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The Legitimacy of Spying Among Nations

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ARTICLE

**THE LEGITIMACY OF SPYING AMONG
NATIONS**

RAPHAEL BITTON*

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I. INTRODUCTION

Espionage among nations is an exceptionally old and extensive human endeavor. In times of war and peace, a generous slice of states' resources are allocated to intelligence organizations.¹ Foreign espionage also involves considerable moral harm.² One would then expect to find that espionage is anchored in solid moral and legal underpinnings. Surprisingly, this costly and harmful activity lacks a clear justification. Legal and philosophical scholarship seeks to understand the legitimacy of war among nations, and the proper legal framework for regulating war.³ Scholars also rigorously debate the legitimacy of the domestic use of governmental force.⁴ Yet when it comes to espionage, moral theorists are as soundless as spies. If espionage is discussed, it is generally perceived as an extra-moral

1. See STEPHEN DAGGETT, CONG. RESEARCH SERV., RS21945, THE U.S. INTELLIGENCE BUDGET: A BASIC OVERVIEW 2-3 (2004) (finding that the United States Central Intelligence Agency's budget had increased over \$13 billion from 1996 to 2004); Ken Dilanian, *Overall U.S. Intelligence Budget Tops \$80 Billion*, L.A. TIMES, Oct. 28, 2010, <http://articles.latimes.com/2010/oct/28/nation/la-na-intel-budget-20101029> (stating that the United States' annual intelligence budget increased threefold over twelve years to \$80.1 billion in 2010); Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, Jul. 19, 2010, <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/1/> (reporting on unprecedented resources which the United States allocated to espionage practices in the War On Terror).

2. See John P. Langan, *Moral Damages and the Justification of Intelligence Collection from Human Sources*, in ETHICS OF SPYING: A READER FOR THE INTELLIGENCE PROFESSIONAL 104-05 (Jan Goldman ed., 2006) (exploring the effect or "moral damage" that the actions of agents to collection intelligence have on the agents themselves); Ross Bellaby, *What's the Harm? The Ethics of Intelligence Collection*, 27 INTELLIGENCE & NAT'L SEC. 93, 93 (2012) (referencing Guantanamo Bay, Abu Ghraib, extraordinary renditions programs, and the surveillance state as examples of the moral harm of intelligence).

3. For two prominent, pivotal sources out of an extensive literature on the justifiability of war and killing in war, see generally JEFF MCMAHAN, *KILLING IN WAR* vii (2009) (challenging the concept of just war); MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* xi-xvii, 325-27 (1997) (concluding that war may be justified even in a moral world).

4. See generally Russell Hardin, *Rationally Justifying Political Coercion*, 15 J. PHIL. RES. 79, 87-89 (1989).

activity, one that goes beyond the boundaries of ethics.⁵ Espionage is frequently associated with a murky sphere in which the gravitational pull of states' supreme interests bends the standard contours of moral space. This article aims to answer one primary question: what is the appropriate ethical justification for espionage? This justification should underpin the body of law that regulates espionage.

The article's account of international espionage begins from the observation that states restrict access to various spaces that serve as points of access to information and that espionage seeks to penetrate such spaces to collect information. Espionage between states is therefore an undercover state-sponsored intrusion into the restricted space of another state or organization for the sake of collecting information.⁶ Access to a given space can be restricted in many ways, including—but not limited to—physically, visually,

5. See Angela Gendron, *Just War, Just Intelligence: An Ethical Framework for Foreign Espionage*, 18 INT'L J. INTELLIGENCE & COUNTER INTELLIGENCE 398, 402 (2005) [hereinafter Gendron, *Just War*] (offering a just war based framework for inter-state espionage).

6. On various approaches to defining espionage, see generally SHERMAN KENT, STRATEGIC INTELLIGENCE FOR AMERICAN WORLD POLICY, at vii (1953) [hereinafter KENT, STRATEGIC INTELLIGENCE] (describing vital intelligence as "vital for national survival"); MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY 1–2 (2009); Martin T. Bimfort, *A Definition of Intelligence*, 2 STUD. INTELLIGENCE 75 (1958) (compiling definitions of strategic intelligence from varied sources and explaining intelligence as the state-gathering of information from foreign nations for the sake of foreign policy and national security); Thomas J. Troy, *The "Correct" Definition of Intelligence*, 5 INT'L J. INTELLIGENCE & COUNTER INTELLIGENCE 433, 433 (1991) (defining intelligence as "knowledge of the enemy"). *But see* VERNON A. WALTERS, SILENT MISSIONS 621 (1978) (describing intelligence as information on the "strength, resources, capabilities, and intentions of a foreign country"); Sherman Kent, *Prospects for the National Intelligence as a Science*, 36 YALE REV. 116, 117-118 (1946) [hereinafter Kent, *Prospects for the National Intelligence*] (defining intelligence as both a process of surveillance and an end-product of knowledge); Michael Warner, *Wanted: A Definition of "Intelligence"*, 46 STUD. INTELLIGENCE 15, 15 (2002), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol46no3/article02.html> (commenting that there is not yet a concrete definition for strategic intelligence gathering but that creating a standard definition may aid policy decisions and transparency). Consider, too, Shulsky's reference to Random, who identifies secrecy as a common feature of intelligence. ABRAM N. SHULSKY, SILENT WARFARE: UNDERSTANDING THE WORLD OF INTELLIGENCE 171-76 (2002); R.A. Random, *Intelligence as a Science*, 2 STUD. INTELLIGENCE 76 (1958).

acoustically, digitally, and legally.⁷ An intrusion into a restricted space can be achieved through any known method of espionage, whether human or technological.⁸

7. On the definition of spying in international law, see the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 46, June 8, 1977, 1125 U.N.T.S. 3 (defining a spy as “[a] member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces”); Hague Convention Respecting the Laws and Customs of War on Land, Annex, art. 29, Oct. 18, 1907, 36 Stat. 2277 (defining spies as “acting clandestinely or on false pretences, 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”). On the domestic legal perception of spying, see Uniform Code of Military Justice, 10 U.S.C. § 906 (2006) (defining criminal espionage as providing information to a foreign entity with intent or reason to believe that it will injure the United States or advantage a foreign nation); Espionage Act of 1917, 18 U.S.C. §§ 792-99 (2006) (expanding the definition of espionage beyond international standards); Penal Law, 5737-1977, §§ 111-16, LSI (Special Vol.) 49 (1978) (Isr.) (creating degrees of criminality for espionage based on the intent with which the individual acted and the potential harmfulness of the action); Regulation of Investigatory Powers Act, 2000, c. 23, §§ 26-30 (U.K.) (providing state agencies the ability to conduct surveillance with limits to homes and vehicles). It would seem, however, that the legal definition of spying is constantly expanding when domestic criminal courts review it. The *Quirin* case, for instance, focuses on clandestine activity regardless of whether information is collected. See *Ex parte Quirin*, 317 U.S. 1, 45-47 (1942). The Israeli *Vaanunu* and *Gil* cases reflect an accelerated expansion of the criminal legal definition of spying. *Vaanunu* was prosecuted for spying even though an enemy never recruited or handled him and his actions were not clandestine. CrimA 172/88 *Vaanunu v. State of Israel* 44(3) PD 265 [1990] (Isr.). *Gil*'s case is a particularly extreme example. He was convicted of spying and sentenced to five years in prison because, as a handler, he communicated false information to his superiors that he did not actually receive from his agent. CrimA 3166/99 *Gil v. State of Israel* 54(4) PD 193 [2000] (Isr.). In contrast to the intuitive and commonplace definition of espionage, *Gil* was prosecuted for bringing information *into* the state, rather than for communicating it *out*. *Id.*

8. For an account of the various methods available for the gathering and the use of intelligence, see generally MICHAEL HERMAN, INTELLIGENCE POWER IN PEACE AND WAR 2 (1996) [hereinafter HERMAN, INTELLIGENCE POWER] (discussing the impact of intelligence on the development of technology); REGINALD VICTOR JONES, MOST SECRET WAR: BRITISH SCIENTIFIC INTELLIGENCE 1939-1945 45 (1979); WALTER LAQUEUR, A WORLD OF SECRETS: THE USES AND LIMITS OF INTELLIGENCE 3-12, 311-17 (1985) (discussing the role of intelligence in shaping policy and what the future of intelligence); RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 1-

Throughout the argument, the article distinguishes between espionage during states of emergency, such as war or conflict, and espionage during peacetime or ordinary circumstances. An “emergency” refers a time that calls for remedial action to address a clear, imminent, and serious threat posed by one state against a basic interest of another.⁹ War is a classic state of emergency.¹⁰ An explicit threat of war creates an emergency as well. Another more indirect example of an emergency is where State *A* learns from open sources that its neighbor, State *B*, plans to attack it. By definition, in “peacetime,” State *A* has no indication that State *B* is planning any harmful action against it.¹¹ Espionage that is undertaken in response to emergencies can be sufficiently justified by reference to Just War Theory (“JWT”) and the rules of necessity and self-defense. Peacetime espionage poses the real justificatory challenge.

This article offers a new theoretical justification for peacetime espionage among nations. It consists of three parts. Part II analyzes

15 (2005) [hereinafter POSNER, PREVENTING SURPRISE ATTACKS] (discussing reform of U.S. intelligence mechanisms after review by the 9/11 Commission); JEFFREY T. RICHELSON, A CENTURY OF SPIES: INTELLIGENCE IN THE TWENTIETH CENTURY (1995) [hereinafter RICHELSON, A CENTURY OF SPIES]; JEFFREY T. RICHELSON, THE U.S. INTELLIGENCE COMMUNITY 2-3 (1999) [hereinafter RICHELSON, INTELLIGENCE COMMUNITY] (discussing intelligence, counterintelligence, and covert action); ROBERT A. SAYRE, JR., SOME PRINCIPLES OF HUMAN INTELLIGENCE AND THEIR APPLICATION 2-3 (2004) (discussing human intelligence); Matthew M. Aid & Cees Wiebes, *Introduction to the Importance of Signals Intelligence in the Cold War*, 16 INTELLIGENCE & NAT’L SECURITY 1 (2001) (discussing the role and importance of Signals Intelligence by the United States during World War II and the Cold War); Christopher Andrew, *Codebreaking and Signals Intelligence*, 1 INTELLIGENCE & NAT’L SEC. 1, 1-2 (1986) (discussing the role of Signal Intelligence throughout the Cold War); Michael Herman, *Assessment Machinery: British and American Models*, 10 INTELLIGENCE & NAT’L SEC. 13 (1995) [hereinafter Herman, *Assessment Machinery*] (discussing the intelligence estimate systems); Daniel B. Silver, *Intelligence and Counterintelligence*, in NATIONAL SECURITY LAW 935, 965 (John Norton Moore & Robert F. Turner eds., 2d ed. 2005) (discussing covert and overt methods of intelligence gathering); SHULSKY, *supra* note 6, at 171-77 (outlining espionage as knowledge, activity, and organization).

9. Cf. WALZER, *supra* note 3, at 51-62 (outlining the theory of aggression, which provides that a nation may only use force against another nation under imminent threat or actual harm).

10. See *id.* at 51 (equating war with aggression as it disrupts peace).

11. See SHULSKY, *supra* note 6, at 172 (asserting that definitions of intelligence could differ depending on wartime and peacetime).

current justifications for espionage, including the realist argument and an application of JWT, and finds them inadequate. In Parts III and IV, this article offers a new approach to justifying espionage. First, it argues that states should be subject to a duty of basic transparency in their relations with other states. Second, espionage serves as a transparency-enforcing device, one that resolves an otherwise irresolvable political conflict between liberal and non-liberal nations. In light of espionage's sophisticated and essential role in international relations, this article argues that a rule that permits espionage as an instrument for enforcing a duty of basic transparency among nations would be endorsed by all impartial, rational, and reasonable nations.

II. THE INADEQUACY OF AVAILABLE ARGUMENTS

A. THE REALIST ARGUMENT

This section reviews the position of international relations realism on espionage.¹² Broadly speaking, realists tend to prioritize national interests over moral duties.¹³ This view rests on the notion that human beings are egotistical and states operate in an anarchical international sphere.¹⁴ In this sense, realists do not argue that

12. Before presenting the realist argument, an academic caveat is in order. It is probably something of an over-generalization to treat realists as members of a well-defined discipline. In fact, it is doubtful whether realism can be seen as a discipline at all, let alone one with precise boundaries. This issue of over-generalization notwithstanding, realists do seem to share certain common denominators. Realism reflects a theoretical approach to international relations that grants some degree of priority to national interests over morality. Scholarly literature tends to split realism into "classical realism" and "modern realism" or "neorealism," and this article follows this conventional classification in my discussion.

13. See, e.g., Jack Donnelly, *Twentieth-Century Realism*, in TRADITIONS OF INTERNATIONAL ETHICS 85 (Terry Nardin & David Mapel eds., 1992) [hereinafter Donnelly, *Twentieth-Century*] (discussing the realist rejection of the application of morals to state action); Steven Forde, *Classical Realism*, in TRADITIONS OF INTERNATIONAL ETHICS 62 (Terry Nardin & David R. Mapel eds., 1992) (explaining international realism's belief in "primacy of self-interest over moral principle").

14. See EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* 10 (1946)

espionage is morally justified but rather that states do not need to morally justify it in the first place.¹⁵ To realists, adhering to moral duties at the expense of national interests (represented, in this case, by the need to spy) would not make sense. A state that eschews espionage to comply with a moral duty puts its interests at risk, and this, given the nature of the international sphere, could be fatal. Moreover, one state's compliance will have a marginal moral effect, if any, because other actors on the international stage cannot be expected to comply with the same moral duty and no central enforcement authority exists in the international arena.

In the intelligence context, the realist argument seems exceptionally powerful. Suppose that the international community adopts a ban on espionage. From each state's point of view, giving up intelligence-gathering means practically accepting a kind of national blindness. In fact, this blindness would extend to information about other states' non-compliance with the rule against espionage because other states would presumably conduct their espionage clandestinely. This is a crucial point because the stability of any international norm hinges on each nation's expectation that the other nations will observe it.¹⁶ A powerful example of the realist

(describing realism as focus on causes, consequences, and the strength of existing forces and character); HANS J. MORGENTHAU, *SCIENTIFIC MAN VS. POWER POLITICS* (1946) [hereinafter MORGENTHAU, *SCIENTIFIC MAN*] (characterizing politics as a struggle for power); REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* xi–xiii (2001) (finding collective egoism based on moral agreement solidifies national cohesion and sets policy within states); MICHAEL JOSEPH SMITH, *REALIST THOUGHT FROM WEBER TO KISSINGER* 2-3 (1986) (allowing that states under the realist perspective are more concerned with self-interest than absolute moral truths). *See generally* HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (2d ed. 1954) [hereinafter MORGENTHAU, *POLITICS AMONG NATIONS*]; Hans J. Morgenthau, *Human Rights & Foreign Policy*, CARNEGIE COUNCIL ON RELIGION & INT'L AFF. https://www.carnegiecouncil.org/publications/archive/1979_lecture_by_morgenthau/index.html/_res/id=sa_File1/HumanRights_ForeignPolicy_Morgenthau.pdf (last visited July 15, 2014) [hereinafter Morgenthau, *Human Rights & Foreign Policy*] (defending the realist perspective against human rights critics).

15. *See* Forde, *supra* note 13, at 62 (describing the essence of realism as primacy of self-interest over moral principle).

16. *Cf.* JANNA THOMPSON, *JUSTICE AND WORLD ORDER: A PHILOSOPHICAL INQUIRY* 31 (1992) (explaining Hobbes' Laws of Nature theory, which describes societal understanding that peaceful actions result in peaceful neighborhood);

position on espionage is the United States' self-imposed decision to terminate its collection of Signal Intelligence ("SIGINT") in 1929 because of a perceived moral duty not to intrude upon other peoples' communications.¹⁷ This decision significantly harmed the United States during World War II and the world has not improved because of it in any way.¹⁸ No other state followed in the footsteps of the United States.¹⁹ However, as powerful as the realist argument may seem with respect to espionage, this article maintains that it is fundamentally wrong.

The realist approach as a whole has been roundly criticized. Both its empirical assumptions and its normative conclusions have elicited convincing counter-arguments.²⁰ This article does not take on the realist argument in general. However, one general observation about realism's normative attitude that may have intelligence-related implications is that difficult dilemmas of security and justice do not justify a suspension of ethics. To the contrary, ethics is all about these dilemmas: ethics is a normative instrument for guiding

Forde, *supra* note 13, at 77 (allowing Spinoza's societal compacts to explain peace through treaties under realists theory in the international context).

