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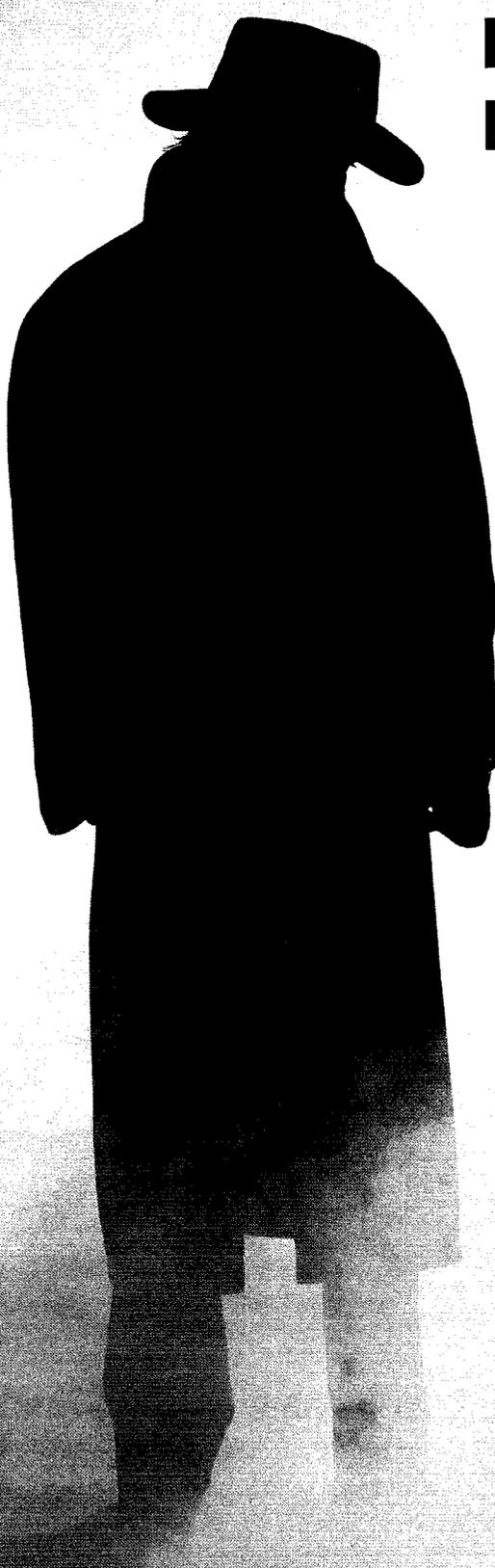
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A black silhouette of a man wearing a trench coat and a fedora-style hat, standing and facing right. The silhouette is positioned on the left side of the page, partially overlapping the text area.

Espionage as a Sovereign Right under International Law and its Limits

by Asaf Lubin¹

It is indispensable for a sovereign to obtain information on his subjects and his soldiers, on all which happens near him or in distant regions, and to know about everything which is occurring, be it of small or great importance. If he does not do so, this will prove a disgrace, a proof of his negligence and neglect of justice... Sending out police agents and spies shows that the ruler is just, vigilant, and sagacious. If he behaves as I have indicated, his state will flourish.

- Nizam Al-Mulk, Persian scholar and vizier of the Seljuq empire (11th century)

The literature surrounding the international legality of peacetime espionage has so far centered around one single question: whether there exist within treaty or customary international law prohibitive rules against the collection of foreign intelligence in times of peace. Lacking such rules, argue the permissivists, espionage functions within a lotus vacuum, one in which States may spy on each other and on each other's nationals with no restrictions, justifying their behavior through the *argumentum ad hominem* of "tu quoque."

