet satellite governments instituted, and which were in most cases
intended to compromise foreign service attaches." A. Vagts, The Military
Attache 236-237 (1967).

68Even among traditionally tolerant participants, such as the Uni-
ted Kingdom, it is not unlimited. On September 24, 1971, the British
government expelled ninety persons attached to various Soviet diplomatic
and trade missions in England and denied re-entry to fifteen more absent
from Britain at the time. The British note to the Soviet government on
this subject stated that "the scale of intelligence-gathering activities
by Soviet officials in this country" has amount to be "a direct threat
to the security of this country. . . ." in"Texts of British Note to So-
viet on Spying and of Home Letters", N. Y. Times, Sept. 25, 1971, at 2:
304.

69For illustrative cases, see Vagts, supra note 67, at 238-239,
quoting N.Y. Times, Dec. 12, 1955, on the presence of Soviet and other
attaches at U.S. Army maneuvers in Louisiana.
Further evidence of this trend in changing international perspectives is presented by President Eisenhower's proposal, made at the 1955 Geneva summit conference, for an "open skies" policy. This proposal provided for an exchange of military blueprints between the United States and the Soviet Union and for the establishment of reciprocal facilities and opportunities for aerial reconnaissance by each within the territory and airspace of the other.\textsuperscript{70} While the Soviet Union did not accept the proposal as presented, wanting it combined with measures directed at general disarmament and made applicable to allies of each of the two nations as well,\textsuperscript{71} "the 'open skies' policy appears to be an unequivocal international prescription."\textsuperscript{72}

Another indication of the development of new international perspectives on the gathering of security intelligence by participants in the territory of other states is presented by the practice of certain participants in not imposing the most severe penalties allowed by their statutes on captured intelligence agents of other participants.\textsuperscript{73} This


\textsuperscript{72} McDougal, Lasswell & Reisman, "The World Constitutive Process of Authoritative Decision," 19 J. Legal Ed. 253, 419 (1967); but see Wright, supra note 62, at 3.

\textsuperscript{73} The West Germans imposed only a three-year term of imprisonment on a colleague of Heinz Suetterlin, the accused Soviet agent who refused to be part of an exchange of intelligence gathering operatives. Terry, supra note 65, at A-25:1. Powers received less than the maximum sentence ("ten years deprivation of freedom, of which the first three years were to be in prison," and the remainder "served in a corrective labor camp" or paroled after serving one-half the sentence of commuted on a showing of good behavior), in part because of his "sincere confession of his guilt and his sincere repentence". The Trial of the U-2, The Court Proceedings of the Case of Francis Gary Powers, heard before the Military Division of the Supreme Court of the U.S.S.R., August 17-19, 1960 (U. Berman, Intro.) XXVI, 158 (1960).
may reflect, at least to a certain extent, a recognition by states of the importance of the performance of the security intelligence function to all participants, especially the major ones, in the international arena.74

However, this practice does not yet appear to extend in all instances to captured intelligence agents of other participants who also qualify as "traitors". McDougal, Lasswell & Reisman, supra note 72, at 419. On treason and espionage, see West, supra note 65, at 362. Vagts observes, in regard to the case involving the Swedish Air Force officer, Col. Sig Wennerstrom, an agent for the Soviet Union while serving, at among other posts, as senior service attache in Washington from 1952 to 1957, that Swedish officials "prosecuted him for 'gross espionage', for having sold the secrets of Sweden and of friendly powers to Russia for some fifteen years--and 'for financial gains', as the prosecutor stressed, much as if ideological motivation would have been less despicable." Vagts, supra note 67 at 240-241.

74"[G]eneral community perspectives toward the gathering of intelligence have undergone far-reaching changes. Contemporary elite decision-makers have evidently decided that maximum knowledge of activities is fundamental to common security." McDougal, Lasswell & Reisman, supra note 72, at 419.

As Lasswell observes elsewhere:

"Even after allowance has been made for the double-dealing so common among intelligence agents, it must be conceded that competent espionage is a tranquilizing factor in the prevailing state of global anarchy. We [the United States] are too strong to be immediately endangered by anything short of an unforeseen technical advance which is put into effective application before we have had time to evolve countermeasures. Espionage can provide a substratum of realistic knowledge about the power position and the power potentials of the nations of the world."

The continued application by nation-states of their statutes and policies against the performance of the security intelligence function in their territory by the operatives of other states should not be permitted to conceal this fundamental shift in perspective. The elites of nation-states employ such statutes, which are usually phrased in terms of prescribing unauthorized disclosure of information relating to military capabilities and intentions, to protect their bases of effective power. While these statutes continue to be applied and often make excessive demands on a citizen’s loyalty, national elites have mitigated their impact in a number of cases involving captured intelligence agents of other participants, either by engaging in exchanges with such participants for their own operatives, or in simply imposing sentences less than the maximal provided under their statutes.

The all-encompassing nature of gathering and sharing intelligence for security purposes, which often include such seemingly innocuous activities as attendance at the meetings of international associations and observations made and reported while travelling abroad as a tourist, suggests that national statutes directed against the performance of the security intelligence function be narrowly construed, to cover only those activities clearly hostile to the maintenance by a national elite of its position of effective power. Such statutes should not encompass all the varied activities which qualify as performance of the security intelligence function, as this would constrict the liberties of those affected while in most instances providing only a small additional increment of protection for an elite’s effective power position. If

75 See, e.g., 18 U.S.C. Sec. 794(a), "Gathering or Delivering Defense Information to Aid Foreign Government" (1954).

76 A permissible scope for such statutes has been suggested by the following:

Experience appears to support the conclusion that the security of a nation depends to a very small degree upon police measures designed to keep knowledge away from the enemy. Modern business has learned to depend less on the protection of patent and copyright privileges than upon keeping a few jumps ahead of competition by excelling on the laboratory front.

In general, it is agreed that proper censorship and police measures are needed to protect the following:
applied indiscriminately, they could serve to convert sizable areas of
both public and private life into patterns characteristic of a "garrison
state."\textsuperscript{77}

III. Conclusion

The security intelligence function is characterized by a policy of
open access when performed on the high seas and in the airspace above
and outer space, and an increasingly open environment when performed
in the territorial sea and the contiguous zone. Although nation-states
have not repealed their statutes or otherwise abandoned their policies
against the performance of the security intelligence function within
their national territory by operatives of another state, there is evi-
dence of increasing recognition on their part of the significance to
their collective security of greater sharing of security intelligence
and of opportunities to gather such information. Support for such a
trend is found in the practice of nations exchanging their intelligence
gathering operatives held by one another, levying less than maximal sen-
tences on captured operatives of another, and acknowledging their spon-
sorship of intelligence gathering activities within the territory of
other states.

Insofar, then, as states apply their policies directed at maintain-
ing their position of effective power and supporting preferred public
order goals such as individual privacy, such policies need not conflict
unduly with policies favoring the gathering and sharing of security in-
telligence. What is required in each instance is a thorough assessment
of the elements involved and the context in which they arise in order
to achieve a balance which accommodates both sets of interests.

\textsuperscript{7} Lasswell, National Security and Individual Freedom, supra note 74 at 88-
89 (footnote omitted).

\textsuperscript{77} Lasswell & Kaplan, supra note 1 at 213.