17. As Secretary of State, Henry Stimson closed the Department of State's code-breaking office, known as the "Black Chamber," as described on the NSA's official website: "In his history of the Cipher Bureau, Yardley charged that Stimson had axed the organization strictly for moralistic reasons. In his own autobiography, Stimson did not deny this: he noted that although he became a heavy consumer of decrypt intelligence in wartime, certain practices that might be necessary during war were unacceptable during peace." *Pearl Harbor Review - The Black Chamber*, NAT'L SECURITY AGENCY, http://www.nsa.gov/about/cryptologic_heritage/center_crypt_history/pearl_harbor_review/black_chamber.shtml (last visited May 25, 2014). *See also* HENRY L. STIMSON & MCGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR 188 (1947) (stating that the U.S. State Department policy in 1931 was to give trust to gain trust); Louis Kruh, *Stimson, the Black Chamber, and the "Gentlemen's Mail" Quote*, 12 CRYPTOLOGIA 65, 69 (1988) (detailing the belief of U.S. diplomats that there would be lasting peace and thus trust should be extended to other nations).

18. *Cf.* Herman, *Assessment Machinery*, *supra* note 8, at 25 (describing the intelligence gap in 1939 as the United States attempted to understand the actions of Adolf Hitler).

19. *See* Kruh, *supra* note 17, at 83 (finding that other nations almost certainly did not follow the United States' lead in abandoning cryptography).

20. *See, e.g.*, WALZER, *supra* note 3, at 7-20 (arguing that realism does not account for the role morality plays in war and politics, even during national security crises).

decision-making in the face of difficult choices. The application of ethical principles does not necessarily require rejecting national interests because ethics weighs such interests and incorporates them into how it treats moral dilemmas.²¹ This is why certain ethical approaches permit violence and war in self-defense.²² Dilemmas posed by espionage can similarly be governed by ethics.

B. THE ARGUMENT OF ‘JUST INTELLIGENCE’

The prominent justification for espionage is the “Just Intelligence” argument, which rests on the state’s right of self-defense and on JWT. The argument has two distinct forms. In its first form, it asserts that intelligence is analogous to the use of force and is therefore justified under the same conditions.²³ The other form casts intelligence as an inherent element of the use of force, as its natural extension.²⁴ Whether directly or by analogy, the Just Intelligence approach argues that JWT should regulate espionage and serve as its source of legitimacy: JWT should determine when an act of espionage is justified, just as it determines when an act of war is justified (“*jus ad bellum*”).²⁵ Similarly, just as it assesses the legality

21. See Gendron, *Just War*, *supra* note 5, at 400 (providing that even in moments of great adversity, democratic nations tend to maintain democratic values, human rights, and civil liberties, even if flexibly).

22. See, e.g., Yitzhak Benbaji, *A Defense of the Traditional War Convention*, 118 ETHICS 464, 466–67 (2008) (outlining the self-defense argument for use of force as a balancing of duties between attacker and victim).

23. See Gendron, *Just War*, *supra* note 5, at 402–03 (offering that the ethical guide to regulating intelligence could be the same as the Just War moral criteria used to regulate force); see also Michael Quinlan, *Just Intelligence: Prolegomena to an Ethical Theory*, 22 INTELLIGENCE & NAT’L SEC. 1, 3–4 (2007) (drawing an analogy of flexibility with intelligence gathering and use of force in extreme circumstances, such as nuclear threat).

24. See John B. Chomeau & Anne C. Rudolph, *Intelligence Collection and Analysis: Dilemmas and Decisions*, in ETHICS OF SPYING: A READER FOR THE INTELLIGENCE PROFESSIONAL 115 (Jan Goldman ed., 2006) (arguing that the purpose and special expertise of intelligence officers is similar to that of military officers); Arthur S. Hulnick & Daniel W. Mattausch, *Ethics and Morality in United States Secret Intelligence*, 12 HARV. J.L. & PUB. POL’Y 509, 515 (1989) (equating intelligence gathering to a national security issue in which states are obligated to protect citizens).

25. Cf. Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 35 (2005) (providing conditions to allow for *jus ad bellum* as a justified response to aggression, harboring individuals that have attacked the state,

of military acts (“*jus in bello*”), JWT should decide which means are legitimate for intelligence-gathering and which are not. This seemingly attractive and powerful argument is fallacious. At best, it justifies the collection of intelligence during wartime or other emergencies; but peacetime espionage and wartime espionage are fundamentally different. Wartime espionage is the easy case: when a state faces a clear threat, a resort to espionage seems justified on its face. In this situation, a simple, necessity-based justification seems satisfactory. In contrast, spying in peacetime—namely, when State *A* has no knowledge of a concrete and imminent threat against it by State *B*—is an entirely different case. Accordingly, the following paragraphs argue that the theoretical foundations of JWT are inadequate for regulating peacetime espionage.

Generally speaking, JWT seeks to govern incidents in which an emergency results from a state’s use of force. It aims first to prevent such incidents. If they do occur, it attempts to minimize their duration and resultant damage.²⁶ A justification for peacetime intelligence would contradict the basic rationale of this theory. As peacetime espionage is a continuous activity, the Just Intelligence argument is analogous to attempting to use JWT to justify an indefinite use of force. Furthermore, JWT offers a clear method for achieving its dual-phase goal. According to JWT, aggressors must be deterred and even may be punished.²⁷ However, a particular aggressor can only be deterred and punished if the aggressor can be identified. JWT facilitates identifying the aggressor by imposing a baseline norm of non-violence.²⁸ Against a backdrop of routine peace and quiet, an illegitimate attack can be identified immediately, like the first drop of ink falling on a sheet of white paper. Unlike violence, peacetime intelligence is an ongoing operation. Identifying the “aggressor” in everyday espionage would be like reading white

and perhaps humanitarian causes).

26. On the purposes of JWT, see Benbaji, *supra* note 22, at 494–95 (providing universal ethical framework of soldiers within battlefields as legitimate targets in war to prevent unnecessary destruction).

27. According to JWT, on the idea that the aggressor must be identified and punished by way of disarmament, incapacitation, and deterrence, see Hurka, *supra* note 25, at 41.

28. *See id.* at 38 (explaining that war should be resorted to only when the harm it causes is outweighed by a positive outcome).

letters on that same sheet of white paper. The “aggression” espionage respond to is unobservable.²⁹ As opposed to threats of physical aggression, the threat during peacetime cannot be objectively ascertained.³⁰ If objective evidence of a tangible threat were available, it would amount to a state of emergency or conflict by definition. Furthermore, the “war” which espionage during peacetime targets is a *never-ending* war, contrary to the notion under JWT that every war or hostility must come to an end.³¹

The Just Intelligence argument is flawed because it demands the use of espionage only in response to a “true threat”—a requirement that parallels JWT’s “just cause” requirement.³² This demand exposes the circularity of the Just Intelligence argument. Just Intelligence justifies espionage only in response to existing threats; however, detecting such threats often requires prior intelligence.³³ Arguably, states do not need intelligence to know where to direct their collection efforts.³⁴ The fact that one state poses a threat to

29. Cf. Gendron, *Just War*, *supra* note 5, at 398 (stating that most intelligence comes from open sources, but “actionable intelligence” is obtained by covert means through intelligence collections).

30. Cf. *id.* at 416.

31. See WALZER, *supra* note 3, at 110 (asserting that once the aims of a Just War are met, the war must end).

32. Cf. Gendron, *Just War*, *supra* note 5, at 415 (describing the “just cause” requirement, which includes tests of “last resort, right intention, proportional means, probability of success, regard for human consequences, and discrimination”).

33. For instance, the question of why Israel should spy on Syria is easier than the question of why Italy should spy on Libya. Indeed, the discovery of the Libyan nuclear compound, a few years ago, was quite unexpected: the Libyan nuclear threat came out of nowhere. According to the Just Intelligence argument, Italy could not legitimately have collected intelligence against Libya unless it was responding to a clear threat. Yet, without espionage, the Western intelligence community would have remained entirely unaware of the Libyan threat. See, e.g., *Bush Official: Libya’s Nuclear Program a Surprise*, CNN (Dec. 19, 2003), <http://www.cnn.com/2003/WORLD/africa/12/19/libya.nuclear/index.html> [hereinafter *Libya’s Nuclear Program*] (reporting that Libya’s nuclear program was more advanced than expected).

34. Israel, for example, does not need intelligence to know that Syria represents a potential threat. Similarly, the U.S. recognizes that it must gather intelligence about the Islamic Republic of Iran. Neither Israel nor the U.S. needs to use its intelligence agency to identify these threats. Once a threat is recognized, however, its particulars—such as when, how, and where it might materialize—do call for intelligence-gathering. If this proposition is true, the circularity argument

another is a fact that lies naturally within the latter state's pool of knowledge; recognizing a threat exists, as opposed to knowing the details and nature of the threat, requires no prior intelligence. Indeed, some states do not need to collect intelligence to know that certain adversaries represent threats to them. For instance, this would be the case for a state whose neighbor declares its harmful intentions publicly. However, these are unrepresentative, easy cases. By definition, one state declaring its hostile intentions throws the nations involved into a state of emergency or conflict. This type of situation is therefore best governed by the rules of necessity. True peacetime espionage, on the other hand, is not based on any previously articulated threat. To the contrary, it is driven by the fear that a seemingly unthreatening neighbor is a proverbial wolf in sheep's clothing.³⁵ Espionage that does not rest on any concrete knowledge of a threat posed by an adversary is therefore justified by referencing some general understanding of the adversary's nature. This point highlights another fundamental instance in which JWT is unsuitable for justifying peacetime espionage. JWT is blind to *general* information about states, information that does not amount to identifying a concrete threat. JWT therefore cannot serve to justify decisions to undertake espionage against particular states because of the nature of those states.³⁶

JWT grants an equal right of self-defense to all states. Intuitively, however, the right to spy on other states during peacetime should be predicated on some discriminating principle. The alternative would be to allow peacetime espionage by all states against all states. Considering the magnitude of the moral harm, this approach seems unreasonable. Clearly, when it comes to certain target states, peacetime espionage appears unnecessary.³⁷ But how are we to

loses much of its weight. However, as argued later, Just War Theory cannot offer such distinction, which is necessary for dealing with the circularity problem.

35. See, e.g., *Libya's Nuclear Program*, *supra* note 33 (reporting that Libya's nuclear ambitions were greater than the United States or British intelligence sources had estimated).

36. A state's "nature" means something like what Rawls defines as a state's comprehensive political or religious doctrine. See John Rawls, *The Law of Peoples*, CRITICAL INQUIRY 36, 37 (1993) [hereinafter Rawls, *Peoples*].

37. See, e.g., Katrin Bennhold, *2 U.S. Allies Diverge on Spy Program*, N.Y. TIMES, Nov. 12, 2013, <http://www.nytimes.com/2013/11/13/world/europe/2-us->

distinguish between states? If the right to spy against a given state depends on preliminary intelligence, the justification for espionage is circular: preliminary intelligence is the product of espionage and cannot play a part in justifying it. On the other hand, if identifying just targets for espionage relies on each state's general nature which is common knowledge and does not require prior intelligence, then the justification for this enterprise cannot be JWT because JWT is blind to states' political and religious doctrines. From this, three basic conclusions about peacetime espionage may be drawn: (1) a persuasive justification for peacetime espionage will need to identify some kind of link between the right to spy and the nature of a given state; (2) the Just Intelligence argument cannot identify any such link because it is morally blind to the nature of any particular state; (3) if the Just Intelligence argument were to offer this kind of link, it would ipso facto abandon its JWT underpinnings.

Though related, war and espionage are very different phenomena. As far as *peacetime* espionage is concerned, the moral framework that governs war seems quite inapposite.

III. THE IDEAL DUTY OF TRANSPARENCY

This section argues for a duty of basic transparency in international relations. As would be the case for any moral argument that concerns the international sphere, the starting point is a schematic depiction of the international community. The label "international community" communicates the key theme that characterizes relations between states: states are clustered in a communal structure. Community requires a modicum of cooperation, which relies partly on trust.³⁸ Community also refers to proximity.³⁹ "Proximity" is defined as follows: State *A* and State *B* are proximate if the offensive military technology of one would be effective against

allies-diverge-on-spy-program.html?_r=0 (giving an account of the possible political fallout from U.S. spying on German and British citizens).

38. See generally ANDREW H. KYDD, TRUST AND MISTRUST IN INTERNATIONAL RELATIONS 21 (2005) (stating that trust is a natural outcome between democratic nations because they both seek security).

39. See generally ALAA A. H. ABD ALAZIZ, BALANCE OF THREAT PERCEPTION AND THE PROSPECTS OF NATO MEDITERRANEAN DIALOGUE 17 (2003) (defining attributes of threat from one nation to another, including geographic proximity and capability).

the other.⁴⁰ By definition, the proximity of *X* to *Y* therefore means that *X* possesses the capacity to harm *Y*. Considering the communal structure of the international community, a given state's concern that a proximate state harbors harmful intentions seems inherently non-trivial. History reveals that proximate states are not only well-situated to harm one another—in many cases, they also intend to do so.⁴¹ Given that (1) most states possess some effective offensive military capability; (2) some states are inclined to be aggressive; and (3) the interests that are threatened by aggression are no less vital—it follows that states are rationally and inherently risk-averse with respect to aggression.⁴²

The most dangerous type of aggression is the kind that erupts by strategic surprise. History offers many examples of such surprise attacks, including Nazi Germany's Operation Barbarossa against Russia,⁴³ Japan's bombing of Pearl Harbor,⁴⁴ the coordinated attack

40. The definition of proximity is therefore a product of the specific circumstances, including State *A* and State *B*'s geographical, military, economic, and logistical attributes. See *infra* Part IV.H.

41. See, e.g., ABD ALAZIZ, *supra* note 39, at 34 (describing the aggression between Israel and its Arab neighbors).

42. The international community has accordingly adopted norms that recognize aggression as a crime. See U.N. Charter art. 2(4) (prohibiting the threat or the use of force in international relations); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 152–62 (2008) (describing the development of crime of aggression in international law starting with the London Agreement of 1945); YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 106–114 (2001) (outlining the history of criminalizing aggressive wars as crimes against peace). International law further recognizes rules that control self-defense in response to aggression and attempt to minimize the resultant damage. Additionally, since the international community has no effective central government, each state must act independently when immediate defensive measures are necessary. On the theoretical meaning of the crime of aggression, see WALZER, *supra* note 3, at 51–62.

43. See BARTON WHALEY, CODEWORD BARBAROSSA 2–5 (1973) (presenting the surprising nature of Hitler's attack at Barbarossa as the source of Soviet defeat); Hayden B. Peake, *A Review of "David E. Murphy: What Stalin Knew: The Enigma of Barbarossa"*, 19 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 376, 377 (2006) (stating that the Soviet army had lost nearly several million men from the fallout of the Barbarossa defeat); Amnon Sella, *'Barbarossa': Surprise Attack and Communication*, 13 J. CONTEMP. HIST.

555, 574–79 (1978) (detailing the attack as absolutely devastating for Soviet ground and air forces).

44. See HERBERT FEIS, THE ROAD TO PEARL HARBOR: THE COMING OF THE WAR BETWEEN THE UNITED STATES AND JAPAN 333–41 (1950) (analyzing the lack

by Egypt and Syria against Israel in 1973,⁴⁵ and the 9/11 attacks on America.⁴⁶ What kind of advance information could foil the surprise element that such strikes rely on?⁴⁷ Any sudden attack is the product of two key conditions: capabilities and intentions.⁴⁸ Capabilities encompass the military, economic, logistical, and political abilities to launch an attack. History suggests that modern warfare requires the complete devotion of all the national resources of a belligerent state.⁴⁹ Assessing the offensive capabilities of a proximate state must therefore draw on a broad body of data about its situation across a host of parameters.⁵⁰ The second prerequisite for a sudden attack—and the more important condition from the neighboring state’s point

of warning the United States had before the Japanese attack on Pearl Harbor).

45. See Avi Shlaim, *Failures in National Intelligence Estimates: The Case of the Yom Kippur War*, 28 *WORLD POL.* 348, 348 (1976) (stating that the Israeli government believed its border was secure enough to preclude any attack). *But see*, EPHRAIM KAM, *SURPRISE ATTACK: THE VICTIM’S PERSPECTIVE* 14–15 (1988) (describing Israeli estimates in 1973 that neighboring Arab states would have long range bomber capability by 1975 or 1976 and thus the capability to attack).