Prohibitionists, on the other hand, have launched a quest to find such expressive constraints within the *lex lata*, citing as potential candidates rules surrounding territorial integrity; sovereign equality; non-intervention; principles concerning friendly relations and co-operation among States; the inviolability of diplomatic and consular communications; state immunity and state ownership rights over certain types of property; States' good faith obligations and obligations to settle disputes through peaceful means; the international protection of trade secrets and intellectual property; certain regulations on the use of the global commons (the waters, airspace, outer-space, and cyber-space); international telecommunications law; and the international human right to privacy. However, this quest has so far been

futile, as prohibitionist scholars refuse to come to grips with the insurmountable realization that nation states have simply accepted, either openly or tacitly, the prevalence and importance of peacetime espionage as a necessary tool in international affairs.

This discourse is self-serving. By calling for a complete ban, prohibitionists effectively refuse to accept any part of the practice as reflective of custom. These scholars thus feed into the "myth system" of prohibitive rules, in what seems to be an attempt to maintain their perceived higher moral ground. By doing so, however, they avoid engaging the actual laborious challenge of drawing out some practical limiting lines and regulations within peacetime espionage. This plays into the hands of permissivists who continue to operate under a guise of presumed lawlessness, accepting as a necessary evil the inevitable race to the bottom of their grand strategy. In the process, new intelligence agencies emerge, rogue elephants, "wellsprings of power in our society, secret clubs for the elites and privileged."² These agencies find, in the conduct of their operations, few *de jure* and *de facto* legal restrictions on both their bases for action and choice of means.

In this article, I thus propose an alternative approach to the scholarly debate on the international law of peacetime espionage. I first introduce the notion of a *Jus Ad Explorationem*, or a right to spy, as a sovereign right within the domaine réservé of States. I contend that the existence of this right finds its underpinning in both historical and contemporary international law. Moreover, I argue that by acknowledging spying as an *acta jure imperii*, a power exclusively granted to sovereign nations, we would finally be able to move away from the paralyzing debate as to the lawfulness of spying and begin drafting meaningful regulations on the way States enjoy their right to spy. Within the limits boundaries of this article, I take a first step at offering one such limiting standard, that relating to the prohibition on espionage as a form of anti-

diplomacy in reference to the doctrine of abuse of rights.

I. The Historical Dimensions of the *Jus Ad Explorationem*

One of the primordial foundations of international law is the capacity of States, as legal entities, to be the bearers of both rights and duties. Professor and diplomat Phillip Marshall Brown once argued that of the rights endowed with States, "the solid rock of international law," is the right of states to exist, which he defined as a "mutual guarantee between nations, great and small, of their legal right to a separate existence in order to realize their own aspirations and destinies."³ The ICJ in its Nuclear Weapons Advisory Opinion similarly recognized the "fundamental right of every State to survival, and thus its right to resort to self-defense [...] when its survival is at stake"

Perhaps as fundamental as the rights of a sovereign to exist and to defend itself, and as innately linked to those rights, is the right of that sovereign to spy. As Sun Tzu, the Chinese strategist, taught us as early as the 6th century, in his masterpiece *The Art of War*, it is foreknowledge ascertained through "spies and spies alone" that enables "the wise sovereign... to achieve things beyond the reach of ordinary men." As later restated in the 11th century by Nizam Al-Mulk, in the above cited quote, it is in fact "indispensable for a sovereign" to routinely collect intelligence on "everything which is occurring" both near and far. These are all logical deductions, for insofar as a sovereign has a right to survival, that right must entail the corollary liberty to collect information on all potential threats to its existence, so to be able to effectively thwart such dangers before they materialize.

Moving forward in time, to the days of European Enlightenment in the age of the Renaissance, intelligence was worshipped as if it were an omnipotent god. Sir Francis Bacon, one of the most prolific philosophers and jurists of the time, argued that the very sovereignty of man "lieth hid in

knowledge." He glorified in *The New Atlantis* the information acquired by explorers, discoverers, spies, and intelligencers, all working on behalf of the reigning monarchs. He wrote:

That they should have knowledge of the languages, books, affairs of those that lie such a distance from them, it was a thing we could not tell what to make of, for that it seemed to us a condition and propriety of divine powers and beings to be hidden and unseen to others and yet to have others open and as in a light to them.