46. See DAVID RAY GRIFFIN, *THE NEW PEARL HARBOR: DISTURBING QUESTIONS ABOUT THE BUSH ADMINISTRATION AND 9/11* xi (2004) (relating the attacks on September 11, 2001 to the surprising nature of the Pearl Harbor attacks of 1941). *But see* POSNER, *PREVENTING SURPRISE ATTACKS*, *supra* note 8, at 7–8 (reporting on the 9/11 Commission’s finding that both the Clinton and George W. Bush administrations had some fault in not preventing the attack).

47. Since terrorist organizations, like regular states, are capable of international aggression (i.e., threats against a nation’s political sovereignty or territorial integrity), there is hardly any difference between the enterprises of justifying espionage against these two types of targets. Since terrorist organizations usually lack the governmental and communications infrastructures enjoyed by states, the necessity of classic espionage—collecting intelligence from human sources—is more acute where they are concerned. As a result, although this article focuses on states, it considers terrorist organizations to be legitimate targets of collection. However, while the article deals primarily with peacetime espionage, counter-terrorism espionage is by nature a wartime activity. Broadly speaking, it can be governed by the rules of necessity rather than by the rules of peacetime-transparency enforcement.

48. See KAM, *supra* note 45, at 22 (explaining the necessity of advance strategic warning on enemy capabilities and intentions).

49. See *generally* Sella, *supra* note 43, 573 (providing detail on the level of state coordination required to mount successful attacks).

50. Cf. HERMAN, *INTELLIGENCE POWER*, *supra* note 8, at 25–26 (“The First World War had indeed shown that total war needed total intelligence; foreign military power had come to depend on factors of industrial capacity, demography and morale which fell outside the analysis of normal military and naval intelligence.”).

of view—is intentions, i.e., the will to take action to promote state interests through the offensive use of force.⁵¹ Aggressive intentions and military capabilities are thus essential elements of surprise attacks. The victim's surprise is primarily a matter of the following features of the aggressor's plans:

51. See KAM, *supra* note 45, at 22–23 (describing state intentions as one of the more difficult aspects of intelligence analysts' job).

(1) whether the attack will actually happen, (2) its timing, (3) its location, and (4) the way in which it will be carried out. If an attack is to take its victim by surprise, it must find him wrong about at least one of these four questions, and usually more. The basic question, of course, is whether an attack is expected at all.⁵²

The core element of strategic surprise is then whether the victim expects an attack, rather than how it will unfold. The specifics of an anticipated attack are secondary to the preliminary decision to launch it. Applying the rules of necessity implies that once the victim is aware that an aggressor intends to attack it, it has the right to spy on the aggressor. The victim can then gather intelligence about the tactical aspects of the attack, such as *when*, *where*, and *how* the attack will materialize. Such efforts are permissible forms of espionage and thus reflect only a marginal element of the effort to justify espionage.⁵³ Justifying peacetime espionage therefore remains a challenge.

In an ideal world, no state would be aggressive. In a less ideal world, in which aggression cannot be eliminated, the mistrust that naturally results from each state's awareness of history and understanding of the nature of its neighboring states could easily be resolved if all states' strategic intentions could be determined in advance. If states could verify that their neighbors' intentions were peaceful, they could avoid the unsustainable demands of continuous vigilance and preparedness. Knowing its neighbors' true intentions, each state could maintain a moderate level of alertness and shift to a higher level of alertness only when the state could no longer verify a neighbor's peaceful intentions. This state of higher alertness would be limited in scope and time and would cease either when the resulting conflict was over or when the peaceful intentions of the neighbor were reconfirmed:

52. *Id.* at 12-13.

53. In some cases, the line between information about whether an attack will occur and information about its timing and location may be blurred. This was true of the 1973 attack on Israel. Israel understood that at some point in the future, Egypt might use force to try to regain the Sinai desert. But this was a vague, general expectation, which could have persisted for years. In this sense, the surprise about the intention to attack merged with surprise about the attack's exact timing.

Advanced warning is the vital link connecting intelligence assessment with countermeasures designed to enhance readiness. Without adequate advance warning military preparedness can never be sufficient to face the threat. In this sense surprise can be regarded as the failure to issue an advance warning to decision makers and troops that would enable them to take appropriate precautions.⁵⁴

The inability to confirm a neighbor's peaceful intentions is unsustainable. Unawareness of a neighbor's intentions necessitates continuous, paralyzing defensive readiness at the border and the use of all available defense systems. Budget priorities must be reevaluated. A larger share of the state's total resources must be allocated to military preparedness. Military reserves must be called into service and wrenched from their vital role in the economy. Huge amounts of oil, food, and other commodities must be stockpiled as emergency reserves. The government and the public focus their attention on the defensive effort and neglect other crucial needs. In severe cases, a state's rational risk aversion might lead it to engage in a preventive, anticipatory attack. In some cases, states with limited territorial depth might be unable to afford to rely on retaliatory strikes. In other cases, a preventive strike might be the only way out of the unsustainable state of blind preparedness. As this kind of condition cannot last indefinitely, a rational state might elect to assume the cost of a short war rather than suffer the consequences of protracted vigilance.

Unless states are transparent about their strategic intentions to some degree, fundamental international cooperation is impossible. Neither security nor economic prosperity can be achieved in the face of the continuous prospect of attack. Since World War I, military technology has made armies faster, larger, more easily maneuverable, and far more destructive. Missile warfare further amplifies the effect of growing speed and destruction. A failure to anticipate or cope with an oncoming attack could prove fatal.⁵⁵ A state that is taken by surprise and attacked by a large, quick army might awaken too late, only to find that its enemy has already gained

54. KAM, *supra* note 45, at 22.

55. *Cf.* POSNER, PREVENTING SURPRISE ATTACKS, *supra* note 8, at 77-78 (explaining the consequences of the U.S.'s failure to anticipate a surprise Japanese attack on Pearl Harbor).

a substantial military advantage. In some cases, the enemy might conquer large portions of its territory. In more extreme cases, a surprise attack might quickly threaten a state's political sovereignty and existence as an independent nation.⁵⁶ As a result, states cannot assume that they will not be attacked, but must make sure of it. The international community cannot afford the paralyzing costs of continuous preparedness on its members' behalf. The solution to this problem lies in information: states must be able to obtain enough information about their proximate neighbors to free them from the unsustainable demands of unceasing preparedness. To this end, states must know their proximate neighbors' strategic intentions.

A. ON CAPABILITIES AND INTENTIONS

To avoid the unstable state of perpetual preparedness, this section argues that states' need for information would be met if the strategic intentions of their proximate neighbors were transparent. As already mentioned, aggression requires both military offensive capabilities and simultaneous aggressive intentions.⁵⁷ Intentions are the most important element of a surprise attack, as most states possess attack capabilities at any given time. A concrete risk of attack only materializes when a state's aggressive intentions combine with their capabilities. Therefore, information about strategic intentions could potentially free nations from the unsustainable condition of blind alert.⁵⁸

56. Three modern examples illustrate this risk: Kuwait in 1990, France in WWII, and some of the Golan Heights in 1973. All three areas were conquered very quickly and in a manner that has only become possible in modern warfare.

57. In theory, a state could reduce the risk of surprise aggression by obtaining advance information about either the neighbor's intentions or its capabilities, or both. These varieties of information are typically categorized as "intelligence on intentions" and "intelligence on capabilities." David Kahn, *An Historical Theory of Intelligence*, 16 INTELLIGENCE & NAT'L SEC. 79, 81–82 (2001). See also KAM, *supra* note 45, at 22–23 (discussing the importance and difficulty of gathering intelligence on enemy intentions).

58. Naturally, capabilities do not create the risk of aggression unless a state also intends to aggressively use these capabilities. It is true, though, that information about capabilities can sometimes shed light on intentions. For instance, suppose that information gathered by State A suggests that its neighbor, State B, has procured new strategic weapon systems and has conducted intensive training in an apparently offensive pattern. This information alone may not conclusively show that State B has adopted offensive intentions, but it can support

It is important to distinguish between information about *strategic intentions* and information about *tactical intentions*. The former addresses the kind of question that goes to the heart of a state's level of alert, i.e., whether the proximate neighbor is planning an act of aggression. In contrast, the latter addresses how the proximate neighbor will specifically execute their strategic intention, such as *when, where, and how* the state might carry out an attack.⁵⁹ These are secondary questions. They may affect how a state implements a state of alert and preparedness but do not shape the answer to the state's primary strategic question—whether it should be on high alert in the first place. Information about the proximate neighbor's *strategic intentions* answers this question.

Information about strategic intentions is far more valuable than information about capabilities because the military capabilities of states are not very well-kept secrets in practice. Squadrons, battleships, and armored divisions cannot be easily concealed. Private intelligence agencies offer extremely accurate and detailed information about the military capabilities of every country on the planet.⁶⁰ The uncertainty about a given state's military capabilities is relatively marginal. By contrast, the non-transparency of intentions throws neighboring states into unsustainable alertness and preventive use of force. Additionally, information about the military capabilities of a neighboring state generally cannot allay security concerns.⁶¹ Most military systems, like combat airplanes and warships, serve both defensive and offensive purposes.⁶² Their existence does not necessarily point to offensive intentions. Knowing about military capabilities may be of tactical importance if an armed conflict erupts, but it contributes little, if anything, to the more dramatic question of whether sudden aggression is on the horizon.⁶³ Only answering this

such a hypothesis.

59. HERMAN, INTELLIGENCE POWER, *supra* note 8, at 123.

60. See, e.g., *Jane's Security Intelligence Solutions*, IHS, <http://www.ihs.com/products/janes/security/index.aspx> (last visited June 1, 2014) (providing an example of offerings of private intelligence agency).

61. Cf. HERMAN, INTELLIGENCE POWER, *supra* note 8, at 25 (explaining that pre-World War II, Britain's information about German military capabilities and military build-up did not allay security concerns).

62. *Id.* at 176.

63. The example of Israel's attempt to assess Egyptian intentions in 1973 also

question can allow states to have reasonable readiness costs and allow for basic international security and cooperation.⁶⁴

In summary, no state can tolerate being blind to the strategic intentions of its proximate neighbors for a prolonged period of time. A state of high alert driven by rational risk aversion can likely disturb states' basic security and stand in the way of international economic cooperation. The availability of information can easily resolve this unsustainable situation. If states know the strategic intentions of their neighbors in advance, they can avoid the devastating costs of vigilance and the international community can

demonstrates the hazards of linking information about capabilities to information about intentions. Israel's effort to deduce Egypt's intentions from its military capabilities proved completely misguided. Israeli intelligence erroneously posited that Egypt's possession of advanced anti-aircraft systems would indicate an intention to launch an attack on Israel. Eventually, Egypt decided to attack despite lacking these systems. Information about strategic intentions is therefore superior, as far as preparedness for surprise attacks, to information about military capabilities. In many cases, information about military capabilities cannot and should not serve as a sufficient indication of strategic intentions. *See generally* URI BAR-JOSEPH, *THE WATCHMEN FELL ASLEEP: THE SURPRISE OF YOM KIPPUR AND ITS SOURCES* (2005) [hereinafter BAR-JOSEPH, *THE WATCHMEN*]; Uri Bar-Joseph, *Israel's 1973 Intelligence Failure*, 6 *ISR. AFF.* 11 (1999) [hereinafter Bar-Joseph, *Israel's 1973 Intelligence*] (describing the failure of Israeli intelligence to warn about the threat of an Egyptian attack).

64. The case of nuclear weapons shows that even a state that knows that its neighbor possesses the ultimate weapon does not, in itself, mean that it can automatically anticipate an upcoming war. However, when nuclear capabilities combine with a regime's lack of transparency, its neighbors tend to react far more seriously. The ICJ's Advisory Opinion on this matter implies that the possession of nuclear weapons per se should not be interpreted as an intention to use them. At least nine states are presumed to possess some level of nuclear military capabilities. Yet, this information has not led neighboring states to conclude that attack is imminent. *See* *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8). *See generally* Louise Doswald-Beck, *International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, *INT'L REV. RED CROSS*, Feb. 28, 1997, at 35 (analyzing the contribution of the ICJ's Advisory Opinion to the interpretation of international humanitarian law); Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 333 (1997) (considering the effect of international law on the behavior of democratic nations); Dale Stephens, *Human Rights and Armed Conflict: The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 *YALE HUM. RTS. & DEV. L.J.* 1 (2001) (discussing the ICJ's analysis of the interrelation of the law of armed conflict and international human rights law).

maintain a measure of security and trust. Therefore, a duty of basic transparency about strategic intentions should be recognized in relations between proximate states. A “transparent state” would make its strategic decisions, such as the decision to go to war, reasonably identifiable to its proximate neighbors. In other words, a state is transparent if it adopts strategic intentions in a way that cannot surprise its neighbors.

At first glance, a duty of transparency likely seems troubling. The duty of transparency seems to require states to disclose their strategic intentions. It also seems irrational to expect a state to disclose its delinquent intentions, such as a plan to go to war, just like it would be irrational to demand a criminal to be transparent about his or her intentions to commit a crime. Similarly, it seems equally irrational to require states to disclose peaceful intentions. This information would seem unnecessary. More importantly, it makes very little sense to rely on disclosed information of a state’s peaceful intentions because states cannot verify the reliability of this information. As a result, this kind of information cannot really contribute to alleviating the unsustainable state of preparedness that results from non-transparency. Therefore, a requirement of transparency seems irrational with regards to both harmful and peaceful intentions. Has the quest to untangle the insufferable situation of non-transparency reached a dead end? I believe not. The requirement of basic transparency is not a matter of *disclosing certain information* and does not require disclosing peaceful or harmful strategic intentions. Instead, it demands that states *maintain a transparent structure*. What must be transparent is not what a state intends to do but rather the process through which it adopts these intentions. Instead of demanding that state leaders come out of the deliberation room and disclose the results of their deliberations, the requirement of transparency asks that the deliberation room be made of glass.

The next section explains why the transparency requirement is a structural requirement. A properly transparent structure calls for institutions that are typical of liberal democracies, such as free elections, parliamentary oversight, and a free press. This point illuminates what a transparent neighbor entails: a state with a transparent neighbor knows at least as much about the strategic intentions of its neighbor as a citizen in a typical liberal democracy

knows about the intentions of his or her own country.⁶⁵ The structural nature of transparency suggests that the duty of basic transparency is rational after all. However, the fact that transparency is structurally characteristic of liberal states leads into another problem: the problem of liberal political imperialism.

B. TRANSPARENCY AND LIBERAL POLITICAL IMPERIALISM

As an example, let us posit that State *A* has no intention of attacking its neighbor, State *B*. State *A* is aware of the potential consequences of its own non-transparency. It may suffer economically without a basic relationship of trust with State *B*. It may be mistakenly attacked by State *B* because State *B* misinterpreted its intentions under conditions of uncertainty and risk aversion.⁶⁶ Under these circumstances, it seems trivial for State *A* to communicate its true intentions to State *B*. It must send a clear message to State *B*: “We are not going to attack you.” Unfortunately, this sort of message would not suffice to alleviate the tension between the states. In this context, transparency hinges on the *specific structure* of a state and is not the result of a *specific message*. State *B* cannot simply rely on State *A*’s message because State *A* could theoretically declare Φ and, in practice, do $\bar{\Phi}$ (the opposite of Φ). In fact, this is exactly what State *B* might expect State *A* to do as part of a strategic deception plan. State *B* will only be able to trust State *A*’s intentions if State *A* adopts these intentions in a *process* that is transparent to State *B*. If such a process were in place, there would be no sense in saying Φ and meaning $\bar{\Phi}$. Since the structure of State *A*’s deliberation process would be transparent, the intention $\bar{\Phi}$ would come through notwithstanding any declarations to the contrary. This kind of continuous transparency requires a particular type of political structure—the type of structure that surrounds the state’s deliberative process with glass walls.

65 See BRUCE M. RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD 38-39 (1995) (stating that democracies do not fear surprise attacks from other democracies).

66. On wars resulting from the misinterpretation of the adversary’s intentions, see generally BRUCE BUENO DE MESQUITA & DAVID LALMAN, WAR AND REASON: DOMESTIC AND INTERNATIONAL IMPERATIVES 39-40 (1992); BRUCE M. RUSSETT, *supra* note 65, at 39-40; David A. Lake, *Powerful Pacifists: Democratic States and War*, 86 AM. POL. SCI. REV. 24 (1992).

If a state's basic transparency is a product of a specific kind of structure, then it is important to distinguish between typical liberal democracies and non-liberal regimes. One of the most salient indicators of a democratic regime is its deliberation process.⁶⁷ Free elections, parliamentary oversight, basic human rights, and a free press all contribute to the transparency of the deliberative process. The people elect the leaders of both the executive and legislative branches only after a protracted and typically tedious campaign in which the public learns about the candidates.⁶⁸ In liberal democracies, electoral campaigns illuminate the candidates' opinions, expose their personal lives, reveal their characters, and identify their circles of influence. Even after the elections, the pursuit of transparency continues. Leaders know that the public must favor their decisions or they will be punished in the next elections.⁶⁹ Governments are subject to parliamentary oversight and must openly discuss the policies by which they will be judged. In many cases, leaders cannot adopt weighty strategic objectives, such as going to war, without parliamentary support in the form of approving the use of armed forces and providing for special budgetary appropriations.⁷⁰

67. See Erik O. Eriksen and John Erik Fossum, *Europe in Transformation: How to Reconstitute Democracy?* 6-7 (May 17-19, 2007) (unpublished European Union Studies Association conference paper), available at <http://aei.pitt.edu/7876/1/fossum%2Dj%2D10d.pdf> (underlining the importance of public justification in a legitimate democracy).

68. Cf. AREND LIJPHART, *PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES* 128 (1999) (commenting on the strength democratically elected presidents draw from popular election).

69. On the influence of the accountability of democratic leaders on the international conduct of democratic states, see JOHN M. OWEN IV, *LIBERAL PEACE, LIBERAL WAR: AMERICAN POLITICS AND INTERNATIONAL SECURITY* (2000) (commenting that democratic leaders are unlikely to pursue "unpopular war[s]" due to the risk of losing future elections"); Bruce Bueno de Mesquita et al., *An Institutional Explanation of the Democratic Peace*, 93 AM. POL. SCI. REV. 791 (1999) (explaining that democratic leaders are unlikely to wage war because waging war requires broad support); Lake, *supra* note 66, at 24 (asserting that democracies wage war less often and more successfully because they do so only with majority support); RUSSETT, *supra* note 65, at 39-40 (arguing that leaders of democracies are generally reluctant to go to war with other democracies because of institutional constraints and will likely settle the conflict short of war).

70. See, e.g., J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991) (explaining that Congress is more likely to support *going* to war but not *declaring* war); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*,

The media also serves as an important arena of policy deliberations and scrutiny. In a democratic state, the press enjoys freedom of speech and liberty of movement, which plays an important role in monitoring the reliability of the state's assertions.⁷¹ In a free market, the press has a powerful incentive to uncover contradictions between the government's professed intentions and its actual plans.⁷²

In light of the inherent nature of transparent deliberation, many would consider typical democratic regimes to be transparent about their strategic intentions. The transparent structure that characterizes democratic nations makes it nearly impossible for them to launch a surprise attack.⁷³ A surprise attack would require the democratic government to secretly adopt an offensive plan, to refrain from priming public opinion on the matter, to circumvent parliamentary authorization and budgetary oversight, and to conduct massive military preparations in secret under the free press's nose.⁷⁴ Regardless of the fact that rational leaders of democratic states are unlikely to seek this path, they would be unable to do so in practice.⁷⁵

82 CORNELL L. REV. 695 (1997) (suggesting that the Founding Fathers intended Congress alone to have the power to declare war); William W. Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972) (discussing the constitutional limits on the President's ability to declare war without Congress's approval).

71. Cf. Eriksen, *supra* 67, at 6 (describing the necessity of accountability through communication with the public to successful democracies).

72. Cf. Kurt Taylor Gaubatz, *Democratic States and Commitment in International Relations*, 50 INT'L ORG. 109, 121–22 (1996) (discussing different perspectives on the relationship between the domestic institutions of liberal democracies, the effect of these institutions on international transparency, and states' international conduct). On the structural transparency of liberal states, see James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577 (1994) (arguing that democracies are more able to clearly signal their intentions because of their strong domestic audiences); Kenneth A. Schultz, *Domestic Opposition and Signaling in International Crises*, 92 AM. POL. SCI. REV. 829 (1998) (explaining that multi-party democracies have a more open political system).

73. See Eriksen, *supra* note 67, at 6. (asserting the importance of accountability in a democracy whereby decision-makers are responsible to and controlled by citizens).

74. See RUSSETT, *supra* note 65, at 38–39 (noting that democracies are not capable of surprise attacks, while nondemocratic states are).

75. See, e.g., Gaubatz, *supra* note 72, at 113 (noting that democratic societies are less likely to make calculated decisions on those based on emotion or public opinion). Cf. RUSSETT, *supra* note 65, at 38 (commenting that democratic leaders

By definition, domestic transparency implies transparency in international relations.⁷⁶ The liberal democracy's governing institutions have no way of communicating a selective message that would reach only the country's citizens but keep foreign listeners in the dark.⁷⁷ Therefore, domestic structural transparency incidentally and substantially contributes to maintaining stable relations with neighboring states.⁷⁸

Liberal democracies are, however, transparent only about their *strategic intentions*, not necessarily about any other type of information, such as *tactical intentions*. For example, the U.S. military might have managed tactically to surprise Saddam Hussein as far as the manner in which it began its war against his regime, including the exact times and places of its strikes. However, in both recent Gulf Wars, the U.S. did not even attempt to strategically surprise Saddam with respect to its intention to use force.⁷⁹ Thus far, the analysis suggests that not all circumstances of peacetime espionage are justifiable. Espionage against prototypical liberal democracies that purports to uncover their strategic intentions seems both unnecessary and unjustifiable because these intentions are public and do not call for clandestine intelligence-gathering.

This article does not intend to equate the liberal political structure with transparency. Indeed, it does not attempt to define the liberal political structure. However, it posits that a typical liberal structure is strongly correlated with transparency. In other words, liberal democracies are not *by definition* sufficiently transparent, but they are *typically* and *habitually* transparent. It allows delegates to

are even less likely to attack other democracies because they recognize their inability to carry out a surprise attack due to societal constraints).

76. See RUSSETT, *supra* note 65, at 40 (noting that leaders of democracies expect time for international conflict prevention mechanisms to take place and thus do not fear surprise attacks by other democracies).

77. See Gaubatz, *supra* note 72, at 122–23 (explaining that democratic assertions of international intentions have more credibility when there is a domestic effect as well).

78. See *id.* at 122 (discussing the interrelation between democratic domestic and international commitments).

79. The U.S. obviously knew in advance that a strategic surprise against Iraq was not a prerequisite to achieving victory. This article argues, however, that America could not have surprised Iraq strategically even had its leaders preferred to do so.

reasonably assume that a liberal nation is most likely a structurally transparent nation.

I should also distinguish between democratic transparency and the well-known idea of “democratic peace.” The “democratic peace” thesis stems from the empirical proposition that democracies do not tend to wage wars against each other.⁸⁰ This thesis deduces that democracies are less aggressive toward one another and thus *less likely to attack*.⁸¹ The democratic peace thesis is not without controversy.⁸² Regardless of its controversial nature, this article’s argument is entirely independent.⁸³ This article argues that democratic states are less likely to wage *surprise attacks* against their adversaries.⁸⁴ The reasoning is simple: the typical democratic structure forces states to transparently adopt strategic intentions.

80. Paul R. Hensel et al., *The Democratic Peace and Rivalries*, 62 J. POL. 1173 (2000).

81. See, e.g., *id.*; Dean V. Babst, *Elective Governments—A Force For Peace*, 3 WISC. SOCIOLOGIST 9 (1964); Nils Petter Gleditsch, *Democracy and Peace*, 29 J. PEACE RES. 369 (1992); CARR, *supra* note 14; MORGENTHAU, *SCIENTIFIC MAN*, *supra* note 14, at 188.

82. Following others, this article supports the idea of democratic peace and does not share Rawls’s assumption that the idea of democratic peace is uncontroversial. JOHN RAWLS, *THE LAW OF PEOPLES: WITH “THE IDEA OF PUBLIC REASON REVISITED”* 44–53 (2001) [hereinafter RAWLS, *LAW OF PEOPLES*]. On the controversy over democratic peace, see generally Melvin Small & J. David Singer, *The War-Proneness of Democratic Regimes, 1816-1965*, 1 JERUSALEM J. INT’L REL. 50 (1976).

83. This article’s argument and the notion of Democratic Peace may be indirectly related. A state’s democratic character seems linked to a weaker inclination toward aggression. This weaker inclination, however, is not required for the article’s argument to be valid.

84. On the idea that the structural transparency of democratic states prevents them from being able to attack their adversaries by surprise, see RUSSETT, *supra* note 65, at 38–40. This idea has been challenged by Sebastian Rosato. See Sebastian Rosato, *The Flawed Logic of Democratic Peace Theory*, 97 AM. POL. SCI. REV. 585, 597–98 (2003) (asserting that democracies are equally capable of carrying out surprise attacks, since the success of the attack does not depend on the type of regime). However, this article strongly disagrees with Rosato’s approach. Of ten notable surprise attacks that have occurred in the post-World War Two era, Rosato zeroes in on only two. He concludes that the apparent surprise attacks by Israel against Egypt in both 1956 (in a joint operation with Britain and France) and 1967 clearly contradict the proposition that democracies cannot launch surprise attacks. Rosato appears to err on the historical facts, and he may also conflate *strategic surprise* and *tactical surprise*.

Therefore, a typical democracy can surprise neither its citizens nor its adversaries as far as decisions like going to war.⁸⁵ Yet, the account of the liberal process of transparent deliberation draws more attention to the conduct of *non-transparent* states and their potential to surprise their adversaries and hide their true intentions, including potential belligerence.

In contrast, non-democratic regimes are not subject to a transparent process of deliberation. Such regimes typically deliberate about strategic matters, such as instigating war, in very restricted forums. This was the case for Iraq under Saddam Hussein and for North Korea under Kim Jong-Il, each of which featured no deliberative process other than the one inside its leader's head.⁸⁶ Opposition in non-democratic regimes is practically nonexistent, and the media is typically an instrument of propaganda rather than a reflection of genuine public debate.⁸⁷ The forgoing portrait describes extreme examples of non-democratic polities. Most non-democratic nations fall somewhere on the spectrum between this extreme and a more transparency-oriented political structure. All, however, fall well short of the kind of transparency characteristic of the liberal democracy as it is commonly conceived. Even though a given state's transparency is a matter of degree, its neighbors will eventually tend to reach a dichotomic conclusion: either that the state's strategic intentions are transparent or that they are not.⁸⁸ This tendency to

85. This does not mean, however, that democratic states cannot surprise their adversaries on the *tactical* level by, for example, attacking at a tactically surprising instant or employing a surprising method of attack. Ruses of war are both permissible and practically available to democratic states. However, the very resort to military force by a democratic regime is likely to surprise neither its citizens nor its adversaries. In other words, democracies are unlikely to initiate *strategic* surprise attacks.

86. See generally JASPER BECKER, ROGUE REGIME: KIM JONG IL AND THE LOOMING THREAT OF NORTH KOREA 148-52 (2005); EFRAIM KARSH & INARI RAUTSI, SADDAM HUSSEIN: A POLITICAL BIOGRAPHY 220-21 (1991).

87. Cf. Gaubatz, *supra* note 72, at 122 (describing the difficulty of knowing the domestic or international intentions of closed societies controlled by a small leadership).

88. This article does not attempt to contribute to the ongoing legal and political scientific debates about the precise definition of democracy. For all practical purposes, democracy—its precise definition notwithstanding—typically implies a basic transparency of strategic intentions. This thesis does not rule out the theoretical (and remote) possibility that a state that is widely recognized as a

classify states depending on whether they meet (or fail to meet) a certain transparency threshold underpins the fundamentally dichotomic approach that this article takes toward transparency even though, strictly speaking, transparency is a gradable characteristic. Since transparency calls for a specific political-institutional structure, the question of whether or not a certain state is sufficiently transparent can be reduced to the question of whether or not a state has a transparent political structure. Because a transparent political structure typically consists of free elections, government accountability, freedom of speech, and freedom of the press, the question of whether a state is transparent overlaps to a great extent with (but not entirely) with the question of whether it is a typical liberal democracy.⁸⁹ Again, this article does not argue that democracy and transparency correspond completely, but that there is strong correlation between the two.

So far, this article asserts that the international communal structure entails proximity and necessitates a basic degree of cooperation between states. This structure calls for a duty of basic transparency of strategic intentions. Transparency is a structural quality that is characteristic of liberal states. These propositions point to an irresolvable political conflict that impairs international cooperation. On the one hand, liberal nations cannot maintain reasonably cooperative relations with their non-liberal, non-transparent neighbors. On the other hand, non-liberal nations cannot adopt the kind of structure that is a prerequisite for the degree of transparency that minimal cooperation requires: this kind of structure would presumably contradict their political or religious doctrines; it would force them to adopt elements characteristic of a liberal political structure. As discussed below, espionage offers a practical solution to this otherwise irresolvable political crisis.

IV. ESPIONAGE AS A SOLUTION TO THE

democracy may be found to be insufficiently transparent. Similarly, this article does not reject the remote possibility that a non-liberal nation might happen to be fundamentally transparent.

89. This does not mean that there can be no controversy over whether a certain state is a liberal democracy or not. This controversy, however, will tend to define the state dichotomously (as one or the other).

LIBERAL CRISIS

Espionage serves as a non-structural substitute for an international duty of basic transparency. Espionage generates non-voluntary enforcement of a duty of transparency without imposing a liberal structure on non-liberal states. This portrait of espionage does not attempt to redefine it but rather attempts to offer a different perspective on its role and significance. This representation of espionage, however, is also not strictly descriptive. By casting espionage in this light, this argument indirectly touches on the issue of its legitimacy. This depiction of espionage underpins the justification for it: all well-ordered states, including non-liberal states, would hypothetically endorse a duty of basic transparency if it were enforced only by means of espionage.

In light of the conflict between the need for basic transparency and the unattractiveness of liberal political imperialism, this section proposes a new approach to the role of international espionage. Espionage serves as an instrument that allows liberal and non-liberal nations to achieve a basic degree of cooperation. It facilitates a practical solution to the otherwise irresolvable crisis of cooperation between liberal and non-liberal nations. It bridges the gap between unsustainable non-transparency for liberal states and an unacceptable liberalism-style duty of transparency for non-liberal states. Espionage that effectively clarifies the strategic intentions of non-liberal target nations creates the effective equivalent of transparent target nations. It offers the non-liberal target state an alternative to being transparent toward its proximate neighbors. It, however, facilitates transparency in a very restrained manner. It does not foist an unacceptable political structure upon non-liberal nations. It also spares target nations from other more damaging forms of external interference, like war or political intervention.

Based on this depiction of espionage, espionage is a legitimate, justifiable endeavor as an instrument for enforcing transparency in international relations. This argument takes a contractarian approach to international justice. A duty of basic international transparency, enforced exclusively through espionage, is legitimate because the hypothetical representatives of all well-ordered nations would endorse it if they were placed in a hypothetical state of fairness and

impartiality. The following section will present a contractarian concept of global justice. It begins by outlining the background of what is likely the most serious and thorough contractarian account of global justice: John Rawls's *Law of Peoples* ("LOP").⁹⁰ Next, it offers objections to the structure of Rawls's international original position and to some of his presumptions. Then, it develops an account of the deliberative process that would take place in the international original position. This exercise constitutes the heart of the argument for the legitimacy of international espionage.

A. A CONCEPT OF GLOBAL JUSTICE

This section situates the contractarian approach within the more general context of related theories of international relations and global justice. Liberalism faces a fundamental dilemma in the international sphere, one that is quite relevant to the issue of espionage's legitimacy. Endeavoring to apply liberalism's democratic constitutional format to the international arena often leads to a dead end.⁹¹ On the one hand, imposing liberalism on non-liberal peoples would breach a fundamental tenet of liberalism by failing to tolerate differences in political and religious doctrines.⁹² On the other hand, accepting non-liberal regimes as legitimate members of the international community might result in overlooking violations of human rights, which are equally fundamental to liberalism.⁹³ Evidently, no escape route is available. A liberal conception of

90. RAWLS, LAW OF PEOPLES, *supra* note 82.

91. *Cf.* JOHN RAWLS, POLITICAL LIBERALISM 230 (2005) [hereinafter RAWLS, POLITICAL LIBERALISM].