The New Atlantis was published in 1627, only 21 years before the peace of Westphalia which led to the formation of the modern European nation states. In those days the *Jus Ad Explorationem* was beginning to take a more structured shape, as espionage was employed to protect and serve the interest of the crown and developed as a result a set of unique features. First, it is important to note that in Hohfeldian terms the right to spy was always considered a liberty right (*a privilege*) not a claim right (*a right proper*). In other words, the right of sovereign X to spy did not entail an obligation on the part of sovereign Y to allow or enable sovereign X to successfully do so. The right of Queen Elizabeth to engage in espionage against Mary, Queen of Scots, or King Phillip II of Spain, was thus only a freedom, a privilege. It did not in any way negate Queen Mary or King Phillip from attempting to prevent or thwart Elizabeth's secret intelligence plots. This nature of the *Jus Ad Explorationem* as a liberty right persists today and is manifested in the domestic prohibition against espionage, which has been legislated into the criminal codes of most civilized nations. It is crucial to emphasize, therefore, that the existence of these modern criminal sanctions against spying in most domestic systems does not in any way entail a conflict with the parallel existence of a right to spy as a liberty right on the international plane.

A second distinct feature of the *Jus Ad Explorationem* during the Enlightenment was that espionage was performed solely by sovereigns and on

their behalf. It was only the crown that had the capacity and the means to establish the complex networks of spies necessary to effectively collect foreign intelligence. The spymasters of the time were all resident ambassadors in the service of the crown. They would often barter information in exchange for certain diplomatic favors including the promise of royal pardons, the resolution of local trade disputes, or the assurance of the court's future patronage. These ambassadors also did not shy away from the occasional bribe, often times paying out of their own pocket. These payoffs were seen as an investment for these diplomatic servants. Each of them competed with other rival officeholders, knowing that valuable intelligence will be rewarded with prestige and authority. Spies and spymasters alike thus viewed the business of espionage as an inherently sovereign profession, with the monarchy as the marketplace and foreign intelligence information as the primary currency.

Finally, a third feature of the Westphalian *Jus Ad Explorationem* was that its scope and reach were not restricted by any limiting standard. Everyone, and everything, was a legitimate target, and there was no definition of categories of people or activities that may or may not be subjected to surveillance - as all information could serve the interests of the crown. Consider for example, Sir Francis Walsingham, viewed by some as the father of modern intelligence agencies. Walsingham's responsibilities as Principal Secretary in the Court of Queen Elizabeth, a post he accepted in December 1573, entailed an exorbitant task: to "understand the state of the whole realm... to know who was who in every shire, and city, and town." To accomplish this incredible feat, Walsingham carefully devised and constructed a web of spy networks. He paid off travelers in the ports of Lyon and merchant adventurers in the bazaars of Hamburg. He contracted with Scottish exiles living in Italy and with English soldiers of fortune in the pay of the Dutch. He turned to low-level ships' captains from Prague and expatriate traders from Barbary, but also to Men of

Letters, poets, scholars, and scientists right from the heart of London. All of these spies kept their eyes open and their mouths shut, reporting back to him, and him alone, per his demand. Knowledge was never too dear, and Walsingham saw to it that he was always well supplied. He filled book after book with records "of every diplomatic matter, every fact or bit of data that might prove useful in England's future dealings abroad. His office piled high with such books... and then, on top of all of these foreign papers, there was an even greater heap, an avalanche of books and papers devoted to all of the domestic affairs that also fell within the Secretary's endless purview. Walsingham's office ledger went on page after page, cataloguing them all."⁴ The result of this enterprise was a 16th century mass surveillance program, which considered no source of intelligence too strange and no piece of information too mundane or obscure to be collected.