92. *Cf. id.* at 135 (explaining political liberalism's assumption that "there are many conflicting reasonable comprehensive doctrines"); RAWLS, LAW OF PEOPLES, *supra* note 82, at 59–61 (explaining human rights as distinct from constitutional rights that pertain to democracies or other kinds of political institutions).

93. *See* Kok-Chor Tan, *The Problem of Decent Peoples*, in RAWLS'S LAW OF PEOPLES: A REALISTIC UTOPIA? 76, 81–84 (Rex Martin & David A. Reidy eds., 2006) [hereinafter Tan, *The Problem*] (discussing Rawls's concept that for states to tolerate liberal states, they must also recognize non-liberal states as equal participants in the international community); Leif Wenar, *Why Rawls Is Not a Cosmopolitan Egalitarian*, in RAWLS'S LAW OF PEOPLES: A REALISTIC UTOPIA? 95–97 (Rex Martin & David A. Reidy eds., 2006) (discussing Rawls's theory that global justice should share similar characteristics to domestic justice systems).

global justice is either over-imperialistic or over-tolerant. Each path seems extremely costly.

In some conceptions of global justice, the cost of over-imperialism seems like a natural one to pay. Cosmopolitanism chooses human rights over tolerance.⁹⁴ It views the citizen as the primary moral agent in the international sphere.⁹⁵ Human rights and equality must be protected, and states, if they have any role at all, should serve this goal, not be served at its expense.⁹⁶ On the broad spectrum of

94. The term “cosmopolitanism” reflects a high—perhaps excessively high—level of generalization. The range of opinions and theories considered to be cosmopolitan is broad and diverse. However, the mainstream political and moral cosmopolitan approach sees citizens, rather than states, as the primary moral agents in the international sphere. Traditionally, cosmopolitans support some degree of national sovereignty, although a thinner sovereignty than that favored by realists. The notion that cosmopolitans necessarily advocate for establishing one unified world state or necessarily rejecting loyalty to one’s own nation state is a common misconception. For prominent scholarship on cosmopolitanism, see generally Charles R. Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591 (1983) [hereinafter Beitz, *Cosmopolitan Ideals*]; Jürgen Habermas, *Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight*, in PERPETUAL PEACE: ESSAYS ON KANT’S COSMOPOLITAN IDEAL 113 (James Bohman & Matthias Lutz-Bachmann eds., 1997); MARTHA NUSSBAUM, FRONTIER OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2007); ONORA O’NEILL, BOUNDS OF JUSTICE (2000); SAMUEL SCHEFFLER, BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT (2001); PETER SINGER, ONE WORLD: THE ETHICS OF GLOBALIZATION (2002); KOK-CHOR TAN, JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM (2004) [hereinafter TAN, JUSTICE WITHOUT BORDER]; Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48 (1992) [hereinafter Pogge, *Cosmopolitanism*].

95. See, e.g., Charles R. Beitz, *Rawls’s Law of Peoples*, 110 ETHICS 669, 672 (2000) [hereinafter Beitz, *Rawls’s Law of Peoples*]; Allen Buchanan, *Rawls’s Law of Peoples: Rules for a Vanished Westphalian World*, 110 ETHICS 697, 698 (2000) [hereinafter Buchanan, *Rawls’s Law of Peoples*] (describing the necessity of focusing on the rights of the individual in the international world); Thomas W. Pogge, *An Egalitarian Law of Peoples*, 23 PHIL. & PUB. AFF. 195, 211 (1994) [hereinafter Pogge, *An Egalitarian Law*] (explaining that concern for nations is concern for individuals); Thomas W. Pogge, *The Incoherence Between Rawls’s Theories of Justice*, 72 FORDHAM L. REV. 1739, 1745 (2003) [hereinafter Pogge, *The Incoherence*] (arguing for the importance of considering the individual at both the domestic and the international level).

96. To relativists, at the other end of the theoretical spectrum, tolerance is naturally before an international menu of human rights. See, e.g., Catherine Audard, *Cultural Imperialism and Democratic Peace*, in RAWLS’S LAW OF PEOPLES: A REALISTIC UTOPIA? 59, 59–60 (Rex Martin & David A. Reidy eds.,

possible approaches toward international relations, Rawls's early work seemed to suggest that his should be positioned near the cosmopolitan end.⁹⁷ However, the subsequent shift from *A Theory of Justice* ("TOJ") to LOP repositioned his approach away from both the cosmopolitan and realist extremes.⁹⁸

The most dramatic shift in LOP is that Rawls contends that peoples, not citizens, are the primary moral agents and actors in the international arena.⁹⁹ Rawls views the international community as a community of collectives.¹⁰⁰ Like Michael Walzer's legalist paradigm, which underlies modern JWT, Rawls's portrait of the international realm directly affects the normative content of his

2006) (criticizing Rawls's assertion that peace and democracy go hand-in-hand); Barry Hindess, *Neoliberal Citizenship*, 6 CITIZENSHIP STUD. 127, 130 (2002) (explaining that states are expected to take care of their own citizens before those of others).

97. See, e.g., BRIAN BARRY, THEORIES OF JUSTICE 184-85, 187 (1991); CHARLES BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 8-10 (1999) [hereinafter BEITZ, POLITICAL THEORY]; THOMAS POGGE, REALIZING RAWLS 1-12 (1989) [hereinafter POGGE, REALIZING RAWLS] (outlining and providing background to two of Rawls's theories).

98. By constructing his theory of global justice as a realist utopia, Rawls managed to satisfy neither one of the two factions. Rawls's realism lies in his choice to ground his theory in human nature and the world as they are at the time; he does not count on any changes to the current nature of humans or peoples. However, given these realist constraints, Rawls seeks to propose the best order and basic structure that could be desired. This is the utopian element of his approach. See JOHN RAWLS, A THEORY OF JUSTICE 3-19 (1999) [hereinafter RAWLS, THEORY OF JUSTICE].

99. Rawls refers to *peoples* rather than *states* mainly because he views peoples, not states, as not necessarily worthy of sovereignty. For the sake of clarity and simplicity, the terms "states" and "peoples" are used interchangeably. RAWLS, LAW OF PEOPLES, *supra* note 82, at 23-30.

100. This view accords with Rawls's position that the international realm could not sustainably be consolidated into a single global state. This structural cosmopolitan idea could have eliminated the gap between the liberal domestic conception of justice—as represented by the constitutional democratic regime—and the conception of justice presented in LOP. Rawls's justifiable rejection of the global-state idea as unstable follows a similar argument by Kant: "The first step is uncontroversial. Almost every theorist joins Rawls in accepting Kant's thesis that a global government would be either perpetually unstable or intolerably oppressive." Wenar, *supra* note 93, at 108; see also IMMANUEL KANT, THE METAPHYSICS OF MORALS 121-26 (Mary Gregor ed. & trans., 1996) (rejecting the cosmopolitan idea).

theory.¹⁰¹ Since Walzer and Rawls share similar conceptions of the international community as a community of collectives, it is no surprise that they develop very similar rules, at least with regard to war.¹⁰²

In the international original position, national representatives behind a veil of ignorance would adopt the rule promulgated by this article, which provides that espionage should serve as the sole means of enforcing a duty of basic transparency. In this respect, it follows that Rawls views states, rather than citizens, as the primary agents of international ethics.¹⁰³ One of the consequences of this Rawlsian approach is tolerating decent-yet-non-liberal peoples, which is an attitude that is unacceptable to cosmopolitans.¹⁰⁴ This article does not attempt to resolve this disagreement (if indeed it is resolvable), as it will later show that the proposed rule would be endorsed even by a global social contract constructed on a certain cosmopolitan approach.¹⁰⁵

101. On the Legalist Paradigm, see WALZER, *supra* note 3, at 58–63.

102. “Community” refers to the normatively neutral definition of a cluster of proximate individuals or groups. It does not mean to denote the social concept of community that Rawls rejects. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 91. On the similarity between Rawls’s and Walzer’s theoretical approaches, see Rex Martin & David A. Reidy, *Introduction*, in RAWLS’S LAW OF PEOPLES: A REALISTIC UTOPIA? 12–14 (Rex Martin & David A. Reidy eds., 2006) (comparing Rawls’s Just War Theory with Walzer). For Rawls’s focused discussion about Just War, see RAWLS, *LAW OF PEOPLES*, *supra* note 82.

103. See Pogge, *The Incoherence*, *supra* note 95, at 1744 (juxtaposing Rawls’s international theory with his domestic theory that endorses normative individualism domestically).

104. See Beitz, *Rawls’s Law of Peoples*, *supra* note 95, at 681 (noting that a cosmopolitan approach is necessarily less tolerant of diverse political traditions and cultures); see also Pogge, *The Incoherence*, *supra* note 95, at 1744; cf. Martin & Reidy, *supra* note 102, at 109 (showing that Cosmopolitanism’s ability to remain pure in theory is a result of individuals representing the theory’s ultimate units); Pogge, *An Egalitarian Law*, *supra* note 95, at 218.

105. See RAWLS, *LAW OF PEOPLES*, *supra* note 82. Some of the grounds on which Rawls’s LOP draws ardent criticism involves what may be an overstatement of Rawls’s predefined goals for his global theory. Rawls’s primary goal is to prevent the great evils of humanity, such as unjust wars, mass murder, starvation, and extreme poverty. To Rawls, these are primarily the consequence of political injustices that result from either the collapse of the basic domestic structure or international disorder. These dangers, namely extreme instances of political injustice, are what Rawls intended to tackle with his theory. Some of LOP’s malcontents pose expectations far beyond those Rawls intended to address. LOP’s

B. THE GLOBAL ORIGINAL POSITION

This section describes the deliberation process that would hypothetically occur in the global original position. This hypothetical process is at the heart of the contractarian moral justification for peacetime espionage. An international duty of basic transparency, enforced solely through espionage, is legitimate and morally justifiable since all well-ordered peoples would be expected to endorse it under terms of impartiality and fairness. This proposition is derived from a more general rule, according to which impartial, rational, reasonable nations would accept reasonable limitations on their sovereignty, provided that such limitations likely promoted peace and stability and all other states also observed these limitations. Theoretically, the proposed rule could also be derived directly from the international original position. As the rule represents a momentous choice for limiting state sovereignty in exchange for enhancing world peace and stability, it may be general and abstract enough to be derived directly from the original position. While on the domestic level the original position produces *basic institutions*, the global original position generates *basic rules*.¹⁰⁶ Rawls takes a similar tack in suggesting that the key rules of just war and the right of self-defense should be part of the basic principles of the LOP, which are endorsed directly in the global original position.¹⁰⁷

more moderate goals may suggest a first, intuitive link to espionage, since espionage may justifiably target some of the very same large-scale evils.

106. See Beitz, *Rawls's Law of Peoples*, *supra* note 95, at 673 (explaining this distinction as resulting from the domestic focus on individuals versus the international focus on groups of persons).

107. See RAWLS, *LAW OF PEOPLES*, *supra* note 82, at 672 (listing the eight key principles of the Law of Peoples). Espionage enables the basic trust that is essential to implementing all of the other terms and conditions of the global social contract. Thus, espionage does not only draw its justification from the global social contract; it also serves as a precondition for the very stability of the global social contract under non-ideal conditions. The SALT agreements offer a good example. These treaties were negotiated under “Rawlsian-like” conditions as both superpowers had effectively reciprocal positions. Both powers faced the problem of monitoring performance. They both chose not to interfere with the “monitoring mechanisms” that—the effective equivalents of espionage—the agreements put into place. This unusually and powerfully demonstrates the role that espionage can play toward enabling minimal trust and maintaining stable treaties. See Michael Herman, *Ethics and Intelligence After September 2001*, 19 *INTELLIGENCE & NAT'L SEC.* 342, 344

In the international original position, impartial representatives represent all nations. These representatives are ignorant of any information about their respective nations that might affect their ability to make impartial decisions.¹⁰⁸ Representatives do not know if their state is liberal or non-liberal, large or small, rich or poor, weak or powerful.¹⁰⁹ Potentially splitting the original-position deliberations into liberal and non-liberal sessions is extremely problematic despite Rawls's assertions.¹¹⁰ The outcome that would have decent, non-liberal peoples agree to the LOP in a separate forum is also incoherent. This set of rules would supposedly be offered to the non-liberal nations on the basis of respect and reciprocity; but respect and reciprocity would not entail allowing non-liberals to be heard within the deliberative process. In Rawls's view, liberal and non-liberal peoples lack a common political culture to the extent that they would be unable to conduct a joint deliberation process.¹¹¹ According to Rawls, the notion of public reason is quite foreign to representatives of non-liberal states.¹¹²

This position seems to contradict the fundamental idea behind the original position, namely that deliberations should take place in a pluralist setting.¹¹³ This incongruity does not escape Rawls's readers.¹¹⁴ Nevertheless, the article's objections to Rawls's "separatism" are limited because both versions of the international original position, Rawls's segmented version and the proposed unified one, would endorse the justification of peacetime

(2004) [hereinafter Herman, *Ethics and Intelligence*] (discussing the SALT agreements and the related agreements that followed that recognized the role of espionage in enforcing international commitments).

108. Beitz, *Rawls's Law of Peoples*, *supra* note 95, at 691.

109. Marta Soniewicka, *The Problem of Global Distributive Justice in Rawls's The Law of Peoples*, 17 *DIAMETROS* 45, 50-51 (2008).

110. RAWLS, *LAW OF PEOPLES*, *supra* note 82.

111. *Cf.* Beitz, *Rawls's Law of Peoples*, *supra* note 95, at 682 (emphasizing that common culture is essential to motivate support and sacrifice for institutions).

112. *Id.*

113. *See* Soniewicka, *supra* note 109, at 48 (noting the necessity for respect of other societies' autonomy); *cf.* Beitz, *Rawls's Law of Peoples*, *supra* note 95, at 675-76 (informing the reader that the Law of Peoples must be considered in two steps: first from the perspective of liberal societies and then from the perspective of decent non-liberal societies to account for differing viewpoints).

114. *See* Beitz, *Rawls's Law of Peoples*, *supra* note 95 (questioning whether the exclusion of some societies is potentially problematic).

espionage.¹¹⁵

Under the unified global original position's conditions of ignorant blindness, when the state representatives engage in designing basic rules for the international community, they are also providing the boundaries between sovereignty and transparency. Given the rational maximin approach that they can be expected to adopt under these conditions, representatives of all states would endorse a rule that imposes on states a duty of basic transparency regarding their strategic intentions, a duty that states enforce solely through espionage. This rule would demand that the process by which each state makes strategic decisions that affects its proximate neighbors' security must be clear and observable. If a state violates the duty of transparency, the remedy available to proximate states would be limited to espionage. Such instances of legitimate espionage would be confined to clarifying non-transparent strategic intentions. Considering the momentousness and irreversibility of a state's choices in the original position and the importance of the competing interests involved—i.e., sovereignty versus peace and stability—risk aversion is a rational strategy. It would be rational for national representatives to first seek to secure their nations' fundamental interests and, only once this goal is achieved, to set a more general target of maximizing average utility.¹¹⁶ For these purposes, a nation's most fundamental interests are territorial integrity, political sovereignty, and the preservation of the nation's way of life and political doctrine.¹¹⁷

In the international original position, national representatives face a choice between endorsing and rejecting a duty of basic

115. As noted earlier, Rawls believes that the original position must be divided into two different phases because liberals and non-liberals lack a common political language to a degree that would frustrate any joint process of deliberation. This approach could trigger extremely undesirable conclusions. It might lead to rejecting humanity as a political common denominator in its own right.

116. Section IV.F. addresses a utilitarian objection to the maximin rule of decision and Rawls's contention that the maximin principle is superior to the rule of average utility.

117. This article does not ignore Rawls's assertion that liberal states have no real comprehensive doctrine. Nevertheless, it refers to the political or religious doctrines of non-liberal states ("decent states" in Rawls's terms) and to the liberal political system as equals. Each represents a basic structure that nations feel is in their supreme interest to preserve.

transparency enforced exclusively through espionage. If they reject this rule, states will not be required to be transparent and their neighbors will have no right to spy on them. The representatives are expected to adopt a maximin strategy: to choose the option that offers the best minimum result. If states rejected this proposed rule on espionage, liberal nations will be worst off. Non-liberal nations can reject the duty of transparency more comfortably than liberal nations. Liberal nations are inherently transparent regardless of any such rule so non-liberal nations would not be threatened by their (transparent) liberal neighbors.¹¹⁸ In the absence of a duty of basic transparency, non-liberal states can avoid unacceptable liberal structural elements. Under the same circumstances, liberal, transparent states would be trapped in the paralyzing situation of living in proximity to non-transparent neighbors.¹¹⁹

Alternatively, states could adopt the proposed rule, which prescribes a duty of basic transparency enforced strictly through espionage. Given the blindness and uncertainty that characterize the international original position, each representative knows that he or she represents either a liberal or a non-liberal nation.¹²⁰ Representatives see that non-liberal nations, if forced to adopt the proposed rule, would be worse off than liberal nations. Liberal nations, which are inherently transparent and would be allowed to spy on their non-transparent neighbors by the rule, would be placed in an advantageous position.¹²¹

A rational representative would weigh the two alternatives. The

118. An important issue is whether non-liberal states might feel threatened by other non-liberal, non-transparent nations. Would this type of threat make them less keen on rejecting an international duty of transparency? If the transparency of their neighbors could only be achieved at the cost of being transparent themselves, non-liberal nations would reject the bargain. The transparency of their non-liberal neighbors is important to their security and prosperity, but it is not as valuable as their interest in preserving their political doctrine. This kind of non-liberal doctrine cannot reasonably be preserved if a state adopts structural transparency. Additionally, under the terms of the original position, non-liberal nations cannot propose terms to other (non-liberal) nations that they would not themselves accept and therefore cannot expect other (non-liberal) nations to accept.

119. Beitz, *Rawls's Law of Peoples*, *supra* note 95, at 676.

120. *See id.* at 674 (discussing the "veil of ignorance" behind which people in liberal democratic societies and nonliberal societies live).

121. *Id.* at 676.

representative might represent a liberal nation without a duty of transparency and thus does not have the right to enforce transparency through espionage. Alternatively, he or she might represent a non-liberal nation in a world that does impose a duty of transparency although states only enforce this duty through espionage. Between the two minimum outcomes, the latter is more advantageous. A liberal nation living in a world without a duty of transparency and without the ability to spy would be unable to protect its most fundamental interests. Its security would be in continuous danger. Coping with this risk would consume enormous defensive costs and, in some cases, lead to a rational, preventive use of force.¹²²

In contrast, a non-liberal nation living in a world that imposes a duty of basic transparency, enforced solely through espionage, would successfully secure its most fundamental interests. Its security would not be jeopardized.¹²³ It would be able to preserve its political structure and the dominance of its religious or political doctrine. It could join the community of nations and could effectively sidestep the obstacle posed by being inherently non-transparent when engaging with liberal nations. Permissible espionage by liberal neighbors would enable non-liberal nations to become basically transparent without being forced to adopt liberalism-style transparency. Most importantly, the transparency generated by espionage would grant the non-liberal nation freedom from political intervention and liberal political imperialism.

The upshot of the international original position is that rational, reasonable, and impartial national representatives, deliberating under conditions of blindness and uncertainty, will endorse a rule that

122. See Glenn Sulmasy & John Yoo, *Counterintuitive: Intelligence Operations and International Law*, 28 MICH. J. INT'L L. 625, 635-36 (2007) (highlighting the inverse relationship between information and conflict: when information gathering goes up, the chance of conflict goes down).

123. For several reasons, the basic interests of a non-liberal nation would not be jeopardized as a result of legitimate espionage against it. First, the activity of espionage by proximate liberal nations confers more security on the non-liberal nation because it precludes foreign intervention and the use of force that could result from non-transparency. Second, it allows the non-liberal state to contend with the non-transparency of its own neighbors. Finally, the legitimate activity of counterintelligence and the inherent limitations on permissible spying diminish both the scope of espionage and the harm that it entails.

enacts an international duty of basic transparency that states will enforce exclusively through espionage.¹²⁴ This choice would maximize minimal results and secure the fundamental interests of all impartial, well-ordered nations.

The advantages of espionage as a bridge between liberal and non-liberal peoples seem almost obvious. This leads to a constructivist question. If the “espionage in return for non-intervention” bargain between liberal and non-liberal nations is so rational and reasonable, what is the reason for these nations not agreeing on it *ex ante*, in a hypothetical original position, and *ex post*?¹²⁵ The original-position device would seem unnecessary. This question assumes that espionage reflects a consensus between liberal and non-liberal nations, one that is independent of state representatives’ awareness of the nature of the states, which they represent.¹²⁶ If this assumption were true, the entire contractarian structure would be redundant. An impartial contractarian approach is, however, necessary.

Some non-liberal nations may not agree to the proposed rule *ex post* even though their “ignorant” representatives would accept it *ex ante*. Non-liberal states that possess supreme military power, such as today’s China or the former USSR, may not accept the “espionage for non-intervention” bargain because their military might protect them against intervention even without political concessions. China’s representative, therefore, would have no reason to accept the rule on espionage once outside of the original position.¹²⁷ Because of its superlative military and economic power, no state can seriously attempt to impose an undesired political structure on China by way of external intervention.¹²⁸ On the other hand, in the original position,

124. In other words, transparency would be enforced through espionage only and not by any other means, like political or military intervention

125. See Simon Chesterman, *The Spy who Came in from the Cold War: Intelligence and International Law*, 6 (Inst. Int’l Law Justice, Working Paper No. 9, 2006).

126. In other words, the constructivist question reflects the argument that even if reasonable, real (rather than hypothetical) representatives of the various states were to convene, without imposing on them any Rawlsian ignorance, they would likely agree to a rule that adopts a duty of basic transparency and limits its enforcement to espionage.

127. Sulmasy & Yoo, *supra* note 122, at 634-35.

128. *Id.*

in which representatives are unaware of the exact nature, size, and capabilities of the states they represent, they can be expected to adopt the rule. Therefore, only in a Rawlsian process of hypothetical, impartial deliberation would a state overcome international controversy and reach a consensus on the legitimacy of peacetime espionage.¹²⁹

C. LIMITING LEGITIMATE ESPIONAGE

This section takes on another facet of the international original position deliberations on espionage: the issue of the limitations that would be set on legitimate espionage. Espionage would be permitted for the specific purpose of enforcing transparency and facilitating international trust, cooperation, and stability. The means employed in pursuing intelligence should not jeopardize the very same ends that justify espionage in the first place.¹³⁰ Extreme intelligence-gathering tactics, such as those that involve coercive recruitment or disregard for the lives and safety of intelligence operatives, might prove counterproductive. Therefore, the global original position deliberations would likely limit espionage activities in a similar manner as Rawls describes for the rules of war:

The aim of war is a just peace, and therefore the means employed must not destroy the possibility of peace or encourage a contempt for human life that puts the safety of ourselves and of mankind in jeopardy. The conduct of war is to be constrained and adjusted to this end. The representatives of states would recognize that their national interest, as seen from the original position, is best served by acknowledging these limits on the means of war.¹³¹

The potential counter-productivity of espionage has at least three different aspects. One is the issue of excessively harmful *means* of

129. *Id.* In this respect, my approach supplements the views of Sulmasy and Yoo on the international regulation of espionage—by way of an international convention, for instance—Sulmasy and Yoo argue that such regulation would be counterproductive, whereas I argue that a convention of this sort would most likely be unrealistic. The political controversy over transparency between liberal and non-liberal nations will likely frustrate any attempt to reach consensus in this area except by way of a (hypothetical) fair and impartial process.

130. *Id.* at 634 (reminding the reader that the two nations still must reach an agreeable settlement).

131. RAWLS, THEORY OF JUSTICE, *supra* note 98, at 332-33.

espionage. The second is the legitimate *scope* of espionage.¹³² The third is a potential paradox: espionage seeks to enforce transparency in international relations and, at the same time, is a massive clandestine and inherently non-transparent activity.¹³³ Finding optimal limitations on espionage deserves a much more thorough review than the scope of this article allows. This article, however, will briefly outline some key points derived from the global original position.

The following propositions seek to ensure that espionage does not become counterproductive on four different levels. First, states may use peacetime espionage only against non-transparent regimes. Typical liberal democracies would not therefore be legitimate targets of peacetime espionage. Moreover, espionage would be permitted only for continuously clarifying an adversary's strategic intentions. The proposed rule thus reduces espionage activities dramatically.

On the second level, the potential counter-productivity of espionage concerns limitations on the *means* in which states employ intelligence-gathering. A list of safeguards for intelligence agents must be formulated. Every national representative would likely endorse such a list to avoid counterproductive espionage. In fact, such a list already exists.¹³⁴ The representatives of all nations already have endorsed a set of limitations on states' dealings with individuals: the set of basic international human rights.¹³⁵

During peacetime as opposed to times of emergency, basic international human rights reflect the limits of sovereignty and of non-intervention.¹³⁶ The freedom that states enjoy in their interactions with individuals ends precisely at the borderline as defined by basic international human rights. These rights are so fundamental that no peaceful arrangement between well-ordered

132. Herman, *Ethics and Intelligence*, *supra* note 107, at 351

133. *Id.*

134. See Elizabeth Sepper, *Democracy, Human Rights, and Intelligence Sharing*, 46 TEX. INT'L L.J. 151, 183-85 (2010) (listing prohibitions on torture and arbitrary detention).

135. *Id.*

136. In times of emergency, basic human rights are subject to a general rule of necessity, as in the case of permissible torture in the face of a "ticking bomb." This proposition is typically uncontroversial, except to extreme absolutist deontological approaches.

societies would be worth respecting if it allowed for their violation. These rights include the right to life and the right not to be subjected to enslavement or torture.¹³⁷ Any basic international rule that violates these rights or ignores them would be paradoxical: it would be an arrangement that aims to eliminate the greatest evils of human society while simultaneously allowing states to engage in such evils.¹³⁸ Again, a thorough review of the restrictions imposed on peacetime espionage by basic international human rights would be a project of its own. This section will briefly outline a few preliminary thoughts about the boundaries of peacetime espionage with respect to risking the lives of agents, coercive handling, and the use of manipulation and deception.

On the third level, states and intelligence organizations will likely distinguish between risks inherent to espionage and risks that are not essential to spying but only materialize as a result of how states engage in espionage. In contrast, for instance, the risk of discovery is inherent to espionage despite preparing extensively and executing a Human Intelligence (“HUMINT”) operation.¹³⁹ The risk of an agent being killed once intentionally exposed by the handlers, either as punishment or as a means of guaranteeing silence, is a function of the practice of espionage and not necessary to verifying the intentions of the target state. A reasonable representative in the global original position cannot expect other representatives to endorse this kind of risk, which is gratuitous as far as the underlying goal of enforcing basic transparency is concerned.¹⁴⁰ Another

137. See Universal Declaration of Human Rights, arts. 3-5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) arts. 3-5 (Dec. 10, 1948) [hereinafter UDHR].

138. See RAWLS, *LAW OF PEOPLES*, *supra* note 82, at 669 (citing Rawls as supporting this proposition). For general reviews of international human rights, see generally TOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* (2d ed. 1995) (providing general reviews of international human rights); Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 114-15 (Louis Henkin ed., 1981); JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* (2006) [hereinafter DONNELLY, *INTERNATIONAL HUMAN RIGHTS*]; J. E. S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 46 (1987); B. G. RAMCHARAN, *THE RIGHT TO LIFE IN INTERNATIONAL LAW* (1983).

139. Herman, *Ethics and Intelligence*, *supra* note 107, at 353.

140. The global original position representatives will likely agree that agents should be handled in a manner that entails reasonable risks. The clandestine nature

consequence of the right to life is that exposing an agent in a non-emergency situation for any reason is also illegitimate. It is unjustified because it endangers the agent's life for a reason other than enforcing basic transparency. This unjustified risk may extend the duration or effectiveness of an intelligence operation and may therefore contribute to enforcing basic transparency. However, human rights serve as a limiting principle for this exact situation. These rights draw an absolute line that cannot be crossed for apparent gains in productivity.¹⁴¹

The same line of argument applies to coercive recruitment and handling. For example, as opposed to a victim of a one-time robbery, a coerced intelligence agent is subject to incessant, unremitting coercion. The services rendered under coercion are a form of servitude and servitude is obviously a moral wrong.¹⁴² Coercive handling violates articles 4 and 5 of the Universal Declaration of Human Rights, which provide that "[n]o one shall be held in slavery or servitude" and that "[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."¹⁴³ While forced handling could conceivably contribute to enforcing transparency, it would do so by means that international representatives would deem counterproductive per se because it violates basic international human rights.¹⁴⁴

The case of manipulation and deception is far more complicated. For the sake of simplicity, this article assumes that people have a moral right for others not to lie to them; a right derived from a more general duty not to lie.¹⁴⁵ This may result in people asserting a moral

of this practice, however, opens the door for possibly more severe risks to agents. Handlers must not take advantage of the agent's inferior position, once recruited, and of the clandestine nature of handler-agent relations to blackmail the agent or to punish him, for example.

141. It is worth clarifying again that this article does not mean to exclude the possibility that such rights might be undermined in times of emergency and under the guidelines of necessity.

142. UDHR, *supra* note 137, art. 4.

143. *Id.* arts. 4-5.

144. See Sepper, *supra* note 134, at 180 (citing torture, disappearance, and detention as serious and constant risks of espionage).

145. James Edwin Mahon, *Kant and the Perfect Duty to Others Not to Lie*, 14 BRIT. J. HIST. PHIL. 653, 674 (2006).

claim that the *state* should not lie to them. Moreover, assume that *individuals* can legitimately demand the enforcement of this right, both vis-à-vis their own state and vis-à-vis any other state, including the intelligence-gathering state. Even assuming that these propositions are true, they do not preclude manipulation for intelligence-gathering purposes. Even if the right not to be lied to is widely recognized, it is nonetheless not a *basic, international, human right*. Consequently, it cannot constrain state action in the international arena. Lying to an agent during recruitment or handling may violate the agent's rights, but it still would not violate the agent's *basic international human rights*.

To clear up any possible inconsistency, this article clarifies the difference between coercion and manipulation. Like Arnold and Rudinow and unlike Haring, this article rejects the argument that holds manipulation to be a form of coercion.¹⁴⁶ These are two different practices and have different moral consequences.¹⁴⁷ Manipulation is not coercive but rather sophisticated and gentle. Whereas manipulation relies on deception, coercion is crudely transparent. The manipulator and the coercer have entirely different general ideas and practical plans.¹⁴⁸ These distinctions may be seen

146. See BERNARD HÄRING, *ETHICS OF MANIPULATION: ISSUES IN MEDICINE, BEHAVIOR CONTROL AND GENETICS* (1975); see also JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* 179-80 (1984) (supporting the distinction between manipulation and coercion); Joel Rudinow, *Manipulation*, 88 *ETHICS* 338, 339 (1978) (claiming that manipulation is much more delicate and sophisticated than crude coercion). See generally Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 *VA. L. REV.* 79, 84 (1981) (espousing the view that manipulation is a form of coercion).

147. Denis G. Arnold, *Coercion and Moral Responsibility*, 38 *AM. PHIL. Q.* 53, 60 (2001) ("Manipulation differs from coercion in at least two respects. First, in cases of manipulation the manipulator need not retain a coercive will . . . the coercer must have an effective desire to compel his or her victim to act in a manner that makes efficacious the coercer's other-regarding desire . . . in cases of manipulation, . . . this desire need not be coupled with an effective desire to compel his or her victim to act in a manner that makes efficacious the coercer's other-regarding desire").

148. It is important to the manipulator that the victim *voluntarily* adopts the will that the manipulator seeks to impose. This is why commentators generally deem manipulation to be less severe—preferring sophistication over force and preference-twisting over compulsion. Rudinow, *supra* note 146, at 339 ("Manipulation seems delicate, sophisticated, even artful in comparison with the hammer-and-tongs crudity of coercion").

in the different moral reactions to coercion and manipulation.¹⁴⁹ One reason we attribute lesser moral and legal severity to manipulation, as compared to coercion, is the relative rarity of coercion. All people engage in manipulation; for instance, when a husband tries to convince his wife to stay in when an important ballgame is on TV; when parents try to get their children to eat better; or when one friend tries to boost the spirits of another by painting an overly optimistic picture of the future.

149. *Id.* (“Coercion alone among the three provides one with an excuse. If one does something prima facie wrong, merely to say ‘I was persuaded to do it’ or ‘I was manipulated’ is never enough to excuse; but if one has been coerced, one is excused.”).