II. Modern International Law and the *Jus Ad Explorationem*

Former ICJ Judge Phillip C. Jessup wrote the following in his treatises of 1946, *A Modern Law of Nations*:

Sovereignty, in its meaning of an absolute, uncontrolled state will, ultimately free to resort to the final arbitrament of war, is the quick-sand on which the foundations of traditional international law are built. Until the world achieves some of form of international government in which a collective will takes precedent over the individual will of the sovereign state, the ultimate function of law, which is the elimination of force for the resolution of human conflicts, will not be fulfilled. Like the legal attribute of equality, the function of sovereignty as a legal concept was to protect the state in a world devoid of any alternative to self-protection. The gradual development of adequate modernized law and organization should provide such an alternative... Once it is agreed

that sovereignty is divisible and that it therefore is not absolute, various restrictions on and relinquishments of sovereignty may be regarded as normal and not stigmatizing.

Since Judge Jessup wrote the above, two major tectonic shifts have occurred changing the landscape of the doctrine of sovereignty in international politics. The first came with the introduction, at the end of WWII, of a new world order structured around the U.N. Charter and its prohibition on the use of force and the principle of non-intervention. The second came at the end of the Cold War with the reorientation of the purposes of the international security system in light of the rise to preeminence of individual human rights. Given the natural connection between sovereignty and espionage, as depicted thus far, it should come as no surprise that these two tectonic shifts also influenced the nature and character of the *Jus Ad Explorationem*.

I wish to focus my analysis on the first tectonic shift, that relating to the post-Charter world order. Nonetheless, let me begin by making a few general observations pertaining to the second shift, concerning human rights. The right to privacy has long been recognized as a fundamental human right enshrined in the United Nations' Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and in many other international and regional treaties. However, it wasn't until recently that we witnessed a new appreciation and interest in the right accompanied by a "rising tide of opinion against mass surveillance."⁵ This global attitude has been expressed by international, regional, and domestic institutions and courts; by the world's largest technology companies; by political figures and civil society; and by the public writ large. It has been manifested, *inter alia*, in the creation of the position and appointment of a special rapporteur on the right to privacy by the Human Rights Council, in the creation of various privacy-enhancing codes-of-conduct for internet companies like Google, Yahoo!, and Microsoft, in the further advancement

of anonymity-enabling technologies like Onion Routing, Off-the-Record Messaging, and various encryption-based services, as well as in a series of groundbreaking judgments of the European Court of Human Rights beginning with *Weber v. Germany*, and leading up to the more recent *Zakharov v. Russia* and *Szabó and Vissy v. Hungary*. If the rise in surveillance had once “been greeted with extraordinary equanimity”⁶ the current backlash marks a momentous shift as a new social contract is drafted between governments and their governed, and between telecom companies and service providers and their consumers. This redrafting of the rules surrounding surveillance and the right to privacy in the digital age is still ongoing and is influenced by the ever-advancing technologies in the field of government surveillance.

But what can we say about the effects of the first shift, the one concerning the restructuring of a new world order engineered by the drafters of the Charter? The prohibition on the use of force and on coercive interventions seems to have had only minor effects on the right to spy. Indeed, Articles 2(4) and 2(7) of the Charter should be read in light of the inherent right for individual self-defense, enshrined in Article 51. As was already noted, intelligence gathering in this sense is a corollary of the right of the state to exist. It is thus necessary “to give substance and effect to the right of self-defense, including the customary international law right of anticipatory or preemptive self-defense.” Given that “[a]ppropriate defensive preparations cannot be made without information about potential threats,”⁷ the *Jus Ad Explorationem* can thus be read into the Charter Article 51 global security structure. In other words, to the extent that a specific intelligence gathering activity can be shown to serve either the short-term national security interest of a particular state, or the long-term goals of international stability and international peace and security, that operation would surely comply with the Charter, and indeed most operations do.

It is important to clarify that it is in the interest of the international community to establish such

a low bar on lawful espionage and allow States to collect foreign intelligence relatively freely. In his first State of the Union Address, President George Washington said that: “[t]o be prepared for war is one of the most effectual means of preserving peace.” When policy makers are provided with sufficiently accurate information as to the levels and types of threats posed by their adversaries, their intentions and capabilities, they are more likely to calibrate their responses properly and are less likely to rely on force as a means for guarding against startling attacks or strategic surprises. Indeed, “the key to contemporary global security is a reliable and unremitting flow of intelligence to the pinnacle elites.”⁸ Espionage becomes a means of ensuring leaders “peace of mind”, and with peaceful mind comes a peaceful foreign policy. Intelligence collection should thus be considered the international community’s relief valve, helping to control and limit the pressure in the system, which could otherwise build up to potential conflicts.