By contrast, coercion and compulsion are more rare.¹⁵⁰ If manipulation and deception—but not coercion—are permissible practices in international espionage, this does not mean that they are recommended or justified practices. It does mean, however, that manipulation will be easier to justify on other compelling grounds. Under non-emergency circumstances, coercion would violate basic human rights and other factors would not be weighed against it.¹⁵¹

In short, espionage should be allowed in peacetime only against non-transparent regimes and only to the extent necessary to clarify the strategic intentions of these states vis-à-vis their proximate neighbors. When states conduct this sort of legitimate espionage, they must respect basic international human rights.¹⁵² Yet, it seems reasonable to demand that espionage should have more restrictive limits even if it does not violate any basic international human rights. The idea that State *A* may collect *all* possible information about State *B* because of State *B*'s non-transparency seems misguided. After all, espionage is an instrument for enforcing a duty of *basic* transparency, namely a duty that, by definition, is limited in scope. The international original position would thus constrain justifiable

150. Another way to coherently treat “coercion” and “manipulation” differently, rather than rejecting the idea that manipulation is a form of coercion, would be to view coercion as a gradable phenomenon. Indeed, scholars who view both *manipulation* and *deception* as forms of coercion tend to view coercion as gradable. On such views, manipulation is a moderate version of coercion. On the other hand, others like Denis Arnold see coercion, duress, and manipulation as distinct and view coercion as non-gradable. See Martin Gunderson, *Threats and Coercion*, 9 CANADIAN J. PHIL. 247 (1979) (defining the different degrees of coercion); see also Robert Nozick, *SOCRATIC PUZZLES* (1977); Michael Gorr, *Toward a Theory of Coercion*, 16 CANADIAN J. PHIL. 383, 385-86 (1986) (claiming that coercion can arise by either action or inaction). *But see* Arnold, *supra* note 147, at 56-57, 59 (laying out the elements coercion, manipulation, and duress as three distinct phenomena). See generally Robert Noggle, *Manipulative Actions: A Conceptual and Moral Analysis*, 33 AM. PHIL. Q. 43 (1996) (laying out the differences between manipulation and deception).

151. The issue of physical pressure in interrogations is a good example. While states are willing to balance the evil of manipulation against its attendant benefit of information-extraction, they commonly refuse to debate the merits of torture except in times of supreme emergency, such as the case of the “ticking bomb.”

152. A catalogue of basic international human rights would include similar rights to those included in the UDHR. See UDHR *supra* note 137, art. 3 (guaranteeing all people the right to life, liberty, and security); see also RAWLS, *LAW OF PEOPLES*, *supra* note 82.

espionage through a *rule of minimal intrusion*. This rule would limit espionage to the minimal level that creates the effect of a basically transparent adversary, one that cannot strategically surprise its neighbors. Since typical liberal democracies may be considered structurally transparent, they indicate the level of transparency that states may be required to display. The degree to which typical liberal democracies expose their citizens to their strategic decisions provides the upper limit of legitimate espionage. Further, the rule of minimal intrusion serves to restrain the *means* that states may permissibly use to carry out legitimate espionage missions, even within the permissible range. The rule dictates a duty to apply the *least intrusive* means that would effectively pursue the objective of transparency.¹⁵³ For example, this suggests that SIGINT should be favored over HUMINT because SIGINT is commonly perceived as less intrusive.¹⁵⁴

Therefore, the hypothetical assembly of representatives will likely agree to non-ideal adaptations to the basic rule proposed on espionage to prevent the over-collection of intelligence. Hyper-transparency might be as detrimental to peace and stability as hypo-transparency. Basic cooperation and peace might be impossible in a world in which every state knows everything about its neighbors.

153. Eric H. Singer, Book Note, 17 SUFFOLK TRANSNAT'L L. REV. 350, 371 (1994) (reviewing W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW* (1992) and ALLAN E. GOODMAN & BRUCE D. BERKOWITZ, *THE NEED TO KNOW: THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON COVERT ACTION AND AMERICAN DEMOCRACY* (1992)).

154. For this reason, Geoffrey Demarest excludes SIGINT from his definition of espionage. Christopher Baker follows suit, insisting that SIGINT is typically "rare as territorially intrusive." A caveat is necessary, however, at this point. SIGINT and all other methods of non-human intelligence might be as dangerous as human intelligence under certain circumstances, as the case of Garry F. Powers demonstrates. *See generally* GREGORY W. PEDLOW & DONALD E. WELZENBACH, *THE CIA AND THE U-2 PROGRAM, 1954-1974* (1998); Christopher D. Baker, *Tolerance of International Espionage: A Functional Approach*, 19 AM. U. INT'L L. REV. 1091, 1093-94 (2003); Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT'L L. & POL'Y 321, 324 (1996); Oliver J. Lissitzyn, *Some Legal Implications of the U-2 and RB-47 Incidents*, 56 AM. J. INT'L L. 135 (1962); Robert S. Hopkins, *An Expanded Understanding of Eisenhower, American Policy and Overflights*, 11 INTELLIGENCE & NAT'L SEC. 332 (1996).

Such a system of international relations would be as unsustainable as an apartment building in which nothing is private and each tenant knows everything about all of the neighbors. The legality of domestic counterintelligence serves to restore balance to the equation. It prevents over-collection and leads to effective self-imposed restraints on international spying. It puts a price on spying and deters states from engaging in spying except when it is necessary and cost-effective.

While spying targets hypo-transparency, counterintelligence seeks to alleviate hyper-transparency. The two activities in tandem should maintain an optimal *range* of states' transparency toward their proximate neighbors. This new perspective on the relationship between espionage and domestic counter-espionage may suggest a solution to a paradox that has puzzled contemporary commentators on customary international law: espionage seems to be both legal and illegal at once.¹⁵⁵ This article proposes that espionage and counter-espionage are not logically incoherent activities; rather, they form a coherent dual-head mechanism that maintains the necessary minimum and maximum levels of state transparency.

The fourth dimension in which espionage is possibly counter-productive concerns its clandestine nature. It might seem irrational to draw on a clandestine, non-transparent activity to address hypo-transparency. However, this objection is erroneous. In non-transparent regimes, hypo-transparency exists from the get-go and espionage can only serve to *increase* transparency levels. In other words, espionage only comes into play under circumstances in which the secrecy that it targets poses a greater security risk than the secrecy that attends it.

The secrecy that accompanies espionage is less likely to endanger

155. Some scholars find international espionage is legal: Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217, 217 (1999); Demarest, *supra* note 154, at 330. Others consider it illegal: Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L L. 53, 61-62 (1984); Manuel R. Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT. L. REV. 65, 79 (1964). In contrast, for those who view espionage as neither legal nor illegal, see John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 595, 597 (2006); Baker, *supra* note 154, at 1094.

peace and stability than the secrecy that it targets in hypo-transparent states. This argument may be formulated in terms of the well-established distinction between *deep secrecy* and *shallow secrecy*.¹⁵⁶ To illustrate this distinction, let us posit two proximate parties, *A* and *B*, and let us assume that *B* is keeping a secret from *A*. *B*'s secret is "deep" if *A* is unaware of its substance and the very fact that the secret exists—i.e., if *A* is ignorant of the fact that *A* does not know the content of the secret. In contrast, *B*'s secret is "shallow" if *A* is aware of its existence but does not know its substance. In the latter case, *A* knows that she *does not* know the content of the secret.¹⁵⁷ In this sense, a hypo-transparent state's concealed aggressive intentions are a deep secret: the state's adversary does not know whether such a secret exists, let alone its content.¹⁵⁸ On the other hand, clandestine espionage conducted in accordance with the proposed framework would be a shallow secret. A hypo-transparent state would know that foreign collection activities target its non-transparency. It would also know what such collection activities aim to unearth. The only remaining secret would be the practical details of these collection efforts, such as when, where, and how they are carried out.¹⁵⁹ In short, the level of uncertainty is dramatically less than the uncertainty that would otherwise envelop the strategic intentions of a non-transparent state. This conclusion—that the secrecy of intelligence (a shallow secret) is less destructive than the secrecy of strategic intentions (a deep secret)—is consistent with the thesis proposed by David Pozen, which provides that shallow secrecy is

156. David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 260 (2010).

157. See generally Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 493 (2007); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 920 (2006) (providing examples of deep secrecy as contrasted with shallow secrecy).

158. If the target state were aware of a plan to attack it, the plan would be a shallow secret. However, such circumstances would no longer generate the prospect of *peacetime* espionage.

159. In other words, a given non-transparent state would be aware that its liberal neighbor is spying on it to overcome its inherent non-transparency. However, the details of this collection activity would remain a secret, namely who collects what kind of information and how and when collection efforts are carried out.

more benign than deep secrecy.¹⁶⁰

D. RISKS OTHER THAN SURPRISE AGGRESSION

The only objective of a legitimate target for peacetime espionage is enforcing a duty of basic transparency against hypo-transparent proximate states. In other words, hypo-transparency of proximate states is the only concern that justifies peacetime espionage. Therefore, it is important to examine other concerns that may result from proximity between states and confirm that none, other than hypo-transparency, offers legitimate grounds for peacetime collection efforts. For instance, such concerns may include the risks of environmental or economic harms. Assuming both are not marginal, intentional harms and unintentional harms must be clearly distinguished. If any potential harm caused by a proximate state, including non-military harm, is *known and intentional*—a known, intentional emission of radiation, for instance—it is ipso facto a form of aggression; and thus, the rule of necessity permits espionage.¹⁶¹ Espionage under these circumstances is not *peacetime* espionage. On the other hand, if a proximate state might cause an *unintentional* injury, such as an unintended emission of radiation, there would be little sense in espionage—which would be targeting a potential act of which the adversary is unaware. In both of these cases, a justification for peacetime espionage seems unnecessary.¹⁶² The only other risk that may generate a legitimate need for peacetime espionage is that

160. See Pozen, *supra* note 156, at 275-322 (analyzing secrecy and deep secrecy as they relate to the utilitarian theory, the liberal democratic theory, and the constitutional theory).

161. See BENJAMIN B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION, THE SEARCH FOR WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS* 547-53 (1975) (providing a general overview on the history of the definition of aggressor); D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 269 (2009) (setting forth the characteristics of the right of self-defense); Benjamin B. Ferencz, *Defining Aggression: Where It Stands and Where It's Going*, 66 AM. J. INT'L L. 491, 500-02 (1972) (discussing legitimate use of force).

162. What starts out as an unplanned harm may turn into an intentional act when non-transparency is involved. Retaliatory espionage may be legitimate under such circumstances on the basis of the necessity-based rule that permits espionage in states of emergency. A good example is the Chernobyl nuclear disaster. Soviet hypo-transparency transformed what began as an unplanned injurious act into circumstances akin to an intentional harm. Emergency-based collection efforts consequently became justified.

of an *unknown intentional* harm, military or otherwise. This risk arises when State *A* has no information that State *B* intends to harm it but also has no information that State *B* has no such intention; in other words, it arises under the circumstances of typical peacetime non-transparency.

Another type of risk that states may be interested in monitoring through collection efforts is the risk of harm to human values in general, such as large-scale violations of human rights. A state that engages in large-scale human-rights violations is an “outlawed” state in Rawlsian terms. In fact, according to both Kant and Rawls, such a state may not constitute a “state” or a “people” in their respective terminologies.¹⁶³ Naturally, a mass violation of basic human rights should be classified as a state of emergency. Therefore, collection efforts under such circumstances should be evaluated as emergency, necessity-based espionage, not as peacetime espionage.

E. BETWEEN EMERGENCY AND ROUTINE

This article draws heavily on the distinction between states of emergency and ordinary, peaceful ones. This distinction is important because each dictates a different justification for espionage activities. During peacetime, espionage is legitimate under a hypothetical international social contract and in well-defined circumstances. During times of emergency, the justification for espionage rests on the rules of necessity. This section further illuminates this distinction. First, it offers a practical row concept of emergency to better define “emergency” and “peacetime.” Next, it explains some of the moral implications of the differences between the two justifications for espionage, the global social contract and necessity.

It is difficult to formulate a complete definition of national states of emergency. National emergencies can take many forms. War or the declaration of war is a prototypical state of emergency. The prospect of an armed attack is also one. A direct threat against a group of citizens—created by a terrorist attack, for example—is another. One way to think about the significance of such emergencies is to analyze its link to remedial rights or remedial

163. Compare Kant, *supra* note 100, § 43 [AK 6:313], with RAWLS, LAW OF PEOPLES, *supra* note 82, at 60-61 (defining differently what constitutes a state).

justifications. States generally have primary rights to political sovereignty and territorial integrity. International-relations emergencies endanger these rights and require remedial action against potential rights-violators.¹⁶⁴ In other words, emergencies are directly linked to necessity. For the sake of this discussion, an emergency is a situation that creates an urgent need for remedial action.¹⁶⁵ Such remedial action is costly but not as costly as refraining from action.

The notion that necessity may justify or excuse an act that would otherwise be proscribed originates in the theory of criminal law.¹⁶⁶ There is no reason why a similar analysis should not apply to the acts of nations.¹⁶⁷ Necessity will usually *justify* an otherwise objectionable act when the act prevents a harm that greatly exceeds the harm that the act itself entails. On the other hand, where there is little or no discrepancy between the moral costs and benefits of an act, necessity serves only as an *excuse* from liability. An emergency situation renders the problematic, excusable act understandable, though not desirable. Whether necessity serves as a justification or merely as an excuse generally depends upon the other requirements of “last resort” and “imminence.”¹⁶⁸ These requirements demonstrate that the rules of necessity are inadequate as governing principles for peacetime espionage. A justificatory framework intended to deal with immediate, isolated events cannot justify a long-term,

164. See CHAIM GANS, A JUST ZIONISM: ON THE MORALITY OF THE JEWISH STATE 45 (2008) (describing the distinction between remedial justifications and primary rights).

165. See *id.*

166. See GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 759-876 (2000) (explaining the theory of necessity in criminal law).

167. For a collective application of the rules of necessity within a moral argument, see Gans' treatment of necessity as a justification for Zionism. GANS, *supra* note 164, at 37-51.

168. See generally NETA C. CRAWFORD, *The Justice Of Preemption and Preventive War Doctrines*, in JUST WAR THEORY: A REAPPRAISAL 25-48 (Mark Evans ed., 2005); Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 216 (1998); Jean Bethke Elshtain, *Just War and Humanitarian Intervention*, 17 AM. U. INT'L L. REV. 1, 23-24 (2001); Christopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 INT'L & COMP. L.Q. 926, 931 (2000); Guy B. Roberts, *New Rules of Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 116 (1985).

continuous endeavor.¹⁶⁹

Emergency times and ordinary times call for very different sources of legitimacy. In turn, these different sources of legitimacy—necessity versus the social contract—entail divergent moral consequences. One example of this divergence involves the right to resist legitimate action. If the right to spy is derived from the rules of necessity, it is subject to the debate over whether a state may legitimately resist a justified act. Therefore, the fact that espionage is legitimate on the basis of necessity may dictate the legitimacy of counterintelligence by the target state: if State A's spying against State B is legitimately grounded in the rules of necessity, State B's counterintelligence might be unlawful. For example, George Fletcher concludes that it is morally wrong to resist an act that is justified on grounds of necessity.¹⁷⁰ On the other hand, Fletcher argues that resistance may be permissible when necessity is merely an excuse. Joshua Dressler criticizes Fletcher's view on the illegitimacy of resisting a justified act.¹⁷¹ One of the implications of the proposed justification for peacetime espionage is that objections to resisting justified acts do not apply since this justification does not rely on necessity. If the source of espionage's legitimacy is the global social contract, there is no reason why espionage and counterintelligence should not be permitted.

169. Taking a similar approach, Alon Harel and Assaf Sharon reject the regulation of torture by way of legislation. To Harel and Sharon, such regulation would amount to treating emergencies as routine and conflating the exceptional with the ordinary. See Alon Harel & Assaf Sharon, *What Is Really Wrong with Torture?*, 6 J. INT'L CRIM. JUST. 241 (2008).

170. A clarification is necessary to avert a potential misunderstanding concerning the legitimacy of spying during a war or an emergency. Ostensibly, if spying is justified on grounds of necessity, it follows from Fletcher's argument that only the state conducting a just war is justified in spying because an unjust nation that spies is equivalent to resisting a justified act. This is obviously wrong. Wartime spying is justified not as a right to resist the spying of another nation but as a lesser evil in a situation in which the use of force would be permissible as well. Therefore, both parties to a war can justifiably spy on each other. This justification for espionage does not carry over to peacetime. If the rule of necessity justified the right to spy in peacetime, a state may not legitimately resist a justified act.

171. See Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 61 (1984); GANS, *supra* note 164, at 49.

F. THE UTILITARIAN ARGUMENT

While this article has certainly rejected the *traditional* utilitarian approach to justifying espionage, it deliberately left the utilitarian argument out of the discussion of existing justifications for espionage. Rawls was right to argue that rational, non-gambling original-position representatives would not adopt the goal of average-utility maximization as a fundamental decision-making principle. It would be extremely irrational for representatives to accept the risk of representing a minority that might be required to sacrifice its fundamental interests for the sake of overall utility. Many utilitarians, however, attack Rawls on this point. Some, like John Harsanyi, argue against Rawls's presumption that a maximin approach would prevail.¹⁷² Harsanyi asserts that original-position representatives would endorse a rule of decision-making that maximizes average utility.¹⁷³ Others argue that Rawls's maximin is itself a utilitarian instrument.¹⁷⁴ This view provides that Rawls's requirement that states secure basic interests before the maximization of overall utility is only a matter of the specific utility function that the approach seeks to maximize, and not a matter of whether the approach is utilitarian.

Naturally, the scope of this article does not allow for comprehensively discussing this controversy. It is noteworthy that most utilitarian opponents of the maximin rule find that its results are similar on the whole to those of an average-utility-maximization rule: Harsanyi and, to a greater extent, Kenneth Arrow argue that the maximin and utilitarian principle of average utility have "very similar practical consequences."¹⁷⁵ This does not mean that the theoretical debate over the relative merits of maximin and average utility is unimportant, but it implies that it has little, if any, impact on justifying espionage. In practice, it seems relatively easy to argue

172. Ken Binmore, *Social Contract I: Harsanyi and Rawls*, 99 *ECON J.* 84, 88 (1989).

173. See *id.*; John C. Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory*, 69 *AM. POL. SCI. REV.* 594 (1975).

174. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 107-10 (Erin Kelly ed., 2001) [hereinafter *RAWLS, JUSTICE AS FAIRNESS*].

175. See Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls's Theory of Justice*, 70 *J. PHIL.* 245, 255 (1973); Harsanyi, *supra* note 173, at 605-06.

that peacetime espionage carried out in accordance with the proposed rule would also maximize average utility.¹⁷⁶ The argument would run as follows: espionage, though injurious, is morally justified because it benefits the aggregate wellbeing of mankind. Intelligence allows states to avoid unnecessary wars caused by uncertainty and risk-aversion, optimize global defense costs, discourage surprise attacks, and increase international cooperation.¹⁷⁷ It enables adversaries to conduct secret communications when conventional diplomacy fails. It also offers a mechanism for the enforcement of international treaties by providing information about treaty violations.¹⁷⁸ In so doing, espionage promotes international cooperation by ensuring that international treaties carry practical significance. Therefore, in the international original position, both representatives acting on Rawls's maximin rule *and* representatives acting on a rule of average utility would endorse the proposed rule for espionage although for different reasons. More generally, neither cosmopolitans nor Rawlsian contractarians should be taken aback that the deliberative processes they propose embody utilitarian principles. The contractarian process of decision-making produces a legitimate, justifiable rule for conducting peacetime espionage. If utilitarians accept its reasoning and outcomes, then that is for the better, as Rawls stated.

176. Kahn, *supra* note 57.

177. *See id.* at 84-85, David Kahn, *Clausewitz and Intelligence*, 9 J. STRATEGIC STUD. 117 (1986) [hereinafter Kahn, *Clausewitz*]; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 46 (5th ed. 1998) [hereinafter POSNER, ECONOMIC ANALYSIS], RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 271 (1981) [hereinafter POSNER, ECONOMICS OF JUSTICE]; Daniel J. Solove, "I've Got Nothing to Hide" and Other Misunderstandings of Privacy, 44 SAN DIEGO L. REV. 745, 746-47 (2007). If espionage is viewed as an anti-privacy action, one might argue that the arguments against the efficiency of privacy support the efficiency of espionage. This conclusion is, however, clearly non-trivial: it must show that the analogy between personal privacy and state secrecy is valid.

178. ANGELA GENDRON, ETHICAL ISSUES: THE USE OF INTELLIGENCE IN PEACE SUPPORT OPERATIONS (2003) [hereinafter GENDRON, ETHICAL ISSUES]; HAZI KARMEL, INTELLIGENCE FOR PEACE: THE ROLE OF INTELLIGENCE IN TIMES OF PEACE (1999); Lawrence E. Cline, *Operational Intelligence in Peace Enforcement and Stability Operations*, 15 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 179 (2002); Bradley Runions, *American and British Doctrine for Intelligence in Peace Operations*, 24 PEACEKEEPING & INT'L REL. 14 (1995).

G. THE COSMOPOLITAN APPROACH TO ESPIONAGE

As noted above, a controversy rages in moral debates on global justice between the approach offered by Rawls's *Law of Peoples* and the cosmopolitan approach. The proposed rule does not depend on the outcome of this controversy because it can be accepted and justified by reference to a cosmopolitan approach of global justice.¹⁷⁹ More specifically, impartial, fair representatives of all nations' *citizens* would endorse the proposed rule for espionage. Thomas Pogge and Allen Buchanan offer a similar approach to applying Rawls's original position on a global scale.¹⁸⁰ Richard Brandt constructed a similar cosmopolitan original position to argue for the legitimacy of the rules of just war.¹⁸¹

In the cosmopolitan original position, the representatives of the world's citizens follow the same policy of "lexically" securing more important interests first. Representatives who are aware that they represent a citizen of either a liberal or non-liberal nation are more likely to endorse the proposed rule than a representative of the state itself. This assumes that some citizens of non-liberal nations oppose the "ruling" doctrine and would prefer to live under a liberal structure. Thus, representatives of citizens are somewhat less concerned than representatives of nations about preserving the non-liberal doctrines of non-liberal nations. Therefore, they are in a better

179. The word "cosmopolitan" might be slightly misleading. This article discusses a cosmopolitan *format* for the global original position: one that does not necessarily reflect cosmopolitan *opinions*. For instance, the representatives in this original position do not necessarily endorse cosmopolitan views about the role of nations; they do not necessarily reject the idea that states are international moral agents.

180. Allen Buchanan, *Taking the Human Out of Human Rights*, in RAWLS'S LAW OF PEOPLES: A REALISTIC UTOPIA? 76, 81-84 (Rex Martin & David A. Reidy eds., 2006) [hereinafter Buchanan, *Taking the Human Out*]; Thomas Pogge, *Do Rawls's Two Theories of Justice Fit Together*, in RAWLS'S LAW OF PEOPLES, A REALISTIC UTOPIA? (Rex Martin & David A. Reidy eds., 2006) [hereinafter Pogge, *Rawls's Two Theories*] (discussing the nexus between Rawls's two theories); Pogge, *Cosmopolitanism*, *supra* note 94; Pogge, *The Incoherence*, *supra* note 95; POGGE, *REALIZING RAWLS*, *supra* note 97, at 5 (exploring the political relevance of the approach taken by those for whom the practical social task is primary); Tan, *The Problem*, *supra* note 93, at 93.

181. See R. B. Brandt, *Utilitarianism and the Rules of War*, 1 PHIL. & PUB. AFF. 145, 145 (1972).

position to adopt a rule that espionage should be permitted as an international instrument for enforcing transparency.¹⁸²

Hypothetical representatives of citizens have a unique, important concern: each representative may, in fact, represent a recruited intelligence operative. Once again, each representative will seek the most beneficial option among those that secure his or her basic interests. Acting on this strategy, a representative will opt for the rule that permits transparency-enforcing peacetime espionage while abiding by the state's general duty to respect basic international human rights. This option would secure the citizen's interest in world peace and stability. Unless a minimal level of peace and security is attained in the international sphere, a reasonable representative must assume that no domestic right is guaranteed.¹⁸³ Choosing the proposed principles also ensures that the benefits of international peace and stability do not expose an individual citizen to irrational risks—if the represented person is an agent—because the right to spy is subject to the duty to respect basic international human rights. Note that the precise menu of international human rights is controversial. Rawls's LOP, for instance, defends a much shorter list of rights than the typical cosmopolitan seeks to protect.¹⁸⁴ However, this controversy does not affect the proposed rule, as the human rights relevant to espionage, such as the right to life, are the most fundamental of all. All reasonable catalogues of human rights would protect these rights.¹⁸⁵

182. Even in this cosmopolitan version of the international original position, the basic premise remains that the representatives elect *basic rules*, not *basic institutions*, for the international community. This premise eliminates the prospect of the representatives adopting global institutions expected to impose constitutional liberal democracy on the entire international community. Notwithstanding the cosmopolitan approach, representatives are deemed to be choosing rules for the international community as it is, not as it should be.

183. Kant, *supra* note 100, at § 44 [AK 6:312].

184. See Buchanan, *Taking the Human Out*, *supra* 180 (setting forth rights contained in Rawls's Law of Peoples).

185. While the controversy over the scope of international human rights may not affect the justification for espionage as a whole, this controversy might affect the legitimacy of some of the *means* that the state may use to gather intelligence.

H. ON PROXIMITY IN THE INTERNATIONAL CLUSTER

Proximity has been a constitutive element of this article's argument: it is the combination of proximity and non-transparency that ignites the state of unsustainable vigilance and permits the solution of transparency through espionage. However, if the justification for espionage relies on proximity, it might seem that only states situated within short geographical distances of each other should be permitted to collect intelligence against each other. This interpretation of proximity is clearly erroneous. Proximity is a practical concept and must be interpreted as such. The definition of proximity offered above relies on many practical parameters, including geography, military technology, economic welfare, and logistics. For the sake of this argument, State *A* is proximate to State *B* if the aggregate outcome of these parameters suggests that State *A* is capable of inflicting intentional harm against the vital interests of State *B*. The implications of these parameters are subject to continuous change depending on timing and circumstances. State *A* may find State *B* is proximate even if a thousand miles of ocean lie between them if, for instance, State *A* sits on an island and State *B* has a powerful navy. Proximity also depends on technology. State *B* may only become proximate to State *A* at the moment it acquires long-range surface-to-surface missiles or develops aerial refueling capabilities that would enable it to carry out airstrikes at a new, extended range.¹⁸⁶

This argument offers a window into the future of espionage. Generally speaking, airstrike and missile capabilities tend to expand continuously, thus increasing the range within which states may be considered geographically proximate.¹⁸⁷ More and more nations therefore come to share a new status—neighbors—with respect to

186. John Newhouse, *The Missile Defense Debate*, 80 FOREIGN AFF. 97, 107 (2001). See generally STEVEN A. HILDRETH & CARL EK, CONG. RESEARCH SERV., R134051, LONG-RANGE BALLISTIC MISSILE DEFENSE IN EUROPE (2008) (examining country relations based on their long-range missile technology).

187. Taking Iran's relations with the EU as an example, Iran achieving the ability to launch missiles with a range sufficiently long enough to target some European countries has obviously affected these countries' attitudes toward it. They no longer consider Iran to be a distant country. Newfound missile technologies have transformed Iran into a "neighbor" whose non-transparency is cause for great concern.

models of peace and stability. As more and more states become proximate neighbors, interest in intelligence collection will presumably grow as well. In other words, the proliferation of military technologies will likely lead to more states identifying each other as proximate and thus new targets for espionage. This process should persist as long as a speedier process of democratization does not offset it.

These two processes—the proliferation of long-range military capabilities and democratization—flow in opposite directions. The former extends the range of proximity and therefore increases the number of potential collectors and targets of intelligence. The latter—democratization—has the opposite effect because states will likely refrain from collecting intelligence against transparent regimes regardless of whether these regimes acquire long-range military capabilities. As it is reasonable to assume that democratization will not be as swift as the proliferation of long-range military capabilities, international espionage will likely grow over time in prevalence and importance. This forecast highlights the importance of fashioning a sound justification for intelligence collection. The rapid development of technologies for transportation, communication, and the military reshapes the world. Ironically, in its reshaped form, the world seems smaller. If this article's argument is sound, the smaller the world gets, the more transparent it must be.

V. CONCLUSION

This article joins a vast literature that addresses the value of information from different angles.¹⁸⁸ In the case of espionage, the

188. See generally Jerome Bracken & Richard Darilek, *Information Superiority and Game Theory: The Value of Information in Four Games*, 31 PHALANX 6, 6-7 (1998) (discussing the Information Age, and its role in the US military); M.P. Carter, *The Valuing of Management Information: Part I: The Bayesian Approach*, 10 J. INFO. SCI. 1 (1985); Harlan Cleveland, *Information as a Resource*, 16 FUTURIST 34 (1982) (relaying the shift from resources being concrete things to intangible information); Vincent P. Crawford, *Lying for Strategic Advantage: Rational and Boundedly Rational Misrepresentation of Intentions*, 93 AM. ECON. REV. 133 (2003) (analyzing the strategic rationale of lying); Gerald A. Feltham, *The Value of Information*, 43 ACCT. REV. 684 (1968); Ronald W. Hilton, *The Determinants of Information Value: Synthesizing Some General Results*, 27 MGMT. SCI. 57 (1981) (elucidating the normative structure for information

information at stake concerns the strategic intentions of proximate states. This information must be available to achieve international peace and stability. This essential information about strategic intentions underpins the proposed duty of basic transparency. This article takes the additional step of connecting peacetime espionage, the essential duty of transparency, and the political structure of government. Typical liberal democracies are sufficiently transparent. Their political institutions correspond to the structural demands of transparency. As obeying an international duty of basic transparency would seem to call for adopting certain liberal democratic elements, non-liberal nations would likely reject this duty. Espionage is an instrument through which the international community enforces the essential duty of basic transparency. It allows for non-liberal states to achieve transparency without imposing a liberal political structure on them.

If this proposal is sound, empirical evidence of it would appear in the real world. For instance, the structure of intelligence communities worldwide would respond to this portrait of espionage. Non-transparent regimes should construct their intelligence communities differently than their democratic counterparts. If democratic states are typically transparent about their deliberations and intentions, their adversaries will likely allocate fewer resources to defensive intelligence and intelligence analysis.¹⁸⁹ Indeed, intelligence communities in democracies—as David Kahn

analysis); S. J. Ho, *Extracting the Information: Espionage with Double Crossing*, 93 J. ECON. 31 (2008) (discussing extracting information and espionage); Morton I. Kamien et al., *On the Value of Information in a Strategic Conflict*, 2 GAMES & ECON. BEHAV. 129 (1990) (explaining the value of information in a decision theoretic framework); Karen B. Levitan, *Information Resources as 'Goods' in the Life Cycle of Information Production*, 33 J. AM. SOC'Y INFO. SCI. 44 (1982) (addressing the significance of information resources as the basis of an "information and knowledge-based society"); Theodore J. Mock, *Concepts of Information Value and Accounting*, 46 ACCT. REV. 765 (1971) (discussing the importance of and potential of information in planning and decision-making); Aatto J. Repo, *The Value of Information: Approaches in Economics, Accounting, and Management Science*, 40 J. AM. SOC'Y INFO. SCI. 68 (2007); Merrill E. Whitney & James D. Gaisford, *An Inquiry into the Rationale for Economic Espionage*, 13 INT'L ECON. J. 103 (1999).

189. Kahn, *supra* note 57, at 84-86; see BARRY R. POSEN, *THE SOURCES OF MILITARY DOCTRINE: FRANCE, BRITAIN, AND GERMANY BETWEEN THE WORLD WARS* (1984).

confirms—tend to invest more heavily in collecting and analyzing foreign intelligence because democratic nations do not tend to attack their neighbors by surprise, while autocracies tend to underestimate these pursuits.¹⁹⁰ Indeed, the divergent structures of intelligence communities demonstrate differences in transparency and deliberative processes. Typically, in democratic states, organizations for central analysis are larger and more powerful than their non-democratic counterparts; their missions are far more complicated and the consequences of an erroneous analysis on their part are far more serious.¹⁹¹

This article tells a new story about contemporary espionage. This story may help envisage the future of espionage: the offered prognosis is that the clash between democratization and the proliferation of long-range weapon systems will shape international espionage. As democracy spreads, fewer nations will be the targets of espionage, espionage will diminish, and fewer individuals will be involved in spying. In this sense, spying is a strange profession—one whose system of ethics will achieve its zenith when the profession is abolished. Until that day, most states will continue to keep their eyes and ears wide-open toward their non-transparent neighbors. Hopefully—and with help from the burgeoning moral discourse on espionage—the individuals involved in spying will keep their hearts similarly open.

190. Kahn, *supra* note 57, at 86.

191. Herman, *Assessment Machinery*, *supra* note 8, at 100-12.