Certain modern treaties even set a positive obligation on States to routinely gather and share intelligence in order to achieve these stabilizing public world order goals, either bilaterally or multilaterally. Take for example the 1972 Treaty on the Limitation of Anti-Ballistic Missile Systems between the U.S. and the Soviet Union. In Article XII both parties agreed that for “the purpose of providing assurance or compliance with the provisions of this Treaty, each Party shall use national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law.” Similar intelligence collection arrangements were introduced into the Strategic Arms Limitations and Reductions Treaties.

Many argue that these bilateral intelligence-gathering arrangements were part of the reason why the Cold War did not deteriorate into a full blown nuclear conflict between the two super powers. On a multilateral setting, consider, for example, the obligations under Article 15(b) of the International Convention for the Suppression of Terrorist Bombings of 1997 which again calls on State parties to

“(collect and) exchange accurate and reliable information” on certain types of terrorist activity (this obligation was reechoed by U.N. Security Council Chapter VII Resolution 1373 which further called upon States to “intensify and accelerate” the exchange of “operational information, especially regarding actions or movements of terrorist persons or networks”). In both these examples we see an anchoring of the *Jus Ad Explorationem* into treaty form, when such spying is done in service of the broader interests of international community.

The tale of intelligence collection, however, does not always align itself with a Washingtonian enhancement of peace. Certain intelligence collection activities may not strengthen international stability but rather would result in defeating it. Intelligence collections activities which are launched for reasons other than to protect the narrow national security interests of a relevant State, are of particular concern. It is in those precise moments that we should wonder whether Dr. Jekyll had turned into Mr. Hyde, whether the right to spy, the *Jus Ad Explorationem*, has been abused by a sovereign state. This can happen when the right is exploited in a way that injuriously affects the broader interests of the international community writ large in the name of ensuring some short-term non-existential economic or political national interest. One such example is the phenomenon of States turning to espionage as a mean of anti-diplomacy.

III. The Prohibition on Espionage as a form of Anti-diplomacy

Professor James Der Derian introduced the term “Anti-diplomacy” in a book of the same title published in 1992. In the book, Der Derian noted that: “new technological practices and universal dangers, mediated by the particular interests of the national security state, have generated a new anti-diplomacy.”⁹ Put differently, when a specific spying operation is conducted against the *raison d’être* of our public international system, when such an operation is antithetical to the spirit of the

U.N. Charter, such an operation should be viewed as an abuse of the right to spy and must be prohibited. In this regard, the new Charter world order has moved us away from the days of Nizam Al-Mulk or Sir Francis Walsingham. For them, every intelligence operation was inherently justified, and no target was ever immune. Under the Charter there are reasons to stigmatize those operations that would cause a chilling effect on international cooperation, on the future negotiations of treaties, or on the engagements of States with adjudicative bodies, or on the work of the U.N. and other intergovernmental mechanisms. Let us look at one particularly relevant case study in this regard.

On 20 September 2004, Timor-Leste and Australia began a new round of negotiations concerning a treaty for the development of a gas extraction field in the Timor Sea known as the “Greater Sunrise Field”. Agents from the Australian Secret Intelligence Service (ASIS) masquerading as employees for an Australian construction company (which operated in Timor-Leste as part of Australian aid programs in the country) installed recording devices into the walls of the Timor-Leste’s cabinet and prime minister’s offices in Dili. Relying on these devices Australia surveils internal discussions pertaining to the negotiations. It obtains sensitive information relating to both Timor-Leste’s negotiation strategies and potential vulnerabilities. The final treaty on Certain Maritime Arrangements in the Timor Sea (CMATS), signed on 12 January 2006, had Timor-Leste willfully give away 50% of all revenues from the field as well as commit itself to a moratorium on asserting and establishing its disputed maritime boundaries in the Timor Sea for 50 years (the period of the CMATS). As reported by Gwynne Dyer of the *Telegraph*:

The operation would never have come to light if the former director of technical operations at ASIS [known as Officer X - A.L.], who led the bugging operation, had not had an attack of conscience... He told East Timor about it, and the Timorese government then brought an action before the Permanent Court of Arbitration at The

Hague demanding that the CMATS treaty be cancelled. The Australian government's response was to arrest the whistleblower and cancel his passport last week so that he could not travel to The Hague to testify, and to raid the Sydney offices of Bernard Collaery, the lawyer who is representing East Timor before the court. The documents seized include an affidavit summarizing the whistleblower's testimony at the court and correspondence between Collaery and his client, Timorese President Xanana Gusmao.¹⁰

In this context, Australia employed espionage in order to achieve unfair advantages during treaty negotiations. This harm is perhaps further exacerbated by the fact that the overall goal of Australia, a regional economic giant, was to thief from its poorest former-colonized neighbor one of its only natural resources. If that is not enough, Australia continued to hinder on Timor-Leste's ability to adjudicate the matter by raiding the offices of the lawyer Timor-Leste hired.

In *Tinker, Tailor, Soldier, Spy*, John le Carré writes: "morality was vested in the aim... Difficult to know what one's aims are, that's the trouble, specially if you're British." While the existence, let alone the aims, of intelligence operations are indeed hard to identify, once they are made clear, as in the case of Timor-Leste Australia espionage scandal, a red line should be immediately drawn. Australia may not claim any national security interest in spying on its neighbor, nor may it claim any broader interest of the international community being protected by its actions. Contrary, its espionage was a well-planned and well-executed act of anti-diplomacy induced by the selfish greed and glutony of a hoggish sovereign. Its spying shook the confidence in the very foundations of international law, from the capacity to conduct good faith treaty negotiations to the ability to effectively resolve disputes through international judicial bodies. Thus, Australia provides us with a prime example of a clear abuse of the right to spy. It has used the right for purposes other than the ones for which it was

initially created, and in a way which impeded the enjoyment by other States of their own rights. Any further scholarly delimitation of the boundaries of the *Jus Ad Explorationem* would therefore have to start with this case study in mind.

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² PHILLIP KNIGHTLY, *THE SECOND OLDEST PROFESSION: SPIES AND SPYING IN THE TWENTIETH CENTURY*, 8 (1987).

³ Phillip Marshall Brown, *The Rights of States under International Law*, 26(2) *YALE L. J.* 85, 86-87 (1916).

⁴ STEPHEN BUDIANSKY, *HER MAJESTY'S SPYMASTER: ELIZABETH I, SIR FRANCIS WALSINGHAM, AND THE BIRTH OF MODERN ESPIONAGE*, 88-93 (2006).

⁵ Privacy International & Amnesty International, *Two Years After Snowden: Protecting Human Rights in an Age of Mass Surveillance*, 3-4 (June 2015) available at <https://goo.gl/IV7IC6>.

⁶ SIMON CHESTERMAN, *ONE NATION UNDER SURVEILLANCE: A NEW SOCIAL CONTRACT TO DEFEND FREEDOM WITHOUT SACRIFICING LIBERTY* 261 (2011).

⁷ Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 *A.F. L. REV.* 217, 224 (1999).

⁸ Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The Intelligence Function and World Public Order*, 46 *TEMP. L.Q.* 365, 434 (1973).

⁹ JAMES DER DERIAN, *ANTIDIPLOMACY: SPIES, TERROR, SPEED AND WAR*, 3 (1992).

¹⁰ Gwynne Dyer, *Australia's Surveillance of East Timor too Shameful to Share*, *The Telegram* (12.12.2013), available at <http://goo.gl/Chng5Q>.